Derivative Beneficiaries

Family members on whose behalf the I-130 petition is filed are considered "principal beneficiaries." If they are being petitioned for in one of the preference categories and have minor, unmarried children or a spouse, those other family members also may qualify to immigrate as "derivative beneficiaries."[1] A derivative beneficiary is the spouse or unmarried child of a principal beneficiary in one of the preference categories.[2]

Derivative beneficiaries, by definition, do not have separate I-130 petitions filed on their behalf. In fact, except for the F-2A preference category, they do not qualify to have a separate I-130 filed on their behalf. If the family member is immigrating as an immediate relative, he or she must have a separate I-130 petition on file.[3]

Derivative family members are accorded the same preference status as the principal beneficiary. These derivatives may either accompany the principal beneficiary or "follow to join," which means immigrating more than six months after the principal beneficiary.[4] Derivative beneficiaries may not obtain lawful permanent residence unless and until the principal beneficiary does.

Retention of Priority Dates

Much can happen between the time the petitioner files an I-130 petition and the beneficiary adjusts status or immigrates. For example, the beneficiary might marry, divorce, turn 21, or die. In addition, the petitioner might divorce, naturalize, lose LPR status, or die. There also might be after-acquired children to consider. Similar events could happen in the lives of the derivative beneficiaries. When a new I-130 needs to be filed, sometimes the beneficiary can retain the original priority date. Let us review the effects in all of these situations.

GENERAL PRINCIPLES

The basic principle is that one can retain an earlier priority date if it is the same petitioner filing for the same beneficiary (including derivative beneficiaries) in the same preference category and the prior I-130 was not terminated or revoked.[5] If the I-130 was lost or withdrawn and the petitioner wants to refile, he or should be able to retain the priority date from the original petition.

MARRIAGE

If the beneficiary is an immediate relative, marrying will move him or her to the third-preference category.[6] If the beneficiary is already over 21 and started out in the first-preference category, then he or she also moves into the third preference.[7] In both situations, there is no need to file a new I-130; simply notify the appropriate service center, the National Visa Center (NVC), or the consulate of the automatic conversion to third preference. The priority date for the third preference visa petition would be the same as that for the immediate-relative or first-preference petition.[8]

This conversion to third preference does not occur if the beneficiary is in the second-preference category. The child/son/daughter of an LPR cannot marry without automatically revoking the I-130

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[1] INA §203(d).

[2] 9 *Foreign Affairs Manual* (FAM) 42.31 N2.

[3] 8 CFR §204.2(a)(4).

[4] 22 CFR §40.1(a)(1).

[5] 8 CFR §204.2(h)(2).

[6] 8 CFR §204.2(i)(1)(ii).

[7] 8 CFR §204.2(i)(1)(i).

[8] 8 CFR §§204.2(i)(1)(i), (ii).

petition. If a second-preference category (F-2A or F-2B) beneficiary marries before immigrating or adjusting status, the I-130 petition is terminated.[9]

DIVORCE

Divorce tends to work the opposite way as marriage. The third-preference beneficiary moves into the immediate-relative category (if under 21) or the first preference (if over 21).[10] Again, no need to file a new I-130, and the priority date remains the same. Inform the appropriate service center, the NVC, or the consulate of the automatic conversion from third preference to first preference or immediate-relative status and enclose proof of termination of the marriage.

If the second-preference beneficiary divorces, he or she cannot regain the status of an F-2A or F-2B preference holder, since the I-130 was automatically revoked. The LPR petitioner must file a new I-130 and cannot retain the earlier priority date. If the beneficiary obtains an annulment, however, that might serve to reinstate the second-preference status. Courts have determined that an annulment serves to void the marriage ab initio.

If the U.S. citizen or LPR petitioner is the one to divorce after filing an I-130 for a spouse, the I-130 is automatically revoked.[11] If the petitioner had filed an I-130 for a stepchild based on that marriage, in most cases the divorce severs the relationship and the I-130 is revoked. But those stepchildren who are able to establish an ongoing relationship with the stepparent may be able to proceed with their petition.[12] Divorce between the principal beneficiary and the derivative spouse in the third– or fourth-preference category terminates the derivative status of the spouse.

NATURALIZATION

When the LPR petitioner naturalizes, principal beneficiaries under 21 convert from the F-2A category to immediate relative. If the beneficiary is already over 21 and in the F-2B category, he or she would convert to the first preference. No need to file a new I-130; the priority date remains the same.[13] Inform the appropriate service center, the NVC, or the consulate of the automatic conversion from second preference to first preference or immediate-relative status and enclose a copy of the naturalization certificate.

For most beneficiaries, the first preference is more current than the F-2B category. But check the *Visa Bulletin*, since that has not been the case for Filipinos for quite awhile, and occasionally it is not the case for Mexicans. The Child Status Protection Act (CSPA)[14] neutralizes the negative effect that the petitioner's naturalizing might have on these sons and daughters.

Beneficiaries with children, however, no longer will be able to count them as derivatives if they convert to the immediate-relative category when the petitioner naturalizes.[15] Derivatives in the F-2A category are most affected, since as immediate relatives they will be required to have a separate I-130 petition filed on their behalf. When the newly naturalized U.S. citizen petitioner files this separate I-130 petition for the unmarried child, the beneficiary retains the original priority date.[16] This is usually irrelevant because, as an immediate relative, the beneficiary is not subject to any annual

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[9] 8 CFR §205.1(a)(3)(i)(I).

[10] 8 CFR §204.2(i)(1)(iii).

[11] 8 CFR §205.1(a)(3)(i)(D).

[12] *Medina-Morales v. Ashcroft*, 371 F.3d 520, 531–32 (9th Cir. 2004).

[13] 8 CFR §204.2(i)(3).

[14] Child Status Protection Act (CSPA), Pub. L. No. 107-208, 116 Stat. 927 (2002). For in-depth guidance on the CSPA, see *AILA's Focus on the Child Status Protection Act* (2008), *www.ailapubs.org*.

[15] 9 FAM 42.31 N2.2.

[16] 8 CFR §204.2(i)(3).

quotas and the CSPA freezes the beneficiary's age in many cases.[17] But should the beneficiary marry before obtaining LPR status, the earlier priority date might prove helpful. When you file the second I-130, state in the cover letter that you are requesting the original priority date, cite the regulatory authority, and attach proof of filing the original I-130.

DEATH OF THE PETITIONER

Death of the petitioner automatically revokes the I-130, but there is possible relief for widows/widowers of U.S. citizens who have not re-married and who file a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, within two years of the citizen's death.[18] The widow/widower adjusts or immigrates as an immediate relative, and unmarried children under 21 are classified as derivatives. The process for self-petitioning as a widow(er) is covered in more detail in chapter 5.

In addition to the spouses of U.S. citizens, other surviving family members may continue to receive immigration benefits from a pending or approved I-130 after the petitioner has died.[19] If section 204(l) applies, it acts to nullify the petitioner's or the principal beneficiary's death. The main requirement is that the beneficiary must have been residing in the United States at the time of the petitioner's death and continue to be residing here. The other requirement is obtaining a substitute sponsor who can file an affidavit of support.

According to the USCIS, there are two ways to request 204(l) relief. If the petitioner died while the petition or application was pending, the beneficiary will simply notify the USCIS and request that the agency proceed with adjudication of the petition or application. This presumes that the petition or application was filed on or after October 28, 2009 or was pending on that date. If it was filed and adjudicated before that date, the Service will allow the affected beneficiary to file an untimely motion to reopen if he or she would otherwise be protected by the provisions of 204(l).[20] The second manner of requesting relief applies to beneficiaries whose petitioner died after the petition or application was approved. Assuming the beneficiary satisfies the residency requirements, he or she can request reinstatement of the approved petition or application.

Reinstatement under 204(l) should not be confused with humanitarian reinstatement. Those beneficiaries who do not satisfy the residency requirement of 204(l) but whose petitioner died after the I-130 was approved may file to reinstate the revoked I-130 based on humanitarian factors.[21] This procedure is described in chapter 2. A sample motion to reinstate an I-130 petition based on humanitarian factors, with a list of supporting documents, is attached as appendix 2. A sample request to reinstate an I-130 petition based on 204(l), with a list of supporting documents, is attached as appendix 5.

Beneficiaries who can benefit from this 2009 statutory amendment include immediate relative children and parents of a U.S. citizen and all preference category principal and derivative beneficiaries in the family-based categories. In cases where the principal beneficiary meets the residence requirements, but the derivatives do not, they may still qualify for relief. It is not necessary that all of the derivative beneficiaries meet the residence requirements. According to the USCIS, if

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[17] INA §201(f).

[18] INA §204.2(b)(2)(A)(i), as amended by FY2010 Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, 123 Stat. 2142, §568(c)(1), Oct. 28, 2009.

[19] INA §204(l), as amended by FY2010 Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, 123 Stat. 2142, §568(d)(1), Oct. 28, 2009.

[20] USCIS Memo, "Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act" (Dec. 16, 2010).

[21] 8 CFR §205.1(a)(3)(i)(C).

"any one beneficiary of a covered petition meets the residence requirements of section 204(l) of the Act, then the petition may be approved…"[22] So this interpretation helps in cases where the principal beneficiary satisfies the residence requirements but the spouse and/or children have been residing abroad.

Section 204(l) also provides relief in situations where the principal beneficiary – not the petitioner – has died. In the past, when the principal beneficiary had died, either the derivatives were left without a basis for immigrating (e.g., derivative children in first preference cases or derivative spouses and children in third or fourth preference cases), or the petitioner had to file a new petition for the child (second preference cases). The statute now allows these derivatives "of the qualifying relative" in all the family-based preference categories to proceed unaffected by the principal beneficiary's death.

The DHS retains the power to deny relief under section 204(l) when it determines that approval of the petition or application "would not be in the public interest." The exercise of this discretion is non-reviewable. According to the USCIS, "only truly compelling discretionary factors should be cited as a basis to deny the visa petition under section 204(l)." And before making such a determination, the officer must first consult with Headquarters.[23]

Section 204(l) does not allow a surviving family member to apply for adjustment of status if not otherwise eligible. Nor does it require approval of a petition or application if the officer believes the beneficiary/applicant is ineligible. For example the officer might determine that there was no good faith marriage in a marriage-based case. This statutory amendment does not waive or excuse the grounds of inadmissibility or deportability; it simply allows the petition or application to be adjudicated notwithstanding the death of the petitioner or principal beneficiary. But the agency interprets the statute as allowing the granting of a waiver of inadmissibility – even though the qualifying relative has died and even though there is obviously no extreme hardship to be suffered by the decedent – if the beneficiary meets the residence requirements of section 204(l). The Service will note the fact that the qualifying relative has died and the death will be "deemed to be the functional equivalent of a finding of extreme hardship." This does not mean that the waiver will necessarily be approved. The Service retains the right to exercise its discretion in adjudicating waivers, even if extreme hardship is established.[24]

The affidavit of support requirements are not waived for family-based cases involving a deceased petitioner – other than a widow or widower – though the beneficiary may submit one from a substitute sponsor. Substitute sponsors may include a close relative of the beneficiary (spouse, parent, mother-in-law, father-in-law, sibling, child at least 18 years of age, son, daughter, daughter-in-law, son-in-law, sister-in-law, brother-in-law, grandparent, or grandchild) or a legal guardian. They must be either a U.S. citizen or LPR and be domiciled in the United States. If they have insufficient income to satisfy the 125 percent of poverty requirement for their household size, they may obtain a joint sponsor who does meet it. Beneficiaries residing in the United States whose petitioning family member has died will need to file a substitute affidavit of support as part of the adjustment of status or consular processing procedure. Those who are residing abroad and will be moving to reinstate the petition will need to include a substitute affidavit of support with the motion. Beneficiaries residing inside the United States who cannot secure a substitute sponsor will be unable to proceed with their application for

[22] *Id.*

[23] *Id.*

[24] *Id.*

adjustment of status or an immigrant visa; those residing outside the country will be unable to proceed with their motion to reinstate.

Death of the spouse/parent usually terminates the stepparent-stepchild petition, except when the parties establish an ongoing relationship.

AGE-OUT

The CSPA has solved the age-out problem for many beneficiaries. This will be explained in greater detail later in this chapter. But prior to the CSPA, turning 21 meant (and for those few who cannot take advantage of the law, still means) one of the following: (1) converting from immediate relative to the first-preference category; (2) converting from F-2A to F-2B; or (3) converting from derivative beneficiary and possibly losing status (derivatives in the F-2A preference category still convert to F-2B).

Prior to the CSPA, children who were under 21 at the time the I-130 was filed on their behalf by a U.S. citizen parent automatically converted from immediate relative to the first-preference category upon turning 21.[25] There was no need to file a separate I-130, nor was there a need to inform the service center, NVC, or consulate. The beneficiary in the first-preference category retained the same priority date as that obtained when the I-130 was filed as an immediate relative.[26]

Children who were under 21 at the time the I-130 was filed on their behalf by an LPR parent automatically converted from the F-2A category to the F-2B category upon turning 21.[27] There was no need to file a separate I-130, nor was there a need to inform the service center, NVC, or consulate. The beneficiary in the F-2B category retained the same priority date as that obtained when the I-130 was filed in the F-2A category.

Derivatives in the second-preference category automatically lost their derivative status when they turned 21. But if they were the unmarried children of an LPR parent, they were able to convert from the F-2A to the F-2B category when the LPR petitioner filed a separate I-130 on their behalf. Fortunately, they were also able to retain the original priority date.[28] However, if they were the children of a principal beneficiary who was the unmarried child of an LPR, they lost their derivative status upon turning 21. That is because the LPR petitioner cannot petition for his or her grandchildren.

Derivatives in other preference categories also lost their derivative status when they turned 21. Unlike the children of LPRs, who converted automatically from the F-2A to the F-2B category, these sons and daughters did not automatically convert to another category upon turning 21. They had to start over again after their parent immigrated or adjusted status. The LPR parent then filed a new I-130 on their behalf. Prior to the CSPA—and even according to current USCIS interpretation after implementation of the law—these former derivatives did not retain the original priority date.

PRE-1977 WESTERN HEMISPHERE PRIORITY DATES

When Congress changed the immigration law at the end of 1976 that established our current family-based preference categories for Western Hemisphere immigrants (North America, Central America, South America, and adjacent islands), it allowed pending applicants—called registrants—to use their old, unused priority dates.[29] It also allowed any derivatives in existence on the date of original filing (registering) to use their unused priority dates for later applications. Derivatives include the spouses and unmarried children under 21 on the date of original filing, as well as children

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[25] 8 CFR §204.2(i)(2).

[26] *Id*.

[27] 9 FAM 42.53 N2.4-2(c).

[28] 8 CFR §204.2(a)(4).

[29] Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703; 9 FAM 42.53 N4.1.

born later from a marriage that existed on that date. This means that children born after January 1, 1977, can still qualify as derivatives if their parents were married and had filed (registered) prior to that date. The savings clause in the 1976 legislation allows the beneficiaries and derivatives to use the original date of filing (registering) for later I-130 applications. Once established, the priority date is retained by the derivatives, even if they subsequently marry or turn 21. The priority date can be used in conjunction with any properly approved visa petition filed on behalf of the alien.