CHAPTER 2

OVERVIEW OF THE APPLICATION PROCESS FOR PERMANENT RESIDENCE

First Step: Filing the Petition for Alien Relative (I-130)

Introduction

The Petition for Alien Relative (Form I-130) and its supporting documentation establish that the petitioner is either a U.S. citizen (USC), a lawful permanent resident (LPR), or a U.S. national and that the claimed relationship to the alien beneficiary is a legally qualifying one.[1] When U.S. Citizenship and Immigration Services (USCIS) adjudicates the petition, it must verify the status of the petitioner and the validity of the relationship. The agency is not screening for potential inadmissibility or eligibility for adjustment of status; that occurs should the applicant file a separate form and seek that immigration benefit. For purposes of completing the I-130, the "petitioner," or more precisely the "you" indicated in the form, is the USC, LPR, or national who is petitioning for the alien relative. The intending immigrant is the "beneficiary."

Who May File an I-130?

As explained in chapter 1, "immediate relatives" are defined as the spouse, parents, and unmarried children (under age 21) of USCs.[2] All other qualifying relationships fall within the preference categories.[3] These include the siblings, unmarried sons and daughters (over age 21), and married children or sons and daughters of USCs. They also include the spouses and unmarried children or sons and daughters of an LPR.

Different rules apply for family dependents, or "derivatives." The term "derivative" includes the spouse and unmarried children under 21 of the principal beneficiary in the preference categories. In those cases, the derivatives may immigrate without the need to file a separate I-130 petition, provided they have that relationship at the time the principal beneficiary immigrates and at the time they immigrate.[4] Derivative relationships include the spouses of the principal beneficiary immigrating through the third- and fourth-preference categories. Unmarried children under 21 may immigrate as derivatives of the principal beneficiary in the first–, second–, third–, and fourth-preference categories.

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[1] 8 CFR §204.1(a)(1).

[2] INA §201(b)(2)(A)(i).

[3] INA §203(a).

[4] 8 CFR §204.2(d)(4).

In most cases, the petitioner is not able to file a separate I-130 petition on the derivative's behalf. For example, a USC may not file a separate I-130 petition for the spouse and children of a married child in the third-preference category or the spouse and children of a sibling in the fourth-preference category. Only when an LPR is petitioning for his or her spouse does he or she have the option of including the unmarried children under 21 as derivatives or filing a separate petition on their behalf.

The derivative beneficiaries will need to file separate applications for adjustment of status or an immigrant visa. They will be considered "accompanying" the principal beneficiary if they immigrate or adjust concurrently or within six months; they will be "following-to-join" if they immigrate more than six months later.[5]

Petitioners seeking to immigrate immediate relatives must file a separate I-130 for each family member, since immediate relatives cannot immigrate derivatives.[6] For example, if a USC is seeking to immigrate a spouse and stepchild, he or she must file a separate I-130 for each person and pay separate filing fees. Similarly, if a USC child over age 21 is petitioning for his or her parent, the parent's spouse or unmarried child may not immigrate as derivatives, since the parent is an immediate relative. In that case, the USC must file a separate I-130 petition for the stepparent and sibling. If the spouse of the parent does not qualify as a stepparent, or the child of the parent as a sibling, they would need to wait until the parent—the principal beneficiary—immigrates. That parent, once an LPR, then may file a second-preference petition for the spouse and child.

Completing the I-130

Part A

The form is completed by the USC, national, or LPR. The first questions ask for the petitioner's relationship to the alien relative and whether it is based on adoption. The qualifying relationships, including those for adopted children, are set forth in chapter 1.

Part B

The next part, Part B, asks for basic information regarding the petitioner: full name, current address, place and date of birth, gender, marital status, date and place of present marriage, Social Security number, information on prior marriages, and information on how citizenship or LPR status was obtained. Type the petitioner's last name in capital letters. Give the petitioner's current address, even if it is temporary or the petitioner is residing abroad. If the petitioner resides in certain specified countries, he or she may file the petition with the USCIS office abroad.[7] Be aware, however, that the petitioner eventually must complete an affidavit of support, which requires

[5] 22 CFR §40.1(a)(1).

[6] 8 CFR §204.2(a)(4).

[7] 8 CFR §204.1(e)(2).

that he or she be domiciled in the United States.[8] Information regarding place and date of birth should be taken from the birth certificate. Be sure to include all other names used by the petitioner, including aliases and maiden names. If the petitioner is married, take the information on date and place of present marriage from the marriage certificate. Only include Social Security numbers obtained lawfully by the petitioner from the Social Security Administration, not fictitious or "borrowed" ones.

Indicate whether the petitioner has any prior marriages, including the names of prior spouses and dates the marriages were terminated. Note that if the petitioner is an LPR who obtained such status through marriage, and the petitioner is seeking second-preference classification for an alien spouse, certain requirements must be met.[9] Either (1) five years must have elapsed since the date the petitioner acquired LPR status;[10] (2) the petitioner must establish through clear and convincing evidence that the prior marriage was not entered into for purposes of evading the immigration laws;[11] or (3) the prior marriage terminated through the death of the petitioning alien's spouse.[12] If five years have elapsed since the date the petitioner acquired legal residency, USCIS cannot use the "clear and convincing" evidence standard to deny a petition filed on behalf of petitioner's new spouse.[13]

If the petitioner is an LPR, indicate the date and place of adjustment of status or the date the LPR first used the immigrant visa issued by the consulate to gain entry to the United States.

Part C

Part C asks for information regarding the beneficiary. Type in the beneficiary's name and refer to his or her birth certificate, passport, or I-94 (Arrival-Departure Record). If there are any inconsistencies, explain the reason on an attached piece of paper. Give the alien's current address, even if it is temporary. If the beneficiary and the petitioner are spouses residing in the United States and not residing together, this will raise suspicions and may result in USCIS conducting an investigation or interview regarding the validity of the marriage. However, the fact that the couple is not currently living together is not, in and of itself, a valid basis for denying the visa petition.[14] List the beneficiary's place of birth; take the information from the beneficiary's passport. The beneficiary's country of birth may have significance for a preference-category petition, since the availability of a visa in a particular category may depend on the beneficiary's country of birth.[15] List any other names used by the

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[8] INA §213A(f)(1)(C).

[9] INA §204(a)(2)(A).

[10] INA §204(a)(2)(A)(i).

[11] INA §204(a)(2)(A)(ii).

[12] INA §204(a)(2)(B).

[13] *Matter of Pazandeh*, 19 I&N Dec. 884 (BIA 1988).

[14] *Matter of McKee*, 17 I&N Dec. 332, 334 (BIA 1980).

[15] INA §202(e).

beneficiary, including maiden names, but if none, so state. If the beneficiary is currently married, list the date and place of the marriage; that information should be found in the marriage certificate. List only valid Social Security numbers.

The alien registration number refers to that number assigned to LPRs, persons placed into removal proceedings (including prior deportation or exclusion), and persons who have otherwise been involved in an investigation conducted by USCIS. If the person has an "A" number, that may indicate to the Department of Homeland Security (DHS) that the alien is in proceedings. Aliens who marry while in deportation, exclusion, or removal proceedings (but not rescission proceedings) are subject to a two-year foreign residency requirement before the I-130 may be adjudicated.[16] Alternatively, the petitioner must establish by clear and convincing evidence that the marriage was entered into in good faith and not for immigration purposes.[17] Provide information on all prior marriages.

Indicate whether the beneficiary has ever been and is currently residing in the United States, since this will be important in determining eligibility for adjustment of status. It will also be important in determining if the beneficiary has incurred any periods of "unlawful presence," which is defined in chapter 6.[18] If he or she is currently in the United States and arrived as a nonimmigrant, write down the following information, taken from the I-94: the 11-digit I-94 number, date of arrival, date authorized stay will expire or did expire, and the letter designation of the nonimmigrant status at entry (*e.g.*, B-1/B-2, F-1). If the beneficiary is currently in the United States but entered without being inspected or was paroled into the country, enter that information on the form. This information may also be important in determining eligibility to adjust status.[19]

Provide the name and address of the beneficiary's present employer, as well as the date the beneficiary began employment. This information could be used by USCIS to begin an investigation as to whether the employer violated the statute relating to employment of aliens who are unauthorized to work.[20] It also could be used to determine if the alien worked without authorization and thus is ineligible for adjustment of status. (That requirement does not apply to immediate relatives who entered the United States with inspection.)[21] Once the federal agency begins again to enforce civil document fraud under Immigration and Nationality Act (INA) §274C, this information also could be used to commence those actions.

Indicate whether the beneficiary has ever been in exclusion, deportation, removal, rescission, or judicial proceedings. Provide the date and place where the proceedings

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[16] INA §204(g).

[17] INA §245(e)(3).

[18] INA §§212(a)(9)(B), (C).

[19] INA §§245(c), (i).

[20] INA §274A.

[21] INA §245(c).

took place. This information may be important in determining whether the beneficiary married while in immigration proceedings. If the beneficiary has been deported or removed from the United States and has not remained outside the country for the required period of time, he or she may need to file a request for permission to re-enter.[22] If the beneficiary in that situation re-entered the United States after April 1, 1997, he or she may have triggered a more serious bar under INA §212(a)(9)(C), which is described in chapter 6. [23] Be aware that USCIS is enforcing INA §241(a)(5), which allows for the reinstatement of deportation or removal orders, immediate physical removal from the country, and ineligibility for adjustment of status.[24] This occurs when the alien left the United States under an order of deportation, exclusion, or removal and subsequently re-entered illegally, regardless of the date of re-entry. In addition, aliens who were ordered deported in absentia are inadmissible for five years after their departure[25]; those who were granted voluntary departure but failed to leave on time may be barred from adjusting status, as well as other forms of relief, for up to 10 years.[26]

If the alien is currently in proceedings (pending before an immigration judge or the Board of Immigration Appeals), he or she may be eligible to file for adjustment of status with the Executive Office for Immigration Review (EOIR). If the alien was previously in immigration proceedings and received a final order that has not been effected by a subsequent departure, he or she may have to move to reopen the proceedings to apply for adjustment before the immigration judge.[27] The trial attorney may have to consent to this motion to reopen.[28]

Part C continues with a question regarding the name, date of birth, and country of birth of the alien relative's spouse and children. If the petition is being filed on behalf of a spouse, do not include the name of the petitioner. Refer to the section above on who can file an I-130 to determine which relatives require separate I-130 applications and which can immigrate as derivatives, or family dependents, with the principal beneficiary.[29]

Give the address in the United States where the intending immigrant plans to reside. If this is different from the address where the petitioning spouse currently resides and the parties do not intend to reside together, this will raise suspicions and may result in an investigation or interview to determine if the marriage is bona fide.

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[22] INA §212(a)(9)(A)(iii). See chapter 7 for more information and a sample Form I-212 application.

[23] INA §212(a)(9)(C).

[24] 8 CFR §241.8.

[25] INA §212(a)(6)(B).

[26] INA §240B(d).

[27] INA §240(c)(7)(C).

[28] 8 CFR §1003.2(c)(3)(iii).

[29] *See* 8 CFR §§204.2(a)(4), (d)(4).

List the beneficiary's foreign residence, if any, in response to question 19. If a foreign address was listed in part C, question 2, put the same address here. Most nonimmigrants (except for H-1, L-1, and E visa holders) must maintain a foreign address that they have no intention of abandoning as a condition to their status.[30] In a spousal petition, list the address where the couple last resided together. If they are currently residing together, that address should be the same as that listed in part B, question 2. If the parties have never resided together, the same suspicions may be raised as to the legitimacy of the marriage, and an investigation and marriage interview may result.

In order to respond to question 22, the petitioner must understand the eligibility requirements for adjustment of status.[31] These are set forth in chapter 3. If the alien relative cannot meet the adjustment requirements, he or she will be processing abroad at a U.S. consulate.[32] These eligibility requirements and differences are set forth below. If you know that the intending immigrant will be consular processing, indicate the appropriate consular office. It normally will be in the country of the alien's citizenship and in the city of the U.S. consulate closest to the alien's place of residence or last residence abroad.[33] Consult the Department of State's website to obtain the addresses of the consulates abroad, their geographic jurisdictions, their contact information, and whether they process immigrant visas. Do not designate a consulate other than the appropriate one unless prior arrangements have been made.

Part D

Part D asks for miscellaneous information. If the petitioner simultaneously is submitting I-130 petitions for other relatives, indicate their names and relationship. If the petitioner has ever submitted an I-130 petition for this or any other alien in the past, include that information as well. If the petition was for the same alien relative and the petition was denied, do not refile unless the facts have changed or new evidence can be supplied to overcome the reasons for the denial. Indications that the petitioner has filed other petitions for prior alien spouses may raise suspicions about the validity of the present marriage.

The petitioner, not the alien relative, signs the I-130.[34] Anyone who assists in preparing the I-130, even if a separate G-28 is filed,[35] also should sign the petition at the end of the form. If you are an attorney or accredited representative, you should sign the form. If you are not, but work for an agency that has attorneys or accredited representatives on staff, one of them should sign the form after reviewing it.

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[30] INA §214(b).

[31] 8 CFR §§245.1(b), (c).

[32] INA §§221, 222.

[33] 9 *Foreign Affairs Manual* (FAM) 42.61 N1.1, N1.2, N2.1.

[34] 8 CFR §204.1(d)(1).

[35] 8 CFR §292.4.

Supporting Documentation

The petitioner must attach certain supporting documents to establish U.S. citizenship, U.S. national, or LPR status, and familial relationship to the beneficiary.[36] Read the instructions on the I-130 form for detailed information on the specific documents that are required. The instructions require the petitioner to provide a photocopy of each required document only. If the petitioner submits an original, USCIS may retain it for their records. Submit a translation of all documents in a foreign language, along with a certification that the translation is accurate and the translator is competent to translate.[37] The regulations require a translation of the document in its entirety, but some USCIS service centers and district offices accept "summary" translations of common foreign documents.

Primary evidence consists of official government documents that are properly authenticated or certified. Secondary evidence would include records that are made or recorded contemporaneously with the event in question, such as baptismal, hospital, church, school, or employment records. When petitioners have established that primary evidence listed in the *Foreign Affairs Manual* is generally unavailable in that country, or that they are unable to obtain a copy of the official document, they may submit secondary evidence.[38] The rules for establishing this and the types of acceptable secondary evidence are set forth in the regulations.[39] Secondary evidence also could include affidavits from persons with personal knowledge of the event.[40]

The standard of proof that the petitioner must satisfy is the "preponderance of the evidence."[41] This means that it is more likely than not that the statements are true and that the relationship is valid.[42] There are three situations, however, in which the petitioner must satisfy a higher standard, that of "clear and convincing evidence," which must be enough to "produce … a firm belief or conviction" that the relationship is valid.[43] If the petitioner is an LPR who obtained that status within five years through a prior marriage to a USC or LPR, and the prior marriage did not end through death of the spouse, the petitioner must establish through clear and convincing evidence that the prior marriage was entered into in good faith.[44] If the alien spouse married a USC or LPR while in immigration proceedings and the alien has not subsequently resided abroad for two years, the petitioner must also meet that higher burden to establish the bona fides of the marriage.[45] And if the petitioner

[36] 8 CFR §204.1(f)(1).

[37] 8 CFR §204.1(f)(3).

[38] 8 CFR §204.1(f)(1).

[39] 8 CFR §§204.1(f), (g).

[40] 8 CFR §204.1(g)(2)(ii).

[41] *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

[42] *See U.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

[43] *Matter of Carrubba*, 11 I&N Dec. 914 (BIA 1966).

[44] INA §204(a)(2)(A).

[45] INA §§204(g), 245(e)(3).

submitted a previous I-130 for the same beneficiary that was denied or withdrawn, USCIS may require additional evidence to establish the relationship.[46]

The following documents must be attached:

- *Petitioner's evidence of U.S. citizenship, U.S. national, or LPR status.* Acceptable primary and secondary evidence of citizenship are listed in the regulations.[47] Primary evidence of U.S. citizenship includes the following: birth certificate if born in the United States; certificate of naturalization; certificate of citizenship; valid unexpired U.S. passport; or Form FS-240, Report of Birth Abroad of a U.S. Citizen.[48] U.S. nationals should submit a copy of a U.S. passport, certificate of identity showing U.S. nationality, or a birth certificate.[49] Primary evidence of LPR status includes a copy of the I-551, Permanent Resident Card, or a stamp in the foreign passport indicating temporary evidence of LPR status.[50]
- *Evidence of the family relationship.* The requirements are set forth in the regulations and the instructions to the form.[51] Primary evidence includes birth certificates, marriage certificates, and adoption decrees.

If a marriage certificate is required and either of the parties has been married previously, include documents showing termination of the prior marriage.[52] In all spousal petitions, the petitioner should submit one or more of the following documents to establish good-faith marriage: joint ownership of real property or joint tenancy; joint ownership of personal property or commingling of financial resources; birth certificates of children born from the relationship; or affidavits from persons who have known the married couple who can attest that it was bona fide.[53] Other evidence could include photos or other proof of the wedding, insurance forms naming the other spouse as a beneficiary, and joint tax returns.

For mother-child relationships, primary evidence includes the child's birth certificate bearing the name of the mother. For father-child relationships, it includes the child's birth certificate bearing the father's and name, as well as a marriage certificate showing the father's marriage to the child's mother. If the child was born out of wedlock, it must include evidence of legitimation. This should be either a formal court decree of legitimation or proof of a subsequent marriage between the child's father and mother before the child turned 18. In the alternative, the petitioning

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[46] *Adjudicator's Field Manual* (AFM) ch. 20.4.

[47] 8 CFR §204.1(g)(1).

[48] 8 CFR §§204.1(g)(1)(i)–(vi).

[49] AFM ch. 21.2(a)(9)(C).

[50] 8 CFR §204.1(g)(1)(vii).

[51] 8 CFR §204.2.

[52] 8 CFR §204.2(a)(2).

[53] 8 CFR §204.2(a)(1); Instructions for I-130, Petition for Alien Relative.

father may submit evidence of a bona fide parent-child relationship (*e.g.*, custody, provision of support) before the child turned 21.

Primary evidence of a sibling relationship includes the petitioner's and the beneficiary's birth certificates showing at least one parent in common. It may also have to include marriage certificates of the parent(s), prior divorce decrees, and evidence of legitimation for children born out of wedlock.

Other Forms and Documents Included in the I-130 Application Packet

The complete I-130 packet is made up of the following documents:

- Form I-130, Petition for Alien Relative
- Form G-325A, the biographic information form (not required for persons under 14) for both the petitioner and the beneficiary in a spousal petition
- Photos of the petitioner and the beneficiary in a spousal petition[54]
- Evidence of petitioner's citizenship (birth certificate, naturalization certificate, certificate of citizenship, U.S. passport, Form FS-240) or LPR status (I-551 card)
- Evidence of family relationship between petitioner and beneficiary (marriage certificate, birth certificate)
- Evidence of termination of prior marriages (if appropriate)
- Evidence of the bona fides of the marriage (if a spousal petition)

Where to File

If the petitioner is in the United States, he or she will file the petition and supporting documents with either the Chicago or the Phoenix Lockbox facility. Those residing in the following states or territories will file the petition at USCIS, Attn: I-130, P.O. Box 21700, Phoenix, AZ 85036: Alaska, American Samoa, Arizona, California, Colorado, Florida, Guam, Hawaii, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Northern Mariana Islands, Oklahoma, Oregon, Puerto Rico, South Dakota, Texas, Utah, Virgin Islands, Washington, Wyoming. For those filing by Express mail or courier delivery, send the petition to USCIS, Attn: I-130, 1820 E. Skyharbor Circle S, Suite 100, Phoenix, AZ 85034.

Those residing in the following states or territories will file the petition at USCIS, P.O. Box 804625, Chicago, IL 60680-4107: Alabama, Arkansas, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Washington, D.C., West Virginia, Wisconsin. For those filing by Express mail or courier delivery,

[54] 8 CFR §204.2(a)(2).

send the petition to USCIS, Attn: I-130, 131 South Dearborn-3rd Floor, Chicago, IL 60603-5517. The I-130 will be feed-in and routed to the appropriate service center, which is dependent on the petitioner's address.

If the petitioner is filing the I-130 concurrently with an application for adjustment of status, file the whole packet at the following address: USCIS, P.O. Box 805887, Chicago, IL 60680-4120. For those filing the I-130 and I-485 by Express mail or courier delivery, send the packet to USCIS, FBAS, 131 S. Dearborn, 3rd Floor, Chicago, IL 60603-5517.

Petitioners filing from overseas in countries with a USCIS office may send their I-130 forms to the Chicago Lockbox, or they may file them at the USCIS office having jurisdiction over the area where they live. If there is no USCIS overseas office in that country, petitioners residing abroad will file the petition at the Chicago Lockbox facility.

After approval of the I-130, the petition will be retained by USCIS if the parties indicated that they will be adjusting status. If the I-130 indicates that the parties will be consular processing, the petition will be forwarded to the National Visa Center (NVC) in Portsmouth, NH, which will in turn transmit it to the appropriate consulate when the priority date is current. The role of the NVC is described in greater detail in chapter 4.

Filing Fee

The filing fee for the I-130 is currently $420.