9 FAM 41.81
NOTES

(CT:VISA-1547; 09-27-2010)
(Office of Origin: CA/VO/L/R)

9 FAM 41.81 N1 CLASSIFICATION UNDER INA 101(a)(15)(K)

9 FAM 41.81 N1.1 Classification Under INA 101(a)(15)(K)(i)

(TL:VISA-756; 07-27-2005)

An alien may be classified as a K-1 if he or she is the beneficiary of an approved Form I-129-F, Petition for Alien Fiancé(e), for issuance of a nonimmigrant visa (NIV). If the consular officer is satisfied that the alien is qualified to receive such a visa, the alien may be admitted to the United States for the purpose of concluding a marriage to the petitioner within a 90-day period.

9 FAM 41.81 N1.2 Classification Under INA 101(a)(15)(K)(ii)

(CT:VISA-1547; 09-27-2010)

Public Law 106-553 established a new category of nonimmigrant visa (NIV) for the spouses of U.S. citizens who await approval of a Form I-130, Petition for Alien Relative, to enter the United States as nonimmigrants. The Department, the Department of Homeland Security (DHS), *and its predecessor, the previous Immigration and Naturalization Service (INS)* have used the symbol K-2 for the children of K-1s since the inception of that category. The symbol for the beneficiaries of this new category will, therefore, be K-3.

9 FAM 41.81 N1.3 Classification Under INA 101(a)(15)(K)(iii)

(TL:VISA-377; 03-29-2002)

This provision is for the children of either a K-1 or a K-3. An accompanying or following-to-join child (as defined in INA 101(b)(1)) of a K-1 is entitled to

K-2 derivative status, as noted in 9 FAM 41.81 N1.2. The child of a K-3 who is accompanying or following-to-join a K-3 principal alien is entitled to K-4 derivative status.

9 FAM 41.81 N2 FILING OF FORM I-129-F, PETITION FOR ALIEN FIANCÉ(E)

(CT:VISA-1547; 09-27-2010)

Because INA 214(d) uses the language "petition filed in the United States," a K visa petition Form I-129-F, Petition for Alien Fiancé(e), may not be filed with, or approved or denied by, a consular officer or an immigration officer stationed abroad. All K visa petitions must be filed with the Department of Homeland Security (DHS) *U.S. Citizenship and Immigration Services (USCIS)* district office having jurisdiction over the petitioner's current or intended residence in the United States. If the citizen fiancé(e) is abroad at the time the K visa petition is filed, the consular officer should advise the petitioner to send the completed petition, supporting documents, and appropriate fee to the DHS *USCIS* service center with jurisdiction over his or her State of intended residence after marriage. The *USCIS* Web site (service centers) has complete information on service center jurisdiction. After the petition is approved, *USCIS* will transmit it to the appropriate post.

9 FAM 41.81 N3 ACCEPTANCE OF K VISA APPLICATIONS

(TL:VISA-756; 07-27-2005)

a. K-1 and K-2 visas must be processed and issued only at immigrant visa (IV) issuing posts. If a nonimmigrant visa (NIV) issuing post receives a K-1 visa petition, it should forward the petition to the IV issuing post which covers the consular district, unless the post has been specifically authorized to process K visas.

b. Subject to (c) below, applicants for K-3 or K-4 visas should also be processed at IV posts, as K-1s are, but in some cases they may have to be processed at a consular post that normally issues only NIV, because there is no IV post in the country.

c. The statute requires that a K-3 visa for an applicant who married a U.S. citizen outside the United States be issued a visa by a consular officer in the foreign state in which the marriage was concluded. However, if no visa-issuing post is located in that country, the K-3 applicant should apply at the consular post designated to handle "homeless" IV cases for that country. A K-4 visa applicant may be issued a visa at any IV issuing post,

or, in the circumstances noted above, at a nonimmigrant post if there is no IV issuing post in the country.

9 FAM 41.81 N4 DOCUMENTARY REQUIREMENTS

(CT:VISA-756; 07-27-2005)

a. The following are documentary requirements for a K-1 or K-3 visa:

(1) The applicant must undergo the standard immigrant visa (IV) medical examination by a panel physician;

(2) A National Crime Information Center (NCIC) name check must be done by the National Visa Center (NVC) for each applicant;

(3) The applicant must present police certificates, if required; and

(4) The applicant must present proof of relationship to the petitioner at the time of the interview.

b. K-1 and K-3 applicants are subject to INA 212(a)(4) and must demonstrate to the consular officer's satisfaction that they will not become a public charge. The Form I-864, Affidavit of Support Under Section 213 A of the Act, cannot be required. Applicants may submit a letter from the petitioner's employer or evidence that they will be self-supporting. The Form I-134, Affidavit of Support, may be required when the consular officer deems it useful.

9 FAM 41.81 N5 FILING PETITION FOR CLASSIFICATION UNDER INA 101(a)(15)(K)

9 FAM 41.81 N5.1 Petition for Classification Under 101(a)(15)(K)(i)

(TL:VISA-377; 03-29-2002)

See 9 FAM 41.81 N2 for filing requirements.

9 FAM 41.81 N5.2 Petition for Classification Under INA 101(a)(15)(K)(ii)

(CT:VISA-1547; 09-27-2010)

An alien seeking admission under INA 101(a)(15)(K)(ii) must be the beneficiary of a K-3 petition filed by a U.S. citizen in the United States. For

the present, *USCIS* is using the usual Form I-129-F, Petition for Alien Fiancé(e), for this purpose. As noted in 9 FAM 41.81 N3, if the couple married outside the United States, the visa must be issued by a consular officer in the foreign state in which the marriage was effected.

9 FAM 41.81 N5.3 K-4 Child of K-1 or K-3

(TL:VISA-756; 07-27-2005)

The unmarried child of a K-1 or K-3 applicant does not require a petition. The applicant needs only to demonstrate that he or she is the "child" (as defined in INA 101(b)(1)) of an alien classified K-1 or K-3. K-2 or K-4 applicants are required to sign a form apprising them that entering into a marriage prior to obtaining adjustment of status will render them ineligible for adjustment as IR-2 or CR-2 immigrant visa (IV) applicants.

9 FAM 41.81 N6 ALIENS CLASSIFIED K-1 OR K-2

9 FAM 41.81 N6.1 Action When Petition Received

(TL:VISA-2; 08-30-1987)

Upon the receipt of an approved K-1 visa petition, the post should send a letter to the beneficiary outlining the steps to be taken to apply for a visa. If the initial 4-month validity of a petition has expired without a response to the post's letter, the consular officer should send a follow-up letter to the beneficiary, with a copy to the petitioner, and request a reply within 60 days. If the 60-day period passes without a response from either party, or, if the response indicates that the couple no longer plans marriage, the case is to be considered abandoned; the petition is to be retained at the post for a period of one year and then destroyed.

9 FAM 41.81 N6.2 Validity of a K-1 Petition

(CT:VISA-1547; 09-27-2010)

An approved K-1 visa petition is valid for a period of four months from the date of *USCIS* action and may be revalidated by the consular officer any number of times for additional periods of four months from the date of revalidation, provided the officer concludes that the petitioner and the beneficiary remain legally free to marry and continue to intend to marry each other within 90 days after the beneficiary's admission into the United States. However, the longer the period of time since the filing of the petition, the more the consular officer must be concerned about the

intentions of the couple, particularly the intentions of the petitioner in the United States. If the officer is not convinced that the U.S. citizen petitioner continues to intend to marry the beneficiary, *including instances where no action has been taken on the application for a year,* the petition should be returned to the approving office of *USCIS* with an explanatory memorandum. (See 9 FAM 41.81 PN7 for revalidation procedure.)

9 FAM 41.81 N6.3 Reissuance of K-1 Visa

(CT:VISA-1547; 09-27-2010)

If a K-1 visa, valid for a single entry and a 6-month period, has already been used for admission into the United States and the alien fiancé(e) has returned abroad prior to the marriage, the consular officer may issue a new K visa, provided that the period of validity does not exceed the 90th day after the date of initial admission of the alien on the original K visa*, provided the alien fiancé(e) pays a new application processing fee,* and provided also that the petitioner and beneficiary still intend and are free to marry. The alien's return to the United States and marriage to the petitioner must take place within 90 days from the date of the original admission into the United States in K status.

9 FAM 41.81 N6.4 Petitioner and Beneficiary Must Have Met

(CT:VISA-1547; 09-27-2010)

USCIS regulations (8 CFR 214.2(k)(2)) require that the petitioner and the K-1 beneficiary have met in person within two years immediately preceding the filing of the petition. At the director's discretion, this requirement can be waived if it is established that compliance would result in extreme hardship to the petitioner or that compliance would violate strict and long-established customs of the beneficiary's foreign culture.

9 FAM 41.81 N6.5 Marriage Bona Fides

(CT:VISA-1547; 09-27-2010)

a. If a consular officer finds that the fiancé(e) or marital relationship is not bona fide but is a sham entered into solely for immigration benefits, post should return the K-1 or K-3 petition with a recommendation for revocation to NVC under cover of a memorandum detailing the specific, objective facts giving rise to the post's conclusion.

b. All immigrant and K-1/K-3 visa revocation cases are to be returned to the following address:

   National Visa Center

32 Rochester Avenue
Portsmouth, NH 03801
Attn: Fraud Prevention Manager

9 FAM 41.81 N6.6 Petitioner and Beneficiary Must be Legally Free to Marry

(CT:VISA-1547; 09-27-2010)

a. For a K-1 petition to remain valid, the petitioner and the beneficiary must:

   (1) Have been legally free to marry at the time the petition was filed;

   (2) Have remained so thereafter; and

   (3) Continue to have the intent to marry within 90 days after the beneficiary's admission into the United States.

b. A K-1 petition filed when the petitioner and/or the applicant was still legally married shall not serve as the basis for visa issuance, even though that marriage was terminated and applicant/petitioner became free to marry within 90 days of arrival in the United States. If a consular officer finds that the petitioner and/or applicant is/was not legally free to marry, post must return the K-1 petition to NVC under cover of memorandum detailing the specific, objective facts giving rise to the officer's determination.

9 FAM 41.81 N6.7 Additional Factors That May Raise Questions in K-1 Cases

(CT:VISA-1547; 09-27-2010)

a. There are several possible discrepancies between the facts stated on the petition and the actual circumstances of the K-1 beneficiary which might lead the consular officer to question whether the relationship is bona fide or which might cause the petitioner to choose not to go forward with the marriage. These include having one or more children not named in the petition, or a prior undisclosed marriage (even if it has been annulled or ended by divorce or death), or, in the case of a fiancée, a current pregnancy.

b. Discovery of a ground of ineligibility of the K-1 applicant raises another issue of the petitioners awareness of all of the factors associated with the fiancé(e).

c. Consular officers should use their discretion in determining whether to return the K-1 petition to *USCIS* in such cases. They should, however, first solicit from the petitioner information as to whether he or she was

aware of the particular circumstance(s) and whether, in light thereof, he or she still wishes to proceed with the proposed marriage. If satisfied in this regard, consular officers need not return the petition.

d. Consular officers should return the K-1 petition to DHS for reconsideration if not satisfied with respect to the bona fides of the relationship or if the petitioner indicates that he or she no longer intends to go forward with the marriage.

9 FAM 41.81 N6.8 Multiple Petitions Approved for Same K-1 Beneficiary

(CT:VISA-1547; 09-27-2010)

In instances where more than one U.S. citizen fiancé(e) has filed visa petitions on behalf of the same alien and more than one K-1 visa petition has been approved for the same beneficiary, the consular officer must suspend action and return all petitions with a covering memorandum to *USCIS* district director who approved the last petition so that the petition approvals may be reviewed.

9 FAM 41.81 N7 TERMINATION OF K VISA PETITION APPROVAL

(CT:VISA-1547; 09-27-2010)

USCIS regulations, (8 CFR 214.2(k) provide that the death of a petitioner or written withdrawal of the petition prior to the arrival of the beneficiary in the United States automatically terminates the approval of the petition. The consular officer should return the petition to the approving *USCIS* office with an appropriate memorandum.

9 FAM 41.81 N8 FORMER EXCHANGE VISITOR

(TL:VISA-2; 08-30-1987)

Before a K visa may be issued to an applicant who is a former exchange visitor and subject to the provisions of INA 212(e), the applicant must establish that the requirements of INA 212(e) have been fulfilled or that a waiver has been obtained. (See 22 CFR 40.202(b) and 9 FAM 40.202 Notes.)

9 FAM 41.81 N9 MARRIAGE FOR PURPOSE OF EVADING IMMIGRATION LAWS-INA 204(C)

(CT:VISA-756; 07-27-2005)

See 9 FAM 42.42 N12.3-2.

9 FAM 41.81 N9.1 Waiver Availability for Applicants Ineligible Under INA 212(a)

(CT:VISA-756; 07-27-2005)

A K visa is a nonimmigrant visa (NIV), and, therefore, K nonimmigrants are generally eligible for INA 212(d)(3)(A) waivers. However, processing an INA 212(d)(3)(A) waiver would not be appropriate unless an immigrant waiver is also available when the K visa holder applies to adjust status to legal permanent resident. To determine whether a waiver is available for a K applicant, the consular officer must, therefore, first examine whether the particular INA 212(a) ineligibility is waiveable for immigrant spouses of U.S. citizens, under either INA 212(g), (h), (i), 212(a)(9)(B)(v), 212(d)(11) or (12) or similar provisions. (For a more complete list, see the abridged list of ineligibilities and immigrant waivers at 9 FAM 40.6.)

9 FAM 41.81 N9.2 Visa Refusal - No Waiver Possible

(CT:VISA-1547; 09-27-2010)

If the K visa applicant is ineligible for a visa on an INA 212(a) ground for which no immigrant waiver is or would be possible after marriage to the petitioner, then the case should not be recommended for an INA 212(d)(3)(A) waiver and no waiver request should be submitted to *USCIS.* (See 22 CFR 40.301.)

9 FAM 41.81 N9.3 INA 212(d)(3)(A) Waiver for K-1 Fiancé(e) Who Would Qualify for Waiver if Married, or for K-3 Spouse

(CT:VISA-1547; 09-27-2010)

a. If it is determined that the K visa applicant is ineligible to receive a visa under INA 212(a) but that the ineligibility could be waived after (or as a result of the) marriage to the petitioner, the consular officer should assist the applicant in completing Form I-601, Application for Waiver of Ground of Inadmissibility, and submit simultaneously both the Form I-601 (with the required fee) and Form DS-221, Two-Way Visa Action Request and Response to the appropriate *USCIS* office abroad with the recommendation concerning the granting of an INA 212(d)(3)(A) waiver. (If the case involves a K-1 fiancé(e), before beginning that waiver

process the consular officer should first satisfy himself or herself that the petitioner was or is aware of the ineligibility and still wishes to pursue the marriage. If not, the petition should be returned to *USCIS* and no waiver process commenced.) Consular officers should follow this same general procedure whether the ineligibility is on medical or nonmedical bases, while taking into account any variant procedure required in certain medical cases as set forth in 9 FAM 40.11 *Notes.*

b. When an alien fiancé(e) of a person in the U.S. military has been found ineligible and it appears that the benefits of INA 212(h) or (i) might be available once the marriage has taken place, the consular officer should discuss the ineligibility and the waiver possibility with the military officer responsible for granting permission to marry, and point out that *USCIS* cannot make advance determinations regarding a waiver.

9 FAM 41.81 N10 VACCINATION REQUIREMENTS FOR K VISA APPLICANTS

(TL:VISA-277; 05-10-2001)

See 9 FAM 41.108 Notes.

9 FAM 41.81 N11 ALTERNATIVE CLASSIFICATION

(CT:VISA-756; 07-27-2005)

The inclusion of INA 101(a)(15)(K) in the nonimmigrant classifications is not intended to prohibit an alien fiancé(e) of a U.S. citizen from applying for and obtaining an immigrant visa (IV) or a nonimmigrant visa (NIV) under another classification, if the alien can qualify for an alternative classification. For example, an alien proceeding to the United States to marry a U.S. citizen may be classified B-2, if it is established that following the marriage the alien will depart from the United States. (See 9 FAM 41.31 N11.1.)

9 FAM 41.81 N12 CHILD OF ALIEN K-1 FIANCÉ(E)

(CT:VISA-1547; 09-27-2010)

USCIS and the Department have agreed that the child of a K-1 principal alien may be accorded K-2 status if following to join the principal alien in the United States even after the principal alien has married the U.S. citizen fiancé(e), and acquired lawful permanent resident (LPR) status. However,

the cutoff date for issuance of a K-2 visa is one year from the date of the issuance of the K-1 visa to the principal alien. After one year, and provided that the alien qualifies, the filing of an immediate relative or second preference petition would be required.

9 FAM 41.81 N13 CHILD OF ALIEN K-3 FIANCÉ(E)

(CT:VISA-1547; 09-27-2010)

USCIS and the Department have agreed that the child of a K-3 principal alien may be accorded K-4 status if following to join the principal alien in the United States even after the principal alien has acquired lawful permanent resident (LPR) status. However, the cutoff date for issuance of a K-4 visa is one year from the date of the issuance of the K-3 visa to the principal alien. After one year, and provided that the alien qualifies, the filing of an immediate relative or second preference petition would be required.

9 FAM 41.81 N14 DISCLOSURE OF PETITIONER CRIMINAL CONVICTION HISTORY, PROTECTION ORDERS, OR RESTRAINING ORDERS UNDER THE INTERNATIONAL MARRIAGE BROKER REGULATION ACT (IMBRA)

(CT:VISA-1402; 02-26-2010)

a. The International Marriage Broker Regulation Act of 2005 (IMBRA) applies to all I-129-F petitions for K status filed on or after March 6, 2006. That legislation required USCIS to provide to the Department, and the Department in turn to disclose to the beneficiary during the visa interview, all criminal background information submitted to USCIS by the petitioner and any related criminal conviction information that USCIS discovered during its routine background check regarding any of the following crimes:

   (1) Domestic violence, sexual assault, child abuse and neglect, dating violence, elder abuse, and stalking;

   (2) Homicide, murder, manslaughter, rape, abusive sexual contact, sexual exploitation, incest, torture, trafficking, peonage, holding hostage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, or an attempt to

commit any of these crimes; and

(3) Crimes relating to a controlled substance or alcohol where the petitioner has been convicted on at least three occasions and where such crimes did not arise from a single act.

b. Disclosure of any protection orders or criminal background information regarding the petitioner that USCIS has reported with an approved K petition is mandatory. The IMBRA legislation requires that the Department must share any such criminal background information that is in government records or databases with the K nonimmigrant visa applicant who is the beneficiary of the petition, while informing the applicant that such criminal background information is based on available records and may not be complete. This should take place prior to the applicant's visa interview, when the instructions regarding the visa application process are sent out. You must also disclose this information to the K visa applicant, in the applicant's primary language, during the visa interview. In making this disclosure, you are not authorized to provide the name or contact information of any person who was granted a protection order or restraining order against the petitioner or was a victim of a crime of violence perpetrated by the petitioner, but are to disclose to the applicant the person's relationship to the petitioner. Because petitioners for K visa status who have filed an I-129-F version that was issued on or after May 26, 2006, have signed a statement therein expressing their understanding that any criminal background information pertaining to them will be disclosed to petition beneficiaries, you are not required to send a petitioner notification that such disclosure has occurred.

c. Further IMBRA guidance will be forthcoming upon publication of an information pamphlet for K visa applicants that the Department of Homeland Security (DHS) is developing. The pamphlet will advise applicants of their rights and options, should they become victims of domestic violence after they enter the United States. Until posts receive these pamphlets, however, you must still inform K visa applicants of any protection orders or criminal background information regarding the petitioner that USCIS has reported with an approved K petition. After informing the applicant, give the applicant time to decide whether he or she wishes to proceed with the K visa application, and, in the case of an applicant for a K-1 visa, whether he or she still intends to marry the petitioner within 90 days of entering the United States. Appropriate case notes should be entered into the IVO system to indicate that the applicant received notice of the petitioner's criminal history. If posts have questions on specific cases, contact post's liaison in CA/VO/L/A or CA/VO/F/P for additional guidance.

9 FAM 41.81 N15 RETURNING I-129-F PETITIONS BASED ON ADAM WALSH ACT REQUIREMENTS

(CT:VISA-1547; 09-27-2010)

a. Section 402 of the Adam Walsh Child Protection and Safety Act of 2006 ("Adam Walsh Act"), which became law on July 27, 2006, amended INA 204(a)(1) and 101(a)(15)(K), rendering ineligible to file a petition for immigrant status under INA 203(a) or nonimmigrant K status, any petitioner who has been convicted of a "specified offense against a minor," defined in section 111 of the Adam Walsh Act as an offense involving any of the following:

(1) An offense (unless committed by a parent or guardian) involving kidnapping;

(2) An offense (unless committed by a parent or guardian) involving false imprisonment;

(3) Solicitation to engage in sexual conduct;

(4) Use in a sexual performance;

(5) Solicitation to practice prostitution;

(6) Video voyeurism as described in section 1801 of title 18, United States Code;

(7) Possession, production, or distribution of child pornography;

(8) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct;

(9) Any conduct that by its nature is a sex offense against a minor.

Section 402 further provides that the bar against filing a petition because of such a conviction will not apply if the Secretary of Homeland Security, in his or her sole and unreviewable discretion, determines that the petitioner poses no risk to the beneficiary.

b. Because of the Adam Walsh Act, you must return the petition to the USCIS domestic service center that approved it, via NVC, any approved I-129-F petition filed by a U.S. citizen identified as having been convicted of one of the offenses against a minor listed in 9 FAM 41.81 *N15*, for reconsideration, unless USCIS has reported that the Secretary of Homeland Security has made the necessary "no risk" determination. Additionally, USCIS has asked that you return to the approving domestic service center (via NVC) for possible revocation any I-129-F petition approved before July 27, 2006 if you are aware of any conviction for a specified sexual or kidnapping criminal offense against a minor that does

not appear to have been known at the time of petition approval. Do not disclose conviction information to the visa applicant in cases in which the petition is being returned.

c. The Adam Walsh Act's bar against the filing of a petition for family-based immigrant or K nonimmigrant visa status by an individual who has been convicted of a specified offense against a minor does not apply if the Secretary of Homeland Security exercises his sole and unreviewable discretionary authority and determines that the individual poses no risk to a beneficiary. You may encounter cases in which the criminal history information reported to post by USCIS relates to a conviction for a crime that is one of the specified offenses against a minor listed in 9 FAM 41.81 *N15.* Provided that the petition reflects that there has been a no-risk determination by the Secretary of Homeland Security and you intend to approve the visa application, you should not forward the petition to USCIS based on the conviction in that instance, but instead consider it to have been properly filed under the Adam Walsh Act, while nonetheless informing the K visa applicant, during the interview, of any conviction listed in 9 FAM 41.81 *N15* that has been reported by USCIS pursuant to IMBRA.