21.2 Factors Common to the Adjudication of All Relative Visa Petitions.

(a) Filing and Receipting of Relative Petitions .

(1) Statutory Definitions of Relationships Covered .

USCIS has the responsibility of determining if the beneficiary of a relative visa petition is eligible for the classification sought. As the adjudicating officer, you will make that determination. Therefore, you must be completely familiar with the statutory definitions of relatives as well as the applicable regulations and precedent decisions. The classes of eligible alien relatives are enumerated in sections 201(b), 203(a), 207(c)(2), and 208(b)(3) of the Act and Public Law 97-359:

(A) **Section 201(b)** of the Act covers aliens exempt from numerical limitations and includes "immediate relatives" of United States citizens:

- **Spouse** , which is not really a defined term under the Act or regulations, although **section 101(a)(35)** of the Act does exclude spouses acquired through unconsummated proxy marriages. Also, section 7 of the Defense of Marriage Act (Pub. L. 104-199) clarifies the term (see Chapter 21.3 of this field manual).

- **Child** , as that term is defined in paragraphs (A) through (E) of **section 101(b)(1)** of the Act

- **Orphan** , as that term is defined in section **101(b)(1)(F)** of the Act, who has been, or will be, adopted abroad

- **Orphan** , as that term is defined in section **101(b)(1)(F)** of the Act, who will be coming to the U.S. to be adopted in legal proceedings in this country

Note

(With regards to both orphans adopted abroad and orphans coming to be adopted, section 101(b)(1)(G) of the Act, dealing with The Hague Convention on International Adoptions, is not yet in effect, and is not expected to be in effect until 2007.)

- **Parent** , as that term is defined in **section 101(b)(2)** of the Act

(B) **Section 203(a)** covers aliens eligible for preferential consideration based on a familial relationship to a citizen or LPR of the U.S. Unlike the immediate relative petitions, the

dependents (spouse and child(ren)) of a beneficiary of a preference petition receive derivative immigrant visa classification if they are accompanying or following to join the principal beneficiary. ("Accompanying" refers to a dependent who is immigrating concurrently with, or who has an immigrant visa issued within 6 months after, the principal alien's admission or adjustment; "following to join" refers to an alien who is immigrating more than 6 months after the principal alien, but based on a relationship which existed at the time of the principal alien's immigration, provided that relationship still exists at the time of the dependent's application for admission to the United States.) The family-based preference classifications are:

- **First preference** under section 203(a)(1) includes the unmarried sons and daughters of United States citizens;

- **Second preference** under section 203(a)(2) includes the spouses, children, and unmarried sons and daughters of lawful permanent resident aliens;

Note 1

If a lawful permanent resident acquired a dependent prior to such LPR's immigration or adjustment (the LPR had already married the spouse or the parent-child had been established), the dependent could qualify for a following to join visa classification and would not need a second preference petition or a second preference quota number.

Note 2

Frequently, the child of an LPR can qualify either as a principal beneficiary (child of LPR) based on a visa petition filed on behalf of the child; or as a derivative (child of the spouse of an LPR) through the petition filed by the LPR for the other parent. This is not always the case, since sometimes the child can only qualify as the child of the spouse, as with a stepchild of an LPR who is over 18 at the time the LPR married the child's parent.

The derivative classification, of course, requires no separate visa petition. The decision on whether to file one visa petition (for the spouse only) or multiple visa petitions (one for spouse and one for each of the LPR's children) is up to the petitioning LPR. Either approach has advantages:

– The advantage of filing one petition is that only one fee must be paid and only one set of supporting documents has to be filed. This can result in considerable savings in time and money, especially if the LPR has a large, multi–child family. Furthermore, should situations change (e.g., if the principal beneficiary dies or the marriage ends in divorce) and individual petitions for the children become necessary, the new petitions will be accorded the same filing date as the original petition (see 8 CFR 204.2 (a)(4)).

– The advantage of filing multiple petitions is that each beneficiary can act independently. If one of the children needs to immigrate before the others are ready to travel (e.g., if a daughter wants to join her LPR mother in the U.S. to begin school in the U.S. while her father remains in the home country to care for a sibling who is finishing school there), that child may do so.

Note 3

In accordance with **Matter of Ah San** , 15 I&N Dec. 315 (BIA 1975) , non-citizen nationals of the U.S. may also file petitions pursuant to section 203(a)(2) of the Act.

• **Third preference** under section 203(a)(3) includes the married sons and daughters of United States citizens;

• **Fourth preference** under section 203(a)(4) includes the brothers and sisters of United States citizens.

(C) **Section 207(c)(2)** of the Act covers the relatives of an alien admitted to the United States as a refugee and includes:

• The **spouse of a refugee** , provided the spousal relationship existed at the time the refugee was first admitted to the United States in that status; and

• The **child of a refugee** , provided the parent-child relationship between the refugee and the child existed at the time of the refugee's admission to the United States, or the child was *in utero* at the time of the father's admission as a refugee. **Note:** In refugee matters, to qualify as "accompanying" the derivative must be admitted within four months of the principal's admission (see **8 CFR 207.7(a)** and contrast with the six month timeframe for immigrant visa cases as discussed in paragraph 21.2(a)(1)(B) above).

(D) **Section 208(b)(3)** of the Act covers the relatives of an alien granted asylum status (an "asylee") and includes:

• The **spouse of an asylee** , provided the spousal relationship existed at the time the asylee was granted such status in the United States; and

• The **child of an asylee** , provided the parent-child relationship between the refugee and the child existed at the time of the refugee's admission to the United States, or the child was *in utero* at the time the father's asylum application was granted.

Note

Nonimmigrant relative petitions for K and V nonimmigrants are discussed in **Chapter 37** of this field manual.

(2) Petition Form .

• Form I-130 (Petition for Alien Relative) is filed with USCIS by a United States citizen or lawful permanent resident on behalf of an alien relative to establish eligibility for the exemption or preference.

• Form I-360 is used to classify an alien as an Amerasian, Widow(er), or as a Special Immigrant. With regards to relatives, it includes those who are:

– The widow or widower of a U.S. citizen. The form allows such person to petition for himself or herself, and to petition for his or her child. The widow or widower of an LPR cannot self-petition. Likewise, the child of a deceased citizen cannot self-petition; the child must be included in his or her parent's widow/widower self-petition.

– A battered spouse or child of a U.S. citizen or LPR. This category also includes certain persons who would have fallen within this category, except that the marriage to the citizen or LPR was bigamous, as well as certain former battered spouses and children of citizens or LPRs.

– An Amerasian under Publ. L. 97-359, as amended by subsequent legislation.

Note:
Form I-360 is also used for a number of other (non-relative) special immigrant classifications which are discussed in **Chapter 22** of this field manual.

• Form I-600 is used to petition for an orphan who has been identified.

• Form I-600A is used to petition for an orphan if the orphan is to be named later.

• Form I-730 is used by an alien who has been admitted as a refugee under section 207 of the Act, or granted asylee status under section 208 of the Act, to bring a spouse or child to the United States as a derivative refugee or asylee.

(3) Priority Dates .

Preference aliens need a priority date for visa issuance, and that date is generally established when the petition, filed on the alien's behalf, is properly signed by the petitioner and the fee has been collected by USCIS . The priority date is the chronological date which establishes the preference alien's place on a waiting list maintained by the Department of State for issuance of the immigrant visa. (See also **Chapter 21.1** of this field manual.)

(A) General .

The priority date, in most instances, is the date the visa petition was properly filed at a USCIS office. If the visa petition is filed at a consulate abroad, and the petitioner is under the jurisdiction of the consulate, the priority date or filing date is the date the petition was received at the consular office if the petition can be approved by the consular officer. For those cases not within the jurisdiction of the consular office, no filing date is accorded until such time as they are received by the appropriate USCIS office in the States. The filing date should be recorded on the appropriate line on the front of the petition with an explanation for any priority date which is different from the date on which USCIS date-stamped the petition when it was originally filed by the petitioner.

(B) Petition Not Properly Filed .

If, during normal processing a delay results from deficiencies in the initial filing, the priority date will be established only when the petition is properly signed by the petitioner and the fee has been collected by USCIS . If questions arise concerning the filing of the petition which cannot be resolved through a check of the Fee Receipting System, (FARES), or other fee collection system, then the director may consider the date of receipt of the petition to be the priority date. Where a petition is returned to the petitioner because the fee has not been paid, or the petition has not been signed, the petitioner should be informed on the Form I-797 that the petition has not been properly filed and no priority date has been es tablished. If you use a later date than the initial date-stamp on the petition as the filing date, you should indicate the reason for using the later date in the Remarks Block on the petition. An example of the format which you may use in the Remarks Block follows:

Priority date not established on date filed because...

a. Fee not paid until_____.

b. Petition not signed until_____.

(4) Chapter 21.2(a)(4) replaced with Memorandum - Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children (REVISED); Effect of FY 2010 DHS Appropriations Act on eligibility to immigrate after death of visa petitioner. See **Appendix 21-7** . [Replacement and addition 12-02-2009]

(b) Adjudicative Procedures .

(1) Review of the Petition .

The basic adjudication procedures and concerns discussed in chapters 10 through 17 of this

field manual apply to relative petitions. Adjudicators who are not already familiar with these matters should review those chapters before adjudicating relative petitions.

(A) General .

You must carefully review the answer to each question on the petition and determine if the information is relevant and correct. People preparing petitions sometimes provide incorrect, inaccurate, or misleading information, and you must detect mistakes and misinformation in order to properly adjudicate the petition. Some errors are inadvertent; others are deliberate. Examples of common problems associated with the execution and filing of petitions are:

- Failure to include the requisite fee;

- Failure to sign the petition;

- Reversal of petitioner's and beneficiary's names (the terms “petitioner” and “beneficiary” sometimes confuse people);

- Failure to answer relevant questions;

- Use of “N/A” to answer relevant questions; and,

- Erroneously listing the current date as the birth date for the petitioner or the beneficiary.

Note

You should be aware that the use of the term "N/A" is a common ploy used to try to conceal relevant information (e.g., prior marriages, children, beneficiary's status in the United States) by implying the answer is "none" without actually stating it. Therefore, "N/A" should generally not be considered an acceptable answer.

(B) Item-by-Item Review .

Special attention should be paid to the following items:

- Name . The names of the petitioner and the beneficiary are basic in establishing identity and are extremely important when trying to locate any relating USCIS records. They also provide clues concerning marriages, illegitimacy, adoption, and other issues for which a name differentiation is normal. Any substantial variation in these names, when compared with USCIS

or other records, must be satisfactorily explained by the submission of additional documents, affidavits, or other appropriate means.

• Date and Place of Birth . This information is essential as it relates to the identity of the individual and is often necessary to locate any relating USCIS records. Additionally, it may determine eligibility for the benefit sought. For example, a petition filed to accord immediate relative classification to a parent or fourth preference classification to a brother or sister requires a review of the petitioner's date of birth because the petitioner must be at least 21 years of age at the time of filing. A large difference in age between the petitioner and beneficiary on a spouse petition is often the first indication you will have that the marriage may have be en contracted solely for the purpose of gaining an immigration benefit (with or without the knowledge and complicity of the petitioner). On petitions for parents, brothers, sisters, children, sons, or daughters, the petitioner's and the beneficiary's birth dates may have a definite bearing on the claimed relationship. Also, the law governing the place where and when the individual was born must be considered in determining eligibility for many benefits. Because of the variance in individual state law as well as in foreign laws, the adjudicator will, ofte ntimes, have to rely on a report from the Library of Congress (see **Chapter 14.10** of this field manual), interim decisions, General Counsel Opinions, or other resources to determine eligibility.

• Previously-Filed Visa Petitions . The answer to this question may provide you with valuable information pertinent to your case. A previously-filed petition may contain the necessary evidence or information that was missing or may indicate a lack of eligibility for the benefit sought. If the petition or other record reflects that a previous petition has been filed by the petitioner, and it is believed that the prior petition may contain evidence or information pertinent to the adjudication of the present petition, then the prior petition s hould be obtained where possible.

• Addresses . The correct addresses for both the petitioner and the beneficiary are extremely important. The petitioner's address generally establishes which USCIS office has jurisdiction over the petition. The addresses are also important because the petitioner and the beneficiary may have to be contacted or interviewed. However, even if personal contact is not necessary, the petitioner will have to be notified of the decision on the petition, and the beneficiary will have to be contacted concerning the issuance of an immigrant visa or adjustment of status.

• Location of Consulate . The location of the United States Embassy/Consulate where the beneficiary will apply for a visa must be shown on the petition, particularly if the beneficiary will have to apply abroad. If the beneficiary will not seek adjustment in the United States or is ineligible for section 245 benefits, the approved petition is forwarded to the National Visa Center (NVC) at:

The Department of State,

National Visa Center,

32 Rochester Ave,

Portsmouth, NH 03801-2909.

The NVC, at the appropriate time, will forward the petition to the consulate designated by the petitioner on the approved petition. If the designation is omitted by the petitioner, you will have to obtain the consular location based on the beneficiary's country of birth or country of last residence. If the consulate designated does not issue immigrant visas, you must ascertain the proper consulate before you can complete the processing of the petition. You can verify whether a consular office issues immigra nt visas from the list of visa issuing posts in the Department of State's Foreign Affairs Manual.

If the beneficiary is unable to return to the country of birth for visa issuance or if a U.S. consulate is not present in the beneficiary's country of birth, the petitioner may request that another U.S. consulate, which is designated as an immigrant visa processing post, accept jurisdiction on humanitarian grounds. This procedure is requested through the individual consulate or the Department of State. If jurisdiction is accepted by the consulate, the adjudicator should annotate the petition to that effect prior to forwarding the petition to the NVC. Under no circumstances is the adjudicator to designate or recommend that the petitioner designate a processing post other than one in the beneficiary's country of birth or country of last residence.

Note

The Form I-797 (Notice of Approval) will show the petition has been sent to the NVC. The consular block on the approval notice will be left blank.

- United States Citizenship of Petitioner . If the petitioner is a United States citizen, proof of citizenship must be submitted with the petition. In most cases, a birth certificate, Naturalization Certificate, Certificate of Citizenship, or U.S. passport will be submitted. **8 CFR 204.1(g)(1)(i - vi**) stipulates the acceptable documents to be presented as evidence of U.S. citizenship. USCIS does not post-audit citizenship claims and, therefore, evidence that the petitioner is a U.S. citizen must be submitted with the petition. If the petitioner was born outside the United States and derived citizenship, but has not applied for a Certificate of Citizenship, the case should be returned to the petitioner to resolve his/her citizenship status at a district office.

8 CFR 204.1(f)(2) allows for the submission of legible, true copies of original documents; however, USCIS reserves the right to require submission of original documents when deemed necessary.

If it appears the petitioner may have expatriated or lost U.S. citizenship, the petition should be referred to the district office having jurisdiction. The district office is able to interview and obtain a question and answer statement or affidavit from the petitioner. Then, the case will be referred to the Citizenship section with all the supporting evidence, and with a memorandum of the conclusion that the petitioner has lost citizenship. The Citizenship section will furnish an informal opinion as to whet her the case would have been referred to Headquarters under outstanding instructions, had it arisen in the Citizenship section. If so, the case is referred to Headquarters,

through the office of the regional director, and will attach its comments and recommendation. This referral is not a certification and the petitioner should not be informed of it.

• Lawful Residence Status of Petitioner . **8 CFR 204(g)(1)(vii)** gives the specific requirements for evidence of lawful permanent residence. Generally, the petitioner will submit a copy of his/her Form I-551. If the original is seen by the adjudicator, verify an alien's status by noting "I-551 seen" or "file seen" beside the petitioner's "A" number. Immediately return the Form I-551 to the petitioner unless the authenticity of the document is questionable.

If the petitioner does not submit Form I-551, conduct a record check in USCIS to verify status. If the relating file cannot be located or does not contain a record of admission for permanent residence, you should attempt to verify arrival pursuant to Chapter 7A of the Records Operations Handbook . If that is unsuccessful, request the alien to submit any document he or she may have which was issued or endorsed by USCIS which may bear on the claim to permanent resident status.

In doubtful cases, the petition should be sent to, and the petitioner referred to, the district office having jurisdiction. An interview should be conducted if there is a question that a document or a record relates to the petitioner.

You should accord the petitioner the benefit of any presumption of lawful admission under **8 CFR 101** to which he or she may be entitled (see **Chapter 23.4** of this field manual).

You should also determine if the petitioner's status as a lawful permanent resident has been lost. If the petitioner's file contains a signed Form I-407 (Record of Abandonment of Residence), but the petitioner contends that he or she had no intentions of abandoning U.S. residence and that the Form I-551 or other document was lifted in error, the case should be referred to the district office for interview.

In the case of a permanent resident who has not yet received Form I-551, the temporary stamp showing processing for Form I-551 is acceptable evidence of permanent residence. This stamp may be in the petitioner's passport or on Form I-181.

• Relationship . Mistakes are often made on this item. Generally, the mistake consists of reversing the relationship; for example, listing the relationship as "father" when a parent is petitioning for a child. Often the intent is obvious in which case you may correct the error (making sure to initial your correction). The relationship must be established by the supporting documents and any other available evidence.

• Prior Marriages of the Petitioner and Beneficiary . The response to this question is very important because it may have a definite bearing on eligibility for the benefit sought. For example, a "child" cannot be married; a "spouse" must have been legally free to marry when the current marriage was contracted; and a marriage is generally necessary for a child to be

considered legitimate. The answer given on the petition may not be completely accurate; therefore, all evidence and information should be carefully reviewed to ascertain if a prior marriage, for w hich you have no evidence of termination, may have occurred. Birth certificates of the subject's children, prior INS or USCIS records, and marriage certificates are good sources of evidence of prior marriages. It is extremely important that this issue be completely resolved and documented for the record. All evidence that was necessary to establish termination of any prior marriages must be made a part of the record.

Note

A son or daughter who is unmarried and under age 21 is a child. Unmarried does not mean “never married” and a previously married son or daughter under age 21 is a “child.” This raises the distinct possibility that someone might engage in divorce fraud in order to qualify for an immigration benefit. As we do not recognize a marriage which is contracted solely to circumvent immigration law, we also do not recognize a divorce which is obtained solely to circumvent immigration law.

• Marital Status of Beneficiary . This question has a definite bearing on eligibility for the benefit sought. You should be careful to verify the answer from the evidence and information furnished. It is not uncommon for a petitioner filing on behalf of a son or daughter to claim the beneficiary has never been married when, in fact, the person is currently married. Some indications that a person may be married, even though the marriage is undeclared, are:

– Age . Some nationalities and cultures tend to marry at a fairly young age. If the beneficiary is abnormally old to be an unmarried person in a particular country, this may indicate an undeclared marriage.

– Children . If the beneficiary has children, there is a strong possibility a marriage exists or did exist. The children's birth certificates will help resolve this.

– Service Records , Records, such as a visa application, Form I-213, affidavit, and previously filed application or petition, may indicate the subject's marital status.

• Petition Submitted Concurrently for Other Relatives . If the petition indicates the petitioner is filing for other relatives at the same time, all the petitions should be considered simultaneously, if possible. However, remember that all petitions stand alone and each must be documented individually. Therefore, a clearly approvable petition should not be held in abeyance pending the adjudication of the other relative's questionable petition. Be aware that generally with "joint" petitions, documents pertaining to all or some of the petitions may be attached t o only one of the petitions. In such a situation, check all the petitions for documentation, as this may save the needless return of a petition. Each petition must be accompanied by the necessary supporting documents, either originals or the acceptable copies, before being approved. The supporting documents must be made part of the Service record relating to that particular case.

(C) Discretionary Procedures for Petitioning Military Members and Their Dependents . [Chapter added on 09-22-2009]

When adjudicating a standalone Form I-130 filed by a military member on behalf of his or her alien spouse or child, Service Center ISOs must follow the steps below:

- Review every properly filed petition in chronological order by the receipt date;

- Determine whether the petition involves an active duty military member (by checking the file for military orders) before issuing a request for evidence (RFE); and

Note

The evidence necessary for the issuance of an RFE in this situation includes but is not limited to the list of documents listed in the memo entitled *Standalone* Form I-130 *and Jointly Filed* Form I-751 *: Discretionary Procedures for Petitioning Military Members and Their Dependents, Sept. 22, 2009.* See **Appendix 21-8** *.*

- Review the evidence submitted to determine the nature of the member's deployment; the claimed bona fides of the marriage and relationship to any children involved. See memo entitled *Standalone Form I-130 and Jointly Filed Form I-751: Discretionary Procedures for Petitioning Military Members and Their Dependents, Sept. 22, 2009.* See **Appendix 21-8**

The detailed steps that the ISO must follow are listed in **Appendix 21-9** .

(2) Types of Primary Documentation .

All petitions must be supported by primary evidence, if available. The standard sources of primary documents are:

(A) USCIS Records .

One of the most valuable, yet often overlooked, sources of information to verify a claimed relationship is the records of USCIS itself. When primary evidence such as birth certificates, marriage certificates or divorce decrees is not provided in support of a family-based petition, or where the authenticity of such documents is in question, USCIS records relating to the petitioner or other close relatives may verify or refute information claimed in the petition. Records showing acceptance in another USCIS proceeding of a claim to U.S. citizenship, marriage, birth of a child, etc. may serve to support such a claim in a later petition, or to refute a contradictory claim.

(B) Federal, State and Local Records .

In the United States, vital records are usually kept by State and local authorities. In some cases (e.g., where an event took place while the party in question was in the military), the vital records may be kept by a branch of the federal government.

(C) Foreign Documentation .

To determine if documentary evidence is available from another country, refer to the Department of State's Foreign Affairs Manual (FAM).

(3) Secondary Evidence .

One problem common to all categories of petitions is the unavailability or alleged unavailability of documents. You should always refer to the FAM any time a petitioner alleges that documents cannot be obtained. When the FAM shows that primary documents are generally available in the country at issue, but the petitioner claims that his or her document is unavailable, a letter from the appropriate registrar stating that the document is not available is required before USCIS will accept secondary evidence. If primary evidence is not available, and if this fact is certified by the issuing authority, secondary evidence (as described in **8 CFR 204.1** and on the I-130 instructions sheet) may be accepted. Furthermore, secondary evidence (e.g.,school records, baptismal certificates, etc.) is also used in conjunction with primary evidence that carries little probative value like a delayed birth certificate.

(A)Documents should be examined critically for alterations, authenticity, validity, and proper certification. **8 CFR 204.1(f)** ("Supporting Documentation") reads, in pertinent part:

(1) Documentary evidence consists of those documents which establish the United States citizenship or lawful permanent resident status of the petitioner and the claimed relationship of the petitioner to the beneficiary.... When the FAM shows that primary documents are generally available in the country of issue but the petitioner claims that his or her document is unavailable, a letter from the appropriate registrar stating that the document is not available will be required before USCIS will accept secondary evidence.

(2) Original documents or legible, true copies of original documents are acceptable. USCIS reserves the right to require submission of original documents when deemed necessary.

(B) **8 CFR 204.1(g)** lists, in detail, the requirements for primary and secondary evidence.

(4) Adequacy of Evidence .

(A) "Law of the Land" .

To evaluate the adequacy of evidence, you must be aware that the law of the state or country where the act (marriage, divorce, legitimation, or adoption) took place generally governs the validity of the relationship established or terminated. You should check the published precedent decisions if there is a question on this issue. If the precedent decisions and other available references do not resolve the issue, you should request an advisory opinion from the Library of Congress (see **Chapter 14.10** of this field manual). Your office may also have available copies of previous Library of Congress opinions for reference.

(B) Exceptions .

Although the law of the land generally governs the validity of a relationship, it does not follow that all legal relationships will confer benefits under the Act. For example, a marriage contracted solely for the purpose of gaining immigration benefits and not intended to create a life together as man and wife, though valid in the place where contracted, is not valid for benefits under the Act, and a proxy marriage is not considered valid under the Act unless consummated. Furthermore, in some countries it m ay be possible to establish a same-sex relationship which is not in compliance with the provisions of section 7 of the Defense of Marriage Act (110 Stat 2419 amending 28 U.S.C. 115, prohibiting federal law recognition of same-sex marriages) and would therefore not be recognized for immigration purposes (see **Chapter 21.3**).

(5) Determining the Meaning of a Document .

You must ensure that the document accepted is, in fact, what it is purported to be. A marriage license is different from a marriage certificate (the former allows the couple in question to get married in a given jurisdiction and within a given time period, the latter is evidence that the marriage has been celebrated). Likewise, often you will find that what appears to be a divorce decree is in reality a petition for divorce or a separation decree, neither of which legally terminates a marriage. Some decrees may be granted with qualification, such as a prohibition against marriage within a specific period of time, and therefore are not valid unless the qualifications are met. Others may specify that the decree will not become final until some future date or is null if the woman becomes pregnant during a specified period of time.

Note

Even in countries where a condition is placed on a decree, that same country might not honor the condition. For example, in Mexico divorce decrees prohibiting remarriage within a certain amount of time do not invalidate a subsequent marriage performed before time limit. When in doubt, solicit an opinion from the Library of Congress (see **Chapter 14.10** of this *field manual*).

(6) Documentation Already in the USCIS File .

The petitioner is required to submit all required documentation with the petition. However, in some instances, the petitioner may advise USCIS that the required document can only be located in the petitioner's file. If so, USCIS should request the file to attempt to locate the document in question.

(7) Evidence in Undocumented Cases .

Primary evidence of birth, marriage, death, divorce, and adoption is sometimes unavailable. In these cases, affidavits by the petitioner and other persons having personal knowledge of the events that created the relationship, and other evidence such as family photographs, blood tests, signature specimen forms, and evidence of transmittal of remittances to the petitioner's family may be considered. In many countries where the lack of primary evidence is known to be a fact, you need not require a certificatio n of the non-existence of a record before you accept secondary evidence. Blood tests may be required in these cases. You should always refer to the FAM for primary document availability. The regulations at **8 CFR 204.1(g)(2)** give specifics as to what type of secondary evidence to request. See *Matter of Tanessa Amelia Pagan* , ID 3378 (BIA 1999).

Any information furnished should be carefully scrutinized for consistency with claims made in the visa petition and information contained in USCIS records, particularly with regard to names, relationships, dates and place of birth, and dates and places of marriages.

When a petitioner seeks to confer immediate relative or preference classification on the basis of an alleged relationship between an adoptive parent and an adopted child (or adopted son or daughter) and no formal adoption decree is available, or, if such a decree is submitted and its authenticity is considered suspect, the petitioner should be required to submit secondary evidence of the alleged relationship. Such secondary evidence may consist of copies of affidavits, photographs, remittances, or other evi dence of support, or letters and other documents bearing upon the validity of the adoption. Such evidence should be made part of the record of proceeding.

In **Matter of Kwan** , 14 I&N Dec. 175 (BIA 1972) , involving a visa petition on behalf of an adopted daughter, the BIA provided a useful guide to the kind of secondary evidence which should be required in an undocumented case. The following is an excerpt from that decision:

Inasmuch as most Chinese adoption cases must be decided without benefit of a recorded formal decree of adoption, it is permissible to resort to other forms of probative evidence in order to reach a decision as to the validity of the adoption.

For instance, it would be proper for the petitioner to submit affidavits executed by (1) both

adoptive parents, (2) witnesses to the adoption ceremony, and (3) relatives and neighbors. The absence of such affidavits is a factor the petitioner must satisfactorily explain. Affidavits submitted should (1) state the nature of the affiant's relationship, if any, to the parties, (2) set forth the basis of the affiant's knowledge, and (3) contain a statement of the facts the affiant knows regarding the adoption, r ather than mere conclusory statements as to the existence of the adoption.

Matter of Kwan describes and explains the necessity of good secondary evidence. You should require similar secondary evidence; make it a part of the record of proceeding when primary evidence of birth, marriage, death or divorce is not available to establish a claimed relationship between a petitioner and beneficiary. Attach the originals or copies of secondary evidence you considered in reaching a decision to any approved petition you forward to a National Visa Center (NVC) . You should not approve the petition unless you are satisfied from the evidence submitted that the petitioner has met the burden of proof.

(8) Affidavits .

When considering secondary evidence, you must usually evaluate sworn affidavits to determine the validity of the relationship. Be sure that the affidavits contain all the specified elements as required by the secondary evidence regulation. You should analyze the affidavits carefully and compare them with any available information to determine if inconsistencies exist. When all the affidavits are worded the same, it indicates that the words are not necessarily those of the affiant and may cast some doubt on the affidavits' validity. When that situation arises, it is often beneficial, if possible, to have the affiant appear for a personal interview to determine what he or she personally knows about the claimed relationship and how the knowledge was acquired.

You should always try to obtain some legal or official document to corroborate affidavits. In some cases it is not possible, but usually the case will indicate something else is available, such as school records, census records, military or draft records, income statements, or social security records. Though the corroborating evidence may be nothing more than information furnished to another agency by the petitioner or beneficiary, it may establish that the relationship was claimed prior to seeking immigrat ion benefits and can be very helpful in verifying the claimed relationship.

(9) Evidence of Status in the United States .

(A) United States Citizenship of Petitioner .

When a USCIS employee has verified the petitioner's status, the notation "proof seen" will be placed beside the citizenship information on the petition and initialed. If a naturalization or citizenship certificate is presented in person, it shall be handed back to the petitioner. If a petition has been mailed in with the certificate attached, it shall be certified by the first employee reviewing the application. The certificate shall then be sent directly back to the petitioner by

certified or registered mail. Form G-3 47 should be used to obtain the naturalization file of any petitioner who is unable to furnish his certificate number and date and place of naturalization or where there is reason to suspect that the petitioner may have been expatriated.

Some petitioners who claim U.S. citizenship through birth in the U.S. are in fact aliens. The following may indicate an alien is making a false claim to U.S. citizenship:

- Delayed birth certificate;
- Delayed baptismal certificate;
- Unavailability of school records;
- No census records of the individual;
- Individual not in the military or registered for the draft;
- No baptismal certificate when of a faith normally baptized;
- No official documents (claim based solely on affidavits);
- Unable to speak English;
- Illiterate, when of an age group for which illiteracy is uncommon;
- No knowledge of area of predominant residence in the U.S.;
- No knowledge of mother, father, and/or brothers or sisters (check the number of prior births on the birth certificate);
- Siblings and/or parents born abroad;
- Claims raised abroad and only recently learned of U.S. citizenship; no satisfactory explanation for means of entry into U.S.;

• Social security card obtained late in life, or the number does not correspond to the claimed place of issuance;

This list is by no means complete, nor can each factor be applied to all cases. Many of the elements discussed can only be developed through personal interview. If the petitioner's citizenship is in question, an interview should be conducted.

(B) Lawful Residence Status of Petitioner .

Ideally, an LPR filing an I-130 petition will submit a photocopy of a currently valid Form I-551 to verify his or her LPR status. However, the instructions on the Form I-130 require an LPR petitioner to submit his or her original "Form I-151 or I-551" (and do not even specify that the Form I-551 must be a currently valid one). On the other hand, even in the absence of documentation, regulations at **8 CFR 103.2(b)(17)** allow for verification of claimed LPR status through USCIS records "at the discretion of the adjudicating officer." Furthermore, **section 264(e)** of the Act requires an LPR (18 years of age and over) to carry his or her Form I-551 at all times. Accordingly, the documentation submitted by the petitioner might range from an original valid Form I-551, to a photocopy of such Form I-551, to an obsolete document, to no document at all; and the action of the USCIS employee or contractor upon receiving a Form I-130 will vary according to the documentation submitted:

• If the petitioner submits an original valid Form I-551, depending on local office policy, either:

– Make a photocopy of the Form I-551 to accompany the petition and return the original to the petitioner, or

– Annotate the Form I-130 in block 14a "Original, valid Form I-551 seen and returned;" add the date and the appropriate identifier (e.g., your stamp number or your initials); and return the Form I-551 to the petitioner.

• If the petitioner submits a photocopy of a valid Form I-551, no verification or annotation action is required at this point.

• If the petitioner submits an original Form I-151, or an original but expired Form I-551, make a photocopy of the document and annotate that photocopy "Expired card seen and returned to petitioner with instructions to apply for replacement" adding the date and your identifier. Then return the card to the petitioner with a Form I-90 and an explanation that the petitioner must apply for a replacement card (see **Chapter 51** of this field manual).

• If the petitioner submits a photocopy of a Form I-151, or of an expired Form I-551, no verification or annotation action is required at this point.

• If the petitioner submits none of the above or no documentation at all, but claims in block 14a of the Form I-130 to be a lawful permanent resident, depending on local policy, either:

– Annotate block 14a of the Form I-130 "No documentation submitted," adding the date and your identifier (which will require verification from USCIS records in accordance with **8 CFR 103.2(b)(17)** , as discussed above), or

– Return the Form I-130 to the petitioner with instructions to submit the required documentation.

Note

Regardless of the action taken at the point of receipt by the USCIS employee or contractor, the adjudicating officer has full responsibility for determining the petitioner's status and standing at the time of adjudication.

Even though the petitioner presents evidence of permanent residence and USCIS records verify the status, the adjudicating officer must determine if the petitioner is entitled to the status or is deportable. A visa petition should not be approved until questions concerning the petitioner's deportability are resolved.

One of the most frequent problems in this area concerns petitioners who gained entry into the United States as children or unmarried sons or daughters, and whose pending petitions establish that they were actually married before entering the United States. These particular cases should be transferred out to the operations branch for their disposition and most likely to a district or local office for full interview and adjudication. The results could lead to prosecution of the petitioner and the possible los s of his/her lawful permanent residence status.

Note

When admitting a "marriageable age" immigrant with a "child" or "unmarried son or daughter" visa (including the "accompanying to join" child classifications), or adjusting an alien in such category, it is always a good idea to verify that the person is still unmarried and to so annotate the visa or adjustment application. This will assist in establishing that the alien committed fraud if it is later determined that he or she was already married at the time. The same pertains to derivative refugees and asyle es being admitted under the RE-3 classification or granted AS-3 classification.

(C) Status in the United States as a Non-citizen National .

An American Samoan (including a Swain's Islander), as a non-citizen national, may file a

relative visa petition for a spouse, child or unmarried son or daughter under second preference (see **Matter of Ah San** , 15 I&N Dec. 315 (BIA 1975)). A non-citizen national will generally present a Certificate of Identity showing United States nationality, a United States passport, or a birth certificate as evidence of his or her status in this country. Chapter 12.8 of the Inspector's Field Manual contains additional information on non-citizen nationals.

(D) Status in the United States as a Refugee or Asylee .

A refugee or asylee will generally present a copy of his or her I-94 showing that he or she has been admitted as a refugee or granted refugee status. He or she may also present a refugee travel document (Form I-571) as evidence of his or her status. Any doubts regarding the petitioner's status in the United States should be resolved through a review of his or her A-file, and, if necessary, a personal interview.

Note

Remember that under **8 CFR 207.7(d)** and **8 CFR 208.20** , a Form I-730 can only be filed within the first 2 years after the refugee's initial admission as a refugee or the asylee's grant of asylee status (a departure and return on a refugee travel document does not begin a new 2-year time period).

(10) Evidence of Relationship .

General information about documentation is contained in **Chapter 11** of this field manual. More specific information on the documentation required to establish a specific relationship is discussed in each of the subchapters (21.3 through 21.10) of this chapter.

(11) Insufficient Documentation .

If the documentation submitted by the petitioner does not adequately prove or disprove all issues involving the standing of the petitioner or the relationship between the petitioner and the beneficiary, you have 3 (or in some offices, 4) means of resolving the outstanding issues:

(A) Requests for Evidence .

When the USCIS determines that the evidence is not sufficient, an explanation of the deficiency will be provided and additional evidence will be requested. Service centers use Form I-797 and districts use Form I-72 to make such request. In accordance with 8 CFR 204.1(h), the petitioner will be given sixty (60) days to present additional evidence, withdraw the petition, request a decision based on the submitted evidence, or request additional time to respond. If the Director determines that the initial sixty (60) day peri od is insufficient to permit the presentation of additional documents, the Director may provide an additional sixty (60) days for the submission. The total time shall not exceed 120 days, unless unusual circumstances exist. Failure to

respond to a request for additional evidence will result in a decision based on the evidence previously submitted. [**Note:** Compare and contrast 8 CFR 204.1(h) (which allows up to two 60-day periods for response) and 8 CFR 103.2(b)(8) (which allows a single 84-day period for response). Since there is an apparent conflict between to these two regulatory provisions, we have to give the applicant or petitioner for a benefit under 8 CFR 204 the more generous provision. Also, because 204.1(h) is specific to section 204, it has more relevance to relative visa petitions]

When you request additional information, inform the petitioner what must be completed, corrected, or submitted. It is important that you inform the petitioner of ALL deficiencies, (remember to consider the allowable time for resubmission stipulated by **8 CFR 204.1(h)**), so the petition is 100% complete and ready for adjudication. Returning of a petition without stipulating all the deficiencies results in additional work for USCIS because of the unnecessary additional handling prior to final decision. This results in complaints from the petitioner concerning inefficiency and delays, in Congressional interest due to the petitioner's discontent with the Service's inordinate processing time for the petition, and in a bad public image of USCIS .

A petition should not be returned, or additional information requested, if there is sufficient documentation to allow a decision to be rendered. For example, if a permanent resident alien files a petition on behalf of a brother submitting both birth certificates indicating a common father and different mothers, but fails to submit other documentation, the petition should not be returned as deficient. The evidence submitted clearly establishes the petitioner's ineligibility to file (because a LPR cannot petition for a sibling), and additional evidence will not alter the situation; therefore, the petition would be properly denied on the evidence of record rather than returned requesting additional documentation. Any evidence reques ted must be necessary and pertinent to the decision in the case.

(B) Interview .

The Service Centers are not set up to conduct interviews; however situations will arise that occasion an interview. These occasions would require a petition referral to the local office having jurisdiction over the petitioner (and/or beneficiary if in the U.S.). (The referral must include a memorandum explaining the reason for the referral and the concerns or issues which must be explored at the interview.) The local office, according to its availability, would then schedule the interview. Each Service Cent er usually has a specified policy as to how to accomplish this referral. Once a case has been referred to a local office, that office becomes the adjudicating office and has full responsibility for the petition; the petition is not to be returned to the Service Center for post-interview adjudication.

Most petitions will be completed without the need of a personal interview; however, the facts of an individual case may indicate that a personal interview is appropriate. Most interviews concern the bona fides of a marriage in spouse petition proceedings or the petitioner's status in the United States.

Usually, a written or taped record of the interview(s) is made to document the proceedings and the interview is used to render a decision.

Interviews are time-consuming and should be requested only when absolutely necessary. If conducted properly, interviews can be very beneficial in helping one reach a decision on a case.

See **Chapter 15** of this field manual for a discussion of interview techniques and procedures.

Note

Upon completion of the interview, the adjudicating office should provide the Service Center with feedback regarding the results of the interview. This will both give the Service Center officer credit for a case well-referred and will enable the Service Center to refine its referral criteria.

(C) Investigation . See **Chapter 10.5(d)** of this field manual.

(D) Field Examination . See **Chapter 17** of this field manual.

(c) Adjudicative Issues .

The adjudication of a relative petition deals with two issues: whether the petitioner has standing to file the petition and whether the beneficiary has the requisite familial relationship to qualify for the classification being sought. These determinations require an understanding of not only the immigration and nationality laws and regulations of the United States, but also of the laws of other countries and states, prior laws, genetics, domestic abuse, fraud, psychology, and a myriad of other issues and s ub-issues.

(1) Burden of Proof .

The adjudication of visa petitions is an administrative proceeding. In administrative proceedings, the petitioner bears the burden of proof to establish eligibility for the benefit sought. **Matter of Brantigan** , 11 I & N Dec. 453 (BIA 1966) .

(2) Review and Rebuttal Rights .

The adjudicating officer must keep in mind the fact that the petitioner must be given the opportunity to inspect and rebut any adverse information used in arriving at the decision to deny or revoke a petition. The one exception pertains to material classified under E.O. 12356. In accordance with **8 CFR 103.2(b)(16)(iv)** , the petitioner must still be given a summary (authorized by a regional director) of the general nature of the information and the opportunity to

rebut it if it can be done without jeopardizing the safety of the information and the source. (See **Matter of Tahsir** , 16 I&N Dec. 56 (BIA 1976) and Chapter 10.19 of this field manual.)

(3) Order of Processing .

Generally speaking, relative petitions should be adjudicated in the order in which they are received. However, the regulations and policies recognize that exceptions to this general rule may be made under certain circumstances (see **Chapter 10.11** of this field manual).

(4) Rules of Evidence .

Strict rules of evidence used in criminal proceedings do not apply in administrative proceedings. Usually, any oral or documentary evidence may be used in a visa petition proceeding.

Petitioners may submit photocopies of documents in support of the petition, but must be able to submit the original documents upon request. The original document which was photocopied must, of course, be a genuine document which was obtained from the authorized keeper of the records.

Copies of public documents, certified by the person having custody of the originals, are generally admissible. Official foreign documents should be certified by the lawful custodian and authenticated by U.S. consular officers, except in cases signatory to the Hague Convention of Legalizations. The absence of an official record may be proved by a written statement signed by an appointed deputy that, after a diligent search, no record of entry of the event is found to exist in the records of the custodian's o ffice.

A statement that a particular record does not exist is, of course, not evidence of the veracity of the claim being presented; it merely allows you to consider other evidence. Any such claims should be carefully reviewed. For example, someone who quit high school in the 9 th grade might claim that he graduated from another high school in the same area whose records he knows to have been destroyed in a fire, so that anyone checking on the claim would be advised that the records (of the school which the person did not attend) are unavailable. The verifying inspector would not know that the records a different school (the one the person briefly attended) exist and reveal that the person did not graduate.

(5) Derivative Beneficiaries .

Any alien classified as an immediate relative must be the direct beneficiary of an approved petition for that classification. Therefore the child of an alien approved for immediate relative spouse classification is not eligible for derivative classification and must have a petition filed on his or her behalf.

However, the children and, in some cases, the spouse of an alien approved for family preference classification, may be included in the principal alien's preference visa petition. The derivative beneficiary will be accorded the same family preference classification and the same priority date as the principal alien.

If the derivative child of a second preference beneficiary reaches the age of 21 years prior to the issuance of a visa to the principal alien parent, a separate petition will be required for that child. The petition must be filed by the same petitioner that filed for the principal alien parent, and, if approved, would retain the original priority date. Remember, this retention of the original priority date only applies when the derivative child's principal alien parent is accorded second preference classifi cation.

When adjudicating a petition, it is important to determine if there are family members eligible to derive benefits from the petition.

If the family is in the United States and the principal alien is outside the United States, the derivative beneficiaries may be eligible for adjustment of status under section 245 of the Act once the principal alien has immigrated (provided they are not subject to the bars contained in sections 245(a) or 245(c) of the Act), and should be so notified.

(6) Special Concerns about Particular Nationalities .

(A) Chinese Visa Petitions .

Prior to 1931, the prevailing standards or guidelines for marriages, adoptions, and other civil proceedings which might be considered in connection with an I-130 were determined by Chinese Customary Rite. This was true also in Hong Kong, a British Crown Colony.

In 1931, the *Chinese Civil Code* was instituted in mainland China, codifying much of the Customary Rite and becoming the governing law of the land. Books IV and V of the Civil Code relate to family affairs and include all the regulations as to what constituted a valid marriage, divorce, or adoption.

The Chinese Civil Code remained in effect in mainland China until the Communist takeover, which started in early 1949, and was essentially completed by 1950. The Communist government evolved its own civil code, eliminating many of the discriminatory or "decadent" provisions of the Chinese Civil Code. For example, under the Communist government, adoption was permitted solely in the interest of the child, to provide the child with a home, education, and parental guidance, and was no longer permitted for the p urpose of instituting an heir to continue a family name. The stigma of illegitimacy was removed, theoretically, by eliminating any distinctions made by the law between children whose parents were married and those whose parents were not. Once paternity was established, the child was considered legitimate.

Therefore, in order for a petition filed by a petitioner from mainland China on behalf of a beneficiary fitting this scenario to be considered for approval, paternity must be shown. The regulations with reference to primary and secondary evidence would apply here also. Once the relationship has been proven, the petition will be adjudicated as any other.

After diplomatic relations were reestablished in the early 1970s, the need for documentation to support relative petitions became more urgent, and the Communist government developed a certificate of family relationship or notarial certificate. Since there was and is no uniform nationwide system of registration, the information contained in the certificates must be obtained from interviews and local records and should carry no more weight than an affidavit prepared by a witness. The BIA corroborated this vie w in **Matter of Cheung** , 17 I&N Dec. 365 (BIA 1980) which was modified by **Matter of May** ,18 I&N Dec. 381 (BIA 1983) which states that notarial certificates are issued on the basis of primary documentation submitted by the applicant or as a result of investigation by notarial office staff and **while generally reliable, are best used in conjunction with other supporting evidence.**

(B) Petitions on Behalf of Aliens from Yemen .

Since civil documents concerning marriage, birth, death, etc., are often issued in Yemen based solely on information furnished by an interested party, often the petitioner or beneficiary of the petition, they are usually not considered conclusive to establish claimed relationships. Both the petitioner and beneficiary should be interviewed. The consular officer will interview the beneficiary abroad; if an interview was possible and carried out by the district office, you should attach a record of the intervi ew with the petitioner to the petition when you forward it to the consul. However, you may only be able to solicit an affidavit from the petitioner responding to specific questions.

Families in Yemen are very close; therefore, your questions should include all the information you can develop concerning family members, including grandparents, aunts, uncles, nephews, nieces, and cousins. You should also ask questions concerning the home village in Yemen, about the house structure and livestock owned. Be on the look out for subtle differences in interviewees' testimony. Questions might include:

- The type of house;
- Number of rooms and location of each;
- Names and relationship of everyone living in the house and where they sleep; and
- The number of cows, donkeys, sheep, goats, and other livestock owned, if any.

The usual procedure is to request the petitioner's "A" file, and upon receipt, make a careful check of the file in reference to the claimed relationship to the beneficiary. Question the petitioner regarding any discrepancies material to the petition, and deny the petition if those discrepancies cannot be reconciled to your satisfaction.

There is no legal adoption in Yemen. Therefore, a petition should not be approved on a claimed adoptive relationship where it is alleged the person was adopted in Yemen. (See **Matter of Mozeb** , 15 I&N Dec. 430 (BIA 1975) .)

(d) Anti-fraud Measures .

Some cases contain information which should alert you that there may be a problem with the case. You should be aware of the indications of fraud or ineligibility and try to detect and deny those cases. It is important to remember that a case may be bona fide notwithstanding the fact that, on the surface, it appears fraudulent. Each case must be decided individually based on the evidence of record.

Note:

Remember that the statute does not provide for the use of administrative discretion in the adjudication of a relative visa petition. Furthermore, the admissibility of the beneficiary is not at issue. If the beneficiary is eligible for the benefit sought, the petition must be approved, regardless of any and all unfavorable aspects of the alien's history and character. However, if during the course of the adjudication of the visa petition you encounter grounds of inadmissibility or unfavorable discretionary f actors, you should make sure that such grounds or factors are properly documented and brought to the attention of the immigration officer considering the alien's application for adjustment of status or the consular officer considering the alien's application for an immigrant visa.

If fraud is suspected, there are a number of methods by which you can seek to resolve the concerns, including (but not limited to):

(1) Parentage Testing .

(A) General .

Parentage testing is used to establish a claimed relationship for benefits under the Immigration and Nationality Act. Such testing may be appropriate to establish a parental relationship in support or a petition for a child, son, or daughter (Form I-130). The procedures discussed herein may also apply to establishing the biological parent of a foreign-born adopted child to support an orphan petition (Form I-600) or to establishing a parental relationship for citizenship cases

(Form N-600). In addition, thes e procedures may be used to establish a parental relationship for refugee and asylum relative petitions (Form I-730).

(B) Authority to Require Parentage Testing .

A petitioner must establish eligibility for a requested immigration benefit. An application or petition must be filed with any initial evidence required by regulation or by the form instructions. Any evidence submitted is considered part of the relating petition or application and may establish eligibility. 8 CFR 103.2(b)(1).

In the case of a petition for a child, son, or daughter, the petitioner must provide evidence of the claimed relationship. 8 CFR 204.2(d)(2). The initial evidence for a child, son, or daughter includes a birth certificate. When a birth certificate is unavailable, the petitioner must demonstrate that it is not available and submit secondary evidence, such as a baptismal certificate, or church or school records. If the petitioner demonstrates that both initial and secondary evidence is unavailable, two or mor e affidavits may be substituted. However, the unavailability of a birth certificate creates a presumption of ineligibility for the benefit, and any alternative evidence submitted must be evaluated for its authenticity and credibility. 8 CFR 103.2(b)(2)(i) and 204.2(d)(2)(v).

A director may also require that Blood Group Antigen or Human Leukocyte Antigen (HLA) blood parentage testing be conducted on the child, son, or daughter and putative mother and father to establish eligibility for a benefit. 8 CFR 204.2(d)(2)(vi). Statistical analysis of these tests provides a likelihood of parentage. These test results will often establish or disprove the claimed parental relationship. Since blood parentage testing can be a valuable tool to verify a relationship, it may generally be requir ed when initial and secondary forms of evidence have proven insufficient to prove a claimed relationship. As a result of technological advances, field offices should be aware that Blood Group Antigen and HLA tests are no longer widely available for testing by laboratories, and are not considered to be as reliable as DNA tests.

Although a director may require blood parentage testing, he or she has no statutory or regulatory authority to require DNA testing. However, when initial and secondary forms of evidence have proven inconclusive and blood parentage testing does not clearly establish the claimed parental relationship, field offices may have no alternative to suggesting DNA testing as a means of establishing the relationship. The petitioner has the burden of proof when the evidence submitted has not satisfied his evidentiary t hreshold and the USCIS would otherwise deny the petition without more conclusive evidence such as that which DNA testing could provide. In such cases, field offices should inform the petitioner that:

- DNA testing is absolutely voluntary;

- The costs of DNA testing and related expenses (such as doctor's fees and the cost of transmitting testing materials and blood samples) must be borne exclusively by the petitioner; and

• Submitting to DNA testing is in no way a guarantee of the approval of the petition.

Field offices should keep in mind that no parentage testing, including DNA testing, is 100 percent conclusive. **[(b)(2) or (b)(7)(E)]**

While blood testing is not and should not be a routine part of the adjudications process, it can be an extremely valuable tool in cases when it otherwise would be impossible to verify a relationship. Parentage blood tests involve laboratory procedures performed on blood samples or other genetic material obtained from the child and putative parent or parents. The statistical analysis of the blood test provides a likelihood of parentage if the putative parent is not excluded. The likelihood of parentage is gr eater with increased information. Increasing the number of genetic testing systems tested provides stronger results, while the absence of information diminishes the strength of results. Officers should be aware that parentage testing is an extremely fact-driven procedure. A laboratory may more accurately determine what tests to run based on specific facts. A more accurate answer will be provided by the laboratory if the Officer provides the laboratory with suspicions of fraud or other pertinent facts.

(C) Minimum Standards .

• Parties tested : The most accurate results are received when the alleged mother, father and child available for testing. However, testing of only the mother and child or father and child are also acceptable.

• Statistical probability : All tests must produce a 99.5% statistical probability for the conclusion of results to establish parentage. Laboratories can continue with a battery of tests until a 99.5% conclusion of parentage is established. After testing the samples from all parties, laboratories will produce a conclusion of parentage which will inform field offices which tests were administered and the conclusion for the results they obtained.

• Preferred test : The preferred test is the Polymerase Chain Reaction (PCR) test drawn with a buccal swab or a PCR test based on a blood sample.

Please see below for a more detailed explanation of the parentage testing process and procedures.

(D) Blood Testing .

Blood consists of red and white blood cells, platelets and liquid plasma. Each component of the blood contains several antigens or "markers." The blood group antigens are structures on the

surface of the blood cells that help to distinguish individuals within a population. The antigens, inherited from the parents, are controlled by genes on a pair of chromosomes. Each parent contributes one of each chromosome pair carrying the genes that determine the detectable properties of an offspring's blood. The prese nce or a specific antigen indicates a particular genetic composition or marker. Conclusions in parentage blood testing are based upon the principle that the child inherits genetic markers in his or her blood from each of his or her biological parents.

(E) Conventional Blood Tests .

There are four basic tests used in conventional blood testing:

- basic red cell antigens (ABO, MN, CcDEe);

- extended red cell antigens;

- white cell antigens (HLA); and

- red cell enzymes and serum proteins.

The laboratory begins by conducting the first test. If parentage cannot be ruled out based on the results of the first test, the laboratory will conduct the second test. The process continues until either the putative parent can be entirely excluded or a good statistical probability is established that the relationship is bona fide.

(F) DNA Testing .

DNA (deoxyribonucleic acid) parentage testing provides an alternative to more conventional parentage blood testing methods. DNA testing can be especially useful in countries with limited medical and transportation facilities because, unlike HLA testing, it does not require the use of live human blood cells, which must be tested within just a few days, and are sometimes difficult to obtain. DNA parentage testing can often provide conclusive results even when not all parties are available for testing.

Officers should be aware that parentage testing technology changes rapidly. Whereas HLA blood testing was widely used until 1994, it is now rarely used. Restriction Fragment Length Polymorphism (RFLP) tests which have been widely used since 1994 are now being phased out by laboratories in the U.S. The DNA test which is most recommended for use in parentage testing is the Polymerase Chain Reaction (PCR) test. Although DNA testing has traditionally been accomplished through blood testing, buccal (mouth or che ek cavity) swabs are an

alternative to drawing brood for testing. Cells are drawn from the inside cheek using a long cotton swab. As opposed to blood testing, buccal swab testing does not require the assistance of a physician, and is non-invasive. Nevertheless, it is recommended that only a person specially trained to collect a tissue sampling perform the procedure in order to ensure the quantity is sufficient for testing.

(G) Parentage Testing Procedures . (Chapter 21.2(d)(1)(G) Revised 04/08/2005; AFM 05-10)

The American Association of Blood Banks (AABB) accredits parentage-testing laboratories for a two-year period. The current list of AABB accredited parentage testing laboratories is contained in **Appendix 21-3** of this field manual. To access this list, click on the web links listed in Appendix 21-3. Offices may accept parentage testing results only from laboratories on this list.

Note

The accreditation standards were developed by the committee on parentage testing of the AABB under a grant from the Federal Office of Child Support Enforcement of the U.S. Department of Health and Human Services and with assistance of special consultants and representatives from the American Bar Association, American Medical Association, American Society of Clinical Pathologists, American Society for Histocompatibility and Immunogenetics and the College of American Pathologists.

The burden of proof is on the petitioner to show that the laboratory chosen is accredited by the AABB.

When a field office requires blood testing or suggests DNA testing, it should provide the petitioner with the list of AABB accredited laboratories. Field offices should be aware that the state designations on the list are for laboratory headquarters. Many laboratories have collection sites in many different states and locations. The petitioner must select a laboratory, contact the laboratory directly, and make the necessary arrangements for conducting the tests. To ensure the integrity of the test results, all stages of parentage testing must be conducted under appropriate safeguards. These safeguards must include strict controls concerning:

- protection of the chain of custody of blood or tissue samples;

- identification of the parties to be tested, generally by photographing individuals being tested; and

- correct presentation of test results.

Communication should be directly between the laboratory and the civil surgeon or panel physician or the field office. Under no circumstances should a third party, including the

individuals being tested, be permitted to carry or transport blood or tissue samples or test results. Since the applicant bears full financial responsibility for testing, USCIS has no objection to that person receiving a copy of the test results from the laboratory or panel physician. It is imperative that the same facility tests bot h the alleged child and the alleged parent(s). Where the petitioner is physically present in the U.S., a U.S.-based lab must conduct the tests and relay the results. Instructions usually require the participation of a witness, identification taken from all (adult) parties involved, and photographs taken of all parties.

(H) Analysis of Test Results .

In all cases of parentage testing, laboratories should provide the statistical probability for the conclusion for the results they obtain. Offices should use the following interpretations of the plausibility of parentage to analyze test results. In general, AABB standards mandate 99 percent to be the minimum requirement for the proof of parentage. However, this statement does not mean that all test results 99 percent and higher should be accepted as conclusive proof of parentage, or that all test results be low 99 percent exclude parentage. The type of parentage test performed, the genetic profile of the local population, and facts specific to the case will all affect the percentage that an office should require establishing a parental relationship. Field offices should provide laboratories with non-genetic evidence, which may affect the lab's assumptions in performing the testing, analysis of the results or the number of genetic markers tested.

Plausibility of Parentage (Percent)	**Interpretation**
99.80 - 99.90	Practically Proved
99.1 - 99.80	Extremely Likely
95 - 99	Very Likely
90 - 95	Likely
80 - 90	Undecided
Less than 80	Not Useful

Please note that in societies where intra-family marriage is common, close relatives will share many genetic markers and the test results of an aunt, uncle, or grandparent of a beneficiary may appear to establish the claimed parental relationship. The statistics used in paternity testing are designed for evaluating an alleged father as compared to unrelated men. Unlike the random population where persons may share genetic markers by chance, related men will share genetic markers by descent. First degree rel atives, such as father, brother or son, will share 50% of their genetic material on average. Therefore, directors should consult with local physicians and parentage testing laboratories, and consider local fraud patterns, to determine the appropriate tests and particular test results to reliably establish the parental relationship in questionable cases. Officers should ask labs to calculate both a father-child and uncle-child or sibling relationship in these cases and should examine reports provided by the laboratory to ensure that sufficient testing was done to distinguish between family members. Officers should feel free to contact the laboratory for clarification if the lab's findings are inconclusive. Labs are able to conduct tests on additional genetic markers if necessary to resolve inconclusive cases.

(I) Questions .

Questions regarding the appropriate parentage test to use to establish a claimed relationship or analysis of the test results may be directed to the parentage-testing laboratory selected by the petitioner. Questions regarding this policy should be directed to the Residence and Status Branch, Adjudications Division at 202-514-4754.

(2) EPIC checks . See Chapter 32.6 of the Inspector's Field Manual.

(3) Interview . See **Chapter 15** of this field manual.

(4) Investigation . See **Chapter 10.5** of this field manual.

(5) Field Examination . See **Chapter 17** of this field manual.

(6) The Immigration Marriage Fraud Amendments of 1986 (IMFA) .

In 1986, Congress amended the Immigration and Nationality Act to provide that if an alien obtains lawful permanent residence based on a marriage that is less than 2 years old at the time of the alien's admission or adjustment to permanent residence, the alien's permanent residence is on a conditional basis. The "condition" is that the alien and the spouse through whom the status was obtained must file an I-751 petition to remove the conditional basis of the residence two years after the immigration or adjus tment (see **Chapter 21.3** and **Chapter 25.1** of this field manual). This requirement pertains only to those aliens who obtain status directly through the alien's marriage to the petitioner, or (in the case of a child) through the marriage of the alien's parent to the petitioner. It does not apply to other relationships, such as a derivative spouse or child of a beneficiary (e.g., a F3-2 or F3-3 immigrant). Properly used, IMFA is a powerful anti-fraud tool, since it enables USCIS to fully adjudicate a case both before the alien obtains LPR status and once again when he or she seeks removal of the conditions. The effectiveness of this second adjudication can be even further enhanced if officers adjudicating the I-130 petition or the I-485 adjustment application provide guidance (in the form of memorandum in the A-file or electronic notes once the automated support systems have such capacity) regarding items to be aware of when adjudicating the Form I-751 .

However, if improperly used, IMFA can be very ineffective. Officers adjudicating the I-130 petition must guard against the temptation to "let the I-485 and I-751 adjudicators worry about the fraud." Likewise, officers adjudicating the I-751 petitions must guard against the temptation to say, "Well, it looked good enough to the I-130 adjudicator and the I-485 adjudicator, so it must be OK." The system only works if each officer adjudicating each step of the process takes full responsibility for detecting and deterring fraud in his or her stage of the process.

(e) The Child Status Protection Act of 2002 (CSPA) . (Revised AD07-04; 04-11-08)

The CSPA amended the Immigration and Nationality Act (Act) to permit an applicant for certain immigration benefits to retain classification as a child under the Act, even if he or she has reached the age of 21. The CSPA added section 201(f) for applicants seeking to qualify as Immediate Relatives and section 203(h) for applicants seeking to benefit under a preference category, including derivative beneficiaries.

(1) CSPA Coverage

(i) Adjustment as an Immediate Relative (IR) .

The CSPA amended section 201(f) of the Act to fix the age of an alien beneficiary on the occurrence of a specific event (e.g. filing a petition). If the alien beneficiary is under the age of 21 on the date of that event, the alien will not age out and continue to be eligible for permanent residence as an IR. It does not matter whether the alien reaches the age of 21 before or after the enactment date of the CSPA, when the petition was filed, or how long the alien took after petition approval to apply for pe rmanent residence provided the alien did not have a final decision prior to August 6, 2002 on an application for permanent residence based on the immigrant visa petition upon which the alien claims to be a child.

(A) Petition Initially Filed as Immediate Relative (IR) Child .

If an alien is seeking to adjust status on the basis of being the beneficiary of an approved petition for classification as an IR (or IR self-petitioner under VAWA) and the petition was initially filed for classification as an IR, then the alien's age for CSPA purposes is the age of the alien on the date on which the petition for classification as an IR (or IR self-petitioner under VAWA) was filed. If the alien was under the age of 21 at the time a petition was filed on his or her behalf for classification as an IR (or IR self-petitioner under VAWA), the alien will not age out.

For an IR self-petitioner under VAWA, officers are to follow the guidance (except footnote 1 and 2 relating to the retroactivity of the CSPA) issued August 17, 2004 entitled Age-Out Protections Afforded Battered Children Pursuant to the Child Status Protection Act and the Victims of Trafficking and Violence Protection Act.

(B) Petition Initially Filed as Child of a Lawful Permanent Resident (LPR).

If an alien is seeking to adjust status on the basis of being an immediate relative child, and the petition serving as the basis for the adjustment was first filed for classification as a family-sponsored immigrant based on the parent being a lawful permanent resident and the petition was later converted, due to the naturalization of the parent, to a petition to classify the alien as an IR, then the age of the alien on the date of the parent's naturalization is the alien's age for CSPA purposes. If the alie n was under the age of 21 on the date of the petitioning parent's naturalization, the alien will not age out.

(C) Petition Initially Filed as Married Son or Daughter of a U.S. Citizen (USC) .

If an alien is seeking to adjust as an immediate relative child, and the petition serving as the basis for such adjustment was first filed for classification as a married son or daughter of a U.S. citizen, but the petition was later converted, due to the legal termination of the alien's marriage, to a petition to classify the alien as an immediate relative, then the age of the alien on the date of the termination of the marriage is the alien's age for CSPA purposes. If the alien was under the age of 21 on t he date of the termination of the marriage, the alien will not age out.

(ii) Adjustment Under a Preference Category .

The beneficiary's CSPA age is determined using the formula below. If the petition is approved and the priority date becomes current before the alien's CSPA age reaches 21, then a one-year period begins during which the alien must apply for permanent residence in order for CSPA coverage to continue.

It does not matter if the alien aged out before or after the enactment date of the CSPA, so long as the petition is filed before the child reaches the age of 21 provided the alien did not have a final decision prior to August 6, 2002 on an application for permanent residence based on the immigrant visa petition upon which the alien claims to be a child.

(A) CSPA Age Formula .

Determine the age of the alien on the date that a visa number becomes available. The date that a visa becomes available is the later of (a) the first day of the month of the Department of State (DOS) Visa Bulletin, which indicates availability of a visa for that preference category or (b) the petition approval date if a visa number is already available on the approval date. Subtract the number of days the petition was pending as described in paragraphs (B), (C) and (D) below. This is the alien beneficiary's CSPA age. If the alien beneficiary's CSPA age is under 21, he or she remains a child for purposes of the application for permanent residence provided the beneficiary properly applies for permanent residence, based on the subject petition, within one year of visa availability and notwithstanding the alien's CSPA age on the date of adjudication of such application.

(B) Direct Beneficiaries .

The number of days that a petition is pending is the number of days between the date that it is properly filed (receipt date) and the date an approval is issued on the petition, including any period of administrative review.

In the case of a petition where adjustment is sought as the child of an LPR (F2A) and it is determined that the age of the beneficiary is over the age of 21 for CSPA purposes, if the petitioner naturalizes then the petition is to be automatically converted to the appropriate first or third family preference category for that petitioner and beneficiary (so long as marriage occurred after the naturalization of the petitioner). The beneficiary will retain the priority date in this case.

(C) Derivative Beneficiaries – Family and Employment-Based .

The number of days that a petition is pending is the number of days between the date that the petition is properly filed (Form I-140 is considered properly filed on the receipt date and not priority date) and the date an approval is issued on the petition, including any period of administrative review. If the petition was approved and the priority date becomes current before the child's CSPA age reaches 21, the alien must, within one year of the visa availability date, apply for adjustment of status, an immigrant visa, or be the beneficiary of an I-824 in order for the CSPA coverage to continue.

Note

An alien may benefit from the CSPA if the alien "sought to acquire" the status of an LPR within one year of visa number availability. USCIS has determined that an alien has "sought to acquire" permanent residence if he or she files an application for adjustment of status or an immigrant visa, or is the beneficiary of an I-824 within one year of the immigration petition approval date (or visa becoming available subsequent to petition approval date, whichever is later). Adjudicators are reminded that an I-824 can be concurrently filed with Form I-485 Application To Register Permanent Residence or Adjust Status. A previously filed I-824 that was denied because the principal alien's adjustment of status application had not yet been approved can serve as evidence of having "sought to acquire" LPR status. USCIS has made this determination because the CSPA language requires the alien to have "sought to acquire" LPR status subsequent to visa availability, which is a product of visa petition approval. Consequently, ne ither a labor certification nor a visa petition will satisfy the "sought to acquire" LPR status requirement because these actions are an integral part of the visa petition approval process and will necessarily precede visa availability.

(D) Derivative Diversity Visa (DV) Applicants .

For the purpose of determining the period during which the "petition is pending," officers should use the period between the first day of the DV mail-in application period for the program year in which the principal alien has qualified and the date on the letter notifying the principal alien that his/her application has been selected (the congratulatory letter). That period should then be subtracted from the derivative alien's age on the date the visa became available to the principal alien.

(2) CSPA Coverage for Specific Aliens Not Covered Under Previous Guidance

(i) Limited CSPA Coverage for K4 Aliens .

The CSPA does not apply to aliens obtaining K2 or K4 nonimmigrant visas or extensions. An alien in K4 status may utilize the CSPA upon seeking adjustment of status because a K4 alien seeks to adjust as an IR on the basis of an approved Form I-130, which is filed under section 204 of the Act. This is because the USC petitioner who filed the nonimmigrant visa petition on behalf of the K3 parent must file a Form I-130 on behalf of the K4 alien before the K4 seeks to adjust status pursuant to 8 CFR 245.1(i). T his necessarily requires the existence of a parent-child relationship between the USC and the K4 alien. Accordingly, the CSPA should be applied to K4 applicants as described in paragraph 21.2(e)(1)(i).

(ii) Limited CSPA Coverage Option for K2 Aliens .

An alien in K2 status does not have a visa petition filed on his or her behalf under section 204. Consequently, a K2 alien cannot utilize the CSPA when seeking to adjust status. Although not required, USCIS may accept a Form I-130 filed by the USC petitioner based on a parent-child relationship between the USC petitioner and the K2 alien (e.g. where the USC petitioner has married the K1 and K2 is not yet 18 years old). This will allow an alien who once was a K2 to adjust on the basis of a petition filed und er section 204 of the Act and will allow him/her to utilize the CSPA when seeking to adjust status in some cases.

Exercising this option requires: (1) an existing parent-child relationship between the USC petitioner and the K2 alien, and (2) paying the requisite fees associated with Forms I-130 and I-485, Application To Register Permanent Residence or Adjust Status. This guidance does not create a petitionable relationship for K2s or K4s where none exists.

(iii) CSPA coverage for preference aliens who did not have an application for permanent residence pending on August 6, 2002 and who subsequently filed an application for permanent residence that was denied solely because he or she aged out.

An alien on behalf of whom a visa petition had been approved prior to August 6, 2002 and who filed an application for adjustment of status after August 6, 2002 may file a motion to reopen or reconsider without filing fee if: (a) the alien would have been considered under the age of 21 under applicable CSPA rules; (b) the alien applied for permanent residence within one year of visa availability; and (c) the alien received a denial solely because he or she aged out.

(iv) CSPA coverage for preference aliens who did not have an application for permanent residence pending on August 6, 2002 and did not subsequently apply for permanent residence .

An alien whose visa became available (as defined in paragraph 21.2(e)(1)(ii)(A)) on or after August 7, 2001 who did not apply for permanent residence within one year of the petition

approval and visa availability, but would have qualified for CSPA coverage had he or she applied but for prior policy guidance concerning the CSPA effective date, may apply for permanent residence.

(3) CSPA Section 6 Opting-Out Provisions .

Beneficiaries of 2nd preference I-130 petitions that were automatically converted to family first preference upon the petitioning parent's naturalization may exercise the "opt-out" provision of section 6 even if the petition in question was originally filed in the F2A category but has now converted to F2B. Aliens seeking to utilize this opt-out provision should file a request in writing with the District Office having jurisdiction over the beneficiary's residence. Adjudicators do not need to determine the a ge of the alien when a section 6 opt-out request is received.

(4) Visa Availability Date Regression .

If a visa availability date regresses, and an alien has already filed a Form I-485 based on an approved Form I-130 or Form I-140, the officer should retain the Form I-485 and note the date a visa number first became available. Once the visa number again becomes available for that preference category, determine whether the beneficiary is a "child" under paragraph 21.2(e)(1)(ii) using the visa availability date marked on the Form I-485, as long as the I-485 was filed within one year of that visa availability date.

If, however, an alien did not file a Form I-485 prior to the visa availability date regressing, and then files a Form I-485 within one year of when the visa availability date again becomes current, the alien's CSPA age is determined using the subsequent visa availability date.

(5) Inapplicability of the CSPA .

The CSPA applies only to those immigrant visas expressly specified in the statute. Nothing in the CSPA provides protection for nonimmigrant visas (e.g. K or V), NACARA, HRIFA, Family Unity, Cuban Adjustment Act, and Special Immigrant Juvenile applicants and/or derivatives not specifically provided in the CSPA. This list is not exhaustive.

Note:

There is an **Appendix** to this chapter showing how the guidance would be applied to some specific scenarios.

(f) Adam Walsh Child Protection and Safety Act of 2006, (Adam Walsh Act), Pub. L. 109-248 . [Section 21.2(f) replaced 04-28-2007; previous Sections 21.2(f)-(h) renumbered as 21.2(g)-(i)]

(1) Background .

Title IV of the Adam Walsh Act, "Immigration Law Reforms to Prevent Sex Offenders from Abusing Children" contains two provisions that amend the Immigration and Nationality Act (the Act).

- **Section 402(a) of the Adam Walsh Act** amends sections **204(a)(1)(A)(i)** and **204(a)(1)(B)(i)** of the Act to prohibit U.S. citizens and lawful permanent residents who have been convicted of any "specified offense against a minor" from filing a family-based immigrant petition on behalf of any beneficiary, unless the Secretary of Homeland Security (the Secretary) determines, in his sole and unreviewable discretion, that the petitioner "poses no risk to the beneficiary."

Section 402(b) of the Adam Walsh Act amends section **101(a)(15)(K)** of the Act to bar U.S. citizens convicted of these offenses from filing nonimmigrant visa petitions to classify their fiancé(e)s, spouses, or minor children as eligible for "K" nonimmigrant status, unless the Secretary determines, in his sole and unreviewable discretion, that the petitioner poses no risk to the beneficiary.

A petitioner who has been convicted of a specified offense against a minor is not simply prohibited from filing on behalf of a minor child. The petitioner is prohibited from filing on behalf of "any" family-based beneficiary under sections 204(a)(1)(A)(i) and 204(a)(1)(B)(i) of the Act or in accordance with section 101(a)(15)(K) of the Act.

Section 401 of the Adam Walsh Act amends section **237(a)(2)(A)** of the Act by adding a new subparagraph (v). Under new section 237(a)(2)(A)(v), an alien who is convicted under new 18 USC 2250, for failing to register as a sex offender, is subject to removal as a deportable alien.

(2) Statutory Definitions .

(A) Beneficiary .

"Any beneficiary" includes a spouse, a fiancé(e), a parent, an unmarried child, an unmarried son or daughter over 21 years of age, an orphan, a married son or daughter, a brother or sister, and any derivative beneficiary permitted to apply for an immigrant visa on the basis of his or her relationship to the principal beneficiary of a family-based petition.

(B) Specified Offense Against a Minor .

The term "specified offense against a minor" means an offense against a minor (defined as an individual who has not attained the age of 18 years) that involves any of the following:

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

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

- Solicitation to engage in sexual conduct;

- Use in a sexual performance;

- Solicitation to practice prostitution;

- Video voyeurism as described in 18 USC 1801;

- Possession, production, or distribution of child pornography;

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

- Any conduct that by its nature is a sex offense against a minor.

The statutory list of criminal activity in the Adam Walsh Act that may be considered a specified offense against a minor is stated in relatively broad terms and takes into account that these offenses may be named differently in a wide variety of Federal, State and foreign criminal statutes.

With one exception, the statutory list is not composed of specific statutory violations. As defined in the relevant criminal statute, for a conviction to be deemed a specified offense against a minor, the essential elements of the crime for which the petitioner was convicted must be substantially similar to an offense defined as such in the Adam Walsh Act.

(C) Poses No Risk to Beneficiary .

USCIS interprets the “poses no risk to the beneficiary” provision to mean that the petitioner must pose no risk to the safety or well-being of the beneficiary, which includes the principal beneficiary and any alien derivative beneficiary.

(3) Field Guidance .

(A) Applicability of the Adam Walsh Act .

Title IV of the Adam Walsh Act does not include a specific effective date. For this reason, it entered into force on July 27, 2006, the date of enactment. In general, an application for benefits under the Act is adjudicated according to the facts and law as they exist on the date of decision. See **Matter of Alarcon** , 20 I&N Dec. 557 (BIA 1992).

(B) Determining "Specified Offense Against a Minor .

(i) Operational Procedures .

On July 28, 2006, **http://www.uscis.gov/files/pressrelease/AdamWalshAct072806.pdf** USCIS field offices were directed to issue a Request for Evidence (RFE) for all police arrest records and court disposition documents and schedule the petitioner for fingerprints if the petitioner's IBIS check revealed a hit for any offense that is or potentially may be a "specified offense against a minor" as defined above.

If there is an IBIS hit or some other indication that a lawful permanent resident petitioner may have a conviction for a specified offense against a minor as defined in the Adam Walsh Act, the case must be handled in accordance with current IBIS procedures as it relates to an "egregious public safety threat."

Note

As defined by the Memorandum of Agreement between USCIS and United States Immigration and Customs Enforcement (ICE) on the Issuance of Notices to Appear to Aliens Encountered During an Adjudication, and accompanying policy memorandum entitled, "Disposition of Cases Involving Removable Aliens," July 11, 2006, ICE may decide to initiate removal proceedings against any lawful permanent resident who is deportable under section 237(a)(2)(A)(v) of the Act (conviction for having failed to register as a sex offende r).

If the offense meets the definition of an egregious public safety threat, adjudication of the petition must be suspended and an appropriate referral to ICE must be completed in accordance with current "egregious public safety threat" procedures.

Otherwise, if the petition has already been approved or is currently being adjudicated and there is an IBIS hit or some other indication that the petitioner may have a conviction of a specified offense against a minor as defined in the Adam Walsh Act, the adjudicator must issue an RFE or Notice of Intent to Revoke (NOIR) for all police arrest records and court disposition documents.

If the petitioner was an “Ident” based on previous fingerprinting, the adjudicator must obtain a current rap sheet per local procedures instead of scheduling the petitioner for fingerprinting. Otherwise, the adjudicator must schedule the petitioner for fingerprinting in accordance with service center or field office procedures, which will be processed without fee.

(ii) Adjudicative Review of Evidence .

If the petitioner fails to respond to the RFE or NOIR, the petition should be denied or revoked accordingly.

If the fingerprint results and the evidence submitted in response to an RFE or NOIR indicate that the petitioner was not convicted of a specified offense against a minor as defined by the Adam Walsh Act, the adjudicator should proceed with the adjudication of the petition in accordance with **8 CFR 204** and other pertinent regulations.

If, after review of the fingerprint results and the evidence submitted in response to the RFE or NOIR, the adjudicator determines that either of the following two instances exists, the adjudicator should forward the file, through appropriate supervisory channels, to local USCIS counsel for review and opinion:

- The adjudicator is unsure whether the petitioner’s conviction may be considered a specified offense against a minor, or

- The criminal case against the petitioner is still pending or the disposition of the case is still unknown.

If, after review of the fingerprint results the evidence submitted in response to the RFE or NOIR, the adjudicator finds that the petitioner has been convicted of a specified offense against a minor as defined by the Adam Walsh Act, the adjudicator must determine whether the petitioner poses a risk to the beneficiary, as described below.

(C) Determining “Poses No Risk to Beneficiary .”

(i) Adjudicative Review of Evidence .

The critical purpose of **section 402 of the Adam Walsh Act** is to ensure that an intended alien beneficiary is not placed at risk of harm from the person seeking to facilitate the alien’s immigration to the United States. USCIS, therefore, may not approve a family-based petition (Form I-130 or I-129F) if the petitioner has a conviction for a specified offense against a minor unless USCIS first determines that the petitioner poses no risk to the beneficiary with respect to

whom a petition was filed. Under section 402 of the Adam Walsh Act, this determination is entrusted to the discretion of the Secretary, who has the “sole and unreviewable” authority to decide whether a petitioner poses any risk to the intended beneficiary.

To avoid denial of a petition or the revocation of a prior approval, a petitioner who has been convicted of a specified offense against a minor must submit evidence of rehabilitation and any other relevant evidence that clearly demonstrates, beyond any reasonable doubt, that he or she poses no risk to the safety and well-being of his or her intended beneficiary(ies). The initially filed petition or response to an RFE or NOIR must include whatever evidence and legal argument the petitioner wants USCIS to con sider in making its risk determination. Examples of such evidence include, but are not limited to:

- Certified records indicating successful completion of counseling or rehabilitation programs;

- Certified evaluations conducted by licensed professionals, such as psychiatrists, clinical psychologists, or clinical social workers, which attest to the degree of a petitioner’s rehabilitation or behavior modification;

- Evidence demonstrating intervening good and exemplary service to the community or in the uniformed services;

- Certified copies of police reports and court records relating to the offense (the court records must include the original indictment or other charging document, any superseding charging document, any pre-sentencing report, and the conviction judgment); and

- News accounts and trial transcripts describing the nature and circumstances surrounding the petitioner’s specified offense(s) against a minor and any other criminal, violent, or abusive behavior incidents, arrests, and convictions.

The determination of whether a petitioner’s evidence is credible, and the weight and probative value to be given that evidence, shall be within the sole and unreviewable discretion of USCIS.

(ii) Decision .

In determining whether a petitioner poses any risk to his or her intended beneficiary, the adjudicator must consider all known factors that are relevant to determining whether the petitioner poses any risk to the safety and well-being of the beneficiary. Factors that should be considered include, but are not limited to, the following:

- The nature and severity of the petitioner's specified offense(s) against a minor, including all facts and circumstances underlying the offense(s);

- The petitioner's criminal history;

- The nature, severity, and mitigating circumstances of any arrest(s), conviction(s), or history of alcohol or substance abuse, sexual or child abuse, domestic violence, or other violent or criminal behavior that may pose a risk to the safety or well-being of the principal beneficiary or any derivative beneficiary;

- The relationship of the petitioner to the principal beneficiary and any derivative beneficiary;

- The age and, if relevant, the gender of the beneficiary;

- Whether the petitioner and beneficiary will be residing either in the same household or within close proximity to one another; and

- The degree of rehabilitation or behavior modification that may alleviate any risk posed by the petitioner to the beneficiary, evidenced by the successful completion of appropriate counseling or rehabilitation programs and the significant passage of time between incidence of violent, criminal, or abusive behavior and the submission of the petition.

Given the critical purpose of section 402 of the Adam Walsh Act, the adjudicator must automatically presume that risk exists in any case where the intended beneficiary is a child, irrespective of the nature and severity of the petitioner's specified offense and other past criminal acts and irrespective of whether the petitioner and beneficiary will be residing either in the same household or within close proximity to one another.

The burden is upon the petitioner to rebut and overcome the presumption of risk by providing credible and persuasive evidence of rehabilitation and any other relevant evidence that proves, beyond any reasonable doubt, that he or she poses no risk to the intended child beneficiary.

In cases where none of the intended beneficiaries are children, the adjudicator must closely examine the petitioner's specified offense and other past criminal acts to determine whether the petitioner poses any risk to the safety or well-being of the adult beneficiary.

For example, past acts of spousal abuse or other acts of violence must certainly be considered. The fact that a petitioner's past criminal acts may have been perpetrated only against children or that the petitioner and beneficiary will not be residing either in the same household or within

close proximity to one another may not, in and of themselves, be sufficient to convince USCIS that the petitioner poses no risk to the adult beneficiary.

The burden is upon the petitioner to prove, beyond any reasonable doubt, that he or she poses no risk to the intended adult beneficiary.

Unless the adjudicator can conclude, based on the evidence, that the petitioner poses no risk to the beneficiary, the adjudicator must deny the petition and clearly articulate the factual basis for the determination.

If the adjudicator is uncertain as to whether the petitioner poses no risk to the beneficiary, or if the adjudicator is finding it difficult to articulate the factual basis for the denial, the adjudicator should consult with his or her supervisor and/or USCIS counsel.

(iii) Headquarters Clearance of Approval Recommendations .

If the adjudicator finds that the petitioner poses no risk to the beneficiary, the adjudicator must seek the guidance and direction of USCIS Headquarters, Regulations and Product Management Division, before approving the petition. Adjudicators are prohibited from exercising favorable discretion in such instances without the consent of USCIS Headquarters.

(D) Revocation of Approved Petitions .

If, at any time prior to adjustment of status or consular processing, USCIS becomes aware that the petitioner has a conviction for a specified offense against a minor, steps may be taken to revoke the approved family-based immigrant visa petition or reopen and reconsider the Form I-129F .

For immigrant visa petitions that have already been approved, **section 205** of the Act provides discretion to revoke approval for “good and sufficient cause.”

For a case in which a Form I-130 has been approved, revocation of the approval under **8 CFR 205.2** would be appropriate, if the petitioner has been convicted of a specified offense against a minor and the adjudicator finds that the petitioner poses any risk to the beneficiary.

Therefore, an IBIS check on the petitioner of the family-based immigrant petition must be valid at the time the beneficiary adjusts status. If the IBIS check on the petitioner is not valid at the time of adjustment, IBIS must be re-run and any resulting hits treated in accordance with current IBIS procedures.

For Form I-129F , **8 CFR 103.5(a)(5)(ii)** provides authority to reopen and reconsider the decision on the petition. Thus, in a case in which a Form I-129F has been approved, it would be appropriate to reopen the case and deny it if the petitioner has been convicted of a specified offense against a minor and the adjudicator finds that the petitioner poses any risk to the beneficiary.

(E) Administrative Appeals of Denied or Revoked Petitions .

Traditionally, the denial or revocation of Form I-130 and Form I-360 (in specified cases) has been subject to appeal to the Board of Immigration Appeals (BIA). See **8 CFR 1003.1(b)(5)** .

The denial or revocation of orphan (Forms I-600 and I-600A) and fiancé(e) cases (Form I-129F) may be appealed to the Administrative Appeals Office (AAO). As required in Chapter 10.7(b)(5) of this manual, a decision denying or revoking approval of a Form I 600 or Form I 600A must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.

To aid in the proper presentation of the appealed denial or revocation, each field office must advise Headquarters of any notice of appeal filed with the BIA in any case denied or revoked under **section 402 of the Adam Walsh Act** . Section 402 of the Adam Walsh Act does not affect the AAO's jurisdiction in Form I-600, I-600A, and I-129F cases.

(F) Centralization of AWA-applicable Visa Petitions (Forms I-130 and I-129F) at the Vermont Service Center .

As of March 22, 2011, service center adjudication of all relative visa petitions subject to the Adam Walsh Act (AWA) is centralized at the VSC. Using the procedures set forth in this section, all other service centers will transfer Forms I-130 or I-129F in their possession to the VSC upon determining preliminarily that AWA applies.

(i) Sources of Information. An officer adjudicating a Form I-130 or Form I 129F may identify derogatory information on criminality through any of the following sources:

- Front-end search,
- Back-end referral from an adjudicator based on a hit in TECS or IBIS Manifest, or
- Non-IBIS referral from an adjudicator based on criminal documents in the file or other documents indicating criminality.

(ii) Sufficiency of Information. The following derogatory information s sufficient to determine preliminarily that AWA applies:

- An NCIC sexual offender registry hit, unless it can be conclusively demonstrated that the victim was an adult or that the charge was dismissed, withdrawn, or the prosecution entered "no prosecution [nolle prosequi]."
- A TECS hit revealing anything sexual in nature, unless it can be conclusively demonstrated that the victim was an adult or that the investigation has been closed (with no resulting arrest), dismissed, recorded as "no prosecution," or withdrawn.
- A review of NN16 / NN11 indicates any sexual offense, unless it can be conclusively demonstrated that the victim was an adult or that the charge was dismissed, recorded as "no prosecution," or withdrawn.
- A check of any system reveals derogatory information involving kidnapping or false imprisonment (unless the offense was committed by parent or guardian).

Note: All AWA-related files that are transferred to the VSC must contain a timely and unexpired AWA petitioner criminality-resolution memorandum. The resolution memorandum will detail all criminality issues related to the petition and indicate that a preliminary AWA determination has been made.

(iii) Cases with Scheduled Fingerprinting Appointments. Where the petitioner has a history of criminality, the petition has been transferred to the VSC after the originating service center issued a fingerprint-appointment notice, and the petitioner later fails to appear for (or seeks postponement of) the originally scheduled fingerprinting appointment, the VSC will do the following:
(a) determine whether it is necessary to reschedule the fingerprinting appointment;
(b) if so, apply its local fingerprint scheduling procedures; and
(c) determine whether the petition should undergo AWA-related review and adjudication.

(iv) Post-adjudication Transfers to the VSC. Where an originating service center or the VSC has already adjudicated the underlying petition, but where new derogatory evidence is uncovered, or where a remand from the Board of Immigration Appeals (BIA) requires that a service center review the case for possible AWA determinations, the originating service center should forward the case to the VSC for reconsideration.
Note: If there is a concurrently filed Form I-485 associated with the underlying petition that was to be adjudicated by the originating service center, that Form I-485 will also be adjudicated by the VSC. Additionally, if an AWA-related case is remanded by the BIA to an originating service center, the originating service center should transfer the case to the VSC for AWA-related review and adjudication. In those cases, the originating service center must also provide the petitioner with written notice of the case transfer.

(v) File Transfer. The originating service center will package and send to the VSC all files where there has been a preliminary determination that the petition warrants review as an AWA-related case. The following procedure applies:

- Create a manifest for each box detailing the file receipt and box numbers.
- Record the number of files and list the corresponding barcodes on the manifest.
- Number each box (e.g., "1 of 4") for each shipment (a copy of the manifest should be maintained by the audit team of the sending service center).

- Place a copy of the manifest in the box.
- Send an electronic copy of each manifest via email to the VSC after every shipment, detailing the contents of each shipment.
- Relocate each file to VSC in CLAIMS using "Relocated to new jurisdiction (VSC)" and "batch transfer forward" in NFTS to the VSC shipping destination.
- Affix an AWA cover sheet to each AWA-related case file being transferred to the VSC (see attached uniform AWA cover sheet). For previously batched AWA case shipments, use only one cover sheet for each batch.
- Provide written notice to each petitioner regarding the transfer of the underlying petition or application
- Forward all AWA petitions to the following VSC shipping address:

DHS-USCIS Vermont Service Center
Attn: AWA TEAM
75 Lower Welden Street
St. Albans, VT 05479-0001

(vi) Post-shipment Audit. VSC will audit each shipment of AWA files, as follows:

- The audit will consist of random checks (i.e., samples will be pulled from each box) to an AQL of 1.5 % Level II of ANSI/ASQ Z1.4 2003.*
- The audit will:
    - Verify that the files have been properly transferred forward in NFTS;
    - Verify that the files have been properly manifested;
    - Verify that the files have been properly relocated in CLAIMS "Transferred to new jurisdiction (VSC)";
    - Verify the files are I-130s and I-129Fs; and
    - Verify the I-130 and I-129F data is in CLAIMS 3.
- Once the petition is received at the VSC, all files will be routed to the designated AWA shelf in Essex "Attn: AWA BCU Team" for review and processing. Each file must be clearly marked so that BCU is aware that the petition has been identified as an AWA petition.

(vii) Jurisdiction over AWA-related Determinations. The decision to centralize the adjudication of AWA-related petitions filed does not alter the VSC's ability to refer petitions to district offices when an interview is deemed necessary or an investigation of suspected fraud is merited. In those instances, the VSC will retain exclusive authority to make all AWA-related determinations. Any case referred to a district office should be accompanied by a completed AWA-approval worksheet indicating the VSC has determined that the petitioner poses no risk to his or her intended beneficiary.

(g) Post-Adjudication Actions .

(1) Decision - Approvals

(A) Notification .

When you approve a petition, be sure to note the priority or filing date on the appropriate line, place the approval stamp in the designated block, and sign or initial it. Be sure to check the proper section of law to designate the beneficiary's immigrant classification. If you mark the wrong section of law or fail to affix the approval stamp, the consular office will return the petition to you for correction, and the processing of the beneficiary's immigrant visa will be delayed unnecessarily.

(B) Form I-797 .

Form I-797 is used to notify the petitioner, and any recognized representative, of the approval and disposition of the petition. Any mistakes on the notice will probably be detected by the petitioner, and, in most cases, the petitioner will want a corrected notice. If the mistake is related to the beneficiary's classification or the filing date, it may even be necessary to have the petition recalled from the consular office. This is time-consuming and does not reflect favorably on USCIS .

(C) Beneficiary in the United States and Eligible for Adjustment of Status.

If the beneficiary is in the United States and appears eligible to adjust status pursuant to section 245, you would adjudicate the case. If approvable, note the Consulate block "Adj. case." If there is no "A" file, then you should have one created.

(D) Beneficiary in the United States, But Ineligible for Adjustment of Status .

If the beneficiary is in the United States, but the file indicates ineligibility for adjustment of status, forward the approved petition to the National Visa Center (NVC), with reference to the consulate abroad. It is to be noted also that all immigrant petitions designated as "homeless" petitions will be forwarded to NVC. Designation on the I-130 for a consulate other than one in the beneficiary's country of birth or country of last residence may only be made by the petitioner. Under no circumstances shoul d an officer advise a petitioner to designate a country other than the appropriate consulate having jurisdiction.

(E) Section 243(d) Sanctions and Waivers Thereof .

Section 243(d) sanctions can be imposed against countries which fail to cooperate in the removal of their nationals who have been ordered removed from the United States. Upon being advised by the Attorney General that a particular country is not cooperating, the Secretary of State orders consular officers not to issue either immigrant visas or nonimmigrant visas, or both, to nationals of that country. (The Secretary of State may also choose to apply sanctions against

only certain visa categories.) Unless su ch sanctions are waived by the consular officer on an individual case basis, an alien seeking a visa subject to the sanctions cannot be issued a visa. Unlike the former section 243(g) sanctions, which required adjudicators to annotate visa petitions when sanctions were waived, there is no action required by adjudicators to either implement or waive section 243(d) sanctions. Furthermore, even if sanctions have been imposed, they have no effect on applications (e.g., adjustment applications, change of status applications, waiver applications) handled by USCIS .

There are currently no countries subject to sanctions under section 243(d) of the Act with regard to immigrant visas.

(2) Denials .

A visa petition may not be denied as a matter of discretion or because the beneficiary is excludable. The only valid ground for denial is failure to establish the qualifying relationship as defined in the Act and interpreted through precedent decisions or because of ineligibility of the petitioner. Use Form I-292 to notify the petitioner of the decision and the right to appeal within 15 calendar days from the date of the notice (18 days if the notice is mailed). The appellate body (if any) to which the appe al is filed depends on the type of relative petition involved:

- The appeal from a denial of a Form I-130 petition is made to the Board of Immigration Appeals (BIA) on Form EOIR-29.

- The appeal from a denial of a Form I-360 filed by a widow(er) is made to the BIA on Form EOIR-29.

Note

Any appeal on a case where the BIA has appellate jurisdiction must be accepted and forwarded to the BIA, even if it is not timely filed. The BIA will decide whether to consider the case.

- The appeal from a denial of a Form I-360 filed by a battered spouse is made to the Office of Administrative Appeals on Form I-290B.

- The appeal from a denial of a Form I-600 or I-600A is made to the Office of Administrative Appeals.

- The denial of a Form I-730 is not appealable.

Notify the petitioner in writing of the decision and the right to appeal. As required in Chapter 10.7(b)(5) of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider.

(3) Issuance of a Notice To Appear (NTA) .

Upon completion of adjudication of a visa petition filed on behalf of an alien who is illegally in the United States, the adjudicating officer must consider whether USCIS or DHS should initiate removal proceedings through the issuance of a Notice to Appear. Generally, NTAs should be issued if the beneficiary is illegally in the United States and is not immediately eligible to apply for adjustment of status (e.g., if he or she is subject to bars to adjustment contained in sections 245(a) or 245(c) of the Act).

Only certain officials have the regulatory authority to issue NTAs (see **8 CFR 239.1**) and the director of each office or center determines which unit within that office or center exercises that authority. For example, in some offices, upon completion of adjudicative action, cases are referred from the Adjudications Branch to the Investigations Branch for consideration of NTA issuance; in other offices the NTA is prepared by the Adjudications Branch and signed by the ADD for Examinations or ADD for Adjudications. Follow the procedures set forth in your local office or center.

(h) Revocation of Approval .

The approval of a relative petition may be revoked under **section 205** of the Act and **8 CFR 205** if certain conditions arise or are discovered. Revocations can be divided into 2 areas: Automatic revocation and Revocation Upon Notice.

(1) Automatic Revocation .

(A) Grounds for Automatic Revocation .

The grounds for automatic revocation are set forth in **8 CFR 205.1(a)** . Officers should be familiar with each of the events spelled out in the regulation. Under each of these grounds, the revocation is automatic when the specified events occurs, regardless of whether USCIS is aware of its occurrence or not, and regardless of when (or even whether) USCIS provides notification of the revocation. For example, if an alien who is the beneficiary of an approved 2 nd preference visa petition as the unmarried son or daughter of a lawful permanent resident marries before immigrating to the United States or adjusting status, the petition's approval is revoked. It should be noted that although it is the event of the marriage which triggers the revocation, the revocation itself is as of the date of the petition's approval (in automatic revocation proceedings, revocation upon notice is different). Furthermore, because the petition's approval has been revoked, it does not bec ome valid again if the marriage of the beneficiary is terminated through divorce or death of the beneficiary's spouse. (However, if the marriage is annulled by a court of competent authority, the legal effect is that the marriage never occurred and therefore, neither did the revocation.)

(B) Notification .

Once USCIS becomes aware of the revocation, it must notify the consular post to which the petition was sent (or the National Visa Center, as appropriate) of the revocation and provide a copy of that notice to the petitioner at his or her last known address, or at the estate of the petitioner, as appropriate. As always, if a G-28 is on file indicating that the petitioner has or had legal representation in the petition process, the petitioner's copy of the notice is sent to the legal representative. Again, it is import ant to understand that under 8 CFR 205.1(a) it is the event which triggers the automatic revocation, not the notice; and that the revocation is as of the date of the petition's approval, not as of the date of the notice.

(C) Discretionary Authority to Not Automatically Revoke Approval .

Although revocation of approval is automatic under **8 CFR 205.1(a)(3)(i)(C)** , when the petitioner has died there are circumstances under which the Attorney General may exercise his or her discretion to not revoke the approval. Such discretionary authority is delegated to the district director or service center director who approved the petition, and may be exercised when he or she "determines that for humanitarian reasons revocation would be inappropriate."

The Affidavit of Support (AOS) requirement at section 213A of the Act rendered such "humanitarian reinstatement" moot as there was no sponsor to sign the AOS. Congress remedied this by passing the Family Sponsor Immigration Act, Pub. L. 107-150, that allows for the use of a "substitute sponsor." Now, if a visa petitioner dies after approval of the petition, but prior to the beneficiary adjusting status or immigrating to the U.S., the beneficiary may use a "substitute sponsor" on the AOS.

To request humanitarian reinstatement of a revoked petition, the beneficiary should send a written request for reinstatement to the USCIS service center or field office that approved the petition except that, if the beneficiary has properly filed an application for adjustment of status with USCIS, the written request should be submitted to the USCIS office with jurisdiction over the adjustment application. The written request must include a copy of the approval notice for the revoked petition, the death certificate of the petitioner (or other qualifying relative) and, if required by section 213A of the Act and 8 CFR part 213a, a Form I-864 from a substitute sponsor and proof of the substitute sponsor's relationship to the beneficary. If the director decides that humanitarian reinstatement is not warranted, this decision should be communicated, in writing, to the beneficiary. There is no appeal from a determination not to exercise this discretionary authority. If the director decides that humanitarian reinstatement is warranted, the beneficiary should be notified and the decision forwarded to either the Department of State (if the beneficiary is abroad) or to the USCIS officer adjudicating the beneficiary's adjustment application (if the beneficiary is present in the U.S.).

While there are no other rules or precedents on how to apply this discretionary authority, reinstatement may be appropriate when revocation is not consistent with the furtherance of

justice,&#65533; especially in light of the goal of family unity that is the underlying premise of our nation&#65533;s immigration system.&#65533; In particular, reinstatement is generally appropriate as a matter of discretion, if section 204(l) of the Act and Chapter 10.21 of this *AFM* would support approval of the petition if it were still pending.&#65533; For cases that are not covered by section 204(l) of the Act, the reinstatement request will be addressed in light of the factors that USCIS has traditionally considered in acting on reinstatement requests, which include:

- The impact of revocation on the family unit in the United States, especially on U.S. citizen or LPR relatives or other relatives living lawfully in the United States;
- The beneficiary's advanced age or poor health;
- The beneficiary's having resided in the United States lawfully for a lengthy period;
- The beneficiary's ties to his or her home country; and
- Significant delay in processing the case after approval of the petition and after a visa number has become available, if the delay is reasonably attributable to the Government, rather than the alien.

Although family ties in the United States are a major consideration, there is no strict requirement for the alien beneficiary to show extreme hardship to the alien, or to relatives already living lawfully in the United States, in order for the approval to be reinstated.&#65533; If the alien is required to have a Form I-864 affidavit of support, however, there must be a Form I-864 from a substitute sponsor.&#65533; 8 C.F.R. &#65533; 205.1(a)(3)(i)(C).

Note

[Note removed on 12-02-2009] See Appendix 21-8. [Appendix 21-8 added on 12-02-2009]

(D) Conversion to Another Visa Classification .

Under certain circumstances, the triggering event not only makes the beneficiary ineligible for the visa classification under which the petition was originally approved, it also makes him or her eligible for a different visa classification. For example, when an unmarried son of a U.S. citizen reaches age 21, he is no longer eligible for immediate relative classification as the child of a U.S. citizen (IR-2), but the same event makes him eligible for first preference classification as the unmarried son of a U.S. citizen (F1-1). Likewise, if the unmarried adult daughter of a citizen marries, she is no longer eligible for first preference classification, but the same event makes her eligible for third prefere nce classification as the married daughter of a citizen (F3-1). Paragraphs (G) and (H) of 8 CFR 205.1(a)(3) provide that under such circumstances not only is the approval for the original classification automatically revoked, but the same petition is automatically converted to (i.e., approved for) the new classification. The priority date of the newly-converted petition is the date on which that petition was originally filed (albeit for another classification), not the date on which the conversion occurred.

Similarly, if the petitioner in a second preference case naturalizes, the petition is automatically converted to the new classification for which the beneficiary becomes eligible [“spouse of LPR”

(F2-1) becomes “spouse of citizen” (IR-1); “child of LPR” (F2-2) becomes “child of citizen (IR-2)”; “unmarried son or daughter of LPR” (F2-4) becomes “unmarried son or daughter of U.S. citizen” (F1-1)].

Note

An alien who is eligible for F2-3 derivative classification as the child of an alien classified F2-1 is not the beneficiary of a petition filed on his or her behalf. Accordingly, upon the naturalization of the LPR who petitioned for such child’s parent, there is no conversion that can occur. A new petition would have to be filed for such child. If the child qualifies for classification as the child of the newly-naturalized citizen (i.e., step-child or adopted child), that citizen may file an immediate rela tive petition. If the child does not so qualify, then his mother or father (the spouse of the newly-naturalized citizen) may file a second preference petition on the child’s behalf once he or she becomes an LPR.

(E) Amerasian Petitions .

Special circumstances apply to the automatic revocation of Amerasian petitions which are discussed in subchapter 21.7 .

(2) Revocation Upon Notice .

In addition to those situations covered under the automatic revocation provisions of **8 CFR 205.1** , there are other situations where USCIS determines that the approval of a petition should be revoked for what **section 205** of the Act refers to as “good and sufficient cause.” For example, if subsequent to the approval of a petition for a (natural) sibling, USCIS learned that the sibling relationship had previously been terminated by the adoption of the petitioner out of the family, there would be good and sufficient cause for revocation of approval of the petition upon notice.

(A) Triggering Event .

Under 8 CFR 205.2(a) USCIS can initiate revocation proceedings on a visa petition any time “the necessity of the revocation comes to the attention of the Service.” While this may be the result of a particular triggering event (such as USCIS learning that the petitioner had been adopted out of the natural family unit in the example above), there does not need to be a specific “triggering event” (as with automatic revocation); instead there can be a series of events that leads to the conclusion that the petition’s approval should be revoked. These events could have occurred either before or after the original approval, or some might have occurred before approval and others after.

(B) Good and Sufficient Cause .

The BIA has held that good and sufficient cause exists where the evidence of record at the time of issuance of the notice of intent, if unexplained and unrebutted, would warrant a denial (*see* **Matter of Estime** , 19 I&N Dec. 450 (BIA, 1987)).

(C) Notice of Intent .

When it appears that revocation upon notice is appropriate, USCIS sends the petitioner a Notice of Intent to Revoke, setting forth the reasons (the "good and sufficient causes") why revocation is appropriate. It is important that all the valid reasons for which USCIS intends to revoke the petition be spelled out in the notice, since the petition is only required to respond to, and the ultimate decision can only be based on, reasons which were specified in the notice. In addition to a specific statement of the facts and evidence underlying the proposed revocation, the notice must advise the petitioner of his or her right to review and rebut the evidence. Quite simply, the BIA has held that "a decision to revoke approval of a visa petition will not be sustained where the notice of intent was not properly issued" (*see* **Matter of Estime** , 19 I&N Dec. 450 (BIA, 1987)).

(D) Burden of Proof .

In revocation proceedings, as in all visa petition proceedings, the burden of proof rests with the petitioner. This does not change simply because USCIS is now the party proposing the action of revocation. USCIS's requirement is to set forth the good and sufficient grounds in the notice of intent (and to meet the other requirements of the notice). Once this has been done, the burden of proof is on the petitioner to establish eligibility for the benefit sought (see **Matter of Cheung** , 12 I&N Dec. 715 (BIA, 1968) .

(E) Response to Notice .

The petitioner should be given 30 days to respond to the notice of intent to revoke. If the petitioner requests additional time to respond, and USCIS is satisfied that he or she is not simply seeking to delay the revocation, additional time may be granted to respond to the notice. If the petitioner does not respond within the allotted time, or if the response is inadequate to meet the petitioner's burden of proof, the approval should be revoked through a formal order attached to a notice of decision (Form I-292), with appropriate appeal forms.

(F) Appeal Rights .

As required in Chapter 10.7(b)(5) of this manual, the decision must include information about appeal rights and the opportunity to file a motion to reopen or reconsider. The petitioner has the same appeal rights from a decision to revoke upon notice as he or she would have from a decision to deny the petition. If a denial of the petition would be appealable to the BIA on Form EOIR 29, so is the revocation; if it would be appealable to the AAO on Form I 290B, so is the

revocation. The petitioner also has a right to file a motion to reopen or reconsider the decision revoking the petition approval.

(G) Date of Revocation .

When a petition is revoked upon notice, the revocation is effective as of the date on which the decision becomes final.

(i) Precedent Decisions .

(1) Relating Index Topics .

The foregoing are only a few selected precedent or interim decisions particularly important to the adjudication of the particular petitions. To locate other relevant decisions refer to the index of administrative decisions under the following subtitles:

Adoption	Immediate Relatives	Quota Preference
Annulment	Legitimation	Stepparent, question of
Child	Marriage	Visa, petition for
Divorce	Nonquota Immigration	Visa Petition, revocation of

(2) Synopses of Selected Precedent Decisions .

(A) Precedent decisions of general applicability:

• **Matter of O–** , 8 I&N Dec. 295 (BIA 959) . Admissibility of beneficiary is not relevant to decision of visa petition.

• **Matter of C–** , 9 I&N Dec. 433 (BIA 1961) . - There is no provision for retroactive approval of a petition. Furthermore, only the petitioner (not the beneficiary) can appeal a decision on a visa petition.

• **Matter of Brantigan** , 11 I&N Dec. 493 (BIA 1966) ; and **Matter of Phillis** , 15 I&N Dec. 385 (BIA 1975) . Burden of proof to establish eligibility for the benefit sought lies with the petitioner.

• **Matter of Pearson** , 13 I&N Dec. 152 (BIA 1969) . Failure to prosecute is a valid ground for denial when petitioner fails to comply with a reasonable request to appear for interview.

• **Matter of Varela** , 13 I&N Dec. 453 (BIA 1970) ; distinguished by **Matter of Pagnerre** , 13 I&N Dec. 688 (BIA 1971) . Death of the petitioner terminates relationship; this petition filed prior to the death may not be approved.

• **Matter of Herrera** , 13 I&N Dec. 755 (BIA 1971) ; followed by **Matter of Serna** , 16 I&N Dec. 643 (BIA 1978) . A delayed birth certificate plus delayed secondary evidence does not meet the requirements of 8 CFR 204.2(a).

• **Matter of Ah San** , 15 I&N Dec. 315 (BIA 1975) . Non-citizen nationals of the U.S. may file petitions pursuant to section 203(a)(2) of the Act.

• **Matter of Nevarez** , 15 I&N Dec. 550 (BIA 1976) . English translations of foreign language documents are required notwithstanding the documents were entered into evidence by the Service.

• **Matter of Aviles** , 15 I&N Dec. 588 (BIA 1976) ; **Matter of Mintah** , 15 I&N Dec. 540 (BIA 1975) . Reopening visa petition proceedings on a Service motion after an appeal to the BIA has been taken is prohibited. The District Director loses jurisdiction on such cases once the appeal is filed.

• **Matter of Cintron** , 16 I&N Dec. 9 (BIA 1976) . A petition withdrawn by the petitioner may not be denied.

• **Matter of Tahsir** , 16 I&N Dec. 56 (BIA 1976) ; **Matter of Calilao** , 16 I&N Dec. 104 (BIA 1977) . A decision may not be based on adverse evidence if the petitioner is unaware of it.

• **Matter of Calilao** , 16 I&N Dec. 104 (BIA 1977) . A petition may be filed for a beneficiary who is currently an LPR under removal proceedings.

• **Matter of Serna** , 16 I&N Dec. 643 (BIA 1978) . A delayed birth certificate is given weight on a case by case basis and is not always sufficient to establish U.S. citizenship.

• **Matter of DaBaase** , 16 I&N Dec. 720 (BIA 1979) . Reopening of visa petition proceedings may not be instituted by the beneficiary; the right lies solely with the petitioner.

• **Matter of Bardouille** , 18 I&N Dec. 114 (BIA1981) . A beneficiary of a visa petitioner must be fully qualified at the time the visa petition is filed.

(B) Precedent decisions pertaining to section 204(c) of the Act:

• **Matter of F–** , 9 I&N Dec. 684 (BIA, 1962) ; Matter of Samsen, 15 I&N Dec. 28 (BIA, 1974). The decision on section 204(c) applicability must be made on all the evidence.

• **Matter of Cabeliza** , 11 I&N Dec. 812 (BIA 1966) . Section 204(c) contains no statute of limitations and applies to any subsequently filed petition.

• **Matter of Rahmati** , 16 I&N Dec. 538 (BIA 1978) . A finding that a previous marriage was non-viable does not necessarily indicate it was contracted solely for immigration purposes; therefore, such a finding does not conclusively place an alien within 204(c).

• **Matter of Agdinaoay** , 16 I&N Dec. 545 (BIA 1978) . A finding of deportability under section 241(c)(2) provides a basis for determination that section 204(c) is applicable for subsequent visa petition proceedings.

• **Matter of May** , 18 I&N Dec. 381 (BIA 1983) ; and **Matter of Chu** , 19 I&N Dec. 81 (BIA 1984) ; **Matter of Ma** , 20 I&N Dec. 394 (BIA 1991) . Certificates issued by notarial offices in the People's Republic of China shall be accepted as evidence that both the adoptive relationship was created and that the adoption was valid. However, notarial certificates shall not be regarded as conclusive proof because of the potential for fraud or error in issuance. Lack of corroborating evidence, contradicting evidence and unexplained inconsistencies are indications of possible fraud or error.

• **Matter of Villanueva** , 19 I&N Dec. 101 (BIA 1984) . Unless void on its face, a **valid** U.S. passport issued to an individual as a citizen of the U.S. is not subject to collateral attack in administrative immigration proceedings, but constitutes conclusive proof of such person's U.S. citizenship.

• **Matter of Obaigbena** , 19 I&N Dec. 533 (BIA 1988) . Where a petitioner fails to timely and substantively respond to the notice of intention to deny or to make a reasonable request for an extension, the Board will not consider any evidence first proffered on appeal as its review is limited to the record of proceeding before the district director; for further consideration, a new visa must be filed.

• **Matter of Hilaire** , 19 I&N Dec. 566 (BIA 1988) . Although a petitioner may submit certified copies of documents, the Service may still require the originals in order to determine authenticity.

(C) Precedent decisions pertaining to revocation of approval:

• **Matter of Cheung** , 12 I&N Dec. 715 (BIA, 1968) . The burden of proof in revocation proceedings rests with the petitioner.

• **Matter of Zaidan** , 19 I&N Dec. 297 (BIA 1985) . Since there is no provision for appellate review when a visa petition is automatically revoked under 8 CFR 205.1, the Board lacks jurisdiction over appeals dealing with the automatic revocation of a petition.

• **Matter of Estime** , 19 I&N Dec. 450 (BIA, 1987) . A decision that sets forth requirements for a notice of intent to revoke (see also **Matter of Arias** , 19 I&N Dec. 568 (BIA 1988) ; **Matter of Tawfik** , 20 I&N Dec. 166 (BIA 1990) ; and **Matter of Li** , 20 I&N Dec. 700 (BIA 1993)).

• **Matter of Arias** , 19 I&N Dec. 568 (BIA 1988) . A decision to revoke approval of a visa petition can only be grounded upon, and the petitioner is only obligated to respond to, the factual allegations specified in the notice of intention to revoke.