

FAMILY IMMIGRATION LAW

Introduction

Immigration to the United States organize around two factors: family relationship or employment. The rules surrounding family immigration law are quire complex, but follow basic organizing principles.

- I. **Family Immigration Law.** Only family members can apply for other family members to enter the United States (outside of the employment relationship). Further, these family members must be either in a vertical or horizontal relationship, and separated by only a single generation. The two criteria the Immigration Service will examine are:
 1. The legal status of the petitioner/sponsor
 2. The petitioner's relationship to the alien beneficiary family member
- II. **Legal Status of Petitioner:** The petitioner must either be a United States citizen or a legal permanent resident. The United States citizen is a person who has been born in the United States, has been born to United States citizen parents abroad, or has naturalized their status to United States citizenship after immigration to the United States. To become a naturalized citizen, the person must first have been a permanent legal resident.
- III. **Permanent Legal Resident.** A person who was born in another country and not a citizen of the United States and who is now legally authorized to work and reside permanently in the United States. An alien may become a legal permanent resident in various ways, including through employment and through family relationship. Some other ways an alien may become a permanent legal resident (LPR) is through asylum, refugee, Violence Against Women Act (VAWA), special immigrant juvenile, or cancellation of removal. There are also other seldom used provisions of law which allow a person to become a legal resident, such as service in the United States military during time of war (INA § 329).
- IV. A citizen may apply for the following persons: spouse, children, adult children over 21, adult children who are married, parents, and siblings.
- V. A legal permanent resident can file for the following persons: spouse and children, and sons and daughters who are unmarried and over 21 years old.
- VI. **Immediate relatives:** Certain persons a U.S. citizen can apply for are considered "immediate relatives". Immediate relatives are those persons for whom an immigrant visa is immediately available. The following relatives of a U.S. citizen are "immediate relatives": parents, spouse, and unmarried children under 21, and parents if the U.S. citizen is over 21.

VII. **Priority relatives:** The United States immigration system is based on a system of quotas. Each country in the world is assigned a certain number of allowable immigrant visas, up to the quota of approximately one quarter of a million immigrant visas a year. Immediate relatives are not considered preference or quota relatives. Accordingly, any immediate relatives who enter the United States do not count against the quarter million quota cap on immigrant visas.

The United States Department of State publishes a Visa Bulletin each month. This Visa Bulletin contains the current “priority dates” for preference or quota relatives. It can be found at the State Department website at [travel/state.gov](http://travel.state.gov).

The family preference quota system is divided into four family preference levels or categories, as follows:

1. 1st preference: unmarried children over 21 of U.S. citizen
2. 2A preference: spouse and unmarried children under 21 of legal permanent resident
3. 2B preference: unmarried children over 21 of legal permanent resident
4. 3rd preference: married children of U.S. citizen
5. 4th preference: brothers and sisters of U.S. citizen, provided U.S. citizen is over 21

VIII. **Priority Date:** The immigration process is started by filing the I-130 Petition for Alien Relative. The date on which the I-130 petition is filed sets the “priority date” for the immigrant visa. Because of the quota system allowing only approximately a quarter million immigrant visas under the family preference table per year, there is a backlog of several million immigrant visas waiting to be processed. The immigrant visas are processed in order of their “priority dates”. For example, a brother or sister of a United States citizen who had their immigrant visa petition filed in 1992 will only be eligible to begin the immigration process for the actual visa in 2005. There is a waiting period of approximately thirteen years at the present time in general for the fourth family preference level. The other family preference levels are backlogged in varying degrees as well. The “priority date” is the method to hold each prospective immigrant alien visa petition in line for the immigrant visa process. Accordingly, the sooner the immigrant visa petition is filed, the sooner the person will be eligible to actually immigrate to the United States. This process is only applicable to persons filing under the family preference table. Immediate relatives do not have this restriction, as they are “immediately eligible” for an immigrant visa.

IX. **Derivative Relatives:** Derivative relatives are those relatives of the alien immigrant who are following to immigrate under the principle alien’s immigrant visa petition. Derivative relatives are only the spouse and unmarried children under 21 of the principle alien of one of the family preference categories. There are no “derivative relatives” of an immediate relative. This often results in the anomaly of an immediate relative parent of a U.S. citizen over 21 not being able to immigrate with their young child, who would be the younger sibling of the U.S. citizen petition. The sibling would have to immigrate under the fourth preference level, which currently has a waiting period of approximately

thirteen years or more. This may result in the immediate relative alien parent deciding to remain in the home country until the younger child is old enough to care for themselves, thereby foregoing the immigration process for the immediate future.

- X. **Derivative Citizenship:** An unmarried child under 18 automatically derives citizenship through the alien parent when the parent becomes a United States citizen, provided the child is in the legal custody of the alien parent at the time the parent receives citizenship, the child is in the United States at the time, and the child has obtained legal permanent resident status. For some children, acquisition of both legal permanent resident status and derivative citizenship can occur at the same moment, when the child becomes a legal permanent resident, as derivative citizenship happens automatically by operation of law.

- XI. **Acquisition of Citizenship:** A U.S. citizen may transmit citizenship to his/her child, even though the child is born outside the United States. The laws surrounding acquisition of citizenship are extremely complicated, and are based on the date the child was born; the citizenship status of either the mother or the father; the residency of the U.S. citizen parent prior to the child's birth, as well as prior to or subsequent to the parent's either fourteenth or eighteenth birth date; the legitimacy of the birth of the child and whether the parents were married; as well as other factors. Again, derivation of citizenship happens automatically by operation of law. However, it is often extremely difficult to actually prove derivative citizenship, due to lack of records, or death of one or both parents prior to making the claim of citizenship by the child.

- XII. **Sham Marriages:** Both United States citizens and legal permanent residents can apply to immigrate their alien spouses. The spouse of a U.S. citizen is immediately eligible to obtain an immigrant visa and be admitted to the United States. The LPR spouse must wait until the priority date becomes current before being eligible to immigrate to the United States.

The primary legal points the Immigration Service and the U.S. consular official will review is the status of the petitioner and relationship to the alien beneficiary. Immigration through marriage is scrutinized very carefully, as there is a fairly large amount of fraudulent or "sham" marriages. In these marriages, an alien or an alien trafficker arranges for a United States citizen or legal permanent resident to apply for an immigrant visa on behalf of the alien spouse. However, there is no intent to form a true marriage. Rather, the alien is attempting to circumvent the immigration process in order to come to the United States, usually for economic reasons.

The Immigration Service investigates the possibility of sham marriages quite vigorously. Separate interviews may be conducted of each spouse, often in separate rooms. The interviews are often videotaped, and can be later used as evidence in a federal criminal prosecution. The interviews are done under oath, so either the alien or the U.S. citizen or LPR petition may also be charged with perjury if a fraudulent or sham marriage is discovered. Some of the more frequent telltale signs of fraudulent marriage includes: great disparity between the spouses' age or education, history of drug abuse or criminal activity by U.S. citizen spouse, spouses living at

separate addresses, tips from spouses in alien's home country re possible fraudulent marriage to U.S. citizen.

- XIII. **Marriages While Alien Is in Deportation Proceedings:** There is a presumption of fraudulent marriage if the marriage itself occurs while the alien is in deportation proceedings. However, this presumption can be overcome by clear evidence of a bona fide marriage. Such evidence can include a showing that the spouses had a relationship prior to deportation proceedings starting, birth of a child together, inclusion on insurance policies or bank accounts, and other similar evidence.
- XIV. **Conditional Residency:** If the spouses are married less than two years at the time the immigrant alien actually obtains their permanent residency, the immigrant alien will receive a two year conditional residency card. The alien must file a new petition to become a full legal resident and remove the conditions on status within ninety days prior to the expiration of the two years. Failure to do so automatically results in revocation of permanent resident status. This petition must be signed by both spouses jointly. The Immigration Service will review the petition and supporting evidence to determine if the marriage may be fraudulent. If a fraudulent marriage is suspected, an interview with the spouses will be scheduled at the local immigration office, and a more thorough investigation will be conducted. This investigation can result in criminal charges and/or deportation if the marriage is discovered to be fraudulent.
- XV. **Step Children.** Children of the principle alien spouse, who are step children of either the U.S. citizen or LPR parent, can immigrate with the alien spouse parent, provided the children are unmarried and were under eighteen years old at the time of their parent's marriage to the U.S. citizen or LPR step parent. Step children may apply for their brothers and sisters and natural parents once they become U.S. citizens over 21 years old.
- XVI. **Adopted Children:** Children who are adopted by United States citizens may immigrate to the United States through their adoptive U.S. citizen parent provided the adoption occurred prior to the child's sixteenth birthday, and the child resided in the legal custody of the U.S. citizen for at least two years prior to immigration. If the adoption occurred in the United States, the child must have entered the United States legally, the adoption must still have occurred prior to the child's sixteenth birthday, and the child must have resided in the legal custody of the U.S. citizen parent at least two years prior to filing the petition. This rule also applies to permanent legal residents, although the adoptive child will be under the family preference table.
- XVII. **Orphan Adoptions:** United States citizens may immigrate orphans from other countries. The child must be under the age of sixteen at the time the adoption is completed, although a child under the age of eighteen may be included if a younger brother or sister is also being adopted at the same time. There must be a finding by the foreign court or appropriate agency that the parents are deceased, or the child has been abandoned irrevocably by the parents to the orphanage or other government or similar agency. The U.S. citizen adopting parents must comply with all aspects of the foreign country's

adoption requirements. If the country does not have said adoption requirements, there may be common law or customary adoptions which will be recognized by the Immigration Service. An adoption home study is required, and the U.S. citizen adoptive parents must be approved by the Immigration Service for adoption, meeting essentially the same requirements as for adoption within the United States. Additionally, if the child will have a final adoption in the state of residence of the adoptive parents, the adoptive parents must meet all the state adoption requirements as well. If the full and final adoption is occurring in the foreign home country of the orphan child, then only immigration adoption requirements must be met, unless the home state of the U.S. citizen adoptive parents have further requirements.

- XVIII. **Divorce:** If the U.S. citizen or LPR spouse is divorced from the alien spouse prior to the alien spouse becoming a permanent legal resident, the immigration petition is automatically revoked by operation of law. Any unmarried children under 21 of the spouse of a legal permanent resident will be affected in the same manner as the alien spouse after a divorce, including the VAWA provisions.
- XIX. **VAWA:** The only exception to this is under the Violence Against Women Act (VAWA), whereby the alien spouse can self-petition for immigration benefits, provided the self-petition is filed within two years of the divorce. There must be a showing of domestic physical abuse or mental cruelty against the alien spouse by the U.S. citizen or LPR spouse. Under VAWA, the spouse of a U.S. citizen is still considered to be an immediate relative, while the spouse of an LPR is under the family preference table level 2B. Any unmarried children under 21 of the spouse of a legal permanent resident will be affected in the same manner as the alien spouse after a divorce, including the VAWA provisions. Essentially, under VAWA, the battered stands in the place of the U.S. citizen or LPR abusive spouse.
- XX. **Questioning and Investigations:** Aliens are protected by the Due Process Clause of the Fifth Amendment, just as citizens of the United States. They do have the right to remain silent. Further, if they request to speak to an attorney, all conversation with the alien by law enforcement or immigration officials must cease.
- XXI. **Crimes:** Any criminal activity by aliens has extremely severe immigration consequences. There is little consideration given to the United States citizen or legal permanent resident children or spouse of the alien who has a conviction for certain offenses. Criminal immigration law and deportation is extremely complex. If an attorney is presenting an alien with criminal convictions, that attorney should promptly contact an experienced immigration attorney.
- XXII. There is a tremendous need for competent immigration attorneys in Iowa and the upper Midwest. Immigration law is extremely complex, and requires both a significant depth of knowledge and discriminating thought. A week-long intensive immigration law seminar on the basics of immigration practice and procedure is taught by Attorney Benzoni on an

annual basis. The next seminar is being held the week of May 22-26, 2006, in Des Moines. If you are interested in attending, or have general immigration law questions, please contact Attorney James Benzoni at 515-271-5730, or click on his website at BenzoniLaw.com. There is also fairly extensive outline and discussion of criminal immigration law issues affecting aliens in Iowa on his website. You may also contact him by e-mail at Justice@BenzoniLaw.com.