CHAPTER 1

FAMILY-BASED IMMIGRATION: IMMEDIATE RELATIVES AND THE PREFERENCE SYSTEM

Overview of Family-Sponsored Immigration

Historically, family reunification has been the principal policy underlying U.S. immigration law. Family-based immigration allows for close relatives of U.S. citizens and lawful permanent residents (LPRs) to immigrate to the United States. A legal immigrant is a foreign-born individual who has been admitted to reside in the United States as an LPR.[1] Proof of LPR status is the I-551, Permanent Resident Card, commonly referred to as a "green card." These family members immigrate either as (1) immediate relatives of U.S. citizens or (2) through the family preference system.

Immediate Relatives

Immediate relatives include the following: (1) spouses of U.S. citizens; (2) unmarried minor children of U.S. citizens; and (3) parents of U.S. citizens age 21 or older.[2] 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

The family preference system allows the following persons to immigrate: (1) adult children (unmarried and married) of U.S. citizens; (2) brothers and sisters of U.S. citizens age 21 or older; and (3) spouses and unmarried children (both minor and adult) of LPRs.[3] 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.[4] Backlogs develop because there are more applicants in some countries and categories than there are visas. There are also the nonquota immigrants, such as immediate relatives, who are exempted from the yearly limitations.

Immigrant visas are issued by the U.S. consulates abroad.[5] In addition, U.S. Citizenship and Immigration Services (USCIS) (formerly the Immigration and Naturalization Service [INS]) or the Executive Office for Immigration Review (EOIR) may adjust an applicant's status to LPR in the United States.[6] 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 alien relative petition, and whether they are immigrating through the preference system or as an immediate relative.[7]

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[1] Immigration and Nationality Act (INA) §101(a)(20).

[2] INA §201(b)(2)(A)(i).

[3] INA §203(a).

[4] INA §201(c).

[5] INA §§221, 222.

[6] INA §245.

[7] INA §§245(a), (i).

All citizens or LPRs wishing to petition for a family member must have an income of at least 125 percent of the federal poverty level and execute a legally enforceable affidavit to support their family member, or else secure the assistance of a joint sponsor.[8]

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.[9] However, 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.[10]
- ***Beneficiary***—the alien seeking permanent resident status who is related to the U.S. citizen or LPR petitioner.[11] The beneficiary could be a principal (on whose behalf the alien relative petition is filed) or a derivative (spouse or unmarried children of the principal beneficiary in the preference categories).
- ***Spouse***—the spousal relationship must be legally valid and recognized in the place where the relationship was created.[12] As of June 26, 2013, this includes same-sex marriages that are legal in the jurisdiction in which they are created.[13] 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 a marriage is valid in a foreign country, it must not violate U.S. federal or state public policy. Some marriages are therefore not recognized for immigration purposes: polygamous, incestuous, or proxy (unless later consummated).[14] In some states common-law marriages are recognized. The marriage must be in existence—*i.e.*, not legally terminated—at the time the permanent residency application is adjudicated, although the marriage need not be "viable."[15] If the parties are separated, more proof will be required to demonstrate that the marriage was valid at the time it was entered. If the parties married while the beneficiary was in immigration proceedings, they will have to establish through clear and convincing evidence that the marriage is bona fide.[16]
- ***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).[17]

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[8] INA §213A.

[9] INA §204(a).

[10] 8 CFR §§204.1(a)(1)–(5).

[11] 8 CFR §204.1(a).

[12] *See Matter of Bautista*, 16 I&N Dec. 602 (BIA 1978).

[13] *U.S. v. Windsor*, [cite]. As of June 26, 2013, same-sex marriage is legal in the District of Columbia and 12 states: Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington, as well as in 13 foreign countries.

[14] INA §101(a)(35).

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

[16] INA §245(e)(3).

[17] 8 CFR §204.2(c).

- ***Brother or sister***—siblings each must show they are the "child" of at least one common parent.[18]
- ***Child—***must meet definition in the statute, INA §101(b)(1), and must be unmarried and under 21; "son or daughter" refers to children of any age.
  - ***legitimacy***—a child who was born in wedlock[19] or was legitimized before age 18 while in the father's custody is a "child" for immigration purposes.[20] Marriage of the natural parents is the most common form of legitimation. Children born out of wedlock may obtain immigration benefits from the natural mother.[21] Or they may obtain it from the natural father, so long as they have established a "bona fide parent-child relationship," *i.e.*, cohabitation and provision of support, before age 21.[22]
  - ***stepchildren***—eligible to immigrate through stepparent if child was under 18 at the time of the marriage creating the relationship.[23] It is irrelevant whether the stepchild was born in wedlock or out of wedlock. The stepchild relationship may continue even after the natural parent dies or divorces the stepparent, provided the stepparent has maintained active parental interest.[24] Stepchildren may also serve as petitioners and immigrate their stepparents.
  - ***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.[25] The two years can be counted in the aggregate. The adoption must be legally valid in the jurisdiction where it took place.[26] Natural siblings of the adopted child are also eligible to immigrate if adopted while under 18 by the same adoptive parent.[27] Adoptions are also available under the Intercountry Adoption Act of 2000,[28] which the United States enacted to comply with its obligations under the Hague Convention.[29] U.S. citizens seeking to adopt and immigrate a child from one of the convention member countries must satisfy certain requirements.[30] The procedure for immigrating an adopted child pursuant to the Hague Convention is covered in chapter 2.
  - ***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

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[18] *See Matter of Mahal*, 12 I&N Dec. 409 (BIA 1967).

[19] INA §101(b)(1)(A).

[20] INA §101(b)(1)(C).

[21] INA §101(b)(1)(D).

[22] *See Matter of Vizcaino*, 19 I&N Dec. 644 (BIA 1988).

[23] INA §101(b)(1)(B).

[24] *See Matter of Mowrer*, 17 I&N Dec. 613 (BIA 1981).

[25] INA §101(b)(1)(E).

[26] 8 CFR §204.2(d)(2)(vii)(C).

[27] INA §101(b)(1)(E).

[28] Pub. L. No. 106-279, 114 Stat. 825.

[29] Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, S. Treaty Doc. 105-51 (1998), 32 I.L.M. 1139. For in-depth guidance on international adoption issues, see *The International Adoption Sourcebook* (AILA 2008), *www.ailapubs.org*.

[30] INA §101(b)(1)(G); 22 CFR §42.24.

adoption.[31] 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 beneficiary of a 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.[32]

Immediate Relatives and the Preference System

Immediate Relatives

The term "immediate relative" is defined to include the following family relationships: spouse, child (unmarried, under 21), and parent of a U.S. citizen.[33] In the case of a parent, the U.S. citizen petitioner must be at least 21 years of age. The definition also includes widows or widowers of U.S. citizens who were not legally separated at the time of the spouse's death, file an application within two years of the death, and did not remarry before acquiring the immigrant visa or status.[34] Immediate relatives 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 a backlog at some USCIS service centers in adjudicating the relative petitions and at some USCIS district offices in scheduling adjustment interviews. This means that even immediate relatives can expect to wait six months or more to receive their immigrant status.

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[35]
- Second—has two subsections:

  –F-2A: spouses or unmarried children (under 21) of LPR[36]

  –F-2B: unmarried sons or daughters age 21 and over of LPR[37]
- Third—married sons and daughters of U.S. citizens[38]
- Fourth—brothers and sisters of U.S. citizens, where citizen is at least 21[39]

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[31] 8 CFR §204.3(d)(1)(iii).

[32] 8 CFR §§205.1(a)(3)(i)(H), (I).

[33] INA §201(b)(2)(A)(i).

[34] 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.

[35] INA §203(a)(1).

[36] INA §203(a)(2)(A).

[37] INA §203(a)(2)(B).

[38] INA §203(a)(3).

[39] INA §203(a)(4).

– *Quota System*

Congress has placed a limit on the number of foreign-born individuals who are admitted to the United States annually as family-based immigrants. They are limited by statute to 480,000 persons per year.[40] 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.[41]

There is no numerical cap on the number of immediate relatives admitted annually to the United States as immigrants.[42] 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.[43] But no fewer than 226,000 visas are available each year.[44]

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

- *1st Preference* (unmarried sons and daughters of U.S. citizen)—23,400 visas/year, plus any visas left over from the 4th preference[45]
- *F-2A Preference* (spouses and minor children of LPR)—87,900 visas/year, plus any visas left over from the 1st preference[46]
- *F-2B Preference* (unmarried adult children of LPR)—26,300 visas/year, plus any visas left over from the 1st preference
- *3rd Preference* (married adult children of U.S. citizen)—23,400 visas/year, plus any visas left over from the 1st and 2nd preferences[47]
- *4th Preference* (brothers and sisters of U.S. citizen over 21)—65,000 visas/year, plus any visas left over from the previous preferences.[48]

The primary source of information on visa availability is the *Visa Bulletin*, available from the U.S. Department of State, Bureau of Consular Affairs, Visa Services, Washington, DC 20520. A copy of a *Visa Bulletin* for July 2013 is included as appendix 1. You can request to be sent the *Visa Bulletin* by e-mail; send your request to *listserv@calist.state.gov*. In the body of the message type "subscribe Visa Office Bulletin," followed by your first name and last name. Alternatively, you may call the State Department for a recording on the status of priority dates, (202) 663-1541, or visit its website at *http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html*. Visa Bulletins are also posted to the AILA InfoNet, *www.aila.org*.

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[40] INA §201(c)(1)(A)(i).

[41] INA §202(e).

[42] INA §201(b).

[43] INA §201(c)(1)(A).

[44] INA §201(c)(1)(B)(ii).

[45] INA §203(a)(1).

[46] INA §203(a)(2)(B).

[47] INA §203(a)(3).

[48] INA §203(a)(4).

You will need to become familiar with how to read the *Visa Bulletin* to determine how long a particular visa application will take. In order to understand it, you must be familiar with the following concepts:

- ***Priority date***—Under the quota system, family-based immigrant visas are distributed on a chronological basis determined by the date that the alien relative petition (Form I-130) was properly filed with USCIS. That filing date becomes the "priority date."[49] To be properly filed, the application must be completed, signed, and submitted with the appropriate filing fee.[50]

  Once you know the priority date, you can determine whether it is "current," *i.e.*, a visa is 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. The priority date must be *before* the date on the *Visa Bulletin* to be considered current. For example, a Mexican LPR who is immigrating his spouse in the F-2A visa category will look at the most recent *Visa Bulletin* for that preference category under the column for Mexico. In July 2013, the date on the *Visa Bulletin* for that category and nationality was September 1, 2011. Only applicants whose I-130s were filed before that date are considered current.

- ***Cross-Chargeability***—If the principal and derivative beneficiaries were born in different countries, it may be possible to apply cross-chargeability principles. Visas are usually chargeable to the country of the beneficiary's place of birth.[51] But a basic tenet of family-based immigration is maintaining the family intact. If one family member were being charged to a country that is oversubscribed, while the other family members in the same preference category were charged to countries that are current, this would result in separation and undue hardship. To remedy this potential problem, the law allows in some situations for the family to elect whichever foreign state is more beneficial. The law seems to limit application of this cross-chargeability, however, to the third– and fourth-preference categories and to situations in which it is necessary to prevent the separation of the spouses or separation of the children and parents.[52] For example, if a U.S. citizen is petitioning for his married Mexican son, the son and his Guatemalan spouse can elect to have their visas charged to Guatemala, since the third preference for Mexicans is backlogged farther than for Guatemalans. Similarly, if a U.S. citizen is immigrating his Japanese brother, the brother's Filipino wife would elect to be charged to her husband's country of birth. Their child, who was born in India, could elect to be charged to either parent's country, and in this example would elect the father's.

[49] 8 CFR §204.1(c).

[50] 8 CFR §204.1(d).

[51] INA §202(b).

[52] 22 CFR §42.12.