

## **9 FAM 42.41 NOTES**

*(CT:VISA-1039; 09-26-2008)  
(Office of Origin: CA/VO/L/R)*

### **9 FAM 42.41 N1 ESTABLISHING RELATIONSHIP BETWEEN PETITIONER AND ALIEN BENEFICIARY**

*(CT:VISA-1039; 09-26-2008)*

The approval of a petition under INA 204 (8 U.S.C. 1154) is considered to establish prima facie entitlement to status. The validity of the relationship between the petitioner and the alien beneficiary, familial or employer and/or employee, is presumed to exist. Unless *you have* specific, substantial evidence of either misrepresentation in the petition process or *have* facts unknown to Department of Homeland Security (DHS) at the time of approval, *you* generally would have no reason to return the petition to DHS. (See 9 FAM 42.43 Related Statutory Provisions.)

#### **9 FAM 42.41 N1.1 Classification as Immediate Relative, Orphan, Amerasian or Widow(er)**

*(TL:VISA-333; 11-15-2001)*

For additional information on classification as an immediate relative under INA 201(b)(2)(A)(i), an orphan as defined in INA 101(b)(1)(F), a widow or widower of a U.S. citizen eligible under INA 201(b)(2)(A)(i), or an Amerasian eligible under Public Law 97-359. (See 9 FAM 42.21 Related Statutory Provision and 9 FAM 42.21 Notes.)

#### **9 FAM 42.41 N1.2 Classification as Family- Preference Immigrant**

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

For information on classification as a family-preference immigrant under INA 203(a)(1)-(4), (see 9 FAM 42.31 Related Statutory Provisions and 9 FAM 42.31 Notes.)

#### **9 FAM 42.41 N1.3 Classification as Employment-**

## **Preference Immigrant**

*(CT:VISA-881; 05-09-2007)*

For additional information on classification as an employment-based preference immigrant under INA 203(b)(1) through (4), (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) Related Statutory Provisions; 9 FAM 42.32(a) Notes; 9 FAM 42.32(b) Notes; 9 FAM 42.32(c) Notes; and 9 FAM 42.32(d) Notes.)

## **9 FAM 42.41 N1.4 Classification as Employee of U.S. Government Abroad**

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

For additional information on classification as a U.S. Government employee as described in INA 101(a)(27)(D), (see 9 FAM 42.32(d)(2) Related Statutory Provisions and 9 FAM 42.32(d)(2) Notes.)

## **9 FAM 42.41 N1.5 Classification as Alien Entrepreneur**

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

For additional information on classification as an immigrant entrepreneur under INA 203(b)(5), (see 9 FAM 42.32(e) Related Statutory Provisions and see 9 FAM 42.32(e) Notes.)

## **9 FAM 42.41 N2 IMPORTANCE OF FILING PETITIONS FOR PREFERENCE STATUS**

*(CT:VISA-1039; 09-26-2008)*

Immigrant visa applicants compete on a “first-come, first-served” basis for the visa numbers available. Since the filing date of an approved petition may establish the priority of certain preference applicants, *you* should encourage the filing of a petition on behalf of any alien eligible for preference status, and should not discourage the filing of a petition because the preference category or foreign state limitation is oversubscribed.

## **9 FAM 42.41 N3 PETITION FORMS**

*(CT:VISA-1039; 09-26-2008)*

a. Form I-130, Petition for Alien Relative, is used to classify the following as

immediate relatives under INA 201(b) (8 U.S.C. 1151(b)) or as family preference immigrants under INA 203(a)(1), (2), (3) or (4):

- (1) Spouse of a U.S. citizen;
  - (2) Child of a U.S. citizen;
  - (3) Parent of an adult (over age 21) U.S. citizen;
  - (4) Unmarried son or daughter of a U.S. citizen;
  - (5) Spouse, child, son, or daughter of a permanent resident alien;
  - (6) Married son or daughter of a U.S. citizen; and
  - (7) Brother or sister of an adult (over age 21) U.S. citizen.
- b. Form I-600, Petition to Classify Orphan as an Immediate Relative, is used to classify the following as an immediate relative under INA 201(b):
- (1) Child to be adopted in the United States by a U.S. citizen; and
  - (2) Orphan adopted overseas by a U.S. citizen.
- c. *Form I-800, Petition to Classify Convention Adoptee as an Immediate Relative, is used to classify a Child in Hague Convention Country to be adopted in the United States by a U.S. citizen as an immediate relative under INA 201 (b) (see 9 FAM 42.21 N 14).*
- d. Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, is used to classify the following as an immediate relative under Public Law 97-359 or under INA 201(b), or as a special immigrant under INA 203(b)(4) (8 U.S.C. 1153(b)(4)):
- (1) Amerasian child, son, or daughter of a U.S. citizen eligible under Public Law 97-359 (see 9 FAM 42.24 Related Statutory Provisions);
  - (2) Widow(er) of a U.S. citizen;
  - (3) Special immigrant under INA 203(b)(4); and
  - (4) Spouse or child of abusive citizen or legal permanent resident (see 9 FAM 42.42 N3.2).
- e. Form I-140, Immigrant Petition for Alien Worker, is used to classify an alien as a preference immigrant under INA 203(b)(1), (2) or (3) (see 9 FAM 42.32(c) Notes):
- (1) Priority workers;
  - (2) Professional holding advanced degree or person of exceptional ability; and
  - (3) Skilled worker; professional or other worker.
- f. Form DS-1884, Petition to Classify Special Immigrant Under INA 203(b)(4) as an Employee or Former Employee of the U.S. Government

Abroad, is used to classify an alien for status as a special immigrant as described in INA 101(a)(27)(D) (8 U.S.C. 1101(a)(27)(D)). (See 9 FAM 42.32(d)(2) Notes.)

- g.* Form I-526, Immigrant Petition by Alien Entrepreneur, is used to classify an alien as a preference immigrant under INA 203(b)(5). (See 9 FAM 42.32(e) Notes.)
- h.* No petition is required for the following aliens:
  - (1) Returning residents classified under INA 101(a)(27)(A) (see 9 FAM 42.22 Notes);
  - (2) Certain former U.S. citizens classified under INA 101(a)(27)(B) (see also 9 FAM 42.23 Related Statutory Provisions); and
  - (3) Amerasians eligible under *section* 584(b)(1)(A) of Public Law 100-202 as amended by Public Law 101-167 and Public Law 101-513. (See 9 FAM 42.24 Related Statutory Provisions.)

## **9 FAM 42.41 N4 FILING PETITIONS**

### **9 FAM 42.41 N4.1 Proper Filing**

*(CT:VISA-1039; 09-26-2008)*

A properly filed petition must be:

- (1) Signed by the *petitioner*; and
- (2) Accompanied by the appropriate Department of Homeland Security (DHS) fee. (See 8 CFR 103.7.)

### **9 FAM 42.41 N4.2 Executing Visa Petitions**

#### **9 FAM 42.41 N4.2-1 Petitions Executed in the United States**

*(CT:VISA-1039; 09-26-2008)*

- a. Petition Form I-130, Petition for Alien Relative, Form I-140, Immigrant Petition for Alien Worker, and Form I-526, Immigrant Petition by Alien Entrepreneur, are executed in single copy. A separate petition and fee are required for each beneficiary. Petitioners should file petitions with the Regional Service Center having jurisdiction over their place of residence. Separate petitions are not required for spouses and children entitled to derivative preference status under INA 203(d) (8 U.S.C. 1153(d)). For all petitions received at the U.S. Citizenship and Immigration Services offices both in the United States and overseas, the petitions bear a USCIS

receipt number. USCIS maintains records of the approval of each petition by beneficiary or receipt number. Upon approval, USCIS will forward the petition by first-class U.S. mail or express delivery service to the National Visa Center (NVC). However, when the petition is filed in conjunction with the application for adjustment of status, the petition may be filed with the USCIS district office having jurisdiction over the beneficiary's place of residence.

- b. Petition Form I-600, Petition to Classify Orphan as an Immediate Relative, is executed in single copy. The fee paid by the prospective adopting parents for the Form I-600-A, Application for Advanced Processing of Orphan Petition, covers the application for the first child and applications for any siblings. A separate fee is required for petitions filed for unrelated children up to the number authorized by the Form I-600-A approval. Petitioners may file the Form I-600 at the USCIS field office having jurisdiction over their place of residence or at the immigrant visa-issuing post (or USCIS office abroad) having jurisdiction over the child.
- c. *Petition Form I-800, Petition to Classify Convention Adoptee as an Immediate Relative, is executed in single copy. The fee paid by the prospective adopting parents for the Form I-800-A, covers the application for the first child and applications for any siblings. A separate fee is required for petitions filed for unrelated children up to the number authorized by the Form I-800-A approval. Form I-800-A supplement 1 must also be provided for each adult member of the household, excluding the applicant and applicant's spouse. Petitioner must always file Form I-800 with the USCIS National Benefits Center. A prospective adoptive applicant residing outside the United States should generally file Form I-800-A with the USCIS office abroad having jurisdiction over the applicant's place of foreign residence or with the USCIS office in the United States with jurisdiction over the proposed place of the child's residence in the United States.*

## **9 FAM 42.41 N4.2-2 Petitions Executed by U.S. Citizenship & Immigration Services (USCIS) Abroad**

*(CT:VISA-881; 05-09-2007)*

- a. USCIS officers abroad are authorized to approve Form I-130, Petition for Alien Relative, for immediate relative status, if the petitioner is a resident of the country where the USCIS office is located. Petitioners who are not residents must file petitions with the Domestic Service Center which has jurisdiction over their place of residence. If a USCIS office is located in a country with consulates and if that USCIS office will accept petitions by mail, the petitioner may pay the Form I-130 filing fees at a consulate. The petitioner should forward the petition, fee receipt, and required documentation directly to the overseas USCIS office in his country of

residence.

- b. USCIS officers abroad are authorized to adjudicate Form I-600, Petition to Classify Orphan as an Immediate Relative, overseas regardless of whether the United States citizen petitioner is a resident of the country where the USCIS office is located provided certain conditions are met.
- c. USCIS officers abroad may approve Form I-360, Petition for Amerasian, Widower(er), or Special Immigrant, if the alien is a resident of that country.
- d. For a current list of USCIS offices abroad and their respective areas of adjudication, see the USCIS Web site. USCIS may accept and adjudicate a petition for a petitioner not resident abroad if it is in the national interest or it is established that humanitarian or emergent circumstances exist.

## **9 FAM 42.41 N4.2-3 Consular Officers Authorized to Approve Certain Petitions**

*(CT:VISA-1039; 09-26-2008)*

- a. Under a longstanding agreement, DHS authorized consular officers assigned to countries where no USCIS officer is stationed to approve the following kinds of petitions if they are "clearly approvable," and if one of the conditions listed in section (c) below, is met. Whenever petitions are adjudicated under this authority, the petitioner and the visa applicant must be physically present in the district and the beneficiary must be likely to be able to remain in the country for the time it normally takes to process the visa. The beneficiary need not be a resident of the consular district.
- b. The only petitions covered are:
  - (1) Form I-130, Petition for Alien Relative;
  - (2) Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, when filed by a widow or widower; and
  - (3) Form I-600, Petition to Classify Orphan as an Immediate Relative, when accompanied by an approved Form I-600-A, Application for Advance Processing of Orphan Petition to accord immediate relative status under INA 201(b) or family preference status under INA 203(a).
- c. The only conditions under which petitions may be filed at post are:
  - (1) The petitioner is a resident of the consular district. *The petitioner must have maintained continuous residency in the consular district a minimum of the preceding six months in order to demonstrate residency.* You may accept Form I-130 petitions from U.S. citizens

- who reside in your jurisdiction and have done so for the previous six months. U.S. citizens whose principal residence is not in the consular district, and/or who have entered the consular district as a temporary visitor/student/or with limited leave to enter and remain must file the petition with the appropriate USCIS service center in the United States. You may accept Form I-360 petitions from widows and widowers of American citizens if these self-petitioners reside in the consular district. You must require appropriate evidence that the petitioner has permission to reside in the consular district or, if he/she is a member of the U.S. military stationed in the country, a copy of the petitioner's orders; or
- (2) Acting on the petition is in the national interest; or
  - (3) An emergent or humanitarian situation exists, consistent with 9 FAM 42.41 N4.2-5 below.
- d. If a petitioner has met one of the requirements in paragraph c above, and you conclude after reviewing the petition that it is not "clearly approvable," you are not authorized to deny the petition. Instead, forward the petition, with all supporting documents, to the appropriate USCIS office with jurisdiction over that location. (See 9 FAM Appendix N, 201 c.)
- e. Adam Walsh Act eligibility to file requirement in Form I-130 cases:
- (1) In a Form I-130 case that satisfies the criteria in 9 FAM 42.41 N4.2-3 c, above, you may not approve a petition until USCIS has conducted a background check to determine whether the petitioner has been convicted of a sexual or kidnapping criminal offense against a minor specified in 42 U.S.C. 16911(7), section 111 of the Adam Walsh Child Protection and Safety Act of 2006 ("Adam Walsh Act"), Public Law 109-248. Otherwise, the Form I-130 is not clearly approvable. (See 9 FAM 42.41 N4 and 9 FAM 42.41 PN5.) The Adam Walsh Act was made effective on July 27, 2006.
  - (2) Under INA 204(a)(1)(A)(viii) or 204(a)(1)(B)(i), a petitioner is not eligible to file such a petition if convicted of such an offense without a determination by the Secretary of Homeland Security, in his sole and unreviewable discretion, that the petitioner poses no risk to the beneficiary. Because you do not have access to petitioners' criminal history records, which must be reviewed to establish eligibility to file, it is necessary for USCIS to conduct this review and report whether processing of the petition may proceed. Any petition approved by a consular officer on or after July 27, 2006 is not valid unless and until USCIS has performed an Adam Walsh check and confirmed that the petition is approvable. (See 9 FAM Appendix N, 201 c.)

## **9 FAM 42.41 N4.2-4 Marriage of Persons Under the Age of 18**

*(CT:VISA-1039; 09-26-2008)*

- a. Many states impose conditions such as a parental consent, a court order, and/or pregnancy before the state will recognize a marriage in which one or both intending spouses are under the age of 18. Where the consular officer is faced with determining the validity of such a marriage for consular approval of a petition, the case must be considered "not clearly approvable" and submitted to Department of Homeland Security (DHS) for approval. (See 9 FAM Appendix N 201 c.)
- b. In cases where the DHS has approved a petition involving such a marriage, and the consular officer questions its validity but does not believe it necessary to return the petition directly to DHS pursuant to 22 CFR and 9 FAM 42.43, the consular officer shall refer any questions concerning the validity of the petition to *the Office of Legislation, Regulations, and Advisory Opinions Division (CA/VO/L/A)* for an advisory opinion.
- c. See 9 FAM 40.41 N5.2 for the public charge aspects of an immigrant visa case where the petitioner is under age 18.

## **9 FAM 42.41 N4.2-5 Adjudicating National Interest, Emergent Or Humanitarian Cases**

*(CT:VISA-1039; 09-26-2008)*

- a. In emergent or humanitarian cases or in cases of national interest, you (as well as USCIS officers at overseas USCIS offices) may accept and adjudicate a petition filed by a petitioner who does not reside within your jurisdiction. Such cases should be quite rare and limited to true emergency circumstances such as a beneficiary who is a very young child who has unexpectedly lost his or her caretaker or military or U.S. Government employees facing transfer.
- b. You generally should not accept petitions in cases which neither the petitioner nor beneficiary is a resident in the consular district. If you believe that such a case qualifies for processing based on humanitarian, emergent, or national interest grounds, post should seek concurrence from *the Public Liaison Division (CA/VO/F/P)* before accepting the petition.

## **9 FAM 42.41 N4.2-6 Adjudicating Form I-600, Petition to Classify Orphan as an Immediate Relative**

*(CT:VISA-881; 05-09-2007)*

See 9 FAM 42.21 N12.

## **9 FAM 42.41 N5 PETITION VALIDITY**

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

Unless a petition has been automatically revoked under INA 203(g), a properly approved petition shall remain valid indefinitely provided the familial or employer and/or employee relationship exists.

## **9 FAM 42.41 N6 SUPPORTING DOCUMENTS AND FEES**

*(CT:VISA-1039; 09-26-2008)*

The supporting documents and fees required by Department of Homeland Security (DHS) in connection with the filing of a petition are given under the instructions portion of each petition. See 8 CFR 103.7 for a listing of DHS fees *and see [www.uscis.gov](http://www.uscis.gov) for additional information on supporting documents and fees.* Also see 9 FAM 42.21 N13.3-3 for discussion of documents required for Form I-600, Petition to Classify Orphan as an Immediate Relative.

## **9 FAM 42.41 N7 ESTABLISHING PETITIONER STATUS**

### **9 FAM 42.41 N7.1 Proof of U.S. Citizenship**

*(CT:VISA-1039; 09-26-2008)*

- a. Primary evidence that the petitioner is a naturalized U.S. citizen may consist of the following:
- (1) A birth certificate issued by a civil authority which establishes birth in the United States;
  - (2) A Certificate of Naturalization or Certificate of Citizenship;
  - (3) An unexpired U.S. passport issued initially for a full ten-year period to a petitioner over the age of 18 as a citizen of the United States (and not merely a noncitizen national);
  - (4) An unexpired U.S. passport issued initially for a full five-year period to a petitioner under the age of 18 as a citizen of the United States (and not merely a noncitizen national);

- (5) Department of State Form FS-240, Consular Report of Birth Abroad of a Citizen of the United States of America.
- b. If primary evidence is unavailable, the petitioner must present secondary evidence. This evidence must be evaluated for authenticity and credibility. Such evidence may include, but is not limited to, one or more of the following:
- (1) A baptismal certificate with the seal of the church, showing the date and place of birth in the United States and date of the baptism;
  - (2) Affidavits sworn to by persons who have personal knowledge and were present at the time naturalization took place;
  - (3) Early school records showing the date of admission to the school, the child's date and place of birth, and the name(s), date(s), and place(s) of birth of the parent(s); or
  - (4) Census records showing name, date and place of birth, or age.
- c. An approved Form I-600-A, Application for Advance Processing of Orphan Petition for an adoptive or prospective adoptive parent attests to **USCIS** determination that citizenship and age requirements have been met.

## **9 FAM 42.41 N7.1-1 U.S. Passport as Proof of Citizenship**

*(TL:VISA-621; 05-10-2004)*

A U.S. citizen petitioner abroad may establish U.S. citizenship by presentation of an unexpired U.S. passport issued initially for the full period of validity to the petitioner as a citizen of the United States, not as a non-citizen national. If the petitioner intends to mail the application to an DHS office, or is not carrying the passport when seeking to file the petition at a consular office, citizenship may be established by a statement by the consular officer that the petitioner has presented such a passport on some occasion or that post records show the petitioner to be a U.S. citizen who is the bearer of such a passport. This statement may be written on or attached to the Form I-130, Petition for Alien Relative, Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, or Form I-600, Petition to Classify Orphan as an Immediate Relative. If the petition is filed at a consular office and the consular officer is not fully satisfied that the petitioner is a U.S. citizen rather than a national, the petition should be considered "not clearly approvable". (See 9 FAM 42.41 N4.2-3.)

## **9 FAM 42.41 N7.1-2 U.S. Citizen in Armed Forces**

*(TL:VISA-333; 11-15-2001)*

If it is determined that it would cause unusual delay or hardship to obtain documentary proof of birth in the United States, a U. S. citizen petitioner

who is a member of the U.S. Armed Forces and who is serving outside the United States may submit a statement from the appropriate authority of the Armed Forces. The statement should attest to the fact that the personnel records of the Armed Forces show that the petitioner was born in the United States on a certain date (see 8 CFR 204.1(g)(2)(V)).

## **9 FAM 42.41 N7.2 Establishing Lawful Permanent Resident (LPR) Status**

*(CT:VISA-881; 05-09-2007)*

The Form I-551, Permanent Resident Card, or other proof given by DHS is evidence of status as a lawful permanent resident.

## **9 FAM 42.41 N7.3 Photocopies of Supporting Documents**

*(TL:VISA-621; 05-10-2004)*

- a. Department of Homeland Security (DHS) regulations require legible, true copies of original documents, including copies of naturalization certificates and Permanent Resident Cards which are acceptable if filing petitions with DHS adjudicators. A copy of a certified copy from a state bureau of vital statistics which is certified by a notary public is **NOT** acceptable unless accompanied by the copy containing the state seal.
- b. DHS has determined, however, that the authority delegated to consular officers to approve petitions will include only those cases in which the originals of the required supporting documents are submitted. All documentation submitted in support of visa petitions approved by consular officers must be original. If the petitioner submits copies of required supporting documents and is unwilling to submit the originals, the consular officer shall consider the petition "not clearly approvable" and refer the petition to DHS.

## **9 FAM 42.41 N8 PETITIONER AGE AND COMPETENCY**

*(CT:VISA-881; 05-09-2007)*

Under INA 201(b) (8 U.S.C. 1151(b)) a U.S. citizen petitioner must be at least 21 years of age to accord immediate relative status to an alien parent. Under INA 203(a)(4) (8 U.S.C. 1153(a)(4)) petitioners must be at least 21 years of age to accord family-sponsored fourth preference status to a brother or sister. Although it is unlikely that any person under age 14 will have reason to file a petition, it is possible that such a person could be a

“spouse” or “parent” and therefore be in a position to file a petition on behalf of their spouse or child. Should this occur, a parent, guardian, or other adult having a legitimate interest in a person who is under 14 years of age may file a petition on that person’s behalf, and the guardian of a mentally incompetent person may file a petition on that person’s behalf. (See also 9 FAM 42.41 N4.2-4 for marriage of persons under the age of 18.) The INA does not establish an age requirement for the petitioner for any of the other immigrant classifications.

## **9 FAM 42.41 N9 PETITION BASED ON PROXY MARRIAGE**

### **9 FAM 42.41 N9.1 Consummated Proxy Marriage**

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

If the consular officer is satisfied that the marriage has been consummated, he or she may proceed with processing the visa application based on the premise that a consummated proxy marriage relates back to the date of the proxy ceremony.

### **9 FAM 42.41 N9.2 Unconsummated Proxy Marriage**

*(TL:VISA-621; 05-10-2004)*

If the marriage has not been consummated, the consular officer shall return the petition to Department of Homeland Security (DHS). (See 9 FAM 42.43 N3 and 9 FAM 42.43 Procedural Notes.) If the marriage is subsequently consummated, and DHS approves a petition for the same preference classification, the new petition approval can be regarded as a reaffirmation of the validity of the original petition and the original priority date is retained.

## **9 FAM 42.41 N10 AUTOMATIC CONVERSION OF PETITIONS**

### **9 FAM 42.41 N10.1 Immediate Relative and Family-Based Petitions**

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

See 9 FAM 42.31 N1.

## **9 FAM 42.41 N10.2 Petitions Approved Prior to 1965 Amendments**

*(TL:VISA-351; 01-29-2002)*

Form I-130, Petition for Alien Relative, petitions approved in accordance with the Immigration and Nationality Act of 1952 prior to the 1965 amendments were automatically converted to the new preference or immediate relative status in 1965.

## **9 FAM 42.41 N10.3 Petitions Approved Prior to October 1, 1991**

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

- a. Family-sponsored petitions approved under the Immigration and Nationality Act prior to October 1, 1991, automatically convert to the corresponding new family preference category.
- b. Employment-based third and sixth preference petitions filed before October 1, 1991, automatically accord the new employment-based second and third preferences (E-2 and E-3), respectively. The following-to-join spouse or child of a third preference alien is accorded status in the new employment second preference. The following-to-join spouse or child of a sixth preference alien beneficiary issued a visa prior to October 1, 1991 is accorded the new employment third preference (E34 or E35) status. However, entitlement to status on the basis of these employment-based petitions shall not apply more than two years after the priority date has been reached for visa issuance. In compliance with 8 CFR 204.5(f), the Department has interpreted this provision in a prospective sense; i.e., two years from October 1, 1991, or two years from the date on which a visa number becomes available, whichever is later.

### **9 FAM 42.41 N10.3-1 Priority Dates Current on October 1, 1991 and Remained Current**

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

If the priority date of an old third or sixth preference petition approved prior to October 1, 1991 was current on that date, or subsequently became current, the Department has determined that conversion is no longer applicable and is considered to have expired on September 30, 1993, if:

- (1) The priority date has remained continuously current; and
- (2) The applicant did not execute an immigrant visa application before a consular officer on or before September 30, 1993.

## **9 FAM 42.41 N10.3-2 Priority Dates Current Subsequent to October 1, 1991**

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

An old third or sixth preference petition, for which the priority date became available subsequent to October 1, 1991, is considered to have expired on the second anniversary of the date on which the priority date was reached, if:

- (1) The priority date has been continuously available for the entire two year period; and
- (2) The beneficiary did not execute a visa application on or before the last day of such two-year period.

## **9 FAM 42.41 N10.3-3 Interpretation of "Notification That Visa is Immediately Available"**

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

For the purpose of administering 8 CFR 204.5(f) (see 9 FAM 42.41 Exhibit I), the Department has interpreted "notification that an immigrant visa is immediately available," to mean the monthly "Visa Bulletin" in which the beneficiary's priority date is first listed. The two-year clock will begin on the first day of the month following the publication of that "Visa Bulletin" unless the date should retrogress. To avoid the loss of the old priority date, the beneficiary must apply for an immigrant visa within the two-year period beginning on that date.

## **9 FAM 42.41 N10.3-4 Retrogression of Priority Date**

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

If the priority date of an old third or sixth preference petition retrogresses before the full two years have passed, the priority date will not be lost. In fact, a new two-year period will begin for that priority date when the date again becomes current.

## **9 FAM 42.41 N11 EFFECT OF MARRIAGE FRAUD AMENDMENTS ACT OF 1986, PUBLIC LAW 99-639**

*(CT:VISA-1039; 09-26-2008)*

- a. The Marriage Fraud Amendments Act of 1986 prohibits Department of Homeland Security (DHS) approval of petitions in certain instances where

the spouse of an alien obtained immigrant status on the basis of marriage which took place while administrative or judicial proceedings were pending. (See 9 FAM 42.42 *N12.2*.) If the petition is approved by DHS in error, consular officers shall return the petition to the DHS adjudicating office. If such a petition is presented to a consular officer for approval, the consular officer shall consider the petition "not clearly approvable" and shall forward the petition to DHS.

- b. The Immigration Act of 1990, however, provides for an exemption if the petitioner provides clear and convincing evidence that:
  - (1) The marriage was entered into in good faith and in accordance with the laws of the place where the marriage took place;
  - (2) The marriage was not entered into for the purpose of procuring the alien's entry as an immigrant; and
  - (3) No fee or other consideration was given for the filing of the petition.

## **9 FAM 42.41 N12 PETITIONS WHERE DEPARTMENT OF HOMELAND SECURITY (DHS) MEMORANDUM IS ATTACHED**

*(CT:VISA-1039; 09-26-2008)*

- a. In rare instances, the consular officer may receive a petition from Department of Homeland Security (DHS) accompanied by a memorandum containing information which may relate to the alien's entitlement to status or visa eligibility. In those instances, where the information relates to a minor question of fact which the consular officer is able to resolve in the alien's favor, the consular officer shall endorse the memorandum with a brief statement indicating why the visa was issued. The memorandum shall be placed in an envelope, along with the petition, which shall be attached to the sealed envelope for the visa.
- b. If the consular officer determines that the alien is clearly not entitled to status, the consular officer shall return the petition to the DHS adjudicating office in accordance with the instructions in 9 FAM 42.43 N3.
- c. If the information contained in the DHS memorandum raises questions regarding the alien's eligibility or contains classified information, or if a statement regarding the countervailing evidence would require a security or administrative classification, the consular officer shall submit the case to the Department's *Advisory Opinions Division* (CA/VO/L/A) for an advisory opinion. The advisory opinion request must provide:
  - (1) A copy of the information furnished by Department of Homeland Security (DHS);

- (2) The evidence developed by the consular officer; and
- (3) The consular officer's recommendation regarding the alien's entitlement to status or eligibility.

## **9 FAM 42.41 N13 DISPOSING OF APPROVED VISA PETITIONS**

### **9 FAM 42.41 N13.1 Petitions Filed with Department Of Homeland Security (DHS)**

*(CT:VISA-1039; 09-26-2008)*

DHS will endeavor to send approved petitions to the National Visa Center (NVC) on a daily basis via first-class mail or express delivery. If, due to unanticipated difficulty, the DHS Service Center is unable to ship petitions within 72 hours after approval, DHS will so notify the NVC. DHS will include a computer-generated manifest, arranged in ascending numerical order of DHS receipt numbers, in each box of petitions shipped. White bar-code labels will be placed on the right-hand corner of the petitions. No staples will be affixed through the labels. Where required or requested, DHS will cable directly to the post or DHS office abroad, information on immigrant petitions for orphans and approval of Forms I-600, Petition to Classify Orphan as an Immediate Relative, advance processing applications for orphans. When the petition indicates that the beneficiary intends to adjust status, but no immigrant visa number is immediately available, DHS shall retain the petition until such time as a number becomes available.

### **9 FAM 42.41 N13.2 Receipt of Petition at Consular Offices**

#### **9 FAM 42.41 N13.2-1 Petitions Accepted for Processing**

*(CT:VISA-881; 05-09-2007)*

You may accept jurisdiction for processing an immigrant visa petition if the petitioner meets the residency requirements (or emergent, humanitarian, or national interest requirements discussed in 9 FAM 42.41 N4.2-5) and both the petitioner and the visa applicant are physically present in their district and the beneficiary is likely to be able to remain in the country for the time it normally takes to process a visa. The beneficiary need not be a resident of the consular district.

## **9 FAM 42.41 N13.2-2 Petitions Received for Aliens Outside Consular District**

*(TL:VISA-621; 05-10-2004)*

If post receives a petition for an alien not residing in its consular district and the post does not choose to process the application under its discretionary authority (see 9 FAM 42.61 N3.2), posts have two options:

- (1) Transfer the petition to the post having jurisdiction, usually the applicant's last place of residence abroad (see 9 FAM 42.41 PN3);  
or
- (2) Keep the petition, if the city or country having jurisdiction is not designated to handle immigrant visa applications. **Post shall not return immigrant visa petitions to Department of Homeland Security (DHS).**

## **9 FAM 42.41 N13.2-3 Notifying Beneficiary**

*(TL:VISA-23; 04-04-1990)*

The consular officer shall notify the beneficiary of the receipt and disposition of the petition. (See 9 FAM 42.41 PN1.) Should the consular officer retain the petition at post, he or she shall make clear to the applicant that the petition will be kept on file until such time as a request for transfer is received from another post.

## **9 FAM 42.41 N13.2-4 Petitions Received After Visa Issuance**

*(TL:VISA-333; 11-15-2001)*

See 9 FAM 42.73 PN2.1 d.

## **9 FAM 42.41 N13.3 Petitions Received by National Visa Center (NVC)**

*(CT:VISA-1039; 09-26-2008)*

Upon receipt of an approved petition, NVC will send the beneficiary *the Instruction Package for Immigrant Visa Applicants (formerly packet 3)*. (See 9 FAM 42.63 PN5.)

## **9 FAM 42.41 N14 LOCATING POST TO ACCEPT JURISDICTION**

*(TL:VISA-23; 04-04-1990)*

The consular officer shall make it clear that it is the applicant's responsibility to locate a post willing to accept the case and to ask the receiving post to request transfer of the petition on their behalf. (For further instructions regarding transferring files, see 9 FAM 42.61 PN1.)

## **9 FAM 42.41 N15 REVOCATION AND REVALIDATION OF PETITIONS**

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

See 9 FAM 42.43 Related Statutory Provisions and 9 FAM 42.43 Notes.