9 FAM 41.81 Notes

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

9 FAM 41.81 N1 Special Nature of K Visa Applications

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

Although K classification is a nonimmigrant classification under INA 101(a)(15), it differs from other nonimmigrant classifications since its use facilitates the admission of aliens who are intending immigrants. For this reason and because the provisions for according permanent residence to such aliens are based upon INA 214(d) and not INA 245, the requirements and procedures for processing applications for K visas are similar to those prescribed for processing immigrant visa applications for immediate relatives, rather than those for other nonimmigrant cases.

All K visas are to be processed and issued only at immigrant visa issuing posts. If a nonimmigrant visa issuing post receives a K visa petition, it should forward the petition to the immigrant visa issuing post which covers the consular district.

9 FAM 41.81 N2 Filing of Form I-129F, K Visa Petition

(TL:VISA-2 8-30-87)

Because INA 214(d) uses the language "petition filed in the United States," a K visa petition (Form I-129F, Petition to Classify Status of Alien Fiance or Fiancee for Issuance of Nonimmigrant Visa) may not be filed with, or approved or denied by, a consular officer or an immigration officer stationed abroad. All K visa petitions must be filed with the INS district office having INS jurisdiction over the petitioner's current or intended residence in the United States. If the citizen fiance(e) is abroad at the time the K visa petition is filed, the petition may be executed before a consular officer or immigration officer stationed abroad or, in the case of a member of the armed forces, before an officer authorized to perform notarial acts under Article 136, Uniform Code of Military Justice. The petition must be sent from abroad to the appropriate INS district office. After the petition is approved, INS will transmit it to the appropriate post.

9 FAM 41.81 N3 Validity and Revalidation of K Visa Petitions

9 FAM 41.81 N3.1 Period of Validity

(TL:VISA-2 8-30-87)

An approved K visa petition is valid for a period of 4 months from the date of INS action and may be revalidated by the consular officer any number of times for additional periods of 4 months from the date of revalidation provided the officer concludes that the petitioner and the beneficiary remain legally free to marry and continue to intend to marry each other within 90 days after the beneficiary's admission into the United States. However, the longer the period of time since the filing of the petition, the more the consular officer must be concerned about the intentions of the couple, particularly the intentions of the petitioner in the United States.

If the officer is not convinced that the U.S. citizen petitioner continues to intend to marry the beneficiary, the petition should be returned to the approving office of INS with an explanatory memorandum. [See 9 FAM 41.81 PN7 for revalidation procedure.)

9 FAM 41.81 N3.2 Follow-Up Letter

(TL:VISA-2 8-30-87)

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

9 FAM 41.81 N4 New K Visa Issuance

(TL:VISA-2 8-30-87)

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

9 FAM 41.81 N5 Cases Requiring Special Action

9 FAM 41.81 N5.1 Petitioner and Beneficiary Not Personally Acquainted

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

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

9 FAM 41.81 N5.2 Failure To Name a Child in K Visa Petition

(TL:VISA-2 8-30-87)

INS holds that all children of an alien classified K-1 must be listed on the K visa petition. Therefore, if the beneficiary has a child not named in the petition, the consular officer must suspend action and return the petition with an explanatory memorandum to the approving INS office for reconsideration.

However, INS has held that if an alien beneficiary is pregnant at the time of visa application and this fact is not disclosed in the approved petition, the petition need not be returned to the approving office provided the consular officer obtains an acknowledgment from the petitioner in writing or by telegram. The petitioner must indicate awareness of the pregnancy and the desire to proceed with the marriage. This written acknowledgement should be included with the other documents accompanying the visa.

9 FAM 41.81 N5.3 Factual Marital History Requirement

(TL:VISA-2 8-30-87)

If the facts of a beneficiary’s prior marital history are not consistent with information in the approved petition, the consular officer should suspend action and return the petition to the approving INS office for reconsideration. This requirement applies even though the beneficiary is legally free to marry. For example, if the petition indicates that the beneficiary has never been married and the consular officer receives evidence to the contrary, the fact that the beneficiary’s prior marriage has been terminated by annulment, divorce, or death of the previous spouse does not alter the requirement for suspension of action and return of the petition for reconsideration.

9 FAM 41.81 N5.4 Return of Petition to INS When Information Incomplete

(TL:VISA-2 8-30-87)

In situations such as those described in 9 FAM 41.81 N5.2 and 9 FAM 41.81 N5.3, a petitioner may inform the consular officer of the existence of the beneficiary's children or of the beneficiary's prior marital history not reflected in the petition. The consular officer must return such petitions to the approving office of INS, and should include in the accompanying memorandum the fact that the petitioner has communicated such information to the consular officer.

9 FAM 41.81 N5.5 Multiple Petitions Approved for Same Beneficiary

(TL:VISA-2 8-30-87)

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

9 FAM 41.81 N6 Termination of a K Visa Petition Approval

(TL:VISA-2 8-30-87)

INS regulations, 8 CFR 214.2(k), provide that the death of a petitioner or written withdrawal of the petition prior to the arrival of the beneficiary in the United States automatically terminates the approval of the petition.

The consular officer should return the petition thus terminated to the approving INS office with an appropriate memorandum.

9 FAM 41.81 N7 Former Exchange Visitor

(TL:VISA-2 8-30-87)

Before a K visa may be issued to an applicant who is a former exchange visitor and subject to the provisions of INA 212(e) the applicant must establish that the requirements of INA 212(e) have been fulfilled or that a waiver has been obtained. [See 22 CFR 40.7(b) and Notes.]

9 FAM 41.81 N8 Ineligible Applicants

9 FAM 41.81 N8.1 Visa Refusal—No Waiver Possible

(TL:VISA-2 8-30-87)

If it is determined that the beneficiary is ineligible to receive a visa on grounds for which no waiver would be possible under INA 212(g), (h), or (i) after marriage to the petitioner, the consular officer should process the case in the manner prescribed for nonimmigrant refusals. [See 22 CFR 41.121(b).] Submission by the officer of an INA 212(d)(3)(A) waiver recommendation is not appropriate in such a case.

9 FAM 41.81 N8.2 INA 212(d)(3)(A) Waiver for Fiance(e) Who Would Qualify for INA 212(h) or (i) Waiver if Married

(TL:VISA-2 8-30-87)

(a) If it is determined that the beneficiary is ineligible to receive a visa under INA 212(a)(9), (10), (12), (19), or (23), which ineligibility could be waived under INA 212(h) or (i) after marriage to the petitioner, the consular officer should return the petition to the approving office of INS for reconsideration. If the petition is reaffirmed, it will be returned to the consular office. At that time the officer should assist the applicant in completing Form I-601, Application for Waiver of Grounds of Excludability [Exhibit I], and submit simultaneously both the Form I-601 (with the required fee) and Form OF-221, Two-way Visa Action Request & Response [Exhibit II], to the appropriate INS office abroad with the recommendation concerning the granting of an INA 212(d)(3)(A) waiver. [See 22 CFR 40.7(a)(9) N14, PN1, PN2, and PN3 for INA 212(h) and (i) cases and 22 CFR 40.8 and Appendix A for INA 212(d)(3)(A) procedure.]

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

9 FAM 41.81 N8.3 INA 212(d)(3)(A) Waiver for Fiance(e) Who Would Qualify for INA 212(g) Waiver if Married

9 FAM 41.81 N8.3-1 Tuberculosis Cases

(TL:VISA-2 8-30-87)

If it is determined that the beneficiary is ineligible to receive a visa under INA 212(a)(6) ("afflicted with any dangerous disease," which includes tuberculosis), and that the ineligibility could be waived under INA 212(g) after marriage to the petitioner, the consular officer should return the K visa petition, accompanied by a completed Form I-601 waiver application, to the approving INS office for reconsideration. If the petition is reaffirmed, INS will take appropriate action and then transmit the petition, the Form I-601, and the district director's report to the consular office. No INS fee is required in such cases.

9 FAM 41.81 N8.3-2 Mental Retardation and Insanity Cases

(TL:VISA-2 8-30-87)

If it is determined that the beneficiary is ineligible to receive a visa under INA 212(a)(1) or (3), and that the ineligibility could be waived under INA 212(g) after marriage to the petitioner, the consular officer should return the K visa petition to the approving INS office for possible reaffirmation, explain to the applicant the need for a detailed medical report as covered in the Form I-601 instructions, assist the beneficiary in completing Form I-601, and in submitting the case to the USPHS. Detailed procedures are outlined in 22 CFR 40.7(a)(1-6) N6 and PN1. As soon as USPHS approves and returns the forms and the reaffirmed petition is received from INS, the consular officer should submit the waiver application Forms I-601 and OF-221 to the appropriate INS office abroad with a recommendation. No INS fee is required in such cases.

9 FAM 41.81 N9 Vaccination Requirements for K Visa Applicants

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

(See 9 FAM 41.108 Notes).

9 FAM 41.81 N10 Alternative Classification

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

The inclusion of INA 101(a)(15)(K) in the nonimmigrant classifications is not intended to prohibit an alien fiance(e) of a U.S. citizen from applying for and obtaining an immigrant visa or a nonimmigrant visa under another classification, if the alien can qualify for an alternative classification. For example, an alien proceeding to the United States to marry a U.S. citizen may be classified B-2, if it is established that following the marriage the alien will depart from the United States. [See *9 FAM* 41.31 N*11*.1.]

9 FAM 41.81 N11 Child of Alien K-1 Fiance(e) Following To Join

(TL:VISA-2 8-30-87)

INS and the Department have agreed that the child of a K-1 principal alien may be accorded K-2 status if following to join the principal alien in the United States even after the principal alien has married the American citizen fiance(e), and acquired lawful permanent resident status. However, the cutoff date for issuance of a K-2 visa is 1 year from the date of the issuance of the K-1 visa to the principal alien. After 1 year, and provided that the alien qualifies, the filing of an immediate relative or second preference petition would be required.