

9 FAM 42.31 NOTES

(CT:VISA-1085; 10-20-2008)
(Office of Origin: CA/VO/L/R)

9 FAM 42.31 N1 ENTITLEMENT TO CLASSIFICATION UNDER INA 203(A)

(CT:VISA-1085; 10-20-2008)

- a. A U.S. citizen or a permanent resident alien may file a petition under INA 203(a) on behalf of a family member if the alien meets one of the relationships listed below:
- (1) **First Preference:** Unmarried sons and daughters of U.S. citizens;
 - (2) **Second Preference:** Spouses and unmarried sons and daughters of permanent resident aliens;
 - (3) **Third Preference:** Married sons and daughters of U.S. citizens; and
 - (4) **Fourth Preference:** Brothers and sisters of U.S. citizens.
- b. The alien must be the beneficiary of a *Department of Homeland Security (DHS)*-approved petition and must meet all other requirements for the issuance of an immigrant visa *(IV)*.

9 FAM 42.31 N2 DERIVATIVE STATUS FOR SPOUSE AND CHILD(REN)

(TL:VISA-192; 05-14-1999)

The spouse and unmarried children of an alien beneficiary are entitled to the same preference status, and the same priority date, as the principal alien.

9 FAM 42.31 N2.1 Offspring of Derivative Child

(CT: VISA-785; 12-02-2005)

A "derivative" beneficiary of an approved immigrant visa (IV) petition cannot bestow upon someone else the immigration status they, themselves, have "derived" from the "principal beneficiary." For example, if a permanent resident files a second preference petition for his wife, once the petition is

approved, she becomes the "principal beneficiary" of the status accorded by the petition. Any children (as defined by INA 101(a)(47)(b)) of the "principal beneficiary" (the wife) would "derive" from their mother the same immigration status that she has been granted. However, the law does not provide an avenue for "derivative beneficiaries" to pass their "derived" immigration status on to any children of their own (or to anyone else for that matter). Under such circumstances, however, the petitioner could elect to file a separate petition for any of his children who have children of their own. With a separately approved petition, the petitioner's child would then become the "principal beneficiary" of the petition and, accordingly, the beneficiary's children would qualify for "derivative" immigration status through the "principal beneficiary" parent.

9 FAM 42.31 N2.2 Filing Petitions for Derivative Aliens

(CT:VISA-1085; 10-20-2008)

Careful attention should be paid to cases where a "derivative" beneficiary's immigration status is likely to change. For instance, when a child turns 21, he or she is no longer considered a "child" under the INA. *The Child Status Protection Act (CSPA) may protect the derivative from "aging out" and losing the ability to derive status from the "principal beneficiary" of the petition. (See 9 FAM 42.42 for guidance on CSPA calculations.)* Likewise, if the petitioner intends to become a U.S. citizen before his wife and children have immigrated to the United States, he should file separate immigrant visa (IV) petitions for any children who are currently "deriving" their immigration status through the mother. That way, when the petitioner is naturalized, the petition according second preference status to his wife, as well as those petitions according second preference status to any children, will be converted automatically to accord the family "immediate relative" status. If, however, the petitioner does not file separate petitions for his children before his naturalization, the children will lose their "derivative" status upon the father's naturalization. The father will then have to file new petitions on their behalf to accord them "immediate relative" immigrant status.

9 FAM 42.31 N3 DEFINING "SON," "DAUGHTER," "SPOUSE," "CHILD," "BROTHER," AND "SISTER"

(CT:VISA-1085; 10-20-2008)

See 9 FAM 40.1 *Related Statutory Provisions* and 9 FAM 40.1 Notes for definitions or descriptions of terms.

9 FAM 42.31 N4 AUTOMATIC CONVERSION OF PETITIONS

9 FAM 42.31 N4.1 Immediate Relative Converts to First or Third Preference

(TL:VISA-49; 10-30-1991)

If the child of a U.S. citizen is the beneficiary of an immediate relative petition, the petition automatically converts to a first preference petition if the child reaches the age of 21 and remains unmarried. If the child should marry, the immediate relative petition converts to third preference petition. The priority date of the first preference petition is the filing date of the immediate relative petition.

9 FAM 42.31 N4.2 First Preference Converts to Third Preference

(CT: VISA-785; 12-02-2005)

If the unmarried son or daughter of a U.S. citizen marries before the visa is issued, the beneficiary's first preference petition automatically converts to a family third preference petition. Any child(ren) of the beneficiary would then be entitled to derivative third preference status. The priority remains the same.

9 FAM 42.31 N4.3 Second Preference Converts to Immediate Relative

(CT:VISA-1085; 10-20-2008)

A second preference petition for the spouse of a lawful permanent resident (*LPR*) automatically converts to an immediate relative petition if the petitioner becomes a U.S. citizen. However, derivative second preference status for the beneficiary's child(ren) does not convert, since there is no derivative status for immediate relative petitions. The petitioner must file a separate petition for the child, if the child meets the definition of "child" as defined in 9 FAM 40.1 N2. The priority remains the same.

9 FAM 42.31 N4.4 Second Preference Converts to First Preference

(TL:VISA-49; 10-30-1991)

A second preference petition for the unmarried son or daughter of a lawful

permanent resident automatically converts to a first preference petition if the petitioner becomes a U.S. citizen. The accompanying or following-to-join child(ren) would also be entitled to derivative first preference status. The priority remains the same.

9 FAM 42.31 N4.5 Third Preference Converts to First Preference

(TL:VISA-49; 10-30-1991)

- a. A third preference petition approved for a married son or daughter of a U.S. citizen who has since become widowed or divorced automatically converts to accord first preference status (or immediate relative status if the beneficiary is under the age of 21). If the petition converts to first preference, the accompanying or following-to-join child(ren) may be granted derivative first preference status. The priority remains the same.
- b. There is no derivative status for the child(ren), if the beneficiary becomes entitled to immediate relative status

9 FAM 42.31 N5 SECOND PREFERENCE PETITIONER RESIDING ABROAD

9 FAM 42.31 N5.1 Second Preference Petition Filed Abroad by Returning Resident Alien

(CT:VISA-1085; 10-20-2008)

An alien who qualifies as a special immigrant returning resident under the terms of INA 101(a)(27)(A) is by definition an alien "lawfully admitted for permanent residence." The alien may be considered to have the same status under the identical language of INA 203(a)(2). Therefore, an alien issued a special immigrant visa (IV) as a returning permanent resident, an alien returning with a valid reentry permit, or an alien holding *a Form I-551, Alien Registration Receipt Card (Machine-Readable) (Green Card)*, may file a petition while abroad for a spouse or an unmarried son or daughter.

9 FAM 42.31 N5.2 When Legal Permanent Resident (LPR) Status is Doubtful

(CT:VISA-1085; 10-20-2008)

INA 101(a)(20) reads as follows:

The term "lawfully admitted for permanent residence" means the status of

having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. If a consular officer has reason to believe the petitioner may no longer be entitled to permanent resident status, the consular officer shall return the petition to the appropriate DHS office pursuant to 9 FAM 42.43(a)(1) Regs/Statutes. If the petitioner has filed a petition abroad, the consular officer should forward the petition for DHS adjudication as a case "not clearly approvable." (See 9 FAM 42.41 N4.2-3.)

9 FAM 42.31 N6 NEW PETITION APPROVAL EQUIVALENT TO REVALIDATION IF FILED BY SAME PETITIONER ON BEHALF OF SAME BENEFICIARY

(CT:VISA-1085; 10-20-2008)

See 9 FAM 42.43 N10.1.

9 FAM 42.31 N7 STATEMENT SIGNED BY ALIEN ISSUED VISA AS UNMARRIED SON OR DAUGHTER

(TL:VISA-3; 8-30-1987)

See 9 FAM 42.72 PN1.

9 FAM 42.31 N8 FAMILY-SPONSORED PREFERENCE PETITION IN CASES OF MARRIAGE BETWEEN RELATIVES

(TL:VISA-49; 10-30-1991)

See 9 FAM 42.21 N8.

9 FAM 42.31 N9 SPECIAL PETITION PROCEDURES FOR U.S. CITIZENS AND RESIDENT ALIENS ABROAD

(TL:VISA-3; 08-30-1987)

See 9 FAM 42.41 N4.2-2.

9 FAM 42.31 N10 SPOUSE, CHILD, SON, OR DAUGHTER OF LPR KILLED IN SEPTEMBER 11, 2001 TERRORIST ATTACKS

(CT: VISA-785; 12-02-2005)

The spouse, child, son, or daughter of an alien killed in a September 11, 2001 terrorist attack, may self-petition for status using the Form I-130, Petition for Alien Relative. They will be processed as if the petitioner had not been killed in the attack. The beneficiary must demonstrate that he or she was present in the United States on September 11, 2001, that the spouse or parent had legal permanent resident (LPR) status on September 11, 2001, and that the spouse or parent was killed as a direct result of the terrorist attacks.