CHAPTER ONE

FAMILY-BASED IMMIGRATION: IMMEDIATE RELATIVES AND THE PREFERENCE SYSTEM

I. OVERVIEW OF FAMILY-SPONSORED IMMIGRATION

Family reunification has historically been the principal policy underlying U.S. immigration law. Family-based immigration allows for close relatives of U.S. citizens and legal permanent residents (LPR) to immigrate to the United States. These family members immigrate either as immediate relatives of U.S. citizens or through the family preference system. When these family members "immigrate" they themselves become legal permanent residents. A legal permanent resident is a foreign-born individual who has been admitted to live and work indefinitely in the United States. Proof of LPR status is the I-551, Permanent Resident Card, commonly referred to as a "green card."

Immediate relatives include the following: (1) spouses of U.S. citizens; (2) unmarried minor (under 21) children of U.S. citizens; and (3) parents of U.S. citizens over age 21. The benefit of immigrating as an immediate relative is that there is no cap, or quota, on the number of visas available each year.

The family preference system allows the following persons to immigrate: (1) adult (over 21) children (unmarried and married) of U.S. citizens; (2) brothers and sisters of U.S. citizens over 21; and (3) spouses and unmarried children (both minor and adult) of LPRs. There are a limited number of visas available every year under the family preference system.

Legal immigration to the United States is controlled by numerical limitations called quotas, which are applied to the family-based category and to the overall number of permanent resident visas distributed per country, per year. Backlogs develop because there are more applicants in some countries and categories than there are visas. There are also the non-quota immigrants, such as immediate relatives, who are exempted from the yearly limitations.

Immigrant visas are issued by the U.S. consulates abroad. In addition, the United States Citizenship and Immigration Services (USCIS) or the Executive Office for Immigration Review (EOIR) may adjust an applicant's status to LPR in the United States. Whether applicants for immigrant visas are eligible to adjust status or must consular process depends on several factors, including whether they made a lawful entry to the United States, whether they violated the terms of their nonimmigrant visa, when they filed the relative petition, and whether they are immigrating through the preference system or as an immediate relative.

Citizens and LPRs wishing to petition for a family member must be domiciled in the United States and evidence an income at least 125 percent of the federal poverty level, or else obtain the assistance of someone who satisfies that income requirement.

II. REQUIREMENTS FOR FAMILY RELATIONSHIPS

Many of the terms used in defining eligibility for a family-based visa are technical and are set forth in the statute and regulations. The following are the most important terms and requirements:

- ***Petitioner*** - the family member who is either a U.S. citizen or an LPR. Some family members may self-petition, such as widows/widowers, battered spouses and children of U.S. citizens and LPRs, certain Amerasian children, and special immigrant juveniles.

- ***Beneficiary*** - the alien seeking permanent resident status who is related to the U.S. citizen or LPR petitioner.

- ***Spouse*** - the spousal relationship must be legally valid and recognized in the place where the relationship was created. As of June 26, 2013, this includes same-sex marriages that are recognized in the jurisdiction in which they are created. It must not be a sham marriage, i.e., entered into for immigration purposes. There is a presumption that the marriage is a sham if the couple gets divorced within two years of obtaining LPR status based on the marriage. In addition, even if valid in the foreign country, it must not violate federal or state public policy. Some marriages are therefore not recognized for immigration purposes: polygamous, incestuous, or proxy (unless consummated). In a small number of states common law marriages are recognized. The marriage must be in existence, i.e., not have been legally terminated, at the time the permanent residency application is adjudicated, although the marriage need not be "viable." If the parties are separated, more proof will be required to demonstrate that the marriage was valid at the time it was entered.

- ***Parent*** - must meet the definition in the statute, INA § 101(b)(2), and may include stepparent, adoptive parent, and parent of child born out of wedlock (though may have to establish the "parent-child relationship" by blood tests, evidence of cohabitation, support and communication). See 8 CFR § 204.2(c).

- ***Brother or sister*** - siblings must show they are the "child" of at least one common parent.

- ***Child*** - must meet the definition in the statute, INA § 101(b)(1), and must be unmarried and under 21; "son or daughter" refers to children of any age.

    a. ***legitimacy*** - a child who was legitimate when born or who was legitimized before age 18 while in the father's custody is a "child" for immigration purposes. Marriage of the natural parents is the most common form of legitimation. Illegitimate children may also obtain immigration benefits from the natural mother, or from the

natural father so long as they have established a "bona-fide parent-child relationship," i.e., cohabitation and provision of support.

b. ***stepchildren*** - eligible to immigrate through stepparent if child was under 18 at the time of the marriage creating the relationship. The stepchild relationship may continue even after the natural parent dies or divorces the stepparent, provided the stepparent has maintained active parental interest.

c. ***adopted children*** - eligible to immigrate if adopted before age 16 and have been in the legal custody and resided with the adoptive parent for at least two years. The two years can be counted in the aggregate; the adoption must be legally valid in the country where it took place. Natural siblings of the adopted child are also eligible to immigrate if adopted while under 18 by the same adoptive parent. Certain adopted children may immigrate under the Intercounty Adoption Act of 2000, which the United States enacted to comply with its obligations under the Hague Convention. U.S. citizens seeking to adopt and immigrate a child from one of the convention member countries are required to satisfy certain requirements.

d. ***orphans*** - a U.S. citizen can petition for an orphan under age 16 if legal requirements are met under INA § 101(b)(1)(F). In order to be an orphan, both parents must have died, disappeared, or abandoned the child. If there is a sole or surviving parent, he or she must be incapable of providing for the child and irrevocably release the child for emigration or adoption. The child must be under 16 and unmarried at the time the petition is filed on his or her behalf to classify as an immediate relative. The petitioner must be a U.S. citizen. Natural siblings of the orphan are also eligible to immigrate if adopted abroad while under 18 by the same adoptive parent.

- ***Unmarried*** - not married at the time the I-130 petition was filed, at the time the application for the immigrant visa was filed, and at the time of admission to the United States as the unmarried son or daughter of a U.S. citizen or LPR, whether or not previously married. If immigrating as the derivative beneficiary of a first or second preference petition, the person must be unmarried from the filing of the petition until admission as a permanent resident. If the beneficiary marries at any time during that period, the petition is automatically revoked.

III. IMMEDIATE RELATIVES AND THE PREFERENCE SYSTEM

A. IMMEDIATE RELATIVES

The term "immediate relative" is defined to include the following family relationships: spouse or child (unmarried, under 21) of a U.S. citizen, and parent of a U.S. citizen who is 21 or over. "Spouse" includes widows or widowers of U.S. citizens who file an application within two years of the citizen's death. These persons can immigrate outside of the numerical restrictions and thus are not subject to the long waiting period that exists in many of the preference categories. Nevertheless, there is still a considerable backlog at the USCIS service centers in their adjudicating the relative petitions and at the USCIS district offices in their scheduling adjustment interviews. This means that even immediate relatives can sometimes expect to wait more than a year to receive their immigrant status.

B. PREFERENCE SYSTEM

Relatives immigrating through an LPR, as well as some immigrating through a U.S. citizen, are subject to numerical restriction. The following are the family preference categories:

- First - unmarried son or daughter (age 21 or over) of U.S. citizen parent

- Second - has two subsections:
  2A: spouses or unmarried children (under 21) of LPR
  2B: unmarried sons or daughters age 21 and over of LPR

- Third - married sons and daughters (any age) of U.S. citizens

- Fourth - brothers and sisters of U.S. citizens, where citizen is at least 21

1. Quota System

Congress has limited the number of foreign-born individuals who may be admitted to the United States annually as family-based immigrants to 480,000 persons per year. Family-based immigration is governed by a formula that imposes a cap on every family-based immigration category, with the exception of "immediate relatives" (spouses, minor unmarried children, and parents of U.S. citizens). The formula allows unused employment-based immigration visas in one year to be dedicated to family-based immigration the following year, and unused family-based immigration visas in one year to be added to the cap the next year. This formula means that there are slight variations from year to year in family-based immigration. Because of the numerical cap, there are long waiting periods to obtain a visa in most of the family-based immigrant categories.

There is no numerical cap on the number of immediate relatives (spouses, minor unmarried children and parents of U.S. citizens) admitted annually to the U.S. as

immigrants. However, the number of immediate relatives is subtracted from the 480,000 cap on family-based immigration to determine the number of other family-based immigrants to be admitted in the following year. But no fewer than 226,000 visas are available each year.

The following are the number of visas available in each of the four family-based preference categories:

- 1st Preference (unmarried adult children of U.S. citizen) — 23,400 visas/year, plus any visas left over from the 4th preference

- 2A Preference (spouses and minor children of LPR) — 87,900 visas/year, plus any visas left over from the 1st preference

- 2B Preference (unmarried adult children of LPR) — 26,300 visas/year, plus any visas left over from the 1st preference

- 3rd Preference (married children of U.S. citizen) — 23,400 visas/year, plus any visas left over from the 1st and 2nd preferences

- 4th Preference (brothers and sisters of U.S. citizen over 21) — 65,000 visas/year, plus any visas left over from the previous preferences

The primary source of information on visa availability is the Visa Bulletin, available on the State Department website at http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html. The State Department disseminates a new Visa Bulletin every month. You need to learn how to read the Visa Bulletin to determine how long a particular visa application will take. There is a sample visa bulletin in your materials after the exercises on the visa bulletin.

In order to understand the Visa Bulletin, you must be familiar with the following concepts:

- ***Priority date*** - Under the quota system, visas are distributed on a chronological basis determined by the date that the relative petition (Form I-130) was properly filed with the USCIS. That filing date becomes the "priority date." To be properly filed, the application must be completed, signed, and submitted with the filing fee and necessary documents.

  Once you know the priority date, you can determine whether or not it is "current," i.e., available, or approximately how long before it becomes current. Compare the priority date against the date indicated in the most recent monthly Visa Bulletin, taking into consideration the particular preference category and the alien's country of origin.

- ***Cross-Chargeability*** - a preference visa is generally chargeable against the quota for the country where the applicant was born. Some special rules apply with spouses and children who accompany the principal beneficiary as derivatives where the principal and derivatives are from different countries. The couple can elect to charge their visa application to the country of either spouse, depending on which country's priority dates are moving more quickly.

2. Derivative Beneficiaries

Family members who are being petitioned by a U.S. citizen or LPR through the preference system are considered "principal beneficiaries" if they are also immigrating with their minor, unmarried children or spouse; their spouse or minor, unmarried children may also be admitted as "derivative beneficiaries." They can be accorded the same preference status as the principal beneficiary without having to file a separate I-130 petition. These derivatives may either accompany the principal beneficiary or "follow to join," which means immigrating more than six months after the principal beneficiary. However, this procedure only operates through the preference system. If the family member is immigrating as an immediate relative, each family member must have a separate relative petition (I-130) on file. Immediate relatives are not allowed derivative beneficiaries.

> **Example:** *Carlos, an LPR from Peru, petitions for his spouse, Rosa. Rosa and Carlos have three young children, ages 9, 6, and 4. These children are "derivative beneficiaries"; when the priority date is current for Rosa's petition, the children can immigrate with her even though only one visa petition was filed. If Carlos was a U.S. citizen (USC) with a spouse and three children, he would have to file four separate visa petitions because there are no derivative beneficiaries for immediate relatives.*

3. Retention of Priority Dates

Intending immigrants may lose their ability to immigrate under the original I-130 while it is being processed or during the time it takes for the priority date to become current. For example, the unmarried son or daughter of an LPR may marry, thus terminating the petition. Or the dependent child of an immigrating parent may turn 21, thus requiring a separate I-130 to be filed. Or the petitioner may naturalize, upgrading the original petition from a second preference to an immediate relative, and thus requiring dependent children to have their own I-130 filed.

Alternatively, the intending immigrant may change from one preference category to another. For example, an unmarried son or daughter of a U.S. citizen may marry, thus moving from first preference to third preference. Similarly, the child of an LPR who is classified in the 2A category may "age out" and move into the 2B category.

In some of those examples, the intending alien retains the original priority date,

even if a new I-130 must be filed. In the following circumstances, the alien beneficiary retains the original priority date:

- Naturalization of the petitioner changes son or daughter (age 21 or over) from 2B to 1st preference (if the child is under age 21, change is to immediate relative and priority date is irrelevant)

- Divorce of son or daughter (age 21 or over) of a U.S. citizen changes 3rd preference to 1st preference (divorce of child under 21 changes 3rd preference to immediate relative)

- Marriage of a child of a U.S. citizen changes from immediate relative to 3rd preference

- Marriage of a son or daughter (age 21 or over) of a U.S. citizen changes from 1st to 3rd preference

Derivative beneficiaries of a 2A or 2B petition cannot retain or recapture a priority date when they marry and subsequently divorce. Not only must a new petition be filed in their behalf, but they must start over with a new priority date. However, some practitioners have been successful at recapturing the priority date if the marriage is annulled. Also, offspring of derivative beneficiaries cannot immigrate with the derivative beneficiary and cannot retain the original priority date. They may be able to immigrate as derivatives, however, if a separate visa petition has been filed for their parent.

> ***Example:*** *Eduardo, an LPR from Argentina, filed a visa petition for his wife Luisa. Their 18-year-old son Marco is a derivative beneficiary. Marco's one-year-old son Walter cannot immigrate on this petition because he is the son of a derivative. Eduardo can file a separate 2A petition for Marco and Marco will be able to have the priority date from his mother's case transferred to his case. As a principal beneficiary, Marco will then be able to have his son Walter immigrate as a derivative.*

C. PROTECTION FOR "AGING OUT" IMMIGRANTS

As described above, the definition of "child" under immigration law requires the "child" to be under the age of 21. Until 2002, this meant that children who turned 21 before immigrating as an immediate relative or as second preference 2A beneficiary "aged out" of their categories and faced longer waits for visas. For example, a child of a USC who turned 21 while waiting to immigrate moved to the first preference category, and the child of an LPR moved from the 2A category to the 2B category. In both of these situations, the wait for a visa will be much longer.

The Child Status Protection Act, which went into effect on August 6, 2002, helps many children avoid these age out problems. Under this law:

(a) Children of USCs **who were under 21 on the date the I-130 was filed** will retain immediate relative status if they turn 21 before becoming LPRs.

> ***Example:*** *Lucy is 20 years old when her USC father files a petition for her. While waiting to immigrate, Lucy turns 21. Lucy can still immigrate as an immediate relative.*

(b) Children of LPRs who naturalize become immediate relatives if they are unmarried and under age 21 on the day of the petitioning parent's naturalization, and preserve that status even if they turn 21 before immigrating. **This presumes that the LPR parent had filed an I-130 petition before naturalizing.**

> ***Example:*** *Micah is an LPR who filed an I-130 under the 2A category for his son Tomas. Micah becomes a USC on August 10, 2005, when Tomas is 20 years old. Tomas is now an immediate relative because he is the unmarried child of a USC and under age 21. Even if Tomas turns 21 before he immigrates, he will remain in the immediate relative category.*

(c) Married children of USCs (third preference category) who divorce before turning 21 become immediate relatives. They will also preserve that status even if they turn age 21 before immigrating.

(d) Children of LPR parents who do not naturalize have a more limited form of relief under the new law. These children previously would have moved from the 2A to the 2B category upon turning age 21. Under the new law, their age for purposes of determining their preference category will be reduced by the period of time the I-130 was pending.

> ***Example:*** *LPR Hyelom filed 2A petitions for his sons Abdul and Ali, and it took USCIS 10 months to approve the petitions. By the time the 2A priority date is current, Abdul is 21 years and eight months old and Ali is 23. Abdul will still qualify to immigrate in the 2A category because he is under age 21 if you subtract the 10-month period the visa petition was pending before approval. His brother Ali will not qualify to remain in the 2A category, however, because he is still over age 21 when you subtract the 10-month period. Ali will move into the 2B category, although he retains his old priority date.*

Note that the intending 2A immigrant must apply for residency within one year of qualifying in order to take advantage of this "age-out calculation."

(e) Unmarried children of asylum and refugee status applicants who turn 21 after an asylum application was filed remain eligible for derivative asylum status.

For family-based preference immigrants, any delay in petition adjudication has both negative and positive implications. All of the time that it takes to adjudicate the petition will be subtracted from the beneficiary's age, thus tolling their age from the

filing date until the approval date. Hence, the longer it takes to adjudicate the petition, the greater the chances that the beneficiary will still be under 21 on the date the priority date becomes current. On the negative side, should the petitioner die while the petition is pending, the beneficiary will not be able to seek humanitarian reinstatement, because that remedy is only available once the petition is approved. Should the beneficiary be residing in the United States on the date of the petitioner's death, however, he or she might be eligible for separate relief under INA § 204(l).

AUTHORITY

A. STATUTES

The following statutory cites provide legal authority for the issues discussed above:

- INA § 201 — the immigrant visa selection system
- INA § 202 — numerical limitations and distribution of 2nd preference visas
- INA § 203 — family-based preferences and order of consideration

B. REGULATIONS

The following regulatory cites provide legal authority for the issues discussed above:

- 8 CFR § 204.1 — substantive basis for immediate relative and family preference petitions; evidentiary and documentary requirements
- 8 CFR § 204.2 — elements to be proven and the documentation to be submitted to establish each type of family relationship
- 22 CFR § 40.1 — definition of terms
- 22 CFR § 42 — documentary requirements

C. GUIDELINES

The following guidelines provide legal authority for the issues discussed above:

USCIS Operations Instructions:	The procedures followed by the USCIS in adjudicating petitions, located in §§ 204.1-.9, 205
Foreign Affairs Manual (FAM):	Defines qualifying relationships, provides guidelines regarding immigrant visas, and availability of foreign documents, located in Notes to 22 CFR § 42
USCIS Examinations Handbook:	Detailed description of procedures and USCIS's interpretation of the law

Appendices for Chapter One

Chapter 1 Appendix 1

SUGGESTED EVIDENCE OF BONA FIDE MARRIAGE

1. Photographs that show both spouses together, and with family and friends. These can be taken at the wedding, at other functions or events, and throughout their relationship.

2. Copies of joint income tax returns.

3. Evidence of joint checking or savings accounts.

4. Photo identification cards of both spouses with a new card for the wife showing her married name.

5. Driver's licenses, credit cards, check-cashing cards, employment ID cards, video club memberships, etc, for both parties.

6. Real property deeds showing joint tenancy.

7. Apartment lease or a letter from the landlord indicating that both spouses live at the apartment, or copies of rent receipts showing both parties' names.

8. Letter from an employer showing a change in records to reflect spouse's new marital status.

9. Letter from an employer showing designation of the spouse as the person to be notified in event of accident, sickness, or other emergency.

10. Evidence of life insurance policies where the spouse is named as beneficiary.

11. Evidence of medical or health insurance plans that name the spouse as a member or beneficiary.

12. Evidence of correspondence between the parties, including letters, birthday and holiday cards, telephone calls and other correspondence addressed to the parties.

13. Religious marriage certificate if the couple was married in a religious ceremony.

14. Copies of gas, electric, telephone and other utility bills.

15. Evidence of joint ownership of automobile.

16. Birth certificates of children born of the relationship.

17. Evidence of vacations taken together, including airline tickets and hotel bills.

18. Evidence of all major purchases made together, such as stereo, television, refrigerator, washer, dryer, etc.

Chapter 1 Appendix 2
VISA BULLETIN FOR MARCH 2014

FAMILY SPONSORED PREFERENCES

First preference: unmarried sons and daughters of citizens

Second preference: spouses and children, and unmarried sons and daughters of LPRs.

2A. Spouses and children
2B. Unmarried sons and daughters

Third preference: married sons and daughters of citizens

Fourth preference: brothers and sisters of adult citizens

(**NOTE**: Visa numbers are available only for applicants whose priority date is earlier than the cut-off dated listed below)

Family	All Charge-ability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	01-FEB-07	01-FEB-07	01-FEB-07	15-OCT-93	15-AUG-01
2A	08-SEP-13	08-SEP-13	08-SEP-13	15-APR-12	08-SEP-13
2B	01-SEP-06	01-SEP-06	01-SEP-06	01-MAY-93	08-JUN-03
3rd	15-JUN-03	15-JUN-03	15-JUN-03	08-JUN-93	15-FEB-93
4th	08-NOV-01	08-NOV-01	08-NOV-01	15-NOV-96	01-SEP-90

Chapter 1 Appendix 3

Becoming a Permanent Resident Through a Family Relationship

<table>
<tr><th colspan="2">STEP 1: Relative Petition</th></tr>
<tr><td colspan="2">USC or LPR files _____ Petition

Date USCIS receives petition is the _____ date.

USCIS sends Receipt Notice indicating the _____ date.</td></tr>
<tr><th colspan="2">STEP 2: IR or Preference?</th></tr>
<tr><td>Immediate Relative</td><td>or Preference Category?</td></tr>
<tr><td>Proceed <u>immediate</u>ly to Step Three</td><td>USCIS sends Approval Notice

Beneficiary(ies) wait until the _____ date becomes current according to the _____.

When _____ date is current, proceed to Step Three</td></tr>
</table>

STEP 3: Determine Admissibility
Is beneficiary subject to any grounds of _____ at INA §_____? If so, is there an _____ or a _____ available? If there is a _____ available, does the beneficiary have a _____ relative?

STEP 4: Eligible for Adjustment?

4.1) Some **applicant**s may adjust under §**245(a) and (c).**

May applicant adjust under §245(a) and (c)?

YES: Proceed to ADJUSTMENT OF STATUS

NO: Ask next question, 4.2

4.2) Is applicant eligible to adjust under §**245(i)?**

YES: Proceed to ADJUSTMENT

NO: Can Beneficiary Consular Process?

STEP 5: Can Beneficiary Consular Process?

Will beneficiary be subject to any of the bars at §_____ if he or she leaves the US?

If NO: Proceed to **Consular Processing**

If YES: Is he or she eligible for a _____? If yes, does he or she have a _____ relative for the _____? Can he or she show _____ to the _____ relative? Does the beneficiary want to risk not returning to the US?

If YES: Proceed to **Consular Processing**

STEP 6: APPLYING FOR

PERMANENT RESIDENCE

ADJUSTMENT **OF STATUS**	**CONSULAR PROCESSING**
Beneficiary files _____ application with USCIS Petitioner must file an _____ of _____	NVC sends instructions to beneficiary to pay _____ and download _____form Petitioner must file an _____ of _____

Beneficiary (and petitioner) interviewed by _____ If application approved, beneficiary becomes LPR	Beneficiary interviewed at US _____ by officer from the _____ If immigrant visa granted, beneficiary becomes LPR when he or she enters the US