

9 FAM 42.42 Notes

(TL:VISA-582; 09-29-2003)
(Office of Origin: CA/VO/L/R)

9 FAM 42.42 N1 Notice of Petition Approval

(TL:VISA-470; 10-07-2002)

a. A consular officer shall not issue an immigrant visa without receipt from INS of a(n) approved immigrant visa petition:

- (1) Form I-130, *Petition for Alien Relative*;
- (2) Form I-600, *Petition to Classify Orphan as Immediate Relative*;
- (3) Form I-140, *Petition for Immigrant Worker*, or
- (4) Form I-360, *Petition for Amerasian, Widow(er), or Special immigrant*.

b. In emergency situations only, consular officers may issue a visa based on the following:

- (1) Cable notification of such approval; or
- (2) Official notification Form I-797, *Notice of Action*, of such approval;
- (3) An electronic case record provided by NVC; or
- (4) Faxed notice of approval of Form I-600 received directly from the approving INS office.

9 FAM 42.42 N2 Petition Validity

9 FAM 42.42 N2.1 When Relationship is Terminated

(TL:VISA-470; 10-07-2002)

Unless an application is terminated pursuant to INA 203(g) [see 9 FAM 42.83] or revoked pursuant to 8 CFR 205.1, the approval of a petition to classify an alien as an immediate relative under INA 201(b) or a preference applicant under INA 203(a)(1), (2), (3) or (4) shall remain valid for the duration of the relationship to the petitioner, and of the petitioner's status, as established in the petition. A petition filed by a battered or abused spouse or child under INA 204(a)(1)(A)(iii)(I) or (a)(1)(B)(iii)(I), however, may not be revoked solely due to termination of the relationship.

9 FAM 42.42 N2.2 Upon Death of Principal Beneficiary

9 FAM 42.42 N2.2-1 When Principal Dies Prior to Admission to United States

(TL:VISA-470; 10-07-2002)

In the case of the death of the principal beneficiary prior to admission to the United States, the petition is automatically revoked and the priority date is no longer valid for any derivative beneficiary. The petition should be returned to the INS adjudicating office.

9 FAM 42.42 N2.2-2 When Beneficiary Was Killed in September 11, 2001, Terrorist Attack

(TL:VISA-470; 10-07-2002)

Under section 421(b) of the USA Patriot Act, a petition approved for the spouse, child, son or daughter of an alien killed in the September 11, 2001, terrorist attacks, shall remain valid indefinitely and continues as if the petitioner had not died. The beneficiary may retain his or her priority date.

9 FAM 42.42 N2.2-3 Upon Death of Petitioner

(TL:VISA-470; 10-07-2002)

The death of a petitioner in a family-based petition case prior to the beneficiary's admission to the United States results in the automatic revocation of the petition and loss of the beneficiary's priority date obtained on the basis of that petition. However, if the consular officer believes that special humanitarian reasons exist which would warrant consideration by INS of reinstatement of the petition, the consular officer shall prepare a memorandum requesting such consideration and forward it with the petition to the INS office having regional jurisdiction. [See 9 FAM 42.42 N5.1.]

9 FAM 42.42 N3 Family-based Petitions Under USA Patriot Act

9 FAM 42.42 N3.1 When Family-based Petition Has Been Filed

(TL:VISA-470; 10-07-2002)

a. Section 421(b) of the USA Patriot Act preserves immigration benefits for certain surviving family members of a lawful permanent resident who died as a result of the September 11, 2001, terrorist attacks for whom petitions had been filed on or before September 11, 2001.

b. Under section 421 of the Act, the spouse or child may self-petition for special immigrant status. [See 9 FAM 42.32(d)(9).] The derivative child of such applicant must follow to join the principal applicant by September 11, 2003.

c. Under section 423 of the Act, the petition for the spouse or child remains valid indefinitely and the applicant may continue to be processed as if the lawful permanent resident had not died. The beneficiary may retain his or her priority date.

d. Under section 424 of the Act, any alien who is the beneficiary of a petition filed on or before September 11, 2001, and whose 21st birthday occurs after September 30, 2001, shall be considered to be a child for 45 days after the alien's 21st birthday.

9 FAM 42.42 N3.1-1 Applying for Status Under USA Patriot Act

(TL:VISA-391; 04-10-2002)

Under section 421, applicants must file a Form I-360, *Petition for Amerasian, Widow(er), or Special Immigrant*, with the INS service center that has jurisdiction over their place of residence. Under INA 423(b), no new petition is required to retain the priority date already granted.

9 FAM 42.42 N3.1-2 Consular Processing

(TL:VISA-470; 10-07-2002)

a. IV processing under section 421 of the USA Patriot Act is standard once the approved Form I-360, *Petition for Amerasian, Widow(er), or Special Immigrant*, is received from INS via NVC, except no Form I-864, *Affidavit of Support Under Section 213A of the Act*, is required and INA 212(a)(4) does not apply.

b. Under INA 423(a), processing is standard once the priority date becomes current and post receives from the NVC Form I-130, *Petition for Alien Relative*, filed by the LPR on or before his or her death on September 11, 2001, except no Form I-864 is required and INA 212(a)(4) does not apply. Applicants will be issued IR1 visas. As such petitions remain valid for years and are already in the "pipeline," there will be no notation on the petition that beneficiaries continue to qualify under the Patriot Act despite the death of the petitioner. This information would likely only come to a consular officer's attention during document collection and the IV interview.

c. Under INA 423(b) of the Act, petitions for a spouse, child or unmarried son or daughter remain valid indefinitely and may continue to be processed as if the lawful permanent resident petitioner had not died. The beneficiary retains his or her priority date.

d. Under INA 424, a child who is the beneficiary of a petition filed prior to September 11, 2001, shall be considered a child for 45 days after the alien's 21st birthday.

e. Posts should annotate visas issued under the USA Patriot Act as follows:

“SP—beneficiary of section ____, USA PATRIOT Act”

9 FAM 42.42 N3.2 When No Family-based Petition Had Been Filed

(TL:VISA-391; 04-10-2002)

Under section 423(a) of the USA Patriot Act, if no family based petition was filed for a surviving spouse, child or adult son or daughter of an lawful permanent resident killed in the September 11 attacks, such alien may file a self-petition using Form I-130, *Petition For Alien Relative*. The applicant will be processed for an IV as if the would be permanent resident had not died as a result of the September 11 attacks. In addition to the usual documentary requirements, such petitioners and derivatives must demonstrate that they were present in the United States on September 11, 2001, that the spouse or parent was killed as a result of the September 11 attacks [see 9 FAM 40.1 N12], and that the LPR had status on September 11, 2001.

9 FAM 42.42 N3.2-1 How to Apply

(TL:VISA-391; 04-10-2002)

The applicant must file a Form I-130, *Petition For Alien Relative*, with the INS office service center that has jurisdiction over the applicant's place of residence. It is, however, likely that any eligible beneficiaries are in the United States and will file at an INS office.

9 FAM 42.42 N3.2-2 Consular Processing

(TL:VISA-391; 04-10-2002)

IV processing is standard once an approved petition is received. No Form I-864, *Affidavit of Support Under Section 213A of the Act*, may be required and applicants are exempt from 212(a)(4) ineligibility. The class of admission codes should be as if a normal 2nd preference visa.

9 FAM 42.42 N4 Employment Preference

(TL:VISA-470; 10-07-2002)

Unless an application is terminated pursuant to INA 203(g) [see 9 FAM 42.83 Notes and 9 FAM 42.83 Procedural Notes] or is revoked under 8 CFR 205.1, the approval of an employment preference petition based on an approved labor certification is valid indefinitely until the alien immigrates or adjusts status.

9 FAM 42.42 N4.1 Change in Job Location

(TL:VISA-470; 10-07-2002)

Except for a Schedule A labor certification, which is valid anywhere in the United States, a labor certification is valid only for the area within normal commuting distance of the site of the original offer of employment. (Any location within a Metropolitan Statistical Area is deemed to be within normal commuting distance.) If there is a change in job location, the consular officer should return the petition to the INS jurisdiction office for action and the petitioner must file a new petition with the INS Service Center having jurisdiction over the intended place of employment.

9 FAM 42.42 N4.2 Change of Employer

(TL:VISA-470; 10-07-2002)

a. If the beneficiary of an approved petition changes employers, the consular officer should send the petition to the INS jurisdictional office. The INS will reaffirm the validity of a previously approved petition only when there is a successor-ship in interest (i.e., when the business is merged, acquired or purchased by another business). In addition, the new employer must offer the same wages and working conditions, offer the beneficiary the same job as stated on the original labor certification, and must continue to operate the same type of business as the original employer.

b. The new employer must:

- (1) File a new petition;
- (2) Present evidence that it is a successor in interest;
- (3) Present documentation showing a change of ownership;
- (4) Present evidence of ability to pay wages offered; and

(5) If INS did not approve the original petition, evidence that the original employer had the means to pay the proffered wage when the certification was submitted.

9 FAM 42.42 N4.3 Company Name Change

(TL:VISA-470; 10-07-2002)

A situation may arise whereby a petitioning business will have changed its name between the time a petition is approved and the date of the beneficiary's visa issuance. In such instances, INS does not wish to review the petition or issue any further documentation if the only change is the change in the name of the company. If the consular officer is satisfied that the evidence presented makes clear that only the company name has changed, as opposed to a change of ownership or company location, INS need not be consulted. The visa should be annotated, e.g., "abc, inc. formerly xyz, inc."

9 FAM 42.42 N5 Self-petitioning for IR or Family Preference Status

9 FAM 42.42 N5.1 Widow/Widower of U.S. Citizen

(TL:VISA-470; 10-07-2002)

a. The spouse of a deceased U.S. citizen may file a Form I-360, *Petition for Amerasian, Widow, or Special Immigrant*, for classification as an immediate relative under INA 201(b) provided the spouse:

(1) Was married to the U.S. citizen for at least two years prior to death and was not separated at the time of the death;

(2) Files a petition under INA 204(a)(1)(A) within two years of the spouse's death; and

(3) Has not remarried.

b. The child of a qualifying widow or widower is also entitled to status as a derivative if accompanying or following to join the principal beneficiary.

9 FAM 42.42 N5.2 Battered and/or Abused Spouse or Child of U.S. Citizen or Legal Permanent Resident

9 FAM 42.42 N5.2-1 General

(TL:VISA-470; 10-07-2002)

Section 40701 of the Violent Crime Control Act (Public Law 103-322), signed into law on September 13, 1994, amended INA 204 to allow certain spouses and children of U.S. citizens and permanent resident aliens to self-petition for immediate relative and family second preference classification. Although it is anticipated that most applicants will seek adjustment of status, some aliens may apply for visas. [See 9 FAM 42.42 PN4.]

9 FAM 42.42 N5.2-2 Requirements for Battered/Abused Spouse or Child

(TL:VISA-170; 10-01-1997)

The alien spouse or child who has been battered by, or subjected to extreme cruelty committed by a U.S. citizen or permanent resident spouse or parent may file a petition for immediate relative or family second preference classification if the:

- (1) Alien is residing in the United States with the spouse or parent;
- (2) Alien is of good moral character;
- (3) Alien may be classified as a spouse or child under INA 201(b)(2)(a)(i) or INA 203(a)(2)(A);
- (4) Marriage was entered into in good faith;
- (5) Alien or the alien's child has been battered by, or has been the subject of extreme cruelty perpetrated by the alien's spouse; and
- (6) Alien's deportation would result in extreme hardship to the alien or the alien's child.

9 FAM 42.42 N5.2-3 Priority Date of Self-Petition

(TL:VISA-470; 10-07-2002)

The priority date of a self-petition is the date on which the petition is properly filed, provided it is properly signed and executed, the required fee is attached or waived, and it, otherwise, complies with the provisions of 8 CFR 103.2. If the alien is the beneficiary of an earlier filed visa family-based petition, the earlier priority date may be assigned.

9 FAM 42.42 N5.2-4 Effect on Other Approved Petitions

(TL:VISA-485; 11-06-2002)

The approval of a self-petition has no effect on a relative petition. A spouse or child may be both the beneficiary of a self-petition and the beneficiary of a relative visa petition filed by the abuser. Qualified persons may seek immigrant visas based on either petition whichever is most advantageous.

9 FAM 42.42 N5.2-5 Spousal Self-petitions Based on Abuse of Child

(TL:VISA-485; 11-06-2002)

A spouse may file a self-petition based on abuse committed against the spouse's child born in wedlock, a stepchild, a legitimated child, a child born out of wedlock, or an adopted child.

9 FAM 42.42 N5.2-6 Petition Conversion

(TL:VISA-485; 11-06-2002)

a. A self-petition on behalf of a child will be automatically converted and the priority date will be preserved in the following instances:

(1) The approved self-petition for IR classification for a child of a U.S. citizen shall be automatically converted to a second or fourth preference petition when the self-petitioner either reaches 21 years of age or marries; and

(2) The approved self-petition for second preference status for a child of a lawful permanent resident shall be automatically converted to a petition for classification as the unmarried son or daughter of a lawful permanent resident when the unmarried self-petitioner reaches 21 years of age.

b. There is, however, no automatic upgrade of the second preference petition to immediate relative classification if the abuser becomes a U.S. citizen, although the abused child can file a new self-petition for immediate relative classification. Renunciation of citizenship or abandonment of lawful permanent residence status by the abuser will not affect the validity of an approved petition.

9 FAM 42.42 N5.2-7 Where to File a Petition

(TL:VISA-485; 11-06-2002)

See 9 FAM 42.42 PN4.

9 FAM 42.42 N6 Immediate Relative Petitions

(TL:VISA-470; 10-07-2002)

See 9 FAM 42.21 N2.1.

9 FAM 42.42 N7 Orphan Petitions

(TL:VISA-470; 10-07-2002)

See 9 FAM 42.21 N13.2.

9 FAM 42.42 N8 Family-sponsored Petitions

(TL:VISA-470; 10-07-2002)

See 9 FAM 42.31 Notes.

9 FAM 42.42 N9 Employment-based Petitions

(TL:VISA-470; 10-07-2002)

See 9 FAM 42.32(a) Related Statutory Provisions; 9 FAM 42.32(b) Related Statutory Provisions; 9 FAM 42.32(c) Related Statutory Provisions; 9 FAM 42.32(d)(1) Related Statutory Provisions; 9 FAM 42.32d(2) Related Statutory Provisions; 9 FAM 42.32d(3) Related Statutory Provisions; 9 FAM 42.32d(4) Related Statutory Provisions; 9 FAM 42.32d(5) Related Statutory Provisions; 9 FAM 42.32d(6) Related Statutory Provisions; 9 FAM 42.32d(7) Related Statutory Provisions; 9 FAM 42.32(e) Related Statutory Provisions; and 9 FAM 42.33 Notes.

9 FAM 42.42 N10 Diversity Petitions

(TL:VISA-470; 10-07-2002)

See 9 FAM 42.33 Notes.

9 FAM 42.42 N11 Derivative Status for Spouse or Child

(TL:VISA-470; 10-07-2002)

a. A spouse or child, acquired prior to the principal alien's admission to the United States or the alien's adjustment to LPR status, or a child born of a marriage, which existed prior to the principal alien's admission, or adjustment, who is following to join the principal alien, should be accorded derivative status under INA 203(d). No second preference petition is required. [See 9 FAM 42.42 PN2.]

b. Although the spouse or child is entitled to derivative status, a recession of the cut-off date in the derivative category resulting in the unavailability of a number in the derivative category might encourage the filing of a second preference petition. However, there is normally a substantial amount of time involved before the petition could be approved, and the second preference might also be backlogged. The decision to file or not to file a second preference petition must be the petitioner's. Consular officers should neither encourage nor discourage the filing of a second preference petition but may provide copies of recent Visa Office Bulletins which indicate the movement of priority dates. In unusual circumstances, it is possible that slow movement in the beneficiary's derivative class might indicate that the filing of a second preference petition may be beneficial.

9 FAM 42.42 N12 Petitions that Cannot be Approved

9 FAM 42.42 N12.1 Certain Second Preference Petitions by Aliens Attaining Legal Permanent Resident Status on Basis of Previous Marriage

(TL:VISA-470; 10-07-2002)

The following conditions must be met before a second preference petition can be approved for the spouse of an alien who obtained legal permanent resident status through an earlier marriage:

- (1) Petitioner has been a permanent resident for at least five years; or
- (2) Petitioner's prior marriage on the basis of which the alien obtained lawful permanent residence was terminated through the death of the spouse; or
- (3) Petitioner establishes by clear and convincing evidence that the prior marriage was not entered into for the purpose of evading immigration laws.

9 FAM 42.42 N12.1-1 Petitions filed at Consular Offices Abroad

(TL:VISA-470; 10-07-2002)

If a consular officer is presented a petition for approval and is satisfied that the petitioner has been a permanent resident for at least five years, or that the previous marriage was terminated through the death of the spouse, the consular officer may approve such petitions. However, consular officers shall consider all other petitions filed by a petitioner who attained LPR status on the basis of a previous marriage, "not clearly approvable" and should send them, along with the supporting documents, to INS. [See 9 FAM 42.41 N4.]

9 FAM 42.42 N12.1-2 Petitions Approved by INS

(TL:VISA-470; 10-07-2002)

If the consular officer receives an INS approved petition and upon review determines that the petitioner's previous marriage, which served as the basis for attaining LPR status, appears to have been entered into solely to evade the immigration law, the consular officer shall return the petition to the INS approving office for review and possible revocation. [See 9 FAM 42.43 N2.2.]

9 FAM 42.42 N12.2 Petitions Based on Marriage Occurring While Alien in Exclusion or Deportation Proceedings or Related Judicial Proceedings

9 FAM 42.42 N12.2-1 Background

(TL:VISA-470; 10-07-2002)

a. The Marriage Fraud Amendments Act of 1986 (Public Law 99-639) prohibits the approval of petitions for aliens seeking to receive an immigrant visa on the basis of a marriage which was entered into after November 10, 1986, and while administrative or judicial proceedings were pending regarding the alien's right to enter or remain in the United States until the alien has resided outside the United States for a two-year period beginning after the date of the marriage.

b. Section 702 of the Immigration Act of 1990 (Public Law 101-649), amended INA 204 and 245, to provide for an exception to the prohibition if there is clear and convincing evidence that the marriage was entered into in good faith. [See 9 FAM 42.42 Related Statutory Provisions.]

9 FAM 42.42 N12.2-1 Two-year Residency Outside United States

(TL:VISA-470; 10-07-2002)

a. A petition may not be approved to grant an alien immediate relative status or preference status by reason of a marriage which was entered into during administrative or judicial proceedings regarding the alien's right to be admitted or remain in the United States **until** the alien has resided outside the United States for a two-year period commencing after the date of the marriage.

b. An exception to the above may be made if there is clear and convincing evidence that the marriage was entered into in good faith.

9 FAM 42.42 N12.2-2 Petitions “Not Clearly Approvable”

(TL:VISA-470; 10-07-2002)

Consular officers receiving a petition which appears to fall within the category described in 9 FAM 42.42 N10.2-1 above shall consider the petition “not clearly approvable” and shall send the petition, along with the supporting documents to INA for reaffirmation or revocation.

9 FAM 42.42 N12.3 Aliens Attempting or Conspiring to Enter Into Marriage to Evade Immigration Laws

(TL:VISA-470; 10-07-2002)

Section 204(c) of the Marriage Fraud Amendments Act of 1986 prohibits the approval of a visa petition filed on behalf of an alien who has been accorded, or sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws or the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The petition should be denied regardless of whether the alien received a benefit through the attempt or conspiracy. Although it is not necessary for the alien to have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence must be documented in the alien’s file.

9 FAM 42.42 N12.3-1 Petitions Filed at Consular Offices Abroad

(TL:VISA-470; 10-07-2002)

If the consular officer is presented with such a petition for approval, the petition should be considered “not clearly approvable” and should be sent, along with the supporting documents, to the appropriate INS regional office.

9 FAM 42.42 N12.3-2 Petitions Filed with INS

(TL:VISA-470; 10-07-2002)

If the consular officer receives an INS approved petition and upon review determines that the marriage was entered into for the purpose of evading the immigration laws; the consular officer shall return the petition to the INS approving office for review and possible revocation. [See 9 FAM 42.43 N3.]

9 FAM 42.42 N13 Naturalization Subsequent to Petition

(TL:VISA-470; 10-07-2002)

See 9 FAM 42.21 N6.

9 FAM 42.42 N14 Visa Petition Revocation

(TL:VISA-470; 10-07-2002)

See 8 CFR 205.1(a).