

Sec. 204.2 Petitions for relatives, widows and widowers, and abused spouses and children. (Amended 3/26/96; 61 FR 13061)

(a) Petition for a spouse.

(1) Eligibility. A United States citizen or alien admitted for lawful permanent residence may file a petition on behalf of a spouse.

(i) Marriage within five years of petitioner's obtaining lawful permanent resident status.

(A) A visa petition filed on behalf of an alien by a lawful permanent resident spouse may not be approved if the marriage occurred within five years of the petitioner being accorded the status of lawful permanent resident based upon a prior marriage to a United States citizen or alien lawfully admitted for permanent residence, unless:

(1) The petitioner establishes by clear and convincing evidence that the marriage through which the petitioner gained permanent residence was not entered into for the purpose of evading the immigration laws; or

(2) The marriage through which the petitioner obtained permanent residence was terminated through death.

(B) Documentation. The petitioner should submit documents which cover the period of the prior marriage. The types of documents which may establish that the prior marriage was not entered into for the purpose of evading the immigration laws include, but are not limited to:

(1) Documentation showing joint ownership of property;

(2) A lease showing joint tenancy of a common residence;

(3) Documentation showing commingling of financial resources;

(4) Birth certificate(s) of child(ren) born to the petitioner and prior spouse;

(5) Affidavits sworn to or affirmed by third parties having personal knowledge of the bona fides of the prior marital relationship (Each affidavit must contain the full name and address, date and place of birth of the person making the affidavit; his or her relationship, if any, to the petitioner, beneficiary or prior spouse; and complete information and details explaining how the person

acquired his or her knowledge of the prior marriage. The affiant may be required to testify before an immigration officer about the information contained in the affidavit. Affidavits should be supported, if possible, by one or more types of documentary evidence listed in this paragraph.); or

(6) Any other documentation which is relevant to establish that the prior marriage was not entered into in order to evade the immigration laws of the United States.

(C) The petitioner must establish by clear and convincing evidence that the prior marriage was not entered into for the purpose of evading the immigration laws. Failure to meet the "clear and convincing evidence" standard will result in the denial of the petition. Such a denial shall be without prejudice to the filing of a new petition once the petitioner has acquired five years of lawful permanent residence. The director may choose to initiate deportation proceedings based upon information gained through the adjudication of the petition; however, failure to initiate such proceedings shall not establish that the petitioner's prior marriage was not entered into for the purpose of evading the immigration laws. Unless the petition is approved, the beneficiary shall not be accorded a filing date within the meaning of section 203(c) of the Act based upon any spousal second preference petition.

(ii) Fraudulent marriage prohibition. Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

(iii) Marriage during proceedings - general prohibition against approval of visa petition . A visa petition filed on behalf of an alien by a United States citizen or a lawful permanent resident spouse shall not be approved if the marriage creating the relationship occurred on or after November 10, 1986, and while the alien was in exclusion, deportation, or removal proceedings, or judicial proceedings relating thereto. Determination of commencement and termination of proceedings and exemptions shall be in accordance with § 245.1(c)(9) of this chapter, except that the burden in visa petition proceedings to establish eligibility for the exemption in § 245.1(c)(9)(iii)(F) of this chapter shall rest with the petitioner. (Introductory text revised 4/1/97; 62 FR 10312)

(A) Request for exemption . No application or fee is required to request an exemption. The request must be made in writing and submitted with the Form I-130. The request must state the reason for seeking the exemption and must be supported by documentary evidence establishing eligibility for the exemption. (Redesignated effective 4/1/97; previously (D), 62 FR 10312)

(B) Evidence to establish eligibility for the bona fide marriage exemption . The petitioner should submit documents which establish that the marriage was entered into in good faith and not

entered into for the purpose of procuring the alien's entry as an immigrant. The types of documents the petitioner may submit include, but are not limited to: (Redesignated effective 4/1/97; previously (E), [62 FR 10312](#))

(1) Documentation showing joint ownership of property;

(2) Lease showing joint tenancy of a common residence;

(3) Documentation showing commingling of financial resources;

(4) Birth certificate(s) of child(ren) born to the petitioner and beneficiary;

(5) Affidavits of third parties having knowledge of the bona fides of the marital relationship (Such persons may be required to testify before an immigration officer as to the information contained in the affidavit. Affidavits must be sworn to or affirmed by people who have personal knowledge of the marital relationship. Each affidavit must contain the full name and address, date and place of birth of the person making the affidavit and his or her relationship to the spouses, if any. The affidavit must contain complete information and details explaining how the person acquired his or her knowledge of the marriage. Affidavits should be supported, if possible, by one or more types of documentary evidence listed in this paragraph); or

(6) Any other documentation which is relevant to establish that the marriage was not entered into in order to evade the immigration laws of the United States.

(C) Decision . Any petition filed during the prohibited period shall be denied, unless the petitioner establishes eligibility for an exemption from the general prohibition. The petitioner shall be notified in writing of the decision of the director. (Redesignated effective 4/1/97; previously (F), [62 FR 10312](#))

(D) Denials . The denial of a petition because the marriage took place during the prohibited period shall be without prejudice to the filing of a new petition after the beneficiary has resided outside the United States for the required period of two years following the marriage. The denial shall also be without prejudice to the consideration of a new petition or a motion to reopen the visa petition proceedings if deportation or exclusion proceedings are terminated after the denial other than by the beneficiary's departure from the United States. Furthermore, the denial shall be without prejudice to the consideration of a new petition or motion to reopen the visa petition proceedings, if the petitioner establishes eligibility for the bona fide marriage exemption contained in this part: Provided, that no motion to reopen visa petition proceedings may be accepted if the approval of the motion would result in the beneficiary being accorded a priority date within the meaning of section [203\(c\)](#) of the Act earlier than November 29, 1990. (Redesignated effective 4/1/97; previously (G), [62 FR 10312](#))

(E) Appeals. The decision of the Board of Immigration Appeals concerning the denial of a relative visa petition because the petitioner failed to establish eligibility for the bona fide marriage exemption contained in this part will constitute the single level of appellate review established by statute. (Redesignated effective 4/1/97; previously (H), [62 FR 10312](#).)

(F) Priority date. A preference beneficiary shall not be accorded a priority date within the meaning of section [203\(c\)](#) of the Act based upon any relative petition filed during the prohibited period, unless an exemption contained in this part has been granted. Furthermore, a preference beneficiary shall not be accorded a priority date prior to November 29, 1990, based upon the approval of a request for consideration for the bona fide marriage exemption contained in this part. (Redesignated effective 4/1/97; previously (I), [62 FR 10312](#).)

(2) Evidence for petition for a spouse. In addition to evidence of United States citizenship or lawful permanent residence, the petitioner must also provide evidence of the claimed relationship. A petition submitted on behalf of a spouse must be accompanied by a recent ADIT-style photograph of the petitioner, a recent ADIT-style photograph of the beneficiary, a certificate of marriage issued by civil authorities, and proof of the legal termination of all previous marriages of both the petitioner and the beneficiary. However, non-ADIT style photographs may be accepted by the district director when the petitioner or beneficiary reside(s) in a country where such photographs are unavailable or cost prohibitive.

(3) Decision on and disposition of petition. The approved petition will be forwarded to the Department of State's Processing Center. If the beneficiary is in the United States and is eligible for adjustment of status under section [245](#) of the Act, the approved petition will be retained by the Service. If the petition is denied, the petitioner will be notified of the reasons for the denial and of the right to appeal in accordance with the provisions of 8 CFR 3.3.

(4) Derivative beneficiaries. No alien may be classified as an immediate relative as defined in section [201\(b\)](#) of the Act unless he or she is the direct beneficiary of an approved petition for that classification. Therefore, a child of an alien approved for classification as an immediate relative spouse is not eligible for derivative classification and must have a separate petition filed on his or her behalf. A child accompanying or following to join a principal alien under section [203\(a\)\(2\)](#) of the Act may be included in the principal alien's second preference visa petition. The child will be accorded second preference classification and the same priority date as the principal alien. However, if the child reaches the age of twenty-one prior to the issuance of a visa to the principal alien parent, a separate petition will be required. In such a case, the original priority date will be retained if the subsequent petition is filed by the same petitioner. Such retention of priority date will be accorded only to a son or daughter previously eligible as a derivative beneficiary under a second preference spousal petition.

(b) Petition by widow or widower of a United States citizen.

(1) Eligibility. A widow or widower of a United States citizen may file a petition and be classified as an immediate relative under section [201\(b\)](#) of the Act if:

(i) He or she had been married for at least two years to a United States citizen

(Note: The United States citizen is not required to have had the status of United States citizen for the entire two year period, but must have been a United States citizen at the time of death);

(ii) The petition is filed within two years of the death of the citizen spouse or before November 29, 1992, if the citizen spouse died before November 29, 1990;

(iii) The alien petitioner and the citizen spouse were not legally separated at the time of the citizen's death; and

(iv) The alien spouse has not remarried.

(2) Evidence for petition of widow or widower. If a petition is submitted by the widow or widower of a deceased United States citizen, it must be accompanied by evidence of citizenship of the United States citizen and primary evidence, if available, of the relationship in the form of a marriage certificate issued by civil authorities, proof of the termination of all prior marriages of both husband and wife, and the United States citizen's death certificate issued by civil authorities. To determine the availability of primary documents, the Service will refer to the Department of State's Foreign Affairs Manual (FAM). When the FAM shows that primary documents are generally available in the country at issue but the petitioner claims that his or her document is unavailable, a letter from the appropriate registrar stating that the document is not available will be required before the Service will accept secondary evidence. Secondary evidence will be evaluated for its authenticity and credibility. Secondary evidence may include:

(i) Such evidence of the marriage and termination of prior marriages as religious documents, tribal records, census records, or affidavits; and

(ii) Such evidence of the United States citizen's death as religious documents, funeral service records, obituaries, or affidavits. Affidavits submitted as secondary evidence pursuant to paragraphs (b)(2)(i) and (b)(2)(ii) of this section must be sworn to or affirmed by people who have personal knowledge of the event to which they attest. Each affidavit should contain the full name and address, date and place of birth of the person making the affidavit and his or her relationship, if any, to the widow or widower. Any such affidavit must contain complete information and details explaining how knowledge of the event was acquired.

(3) Decision on and disposition of petition. The approved petition will be forwarded to the Department of State's Processing Center. If the widow or widower is in the United States and is eligible for adjustment of status under section [245](#) of the Act, the approved petition will be retained by the Service. If the petition is denied, the widow or widower will be notified of the reasons for the denial and of the right to appeal in accordance with the provisions of 8 CFR 3.3.

(4) Derivative beneficiaries. A child of an alien widow or widower classified as an immediate relative is eligible for derivative classification as an immediate relative. Such a child may be included in the principal alien's immediate relative visa petition, and may accompany or follow to join the principal alien to the United States. Derivative benefits do not extend to an unmarried or married son or daughter of an alien widow or widower. (Paragraph (b)(4) revised 7/31/95; [60 FR 38947](#)) (Revision at [60 FR 38947](#) confirmed 2/27/96; [61 FR 7206](#))

(c) Self-petition by spouse of abusive citizen or lawful permanent resident.

(1) Eligibility.

(i) Basic eligibility requirements. A spouse may file a self-petition under section [204\(a\)\(1\)\(A\)\(iii\)](#) or [204\(a\)\(1\)\(B\)\(ii\)](#) of the Act for his or her classification as an immediate relative or as a preference immigrant if he or she: (Paragraph (c) added 3/26/96; [61 FR 13061](#)) (Previous paragraph (c) redesignated as paragraph (d))

(A) Is the spouse of a citizen or lawful permanent resident of the United States;

(B) Is eligible for immigrant classification under section [201\(b\)\(2\)\(A\)\(i\)](#) or [203\(a\)\(2\)\(A\)](#) of the Act based on that relationship;

(C) Is residing in the United States;

(D) Has resided in the United States with the citizen or lawful permanent resident spouse;

(E) Has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage; or is the parent of a child who has been battered by, or has been the subject of extreme cruelty perpetrated by, the citizen or lawful permanent resident during the marriage;

(F) Is a person of good moral character;

(G) Is a person whose deportation would result in extreme hardship to himself, herself, or his or her child; and

(H) Entered into the marriage to the citizen or lawful permanent resident in good faith.

(ii) Legal status of the marriage. The self-petitioning spouse must be legally married to the abuser when the petition is properly filed with the Service. A spousal self-petition must be denied if the marriage to the abuser legally ended through annulment, death, or divorce before that time. After the self-petition has been properly filed, the legal termination of the marriage will have no effect on the decision made on the self-petition. The self-petitioner's remarriage, however, will be a basis for the denial of a pending self-petition.

(iii) Citizenship or immigration status of the abuser. The abusive spouse must be a citizen of the United States or a lawful permanent resident of the United States when the petition is filed and when it is approved. Changes in the abuser's citizenship or lawful permanent resident status after the approval will have no effect on the self-petition. A self-petition approved on the basis of a relationship to an abusive lawful permanent resident spouse will not be automatically upgraded to immediate relative status. The self-petitioner would not be precluded, however, from filing a new self-petition for immediate relative classification after the abuser's naturalization, provided the self-petitioner continues to meet the self-petitioning requirements.

(iv) Eligibility for immigrant classification. A self-petitioner is required to comply with the provisions of section [204\(c\)](#) of the Act, [section 204\(g\)](#) of the Act, and section [204\(a\)\(2\)](#) of the Act.

(v) Residence. A self-petition will not be approved if the self-petitioner is not residing in the United States when the self-petition is filed. The self-petitioner is not required to be living with the abuser when the petition is filed, but he or she must have resided with the abuser in the United States in the past.

(vi) Battery or extreme cruelty. For the purpose of this chapter, the phrase "was battered by or was the subject of extreme cruelty" includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence. The qualifying abuse must have been committed by the citizen or lawful permanent resident spouse, must have been perpetrated against the self-petitioner or the self-petitioner's child, and must have taken place during the self-petitioner's marriage to the abuser.

(vii) Good moral character. A self-petitioner will be found to lack good moral character if he or she is a person described in section [101\(f\)](#) of the Act. Extenuating circumstances may be taken into account if the person has not been convicted of an offense or offenses but admits to the commission of an act or acts that could show a lack of good moral character under section 101(f) of the Act. A person who was subjected to abuse in the form of forced prostitution or who can establish that he or she was forced to engage in other behavior that could render the person excludable under [section 212\(a\)](#) of the Act would not be precluded from being found to be a person of good moral character, provided the person has not been convicted for the

commission of the offense or offenses in a court of law. A self-petitioner will also be found to lack good moral character, unless he or she establishes extenuating circumstances, if he or she willfully failed or refused to support dependents; or committed unlawful acts that adversely reflect upon his or her moral character, or was convicted or imprisoned for such acts, although the acts do not require an automatic finding of lack of good moral character. A self-petitioner's claim of good moral character will be evaluated on a case-by-case basis, taking into account the provisions of section [101\(f\)](#) of the Act and the standards of the average citizen in the community. If the results of record checks conducted prior to the issuance of an immigrant visa or approval of an application for adjustment of status disclose that the self-petitioner is no longer a person of good moral character or that he or she has not been a person of good moral character in the past, a pending self-petition will be denied or the approval of a self-petition will be revoked.

(viii) Extreme hardship. The Service will consider all credible evidence of extreme hardship submitted with a self-petition, including evidence of hardship arising from circumstances surrounding the abuse. The extreme hardship claim will be evaluated on a case-by-case basis after a review of the evidence in the case. Self-petitioners are encouraged to cite and document all applicable factors, since there is no guarantee that a particular reason or reasons will result in a finding that deportation would cause extreme hardship. Hardship to persons other than the self-petitioner or the self-petitioner's child cannot be considered in determining whether a self-petitioning spouse's deportation would cause extreme hardship.

(ix) Good faith marriage. A spousal self-petition cannot be approved if the self-petitioner entered into the marriage to the abuser for the primary purpose of circumventing the immigration laws. A self-petition will not be denied, however, solely because the spouses are not living together and the marriage is no longer viable.

(2) Evidence for a spousal self-petition.

(i) General. Self-petitioners are encouraged to submit primary evidence whenever possible. The Service will consider, however, any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service.

(ii) Relationship. A self-petition filed by a spouse must be accompanied by evidence of citizenship of the United States citizen or proof of the immigration status of the lawful permanent resident abuser. It must also be accompanied by evidence of the relationship. Primary evidence of a marital relationship is a marriage certificate issued by civil authorities, and proof of the termination of all prior marriages, if any, of both the self-petitioner and the abuser. If the self-petition is based on a claim that the self-petitioner's child was battered or subjected to extreme cruelty committed by the citizen or lawful permanent resident spouse, the self-petition should also be accompanied by the child's birth certificate or other evidence showing the relationship between the self-petitioner and the abused child.

(iii) Residence. One or more documents may be submitted showing that the self-petitioner and

the abuser have resided together in the United States. One or more documents may also be submitted showing that the self-petitioner is residing in the United States when the self-petition is filed. Employment records, utility receipts, school records, hospital or medical records, birth certificates of children born in the United States, deeds, mortgages, rental records, insurance policies, affidavits or any other type of relevant credible evidence of residency may be submitted.

(iv) Abuse. Evidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel. Persons who have obtained an order of protection against the abuser or have taken other legal steps to end the abuse are strongly encouraged to submit copies of the relating legal documents. Evidence that the abuse victim sought safe-haven in a battered women's shelter or similar refuge may be relevant, as may a combination of documents such as a photograph of the visibly injured self-petitioner supported by affidavits. Other forms of credible relevant evidence will also be considered. Documentary proof of non-qualifying abuse may only be used to establish a pattern of abuse and violence and to support a claim that qualifying abuse also occurred.

(v) Good moral character. Primary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit. The affidavit should be accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the self-petitioner has resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. Self-petitioners who lived outside the United States during this time should submit a police clearance, criminal background check, or similar report issued by the appropriate authority in each foreign country in which he or she resided for six or more months during the 3-year period immediately preceding the filing of the self-petition. If police clearances, criminal background checks, or similar reports are not available for some or all locations, the self-petitioner may include an explanation and submit other evidence with his or her affidavit. The Service will consider other credible evidence of good moral character, such as affidavits from responsible persons who can knowledgeably attest to the self-petitioner's good moral character.

(vi) Extreme hardship. Evidence of extreme hardship may include affidavits, birth certificates of children, medical reports, protection orders and other court documents, police reports, and other relevant credible evidence.

(vii) Good faith marriage. Evidence of good faith at the time of marriage may include, but is not limited to, proof that one spouse has been listed as the other's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences. Other types of readily available evidence might include the birth certificates of children born to the abuser and the spouse; police, medical, or court documents providing information about the relationship; and affidavits of persons with personal knowledge of the relationship. All credible relevant evidence will be considered.

(A) "Legal custody" means the assumption of responsibility for a minor by an adult under the

laws of the state and under the order or approval of a court of law or other appropriate government entity. This provision requires that a legal process involving the courts or other recognized government entity take place. If the adopting parent was granted legal custody by the court or recognized governmental entity prior to the adoption, that period may be counted toward fulfillment of the two-year legal custody requirement. However, if custody was not granted prior to the adoption, the adoption decree shall be deemed to mark the commencement of legal custody. An informal custodial or guardianship document, such as a sworn affidavit signed before a notary public, is insufficient for this purpose.

(B) Evidence must also be submitted to show that the beneficiary resided with the petitioner for at least two years. Generally, such documentation must establish that the petitioner and the beneficiary resided together in a familial relationship. Evidence of parental control may include, but is not limited to, evidence that the adoptive parent owns or maintains the property where the child resides and provides financial support and day-to-day supervision. The evidence must clearly indicate the physical living arrangements of the adopted child, the adoptive parent(s), and the natural parent(s) for the period of time during which the adoptive parent claims to have met the residence requirement. When the adopted child continued to reside in the same household as the natural parent(s) during the period in which the adoptive parent petitioner seeks to establish his or her compliance with this requirement, the petitioner has the burden of establishing that he or she exercised primary parental control during that period of residence.

(C) Legal custody and residence occurring prior to or after the adoption will satisfy both requirements. Legal custody, like residence, is accounted for in the aggregate. Therefore, a break in legal custody or residence will not affect the time already fulfilled. To meet the definition of child contained in sections [101\(b\)\(1\)\(E\)](#) and [101\(b\)\(2\)](#) of the Act, the child must have been under 16 years of age when the adoption is finalized.

(3) Decision on and disposition of the petition. (i) Petition approved. If the self-petitioning spouse will apply for adjustment of status under section [245](#) of the Act, the approved petition will be retained by the Service. If the self-petitioner will apply for an immigrant visa abroad, the approved self-petition will be forwarded to the Department of State's National Visa Center.

(ii) Petition denied. If the self-petition is denied, the self-petitioner will be notified in writing of the reasons for the denial and of the right to appeal the decision. (Re-designated as paragraph (c)(3)(ii), previously (c)(3)(iii); effective 6/18/07; [72 FR 19100](#).)

(4) Derivative beneficiaries. A child accompanying or following-to-join the self-petitioning spouse may be accorded the same preference and priority date as the self-petitioner without the necessity of a separate petition, if the child has not been classified as an immigrant based on his or her own self-petition. A derivative child who had been included in a parent's self-petition may later file a self-petition, provided the child meets the self-petitioning requirements. A child who has been classified as an immigrant based on a petition filed by the abuser or another relative may also be derivatively included in a parent's self-petition. The derivative child must be unmarried, less than 21 years old, and otherwise qualify as the self-petitioner's child under [section 101\(b\)\(1\)\(F\)](#) of the Act until he or she becomes a lawful permanent resident based on the derivative classification.

(5) Name change. If the self-petitioner's current name is different than the name shown on the documents, evidence of the name change (such as the petitioner's marriage certificate, legal document showing name change, or other similar evidence) must accompany the self-petition.

(6) Prima facie determination --(i) Upon receipt of a self-petition under paragraph (c)(1) of this section, the Service shall make a determination as to whether the petition and the supporting documentation establish a "prima facie case" for purposes of 8 U.S.C. 1641, as amended by section [501 of Public Law 104-208](#).

(ii) For purposes of paragraph (c)(6)(i) of this section, a prima facie case is established only if the petitioner submits a completed Form I-360 and other evidence supporting all of the elements required of a self-petitioner in paragraph (c)(1) of this section. A finding of prima facie eligibility does not relieve the petitioner of the burden of providing additional evidence in support of the petition and does not establish eligibility for the underlying petition.

(iii) If the Service determines that a petitioner has made a "prima facie case," the Service shall issue a Notice of Prima Facie Case to the petitioner. Such Notice shall be valid until the Service either grants or denies the petition.

(iv) For purposes of adjudicating the petition submitted under paragraph (c)(1) of this section, a prima facie determination--

(A) Shall not be considered evidence in support of the petition;

(B) Shall not be construed to make a determination of the credibility or probative value of any evidence submitted along with that petition; and,

(C) Shall not relieve the self-petitioner of his or her burden of complying with all of the evidentiary requirements of paragraph (c)(2) of this section.