CENTER FOR HUMAN RIGHTS & CONSTITUTIONAL LAW

2014

IMMIGRANT CHILDREN & UNACCOMPANIED MINORS: A LEGAL SERVICES MANUAL

256 SOUTH OCCIDENTAL BOULEVARD
LOS ANGELES, CA 90057
Telephone: (213) 388-8693
Facsimile: (213) 386-9484
www.centerforhumanrights.org
# Table of Contents

Chapter 1: Basic Background of Federal Immigrant Law .......................................................... 1
  1.1 Power and Authority Regarding Immigration Laws .................................................. 1
  1.2 Important Federal Legislation .................................................................................. 2
  1.3 Categories of Immigration Status: ........................................................................... 4
  1.4 Federal Immigration Enforcement Agencies .......................................................... 6

Chapter 2: Rights of Children Subject to Deportation, Removal or Inadmissibility .......... 6
  1.3.1 Family-Sponsored Preferences ........................................................................... 6
  1.3.2 Path to Citizenship for Family Sponsored Visa .................................................. 6
  1.3.2.1 Types of Family Sponsored Visas ................................................................. 7

  1.3.2 Adoption ............................................................................................................. 17
  3. Special Immigrant Juvenile Status ............................................................................ 28
  4. Asylum and Refugees .............................................................................................. 50
  5. Member of a Special Category .................................................................................. 75

Chapter 2: Rights of Children Subject to Deportation, Removal or Inadmissibility .......... 97

  2.1 Types of Removal ................................................................................................... 97
  2.1.1 Inadmissibility S.212 ......................................................................................... 97
  2.1.2 Removal ............................................................................................................ 125

  2.2 Right to Counsel and other Representation ........................................................ 131
  2. Right to apply for benefits ....................................................................................... 135

II. PUBLIC BENEFITS FOR IMMIGRANT CHILDREN ......................................................... 135

  A. CalWORKS .............................................................................................................. 135
     1. Eligibility ............................................................................................................. 136
     2. Which immigration documents do I need to get CalWORKs? ......................... 137
     3. How to Apply ..................................................................................................... 138
     4. GAIN .................................................................................................................. 139
     5. Special Rules Regarding Children ..................................................................... 140

  B. Food Stamps ............................................................................................................ 142
     1. U.S. Code ............................................................................................................ 142
     2. Application Process ............................................................................................ 143
     3. California Food Assistance Program ................................................................ 151

  C. Public Housing ......................................................................................................... 153
     1. Public Housing and Section 8 ............................................................................ 153
     2. Family Self-Sufficiency Program ..................................................................... 156
     3. Section 8 Homeless Program ............................................................................ 156

  D. California Children Services .................................................................................... 157
     1. Medical conditions covered .............................................................................. 157
     2. Eligibility ............................................................................................................ 157
     3. Services available ............................................................................................... 158
     4. How to Apply ..................................................................................................... 159

  E. Cash Assistance Program for Immigrants (CAPI) ...................................................... 160
     2. Application Process ............................................................................................ 161
     3. Benefits .............................................................................................................. 161
4. Redeterminations........................................................................................................162

F. California Department of Developmental Services ................................................163
  1. Developmental Disability Definition.................................................................163
  2. Regional Centers ..............................................................................................163
  3. Eligibility ...........................................................................................................164
  4. Lanterman Regional Center ...............................................................................164

G. Job Corps ................................................................................................................166
  1. Eligibility ...........................................................................................................166
  2. How To Apply ....................................................................................................166
  3. California Offices ..............................................................................................166

H. AB - 540 ................................................................................................................168
  1. Eligibility ...........................................................................................................168

I. California DREAM Act ............................................................................................169
  1. AB 130 .............................................................................................................169
  2. AB 131 .............................................................................................................170
    1. Arrest ............................................................................................................176
    2. Locating a Detainee ....................................................................................177
    3. Notice to Appear ........................................................................................178
    4. Voluntary Departure ..................................................................................179

B. How to avoid a removal order ..............................................................................180
   There limited options once a person is place in removal proceedings, generally
   these include: .......................................................................................................180

C. Prosecutorial discretion .........................................................................................182

E. If the child’s parent gets removed ..........................................................................189
Chapter 1

1.1 Basic Background of Federal Immigrant Law

Although for many legal professionals using this manual, an understanding of the basic principles and tenants of immigration law is assumed, it is equally vital to ensure that this text can be accessible to a wider audience of lawyers, paraprofessionals and independent researchers who may be unfamiliar with this foundation. As such the following succinct overview has been provided. Four major topics are covered here: 1) power and authority regarding immigration laws; 2) important federal legislation; 3) categories of immigration status; and 4) federal immigration enforcement agencies.

1.1.1 Power and Authority Regarding Immigration Laws

NOT REALLY A STATE POWER: As set forth in the U.S. Constitution, power to make and enforce laws is shared primarily between the federal and state governments. State powers are referenced in the 10th Amendment of the Constitution (part of the Bill of Rights) and include chief among them the police power, which allows states to create regulations and laws that focus on protecting the health, safety, moral, and aesthetic interest of the states. While under this rather broad purview, the courts of the U.S. have declared that states are allowed some say in immigration law, immigration law is chiefly within the power of the legislative (Congress) and Executive (the President) branches of the federal government.

A prime example of the line drawn between the purview of state police power and intrusion into immigration policy was set forth recently in the Supreme Court ruling in Arizona v. U.S., 567 U.S. ___ (2012) and its partial overturning of the controversial Support our Law Enforcement and Safe Neighborhoods Act (Arizona S.B. 1070)

FEDERAL POWER

Generally, the federal government, and specifically Congress, has the last say over immigration law. While the Constitution does not expressly say Congress has all power in this field, courts have made specific reference to certain important passages. These include: (a) Article 1 § 8; (b) the 14th Amendment; (c) power to deal with foreign affairs; and (d) the “Plenary Powers doctrine.”

a) Article 1 § 8: The enumerated powers of Congress are listed in Article 1 § 8. Among them is the naturalization power by which “Congress has the power to . . . establish a uniform rule of naturalization”. Congress is endowed with all necessary authority to enact legislation towards this goal through the Necessary and Proper Power.

b) 14th Amendment: In emphasizing and expanding upon the definition and rights of a U.S. citizen, Section 1 of the amendment made it clear that no state was permitted to abridge or in any way alter the rights and liberties of any person
“born or naturalized in the U.S.”. As such, states cannot tamper with federal law regarding the rights or naturalization process of U.S. citizens.

c) Power to Handle Foreign Affairs: Under Article 2, power to make treaties with other nations is confined to the executive branch of the federal government. However, because the Executive is required to seek the advice and consent of the Congress in ratifying and executing foreign treaties, Congressional power is evident in this area as well.

d) Plenary Powers doctrine: While the aforementioned passages do provide some guidance in granting the federal government power over immigration, the Judiciary has repeatedly invoked the Plenary Power doctrine to assert that issues of immigration “are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary” Mathews v. Diaz et al., 426 U.S. 67, 81 (1976).

1.1.2 Important Federal Legislation

While Congress has passed a number of significant, and sometimes controversial, pieces of legislation regarding federal immigrant law (See e.g. the Naturalization Act of 1790, the Chinese Exclusion Act), the following modern laws (which can be found in Chapter 12 of Title 8 of the U.S. Code), are of particular importance.

a. The Emergency Immigration Act of 1921¹ and the Immigration Act of 1924²: While the Emergency Immigration Act was the first law enacting national quotas on the number of immigrants allowed to enter the country per year, the 1924 Act not only set more stringent caps in proportion to contemporary U.S. demographics, but also required a cap of no more than 154,227 immigrants from “the Eastern hemisphere”.

b. The Immigration and Naturalization Act (INA) of 1952³ (also known as the McCarran-Walter Act): This is the definitive piece of legislation regarding federal immigration law for the past 50 years as it:

i. provided the definition of “alien” as someone without U.S. citizenship or status as a national of the U.S.;

ii. set the prevailing categorization of immigration status based on special skills, family relation to U.S. citizens, and “average immigrants”;

iii. set the distinction for documented and undocumented aliens; and

iv. set up the famed Immigration and Nationalization Service (the INS), which enforced federal immigration law from 1952 until it was decommissioned after 9/11.

c. The Immigration and Naturalization of 1965 (the Hart-Celler Act): This Act amended the INA by removing region and national origin based quota systems

¹ Ch. 8 42 Stat. 5 (1921)
² Pub L. 68-139, 43 Stat. 153 (May 28th, 1924)
³ 8 U.S.C. S. 1101-1537
that provided clearly preferential treatment to persons entering from the “Western hemisphere” who were given the term “special immigrants”. Instead, the Act introduced a quota system based predominantly on labor capabilities and family relationship to U.S. nationals and permanent residents.

d. The Refugee Act of 1980 Defined “refugee” as used in U.S. law (INA S. 208) and permitted asylum within the U.S. for non-resident aliens who qualify under this category. (See e.g. INS v. Elias-Zacarias, 502 U.S. 478 (1992), Matter of Kasinga).

e. The Immigration Control and Reform Act (1986): While it did offer an amnesty program for about three million illegal immigrants who had entered the country before 1982, the IRCA is generally seen as a toughening of immigration regulations. Along with requiring employers to attest to employees’ immigration status, the Act also toughened criminal sanctions against hiring undocumented aliens. In addition, it explicitly denied acquisition of federally funded benefits by illegal aliens. However, in keeping with the amnesty program, it also legalized some illegal immigrants who performed seasonal agricultural work.

f. The Immigration Marriage Fraud Amendments of 1985-1986: In response to a rising concern of the immediate relative preference of the INA providing a loophole for immigration quotas, Congress passed a series of amendments in 1986 that targeted the practice of sham marriages. Greater oversight introduced conditional visas to non-resident aliens married to U.S. citizens that required showing the marriage’s continued validity 2 years acquisition of the visa (INA S. 216).

g. The Immigration and Naturalization Act of 1990: Although it did strengthen U.S. border patrol, the Immigration Act of 1990 played a key role in opening up and supporting immigration. Some major provisions included

i. no longer permitting AIDS or homosexuality to be used as reasons for denying entry;

ii. setting up the Diversity Visa Program (informally referred to as the Green Card Lottery), aimed at increasing the number of immigrant visas for persons emigrating from countries with historically low U.S. entry rates;

iii. revising exclusion and deportation procedures codified in the INA; and

iv. introducing the EB-(1-5) visas for persons seeking specialized employment or investing in U.S. domestic business.

h. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IRIRA): Expanded regulations relating to policing of illegal immigration. Replaced all references of “entry” into the U.S. with “admission”. It is the prevailing legislation regarding what constitutes inadmissibility and what punishments can result from entering the U.S. without proper admission at a designated port or U.S. customs site. Inspection at said ports is required both for “arriving aliens” and immigrant visa holders. Failure to be properly admitted results in a status of unlawful presence that can result in a ban from the U.S. lasting anywhere between 3 to 20 years. Permanent bans may also be imposed if the violation is egregious enough.
1.1.3 Categories of Immigration Status

Although the combined legislation of the INA ('52 and '65), the IRCA, the Immigration Act of 1990, and the IIRIRA have resulted in a multitude of specific immigration categories based on the type, duration, and process of the visa acquired, there are three fundamental designations that must be clearly defined.

a. **U.S. Citizen:** As recognized under the 14th Amendment, all persons who have been born or duly nationalized in the U.S. are considered U.S. citizens. As guaranteed under the Constitution, citizens have the right to vote, be elected to federal or state office, seek federal government employment, and bring family members to the U.S. Furthermore, these rights cannot be abridged by state law. Pursuant to the Constitution, citizenship can only be obtained through: (i) birth (codified under INA § 301); or (ii) naturalization after residence as a lawful permanent resident.

i. **Citizenship by birth** (INA § 301): There are two overriding doctrines that ensure citizenship by birth: *jus soli* and *jus sanguine*
   1. **Jus soli:** As stated in the Citizenship Clause of the 14th Amendment and codified under INA § 301(a), any child born in a territory of the U.S. will be considered a U.S. citizen. This rule has been tested and upheld by the Supreme Court in *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1898), ruling that a child in California born to Chinese parents could not be denied re-entry to the U.S. after temporary leave.
   2. **Jus sanguine** (INA § 301(c),(g)): Citizenship will also be granted to any child born to parents, at least one of which is a U.S. Citizen. However, if born outside the U.S. the child will only be given citizenship if:
      a. both parents are U.S. citizens and at least one maintains a permanent residence in the U.S. (INA 301(c))
      b. one of the parents is a citizen and has resided in the U.S. for a period of five years, with at least two of those being after the age of 14 (INA 301(g)).

ii. **Naturalization:** This method of attaining U.S. citizenship is only available to persons already considered lawful permanent residents ("LPRs") (see discussed below). However, maintaining this status by possession of an immigrant visa (a green card) is only one of a number of requirements LPRs must meet before being nationalized under the INA. In addition, they:

   1. must remain in LPR status for at least five (5) years (3 years if married to a U.S. citizen). (INA 316, 319);
   2. must be physically present in the U.S. for at least the last 2.5 years before applying (certain exceptions exist, but if outside
the country for over six months, presence is presumptively broken. (INA 316-317));
3. must maintain a residence in the U.S., preferably in the district in which they are applying;
4. must be at least 18 years of age (although children will be granted derivative citizenship if they acquire LPR status at the same time as the adult LPR (INA 319-320));
5. Must be of good moral character: which is defined under INA 101(F) and subject to the presiding judge’s discretion.
6. must be attached to Constitutional principles; and
7. must meet cultural requirements such as English proficiency and knowledge of U.S. civics and history (INA 312).

iii. U.S. Nationals: While all U.S. citizens are considered U.S. nationals, not all nationals of the U.S. are necessarily citizens. Under current immigration law, only persons born in either American Samoa or the Swain Island fall into this category. Those considered U.S. nationals but not citizens have the right to seek employment without restriction in the U.S., but they cannot vote or hold elected office and must seek citizenship status through the same path as LPRs. (8 U.S.C. S. 1408)

iv. Immigrant Visa Holders - Lawful Permanent Resident (LPR):
The term “lawful permanent resident” applies to any person who can show proof of legal residence within the U.S. by possession of an immigrant visa. While an immigrant visa allows a holder to legally reside permanently within the U.S., these visas do not allow said holders to vote, be elected to office, or take federal employment.

In addition, re-entry into the U.S. after a temporary leave may threaten LPR status, especially if the alien has been away for longer than six months or has failed to maintain a permanent U.S. residence. Nevertheless, LPRs are generally are not required to submit to the admission process at a U.S. customs site upon re-entry.
Visas qualifying a person for LPR status include:

v. Family sponsored visas, (INA 203(a)): Along with one IR category, fall into F1, F2A, F2B, F3, and F4.
vi. Employment based visas (INA 203(b): Set up by 1990 Act, range from EB-1 to EB-5 and center around labor, investment, or business skills.
vii. Diversity Program based visas (DV)
viii. Refugee/Political Asylum visas
ii. Non-Immigrant Visa Holders - Non-Resident Alien: Persons holding non-immigrant visas are considered foreign nationals allowed in the U.S. for a temporary period or purpose. Foreign exchange students, business travelers, visiting athletes, and tourists are just a few examples of persons who must acquire a non-immigrant visa under INA § 101(a)15.

1.1.4 Federal Immigration Enforcement Agencies

Since 1933, INS chiefly handled the enforcement of immigration law, with peripheral help from U.S. Customs and Border Patrol. However, after the September 11th attacks, the INS was dissolved pursuant to the Homeland Security Act of 2002 and replaced by several agencies operating under the joint purview of the Department for Homeland Security (DHS) and the Department of Justice (DoJ). These agencies include:

a. The U.S. Customs and Immigration Service (USCIS): Created as part of DHS, the USCIS took over the majority of the adjudicative and administrative functions of the INS. This includes administration of immigration benefits, adjudication of asylum and temporary worker petitions, and of course grants of LPR and US citizenship status.

b. The U.S. Immigration and Customs Enforcement (ICE): This agency focuses on investigation and deportation proceedings, as well as provides intelligence for DHS.

c. The U.S. Customs and Border Patrol (CBP): This agency is tasked primarily with the policing of American ports and other points of entry.

1.3 Who Can Adjust Immigration Status

There are several different ways for a child to legalize his/her immigration status including: (1) an immediate relative or family petition; (2) a special immigrant visa; or (3) a trafficking visa, as an asylee or as a refugee.

1.3.1 Family-Sponsored Preferences

1.3.1.1 Path to Citizenship for Family Sponsored Visa

There are two distinct paths through which a child can get his/her green card through a family petition.

Child present in the U.S

First, if the child is already present in the U.S. s/he may qualify for adjustment of status to permanent residence in the U.S. In this case, immigrant processing can be completed without the child having to return to his/her home country.

Consular Processing
Second, if the child is outside the U.S. or if the child is not eligible to adjust status in the U.S. s/he may be eligible for consular processing through a U.S. embassy or consulate abroad that has jurisdiction over the child’s foreign place of residence.

1.3.1.2 Types of Family Sponsored Visas

USCIS states that “[t]he U.S. promotes family unity and allows U.S. citizens and permanent residents to petition for certain relatives to come and live permanently in the U.S.” There are different family-sponsored preferences that are available for qualifying children.

Practice Tip

To check on the current availability and wait time for family-sponsored petitions, see the most current visa bulletin at: http://travel.state.gov/visa/bulletin/bulletin_1360.html

Before proceeding it should be noted that petitions and visas for immediate relatives of U.S. citizens (IR visas) are not found in the family sponsored preference categories. Immediate relatives are not truly a family-sponsored preference as it is not subject to numerical limitations. As such, persons applying for an IR visa need not wait for a date set by the visa bulletin (discussed below) to petition for LPR status.

The different family-sponsored preferences are: (1) unmarried sons and daughters of citizens; (2) opposite sex spouses, minor children and unmarried sons and daughters of LPRs; (3) married sons and daughters of U.S. citizens; and (4) brothers and sisters of citizens.

a. Immediate Relatives of U.S. Citizens

For immediate relatives of U.S. citizens, visas are always available, thus, the child who is an immediate relative of a U.S. citizen does not need to wait in line for a visa.

There are five types of visas recognized under the immediate relative category. They are:

- IR 1: Spouse of a U.S. Citizen

4 http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=be1ea6c515083210VgnVCM100000082ca60aRCRD&vgnextchannel=be1ea6c515083210VgnVCM100000082ca60aRCRD
5 Note: family-sponsored preferences are also available to spouses but this section is tailored to children only.
- IR 2: Unmarried child under 21 of a U.S. Citizen
- IR 3: Orphan adopted abroad by a U.S. Citizen
- IR 4: Orphan adopted in the U.S. by a U.S. Citizen
- IR 5: Parent of a U.S. citizen who must be at least 21 years old

While the IR 3 and 4 processes will be touched upon in this section, all references to IR visas for children will primarily focus on the IR 2 status for minor children of U.S. citizens. A deeper discussion of the adoption and visa petition process for orphaned immigrant children can be found starting on page 21 of this manual.

i. Entitlement to status

In order to qualify as an immediate relative, a child must be able to fall under the definition as set forth under INA § 201(b)(2)(A) and explained under 22 C.F.R. 42.21.

“Aliens described in this subsection, who are not subject to the worldwide levels or numerical limitations of subsection (a), are as follows: Immediate relatives [of a citizen of the U.S.]. INA § 201(b)(2)(A)(i).”

Immediate relatives for the purposes of immigration includes, “children, spouses and parents of a citizen of the U.S., except that, in the case of parents, such citizens shall be at least 21 years of age.” INA § 201(b)(2)(A)(i). The immigrant child’s age is determined as of the date the petition was filed. 8 U.S.C. 1151 (f)(1)-(4).

The criteria set forth in 201(b) are further explained in 22 CFR 42.21. As stated here: (a): An alien who is a spouse or child of a U.S. citizen, or a parent of a U.S. citizen at least 21 years of age, shall be classified as an immediate relative under INA 201(b) if the consular officer has received from DHS an approved Petition to Classify Status of Alien Relative for Issuance of an Immigrant Visa, filed on the alien’s behalf by the U.S. citizen and approved in accordance with INA 204, and the officer is satisfied that the alien has the relationship claimed in the petition.

An immediate relative shall be documented as such unless the U.S. citizen refuses to file the required petition, or unless the immediate relative is also a special immigrant under INA 101(a)(27) (A) or (B) and not subject to any numerical limitation.

ii. Requirements for qualifying a child for an IR 2 visa

6 Travel.State.gov, a resource of the Bureau of Consular Affairs at the U.S. State Department, http://travel.state.gov/visa/immigrants/types/types_1306.html
A non-citizen child of a U.S. Citizen is an immediate relative; therefore, the numerical limitations on family-sponsored preferences are not applicable.

To fall under this category, persons must show that the visa recipient is: (1) under 21 years of age at the time of filing under the CSPA; (2) unmarried; and (3) defined as a “child” under one of the six categories listed in INA § 101(b)(1)(A)-(F).

Practice Tip

The best evidence to submit as proof of the parent-child relationship is the child’s birth certificate with the petitioner’s name listed as the parent.

1. Under 21

To be considered immediate family for immigration purposes, the child must be unmarried and under 21 years of age.\(^7\) The child’s age is determined as of the date the petition is filed.

NOTE: The Child Status Protection Act and “age freezing”

The Child Status Protection Act (CSPA) was signed on August 6, 2002.\(^8\) This provides for protection for immigrant children whose eligibility for a family sponsored visa may have been adversely affected by delays in the processing of the application. For a child who is applying for a family sponsored visa as an immediate relative, the child’s age is frozen as of the date that the petition was filed on his/her behalf.

EXAMPLE:

Jane is 20 years old as of 01/01/2012. On her behalf, her USC father files the petition for a visa as an immediate family member on 01/01/2012. Even if Jane turns 21 before the application is processed, the CSPA protects her by

\(^7\) INA § 101(b)(1)

“freezing” her age so that she will still be able to qualify as her father’s immediate family member.

In the absence of the CSPA, Jane would have turned 21 before the application was processed and would have been considered ineligible as an immediate relative. She would have been forced to apply under the family-sponsored first preference, which is subject to numerical limitations.

B. Not Married

If the son or daughter of a USC is married and under 21, he/she is not considered immediate family of his/her parent, for immigration purposes. However, if the marriage ends the son or daughter is again considered an immediate family member and will not have to apply for the family sponsored petitions that are subject to numerical limitations. The CSPA also “freezes” the age of the beneficiary as of the date of the termination of the marriage if a family sponsored petition has already been filed.

EXAMPLE:

John, who got married when 18 years old, is currently 19 years of age. John’s father has already filed a petition for legalization as the married son of a USC. When John’s divorce is finalized he will automatically be considered a child for immigration purposes and his age will “freeze” at 19 (the date of the finalization of his divorce). Even though John was previously married, because of his divorce he is again considered an immediate family member of his father for immigration purposes.

NOTE: Definition of Spouse and the Defense of Marriage Act (D.O.M.A.)

Under the federal Defense of Marriage Act (“D.O.M.A.”), marriages of same sex couples will not be recognized under federal law. As such, all references to spouses by U.S. citizens (for IR status) or LPRs, (for F2 status) refer solely to spouses who are of the opposite sex.

As a result, many same sex spouses of U.S. citizens or LPRs will not be able to seek visas as immediate relatives for either the IR or F2A categories afforded to opposite sex...
spouses. As such, they must apply for petitions independently through non-family based methods (i.e. employment, diversity visas, refugees) in order to acquire LPR status.

While this situation is tragically unfortunate and extremely controversial, it does provide a particular loophole for gay and lesbian children of U.S. citizens and LPRs. For instance, while children of USCs who are married are subject to the quota requirements of the third family preference category under 203(a), this is not the case for USC children married to same sex partners. Instead, they will qualify for either the IR or first family preference (based on whether they are over the age of 21).

Children of LPRs married to same sex spouses are further benefited. While married children of LPRs are afforded no visa preference under INA § 203, unmarried minor and adult children fall under the F2A and F2B categories respectively.

C. Categories of Child

There are six categories of “child”: (1) children born during a marriage; (2) stepchildren under 18 at the time the marriage took place; (3) children born out of wedlock; (4) children born out of wedlock who have a relationship with a USC parent; (5) adopted children; and (6) orphans.\(^\text{11}\)

\begin{itemize}
  \item \textbf{Children born during a marriage:}\n    \begin{itemize}
      \item A child who is considered legitimate under the applicable law is recognized everywhere as legitimate. If there is a change in the law of the country of the child’s birth that no longer differentiates between legitimate children will be apply retroactively if the child is under 18 at the time of the change of law.
    \end{itemize}
  \item \textbf{Stepchildren:}\n    \begin{itemize}
      \item A stepchild will be considered immediate family of his/her stepparent if the marriage occurred before the child’s 18th birthday and the stepchild’s relationship with the stepparent still exists at the time the status is sought.\(^\text{12}\)
    \end{itemize}
\end{itemize}

\(^{11}\) INA § 101(b)(1)(A)-(F)

\(^{12}\) INA § 101(b)(1)(B)
his/her stepparent.

If a stepchild’s relationship with the stepparent is forged on the basis of a sham marriage, the relationship will not be recognized for immediate family purposes even if the child was unaware that the marriage was a pretext.

**Children born out of wedlock**

A child born out of wedlock is considered the child of his/her natural mother. A USC mother can petition for status for her child as an immediate relative.

**Children born out of wedlock with a familiar relationship**

As of 1986, a child born out of wedlock can be considered immediate family of his/her father for immigration purposes if he/she has “a bona-fide parent-child relationship with the person.”

**Adoption**

This section is described in detail below. See page 21.

**Orphans**

Starting in 1948, Congress approved several measures to admit orphan children into the U.S. Currently, there is no limit on the number of orphan petitions that can be submitted by a U.S. family. Orphan petitions are not limited to families, an unmarried USC over the age of 25 can adopt an orphan child from overseas.

Requirements:

- The orphan must be under 16 at the time a visa petition is filed.

- The child must have been orphaned by the death or disappearance of, or abandonment or desertion by, or

---


14 Pub. L. No. 94-155, 89 Stat. 824

15 A child given unconditionally to an orphanage is considered to be abandoned. However, if the child is only temporarily placed in the orphanage, the child will not be considered abandoned unless the parents do not support the child, express an intent not to retrieve the child and fail to express any parental interest. 8 C.F.R. § 204.3(b).
separation\textsuperscript{16} or loss\textsuperscript{17} from, both parents.

- If the child still has one parent, to be considered an orphan that parent must be incapable of providing proper care\textsuperscript{18} for the child and the remaining parent must sign an irrevocable release allowing the child’s adoption.

iii. Procedure for Obtaining an IR Visa

\textbf{One Step Process}

The immigrant child files Form I-485, Application to Register Permanent Residence or Adjust Status at the same time that the U.S. citizen petitioner files Form I-130.\textsuperscript{19}

\textbf{Two Step Process}

The child has the option of filing the I-485 application any time after the petitioner files Form I-130 as long as it has not been denied. The I-485 must be filed with the I-797 Notice of Action, which indicates that the I-130 has been approved or is pending.

\textbf{If the Beneficiary is out of the U.S.}

If the child lives outside the U.S., s/he will have to go through consular processing. In this case, the USCIS works with the Department of State to issue a visa when it becomes available. The child will then travel to the U.S. and become a permanent resident when admitted in the U.S.

b. Family Sponsored Preferences – (INA § 203(a))

While the IR visa is typically free from quotas and can be petitioned for at any time by the alien’s U.S. citizen sponsor, this is not the case for the general Family Sponsored Visa classes (FSV). These visas are given to persons not considered immediate relatives under the INA but still falling under one of the

\textsuperscript{16} Separation is defined as the involuntary severance of a child from his or her parents by authority for good cause in accordance with the country’s laws. The parental rights must have been severed permanently and unconditionally. 8 C.F. R. § 204.3(b)
\textsuperscript{17} Loss is defined as the involuntary severance of the parent from the child in a permanent manner that is beyond the control of the parent. 8 C.F.R. § 204.3(b).
\textsuperscript{18} A parent is considered to be unable to care for his/her child if s/he cannot provide for the child’s basic needs, consistent the country’s standards.
\textsuperscript{19} Both forms are available at: http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=db029c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD
several applicable categories under INA § 203(a).

Petitions for these visas can be made by either U.S. citizens or persons already admitted as LPRs. However, the status of the petitioner (USC or LPR) will also affect the category in which the applicant is considered.

There are five (5) types of family visas that fall into four (4) overall categories, with F2 visas being divided into F2A and F2B subsections. These are as follows: (i) **Preference F1** for unmarried (or married to a same sex spouse) children over the age of 21 with a parent holding U.S. Citizenship, (ii) **Preference F2** for (A) opposite sex spouse or minor children of LPR and (B) adult “unmarried” children of LPRs; (iii) **Preference F3** for married sons and daughters of a U.S. citizen; and (iv) **Preference F4** for brothers and sisters of a U.S. citizen who is over the age of 21.

Please note that family sponsored visas, while referred to under informal designations such as F1, F2A, and F4, actually fall under INA § 203(a). As such, they differ from the formally designated F-1 visa, which is reserved for foreign students studying in the U.S. for at least one year. The F-1 visa is so named because it is authorized under § 101(a)15(F) of the INA.

i. First Family Sponsored Preference

In order to be considered under F1 preference, applicants must be unmarried children, 21 years or older, with a parent holding U.S. citizenship.

As stated Under INA § 203(a)(1), “Unmarried sons and daughters of citizens.- Qualified immigrants who are the unmarried sons or daughters of citizen of the U.S. shall be allocated visas in a number not to exceed 23,400....”

The statute uses, “sons and daughters” instead of “child” to avoid confusion. This family-sponsored preference applies only to adult unmarried children of a USC. Furthermore, as stated in the text, during any given year, only 23,400 such visas will be provided by the USCIS.

iii. Second Family Sponsored Preference

The F2 preference applies to opposite sex spouses of LPRs, and (1) unmarried children under 21 years old with a parent who is a permanent resident; or (2) unmarried sons or daughters 21 years or older with a parent who is a permanent resident.

Under INA § 203(a)(2), “unmarried sons and unmarried daughters of permanent resident aliens – qualified immigrants – (A) who are the ...children of an alien lawfully admitted for permanent residence, or (B) who are the unmarried sons or unmarried daughters (but are not the children) of an alien lawfully admitted for permanent residence, shall be
allocated visas in a number not to exceed 114,200…”

Therefore, for a child to qualify under the relevant provisions:

- The parent and petitioner must be a lawful permanent resident (LPR) of the U.S. (i.e. Green Card Holder); and
- the applicant can be over or under 21 years of age but must be unmarried

Section 2A vs. 2B: Making the distinction.

This family-sponsored preference has been divided into two segments: Section 2A and Segment 2B.

Section 2A refers to immediate relatives of LPRs (minor unmarried children and opposite sex spouses). Section 2B refers to adult unmarried children (or adult children married to same sex spouses) of LPRs.

iii. Third Family Sponsored Preference

The F3 preference is available to qualified immigrants who are the married sons or daughters of U.S. citizens.

“Married sons and married daughters of citizens. – Qualified immigrants who are the married sons or married daughters of citizens of the U.S. shall be allocated visas in a number not to exceed 23,400…” INA § 203(a)(3).

Although the term “married sons . . . or daughters” is in keeping with the language for adult children used in INA § 203(a)(1) (see family preference 1), this does not mean that this category is reserved only for married, adult applicants. Instead, it applies to any child of a U.S. citizen who, regardless of age, is in a marriage that is legally recognized in the U.S. Therefore:

1) Children of U.S. citizens who are under the age of 21 but still married will NOT qualify for the immediate relative exception. Instead, they are required to file petitions under this preference.

2) If the marriage is not recognized in the U.S., (i.e. if the child has a same sex spouse), he/she will qualify for either the first preference or the IR exception, depending on whether the child has reached the age of majority.

iv. Fourth Family Sponsored Preference

The fourth and final family sponsored preference, F4 preference applies to brothers and sisters of U.S. citizens. For this preference to apply, the U.S. citizen must be over the age of 21.
As stated under INA § 203(a)(4): “Brothers and sisters of citizens. – Qualified immigrants who are the brothers or sisters of citizens of the U.S., if such citizens are at least 21 years of age, shall be allocated visas in a number not to exceed 65,000...”

**Practice Tip**

There is a long backlog for this category so applicants might want to consider a series of immediate family petitions. Even though this process may require more work, it will likely be much quicker.

Visa Bulletin

c. The Visa Bulletin provides immigrant visa related information such as cut-off dates governing visa availability in the numerically limited visa categories. Below is the bulletin for May 2012.\(^{20}\)

<table>
<thead>
<tr>
<th>Family-Sponsored</th>
<th>All Chargeability Areas Except Those Listed</th>
<th>CHINA-mainland born</th>
<th>INDIA</th>
<th>MEXICO</th>
<th>PHILIPPINES</th>
</tr>
</thead>
<tbody>
<tr>
<td>F1</td>
<td>01MAY05</td>
<td>01MAY05</td>
<td>01MAY05</td>
<td>01MAY05</td>
<td>15MAY93</td>
</tr>
<tr>
<td>F2A</td>
<td>15NOV09</td>
<td>15NOV09</td>
<td>15NOV09</td>
<td>15OCT09</td>
<td>15NOV09</td>
</tr>
<tr>
<td>F2B</td>
<td>22FEB04</td>
<td>22FEB04</td>
<td>22FEB04</td>
<td>01DEC92</td>
<td>08DEC01</td>
</tr>
<tr>
<td>F3</td>
<td>08MAR02</td>
<td>08MAR02</td>
<td>08MAR02</td>
<td>15JAN93</td>
<td>22JUL92</td>
</tr>
<tr>
<td>F4</td>
<td>01DEC00</td>
<td>22NOV00</td>
<td>01DEC00</td>
<td>01JUN96</td>
<td>22JAN89</td>
</tr>
</tbody>
</table>

20 For the current visa bulletin see: http://travel.state.gov/visa/bulletin/bulletin_1360.html
1.3.2 Adoption

When adopting a child from a different country, there are three different processes that must be followed depending on the adopted child’s individual circumstance: (a) Hague Process; (b) Non-Hague Process; or (c) Immediate Relative Process.

a. Hague Process

The Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (Hague Adoption Convention) is an international treaty between countries that are members of the Convention.\(^{21}\) (www.travel.state.gov). On April 1, 2008, the treaty became effective with respect to the U.S., thus offering greater protections for children, birthparents and prospective adoptive parents. The treaty provides a framework of rules and procedures to ensure certain protections for inter-country adoptions. These include providing adoptees with permanent and loving homes, and looking after children’s best interests throughout the adoption process, thus preventing the abduction, sale or illegal traffic of children.

The Hague Adoption Convention does not apply adoptions that occurred before April 1, 2008.\(^{22}\)

New safeguards administered by USCIS under the Hague Adoption Convention include the creation of new forms; improved, centralized examination processes for inter-country adoption applications; and petitions under the Hague Adoption Convention.\(^{23}\)

i. Statutory language: INA § 101(b)(1)(G)(i)

(b)(1)(G)(i) A child will be considered an immediate relative under § 210(b) if the child

was under sixteen years old at the time the petition was filed and was adopted in a foreign state that is party to the Hague Convention\(^{24}\) or if the child is emigrating from such a foreign state

---

21 For the whole text of the treaty see: http://www.hcch.net/index_en.php?act=conventions.text&cid=69
22 USCIS slideshow
23 http://www.uscis.gov/
24 Countries that are party to the Hague Convention include: Albania, Andorra, Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Belize, Bolivia, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Canada, Cape Verde, Chile, China (and Hong Kong), Colombia, Costa Rica, Cuba, Cyprus, Czech Republic, Denmark,
to be adopted in the U.S. by a U.S. citizen and spouse or by an unmarried U.S. citizen over 25 years of age, if

- the Attorney General is satisfied that proper care will be furnished the child if admitted to the U.S.;

- the person/institution who has legal custody of the child freely give their written irrevocable consent to the termination of the relationship to the child and to the child’s emigration and adoption.

- the natural parents (if the child has two living natural parents) are incapable of providing proper care for the child;

- the Attorney General is satisfied that the purpose of the adoption is to form a bona fide parent-child relationship, and the parent-child relationship of the child and the natural parents has been terminated

ii. How to adopt through the Hague Process

If the child being adopted resides in a Hague Convention country, there are 6 primary steps to adoption. These steps must be completed in this precise order, per Hague Adoption Convention requirements. Adoptive parent(s) must:

(A) choose an accredited adoption service provider;

(B) apply to be found eligible to adopt;

(C) be referred for a child;

(D) apply for the child to be found eligible to immigrate to the U.S.;

(E) adopt the child; and,

(F) obtain an immigrant visa for the child.²⁵

A. Choose an Accredited Adoption Service Provider

²⁵ http://adoption.state.gov/adoption_process/how_to_adopt/hague.php
An Accredited Adoption Service Provider (ASP) must be accredited by the Council on Accreditation (COA) and the Colorado Department of Human Services. These organizations are responsible for: (1) identifying a child for adoption and arranging an adoption; (2) securing the necessary consent to termination of parental rights; (3) performing a home study and reporting on prospective adoptive parents and/or a background study and report on the child; (4) making a non-judicial determination of the child’s best interests and of the appropriateness of an adoptive placement; (5) monitoring the case after the child has been placed with prospective adoptive parents until final adoption; and (6) assuming custody of the child and providing childcare or any other social service, when necessary, because of a disruption pending alternate placement.  

B. Apply to be Found Eligible to Adopt

The prospective adoptive, U.S. citizen, parent files Form I-1800A\(^ \text{27} \) to begin the immigration process. This form will allow USCIS to determine the eligibility and suitability of the parents. (USCIS website). Form I-800A should be sent to:

USCIS
P.O. Box 660087
Dallas, TX 75266

Express Mail and Courier Service deliveries:
ATTN: Hague
2501 S. State Hwy., 121 Business, Suite 400
Lewisville, TX 75067

**E-Notification:** If you want to receive an e-mail and/or text message that your Form I-800A has been accepted at a USCIS Lockbox facility, complete Form G-1145, E-Notification of Application/Petition Acceptance and clip it to the first page of your application.

\(^{26}\) http://adoption.state.gov/adoption_process/how_to_adopt/hague.php

\(^{27}\) Form available at:
http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=af78b3dfe7c58110VgnVCM1000004718190aRCRD&vgnextchannel=c88fd1eb6dc43210VgnVCM10000082ca60aRCRD
Home studies for Hague adoptions must be submitted to USCIS at the same time as filing your I-800A. The home study will include a meeting with all the adults in the household, and an in-depth inquiry into the prospective adoptive parents' health, finances, home, background, and living conditions.

You must work with a Hague accredited adoption service provider. The home study must be completed by a Hague accredited agency, or a Hague accredited agency must review and approve the home study, prior to submitting it, along with your Forms I-800A and I-800 to USCIS. Please remember that a home study can be no more than 6 months old at the time that the application is filed with USCIS.28

USCIS charges a filing fee of $720 USD. An additional fingerprint fee of $85 USD must be paid for each person residing in your household who is 18 years of age or older. (adoption.state.gov)

For Form I-800A, the period of approval is 15 months from the date that USCIS was notified of your fingerprint record check results. You are entitled to request one extension of this approval with no additional fee and a second extension of the approval with a fee. (adoption.state.gov)

C. Be Referred to a Child

If USCIS finds you eligible to adopt, your ASP will send your I-800A approval notice form, along with your home study, to the foreign country's central adoption authority. This notifies the other Convention country that you have been found eligible to adopt by the U.S. government, and that you would like to be matched with a child. The central adoption authority will review your application to determine whether you are also eligible to adopt under that country’s laws.

If the country determines that you are eligible to adopt under its laws and a child is eligible for inter-country adoption, the adoption authority will send you or your agency an official report on a child (called an Article 16 Report). The Article 16 report will include information about the child's psychological, social, and medical history. The report, which is required

28 http://adoption.state.gov/adoption_process/who_can_adopt/homestudy.php
under Article 16 of the Convention, specifies the child's name and date of birth, and the reasons for making the adoption placement. You will have at least two weeks to review the report and consider the medical and social needs of the child, as well as your ability to meet those needs.²⁹

D. Apply for the Child to be Found Eligible to Immigrate to the U.S.

“After approval of Form I-800A, and after an adoption placement has been proposed, the prospective adoptive parent files Form I-800.³⁰ In adjudicating the I-800 form, USCIS assesses the eligibility of a child who habitually resides in a Hague Convention country as a Convention adoptee prior to adoption by a U.S. citizen prospective adoptive parent. Form I-800 and supporting evidence are required for USCIS to determine the child’s eligibility for classification as a Convention adoptee.” (USCIS website).

A Consular Officer at a U.S. Embassy or Consulate must determine that the child qualifies for the visa before you adopt or obtain legal custody of the child. The child must be under 16 years of age at the time the application is submitted, unmarried, and reside in a convention country. The adoptive parent(s) must normally reside in the U.S. and must be a married U.S. citizen filing jointly with his/her spouse, or an unmarried citizen at least 25 years of age. In addition, the child's parents, legal custodians, or guardians must provide written consent for the adoption and legal termination of the relationship with the child.

After you accept a proposed referral, you will apply to the U.S Government (the Department of Homeland Security and USCIS) for provisional approval to adopt the child (form I-800). USCIS will make a provisional determination about whether the child is eligible under U.S. law to be adopted in the U.S. based on the information available to them.

A child being adopted by a U.S. citizen from a Convention country must qualify as a “Convention adoptee” in order to

²⁹ http://adoption.state.gov/adoption_process/how_to_adopt/hague.php
³⁰ Form available at:
http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=8a5538aff9758110VgnVCM1000004718190aRCRD&vgnextchannel=c88fd1eb6dc43210VgnVCM10000082ca60aRCRD
immigrate to the U.S. USCIS determines whether a particular child meets the definition of a Convention adoptee.

If the child appears to meet all the requirements for a Convention adoptee, USCIS will provisionally approve your application. They will notify you, your adoption service provider, and the U.S. embassy or consulate in the Convention country of this provisional approval.

After this, either you or your adoption service provider will submit a visa application to a Consular Officer at the U.S. embassy or consulate. The Consular Officer will review the child's information, along with the Form I-800 that USCIS had provisionally approved, and evaluate the child for possible visa ineligibilities. If practicable to complete the medical examination for the child, then the required medical exam would be completed for consideration as part of this provisional approval stage. If the Consular Office determines that the child appears eligible to immigrate to the U.S., he/she will notify the Convention country's central adoption authority by issuing an Article 5 letter.

For Convention country adoptions, prospective adoptive parent(s) may not proceed with the adoption or obtain custody for the purpose of adoption until the Department issues the Hague Adoption Convention Article 5 letter.

REMEMBER: Most of the analysis of the child's eligibility for the Convention adoptee classification will take place at the provisional adjudication stage. However, the Consular Officer will make a final decision about the immigrant visa later in the adoption process.31

E. Adopt the Child

The process for adopting or gaining legal custody of a child varies from country to country. To learn about the specific requirements of the Convention country from which you are adopting, please visit the Bureau of Consular Affairs' webpage on Inter-Country Adoption which can be found at: (http://adoption.state.gov/adoption_process/how_to_adopt/hague.php).

31 http://adoption.state.gov/adoption_process/how_to_adopt/hague.php
F. Obtain an Immigrant Visa for the Child

After your Convention adoption is complete the adoptive parents need to apply for several travel documents for the child. (http://adoption.state.gov/adoption_process/how_to_adopt/hague.php). The prospective parents will need a new birth certificate to apply for a passport; at that time the child's new name can be added. Then, the child will need a passport from the country of citizenship. Finally, the adoptive parents will need to apply for a U.S. visa from the U.S. embassy for the child, at which point the child’s medical report must be provided. The child will enter the U.S. with an IH-3 immigrant visa (if the child was adopted in a Hague country) or an IH-4 immigrant visa (if adoption is finalized in the U.S.). After the adoption (or custody for purpose of adoption) is granted, adoptive parents must visit the U.S embassy or consulate for final review and approval of the child's I-800 petition and visa application, at which point an immigrant visa can be issued for the child. (http://adoption.state.gov/adoption_process/how_to_adopt/hague.php)

**IMPORTANT:** A foreign country's determination that the child is an orphan does not guarantee that the child will be considered an orphan under the U.S. Immigration and Nationality Act (INA), and eligible to live in the U.S. Foreign countries may use different legal standards when determining whether a child is an orphan. Questions that involve interpretation of specific foreign laws may be addressed by competent authorities in the COO or to a foreign attorney operating in the country where the adoption will take place. (http://adoption.state.gov/adoption_process/how_to_adopt/nonhague.php)

Some countries will require your personal appearance before their court. Sometimes, countries require a period of residence by you or your spouse. In those cases, you may find it necessary to spend an extended period in the foreign country awaiting the completion of the foreign adoption documents. Additionally, several countries require a post-adoption follow-up conducted by the adoption agency or the foreign country's consul in the U.S. (http://adoption.state.gov/adoption_process/how_to_adopt/nonhague.php)

E. Apply for the Child to be Found Eligible for Immigration
“After the adoption is finalized the new parents must file a I-600 with USCIS to determine whether the child meets the “orphan” classification and may immigrate to the U.S.

- Adopting parents currently residing overseas should file the I-600 with the overseas DHS or consular officer at the U.S. embassy or consulate with jurisdiction over their residence.
- Adopting parents residing in the U.S. may file the I-600 with the USCIS office with jurisdiction over their place of residence, or may contact the U.S. embassy or consulate in the country in question for information on filing the I-600 overseas. Parents will be permitted to file the I-600 with DHS officers at U.S. embassies or consulates where Department of Homeland Security immigration officials are assigned. At embassies and consulates without DHS immigration officials, parents may generally file the I-600 only if notice of I-600A has previously been sent to the embassy or consulate, if the U.S. citizen petitioner is physically present before the consular officer, and if the petitioner does not already have an I-600 petition pending somewhere else for the same child. Parents are strongly encouraged to verify I-600 filing procedures at the U.S. embassy or consulate overseas prior to travel to the country in question.
- Parents may wish to consult with adoption agencies, U.S. embassies or consulates overseas, and/or other adopting parents to determine whether they wish to file the I-600 overseas or in the U.S. Processing times for I-600 petitions vary depending on where they are filed. Intent to travel to the child’s country may also affect U.S. resident parents’ decision on where to file the I-600

The following documentation must be presented in order for an I-600 petition to be approved:

1. form I-600, Petition to Classify Orphan as an Immediate Relative;
2. child's birth certificate;

32
http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=c5695f56ff55d010/vgnextchannel=c88fd1eb6dc43210VgnVCM100000082ca60aRCRD
3. a final decree of adoption, if the orphan has been adopted abroad, or proof of legal custody for purposes of emigration and adoption;
4. proof of "orphan" status per definition above (e.g., evidence of abandonment, written relinquishment, death certificates);
5. proof that the pre-adoption requirements, if any, of the state of the orphan's proposed residence have been met, if the orphan is to be adopted in the U.S.; and
6. proof that adopting parents have seen the child prior to or during adoption proceedings.

If an I-600A has already been approved, the adopting parent may file an I-600 for one child without any additional fee. However, if parents are adopting two or more biologically unrelated children, there will be a $670.00 fee for the second child (this fee is waived for siblings).

Parents should note that documentary requirements for filing the I-600 petition are somewhat different, depending on whether the petition is filed with USCIS or the Consular Officer. USCIS officers may accept an I-600 with only the child's birth certificate, and, if not previously provided with the I-600A, proof of marriage of the petitioner (if applicable). USCIS also permits a petitioner to submit copies of some documents in lieu of originals. Form I-600 petitions filed with Consular Officers, however, must have all required documentation at the time of filing, and such documentation must be submitted as originals.

As part of the decision to approve an I-600 and immigrant visa, the DHS Officer or Consular Officer will carefully review information about the orphan and his or her personal situation. This review is documented by the DHS Officer or Consular Officer on an I-604 Orphan Investigation form. To protect adopting parents, the child, and biological parents, any indication or allegation of fraud, child buying or other inappropriate practices will be investigated as part of the I-604 review (or at any time that such concerns arise prior to visa issuance). While the I-604 review for most cases will consist of an analysis of available documents, some cases will require additional interviews, documentation or a field
F. Obtain an Immigrant Visa for the Child

"Once USCIS or the consulate has approved the eligibility of the child for adoption, apply for an immigrant visa at the U.S. Embassy. This immigrant visa allows your child to travel home with you. As part of this process, the Consular Officer must review the Panel Physician's medical report on the child.

Be aware that the adoption of a foreign-born orphan does not automatically guarantee the child's ability to immigrate to the U.S. An orphan cannot legally immigrate to the U.S. without USCIS processing.

Age Limits - There are age limits on eligibility for adoptions and immigration, regardless of whether or not your state laws permit the adoption of older children (or adults). U.S. law allows the adoption and immigration of children who are under 16 years of age, with two exceptions:

- Biological siblings of a child adopted by the same parents may be adopted if under 18 years of age; and
- Orphans over the age of 16 may be adopted as long as the I-600 petition was filed on their behalf before their 16th birthday (or before their 18th birthday in the case of an orphan who is the sibling of a child potentially adopted by the same parents).

If all the documentation for the orphan is in order and there are no legal bars to visa issuance, the orphan will be provided with an immigrant visa consisting of a packet of supporting documentation and either a cover sheet or visa placed in the child's passport. Both should be hand-carried with the child (not packed in luggage) when traveling to the U.S. and should be presented to the immigration inspectors at the port of entry. Do not open the envelope of supporting documents.

33 http://adoption.state.gov/adoption_process/how_to_adopt/nonhague.php
The immigrant visa is valid for 180 days from the date of issuance. In other words, adopted children have 180 days to use the immigrant visa to travel to the U.S.

Orphans are issued IR-3 or IR-4 visas:

- **IR-3 visas**: Applicable to orphans who had a full and final adoption overseas by both adopting parents, when both parents physically saw the child prior to or during local adoption proceedings, and where the state in which they reside does not require re-adoption in the U.S.
- **IR-4 visas**: Applicable to orphans whose prospective adopting parents have legal custody for purposes of emigration and adoption and who have satisfied any applicable state pre-adoption requirements or for orphans who had a full and final adoption overseas. In this case, however, the adoptive parents have not seen the child prior to or during the local adoption proceedings.34

**c. Immediate Relative Process**

If the Hague or non-Hague adoption processes does not apply to your situation, you may still be able to file Form I-130, Petition for Alien Relative, on his or her behalf as the adopted child of a U.S. Citizen.

In order to be eligible to file a Form I-130 petition, the adoptive parents must accrue two years of legal and physical custody and obtain a full, final adoption of the child. The two years of legal and physical custody may be accrued at one stretch of time or cumulatively over several periods. They can also be accrued before, during and/or after adoption. However, the two years must be accrued before the adoptive parents file Form I-130. In addition, the adoption must be finalized before the child’s 16th birthday or before the child’s 18th birthday if he/she is a biological sibling of a child the adoptive parents have already adopted or will adopt.

If your child is found eligible, she/he will enter the U.S. via an IR-2 visa.35

---

34 [http://adoption.state.gov/adoption_process/how_to_adopt/nonhague.php](http://adoption.state.gov/adoption_process/how_to_adopt/nonhague.php)
**Special Immigrant Juvenile Status**

The Special Immigrant Juvenile Status (SIJS) law permits undocumented children who have come under the jurisdiction of a juvenile court and meet other requirements to become lawful permanent residents.

a. What is Special Immigrant Juvenile Status?

Persons under the jurisdiction of a juvenile court who are “deemed eligible for long term foster care” may be able to obtain SIJS and eventually apply for lawful permanent residency. First, the minor needs to apply for SIJS and then for permanent residency. These applications are usually filed at the same time, although in some circumstances the SIJS petition might be submitted first.

“[A]n immigrant who is present in the [U.S. and] has been declared dependent on a juvenile court located in the U.S. or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the U.S., and whose reunification with one or both of the [child’s] parents is not viable due to abuse, neglect, abandonment or a similar basis found under State law[,] for whom it has been determined in administrative or judicial proceedings that it would not be in the alien’s best interest to be returned to the alien’s parents or previous country of nationality or country of last habitual residence[.]”

If an immigrant child is afforded SIJS, no parent, whether adoptive or natural, can later because of family relation receive any immigration benefit.

The most important benefit of applying for SIJS is obtaining lawful permanent resident status (i.e. a green card). Special immigrant juvenile status might be the only route for an undocumented child to gain lawful permanent immigration status in the U.S..

b. Who is eligible?

8 USC § 1101(a)(27)(J) states, in part, that a special immigrant juvenile is:

(J) an immigrant who is present in the U.S. –

---

36 “Special immigrant juvenile” is defined in INA § 101(a)(27)(J), 8 USC § 1101(a)(27)(J), reprinted in Appendix G. This section was added by § 153 of the Immigration Act of 1990 (IA90).
37 INA S. 101(a)(15)(J)(i)-(ii)
38 INA S. 101(a)(15)(J)(iii)
(i) who has been declared dependent on a juvenile court located in the U.S. or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the U.S., and whose reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment,

(ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien’s best interest to be returned to the alien’s or parent’s previous country of nationality or country of last habitual residence, and

(iii) in whose case the Attorney General expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status.

8 CFR § 204.11(c) lists all the requirements for eligibility:

[an immigrant] is eligible for classification as a special immigrant … if the [immigrant]:

(1) Is under twenty-one years of age;

(2) Is unmarried;

(3) Has been declared dependent upon a juvenile court located in the U.S. in accordance with state law governing such declarations of dependency, while the alien was in the U.S. and under the jurisdiction of the court;

(4) Has been deemed eligible by the juvenile court for long-term foster care;

(5) Continues to be dependent upon the juvenile court and eligible for long-term foster care, such declaration, dependency or eligibility not having been vacated, terminated, or otherwise ended; and

(6) Has been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court in which it has been determined that it would not be in the alien’s best interest to be returned to the country of nationality or last habitual residence of the beneficiary or his or her parent or parents; or

(7) On November 29, 1990, met all the eligibility requirements for special immigrant juvenile status in paragraphs (c)(1) through (c)(6) of this section, and for whom a petition for
classification as a special immigrant juvenile is filed on Form I-360 before June 1, 1994.

i. Dependency, Delinquency, or Other Juvenile Court Proceedings

The applicant must be under the jurisdiction of a juvenile court, the immigrant child must have “been declared dependent on a juvenile court located in the U.S. or whom such court has legally committed to, or placed under the custody of, an agency or department of a state.”\(^{39}\) In either delinquency or dependency proceedings, the child applicant must meet all of the requirements for SIJS, including the requirement discussed below that she is “deemed eligible” for long term foster care.

**Example:** Samy is a dependent of a juvenile court due to neglect by his parents. Rose is in delinquency proceedings for auto theft, and the court has found that it can’t return her to her parents’ custody on probation due to their abuse. Both children may be eligible for SIJS.

The Trafficking Victims Protection Reauthorization Act of 2008 amended the definition of a “Special Immigrant Juvenile” at section 101(a)(27)(J) of the INA in two ways. First, it expanded the group of aliens eligible for SIJ status.

An eligible SIJ alien now includes an alien:
- who has been declared dependent on a juvenile court;
- whom a juvenile court has legally committed to, or placed under the custody of, an agency or department of a State; or
- who has been placed under the custody of an individual or entity appointed by a State or juvenile court.

Accordingly, petitions that include juvenile court orders legally committing a juvenile to or placing a juvenile under the custody of an individual or entity appointed by a juvenile court are now eligible. For example, a petition filed by an alien on whose behalf a juvenile court appointed a guardian now may be eligible. In addition, section 235(d)(5) of the TVPRA 2008 specifies that, if a state or an individual appointed by the state is acting *in loco parentis*, such a state or individual is not considered a legal guardian for purposes of SIJ eligibility.

ii. A determination must be made that “reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect,
abandonment.”

In addition to being declared a dependent, 8 USC § 1101(a)(27)(J)(i) mandates that “reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law…”

In short, the TVPRA 2008 removed the need for a juvenile court to deem a juvenile eligible for long-term foster care and replaced it with a requirement that the juvenile court find reunification with one or both parents not viable. If a juvenile court order includes a finding that reunification with one or both parents is not viable due to a similar basis under State law, the petitioner must establish that such a basis bears a similarity to a finding of “abuse, neglect, or abandonment.” Officers should ensure that juvenile court orders submitted as evidence with an SIJ petition filed on or after March 23, 2009, include this new language as quoted above in 8 USC § 1101(a)(27)(J)(i).

Where the Abuse Occurred: There is no requirement in the statute, regulation, or the INS memoranda that the abuse, neglect, or abandonment occur in the U.S. In fact, many immigrant children lost parents or escaped abusive parents in the country of origin and came alone to the U.S. Many U.S. juvenile courts are open to accepting these unaccompanied or abandoned children in the same way they are open to accepting U.S. citizen children who are living on the street (in contrast to children directly removed from families). The only legal issue is whether the juvenile court has made its determinations based on abuse, neglect or abandonment of the child as defined under state law.

Evidence and Documentation Regarding Abuse, Neglect and Abandonment: In some areas of the country, there has been controversy and confusion regarding what kind of evidence the INS can require about abuse, neglect, and abandonment of the child. We feel that the best course is to provide only the judge’s order, with the minimum amount of information needed to meet the legal elements of SIJS, and not to supply a lot of details about abuse, family, living situation, etc. The statute provides that the INS should be given proof that judges have made certain findings, not proof that children actually were abused. The reason for this is simple: the INS officers are in no way trained to evaluate or interpret whether a child has been abused, is telling the truth, whether the abuse should be considered to have ended, state law definitions of children’s terms, psychologist’s reports, etc. Moreover, giving the information to the INS may violate legal and ethical rules regarding confidentiality.
However, some advocates are in a position where the INS has said that without this evidence, it will not approve the case. Additionally, the statute relating to the INS “consent” to accept the judge’s order is vague and could be read to support some INS inquiry. Hopefully in the future the INS will centralize its decision-making on this question, so that reasonable and consistent rules are applied. Until then, advocates need to decide how hard to fight and how to fight most efficiently if the INS requires inappropriate information or documents. We recommend having a meeting with higher-up INS officials and personnel from the juvenile system, such as judges, court staff, directors of social work, or children’s attorneys.

*What evidence must the juvenile court include in its order to establish that it made the order due to abuse, neglect or abandonment?*

Many advocates feel a legal and/or ethical obligation to disclose only the legal basis for the dependency and not to give further factual information. For example, a court order could state “the minor was made a dependent of this court and deemed eligible for long term foster care under Calif. W&I Code § 300(a) (physical abuse) and § 300(d) (sexual abuse).” This is evidence that the juvenile court deemed the juvenile eligible for long-term foster care due to abuse, neglect or abandonment.

Other advocates provide more factual information depending upon privacy rules in their courts, in response to INS threats to deny the SIJS application. Some INS offices routinely demand to obtain a copy, or review a copy, of the entire juvenile court file on the applicant. If the INS requests information that you believe is illegal or unethical to provide, we recommend that the advocate speak with other groups in his/her area (including the Bar Association) and ask to meet with local INS about the issue, rather than simply give over confidential information for review by INS officers who, after all, have no training to evaluate the information.

Regarding documents filed with the court, the INS recognizes that while such documents would be the most reliable evidence of the elements to be proved, in many States documents submitted to or issued by the juvenile court in dependency or delinquency proceedings may be subject to privacy restrictions. *Advocates who demonstrate that juvenile court proceedings are protected by state privacy laws should be able to avoid giving INS documents filed with court.*
It appears that sworn statements by court or state department or agency are a safety device provided in case the juvenile court judge is unable or willing to provide sufficient information. According to the INS:

*If* a dependency order does not include information establishing these crucial elements and State laws prevent court documents from being submitted to INS, a statement summarizing the evidence presented to the juvenile court during the dependency proceeding and the court's findings should be sufficient to establish the elements. In order for a statement to serve as acceptable evidence of these elements, the statement should be in the form of an affidavit or other signed, sworn statement, and be prepared by the court or the State agency or department in whose custody the juvenile has been placed. All other evidence the petitioner submits to establish the consent elements must also be considered in determining whether or not to consent to the dependency order.\(^{40}\)

Thus when all else fails a social worker, department attorney, or other responsible party from court or state agency or department can submit a sworn statement. Immigration proceedings regularly accept un-notarized sworn statements with the following signature statement: “I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.” Again, the person providing the sworn statement must consider legal and ethical confidentiality concerns when deciding what information to include.

iii. A court or an administrative agency must rule that it is not in the child’s best interest to be returned to his or her home country.

Generally the juvenile court will include in its SIJS order (discussed below) that it is not in the child’s best interest to be returned to the home country. The evidence for this finding may range from a home study conducted by a foreign social service agency to determine that a grandparent’s home is not appropriate, to simply interviewing the child to learn that there is no known appropriate family in the home country.

iv. The court should make it clear that it made its findings and

---

\(^{40}\) July 9, 1999 “Memorandum #2” issued by Thomas E. Cook, Acting Assistant Commissioner. p. 3, in
orders based on abuse, neglect or abandonment of the child, rather than to get the child immigration status.

The requirement of a specific finding about “abuse, neglect and abandonment” was added to the SIJS law in 1997. The juvenile court judge’s order should specifically identify whether abuse, neglect or abandonment was the basis for the dependency or placement order, and for “deeming the child eligible for long term foster care” (i.e., determining that reunion with the parents was not viable). For example, the judge’s order could state, “the minor is deemed eligible by this Court for long term foster care, based on abuse” or “the above orders and findings were made due to abandonment and neglect of the minor.” See sample judge’s order in Appendix C.

v. The juvenile court judge should sign an order making the above findings.

The juvenile court judge will sign a special order, usually prepared by the child’s attorney or other advocate, stating that all the findings required for SIJS have been made. The child will submit this order to the INS as part of the child’s application for special immigrant juvenile status.

vi. Other Requirements: Juvenile Court Must Retain Jurisdiction, Applicant Must be Under Age 21 and Unmarried

The INS added some requirements of its own, that were not written in the federal law.

Some of the INS requirements might be dropped in the future, but they apply to all applications now. The juvenile court must retain jurisdiction. Current INS regulation requires that the applicant remain under juvenile court jurisdiction until the immigration application is finally decided and the applicant is a lawful permanent resident.41 Juvenile court lawyers must ensure that judges retain jurisdiction over the applicant until INS grants the SIJS application after the interview. The INS interview may take place from six to thirty-six months, or even longer, after the SIJS application is filed.

Some juvenile court judges will want to, or must under state law, terminate dependency proceedings when the child reaches a certain age. Children’s advocates need to fight to keep the child

41 8 CFR § 204.11(c)(5), reprinted in Appendix G
under juvenile court jurisdiction. Note that immigration attorneys may be able to persuade the INS to speed up (“expedite”) the interview if the child is about to age out of the juvenile court system. When the child goes to the INS interview, s/he should have a copy of the minutes from his/her most recent court hearing to establish that s/he remains under juvenile court jurisdiction. The INS regulation creates a difficult situation and needlessly costs juvenile systems time and energy by requiring children to stay in longer in the juvenile court system than they otherwise would. It is possible that better rules will appear in the future.

The INS was considering regulations that would offer relief to persons who age out of juvenile court jurisdiction before the INS makes its final decision. Advocates should keep abreast of developments. State laws generally require that a youth be under 18 years old at the time he/she is first is declared a juvenile court dependent. State laws vary as to how long a child can remain a juvenile court dependent once declared a dependent. Some states end dependency at age 18, others extend it to age 19 (especially if the child must complete high school), and others can potentially extend the age to 21. Similarly, different states have different laws for how old a young person must be to enter or stay under juvenile court jurisdiction in a delinquency case.

Under INS regulations, any person under 21 who meets the SIJS requirements can apply for SIJS. With respect to the INS a 19 year old could file a SIJS application and attend the INS interview -- so long as s/he remains under the jurisdiction of a juvenile court, is eligible for long term foster care, and obtains a court order declaring that it is not in his or her best interest to return to the home country.

Section 235(d)(6) of the TVPRA 2008 provides age-out protection to SIJ petitioners. As of December 23, 2008, if an SIJ petitioner was a “child” on the date on which an SIJ petition was properly filed, U.S. Citizenship and Immigration Services (USCIS) cannot deny SIJ status to the petitioner, regardless of the petitioner’s age at the time of adjudication. Officers must consider the petitioner’s age at the time of filing to determine whether the petitioner has met the age requirement. Officers must not deny or revoke SIJ status based on age if the alien was a child on the date the SIJ petition was properly filed (if it was filed on or after December 23, 2008, or if it was pending as of December 23, 2008). USCIS uses the definition of child found at section INA § 101(b)(1) to interpret the use of the term “child” in TVPRA 2008 § 235(d)(6). Section 101(b)(1) states that a child is an unmarried person under 21 years of age. The SIJ
definition found at section 101(a)(27)(J) of the INA does not use the term "child," but USCIS had previously incorporated the child definition of the INA § 101(b)(1) into the regulation governing SIJ petitions.

Marriage. Under INS regulations, applicants for SIJS must remain unmarried until the entire process is completed and the INS grants permanent residency.

“Not married” includes a child whose marriage ended because of:

- Annulment
- Divorce
- Death

42

c. Risks in Applying

The greatest risk to the child is that, if the application is turned down, the INS might attempt to “remove” (deport) the child from the U.S. When a child files a petition for SIJS, the child is alerting the INS to the fact that he/she is in the U.S. Since these petitions are not confidential, the INS has the right to use that information to place the child into removal proceedings for deportation if the SIJS and adjustment of status applications are denied. It is crucial to make sure that the child is likely to win the status before submitting an application, so that the child is not unintentionally deported. Note that children who are not eligible for SIJS may still be eligible to get lawful status in some other way (ex. - through adoptive parents, or through abusive U.S. citizen or permanent resident parents even if the child does not come or remain under juvenile court jurisdiction).

43

d. How to Apply

The child must file two applications, one for special immigrant juvenile status and one to adjust status to lawful permanent residency. The applicant does not have to travel outside of the U.S., but can apply locally. Currently, both the SIJS and the adjustment of status

42 http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=28f308d1c67e0310VgnVCM100000082cb60aRCRD&vgnextchannel=28f308d1c67e0310VgnVCM100000082cb60aRCRD

43 Immigration practitioners should see INA § 245(h), which provides that SIJS applicants are deemed paroled in and therefore eligible for adjustment even if they entered without inspection. They do not have to qualify under § 245(i) or another special program, or pay a penalty fee: they are entitled to adjustment by
applications are filed at the same time at the local INS district office with jurisdiction over the child’s residence.\textsuperscript{44} Besides the forms, the applicant must submit the results of a set medical exam conducted by an INS-approved doctor (which includes a test for HIV and tests for the presence of some illegal drugs), various filing fees unless they are waived, and some proof of age (ex. - birth certificate).

Generally, applicants are required to have a photo-identification at the interview. As soon as the application is filed with the INS, the applicant can obtain employment authorization. The INS will schedule an appointment for the applicant to get fingerprinted for an FBI check of any criminal or delinquency record or prior deportation. The wait for the interview itself can be long – depending on the INS office, it may be from six months to three years, or even longer. When the applicant finally gets to the interview, he or she often can have a social worker, and certainly an attorney, attend if desired. The INS might approve the case right at the interview, or might request further information. If the INS denies the case, it might or might not refer the child to a judge for deportation ("removal") proceedings. The applicant can apply again in front of the judge, and can appeal denials at any stage.

"An alien may not be classified as a special immigrant juvenile unless the alien is the beneficiary of an approved petition to classify an alien as a special immigrant… The petition must be filed on Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant. The alien, or any person acting on the alien's behalf, may file the petition for special immigrant juvenile status. The person filing the petition is not required to be a citizen or lawful permanent resident of the U.S." 8 CFR § Sec. 204.11(b).

i. Form I-360 and I-485

Currently, in almost all cases the petition for special immigrant juvenile status and supporting documentation (Form I-360 packet) and the adjustment of status application and supporting documentation (Form I-485 packet) should be submitted to INS together as one packet. (There are some exceptions to this for persons already in removal proceedings.)

**CAUTION:** You are completing several forms that ask for much of virtue of their SIJS petition. Otherwise, immigration attorneys should note that an SIJS adjustment procedure is like that of a 245(a) adjustment for an immediate relative.

\textsuperscript{44} In the future, it is possible that INS will change the procedure and have the applicant mail the petition for SIJS to a regional INS office, and once that is approved have the applicant file the application for adjustment of status in person at a local INS office. Counsel should stay alert for new filing rules.
the same information. Make sure that the information on all the forms is consistent, e.g., list of addressees, birth date, and etc.

**NOTE:** You do not need to submit a fingerprint card to the local INS office with your I-485 packet. INS will give you instructions on submitting that at a later date. For information about the medical exam and fingerprinting.

Be sure to answer all questions on the form, using a black pen or typewriter. If an item is not applicable, write "N/A". If an answer is none, write "none." If extra space is needed to answer any item, attach a sheet of paper with the applicant's name and INS alien registration number (if any) and indicate the item number that you are answering.

A. Form I-360

Form I-360 and instructions are available at:
http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=95be2c1a6855d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD.

The I-360 petition must be filed with evidence of the child's eligibility for special immigrant juvenile status. This includes a court order, signed by the juvenile court judge, which specifically sets out all of the requirements for special immigrant juvenile status. In other words, the judge should sign one order, which you will prepare, identifying the child and stating that s/he is under the jurisdiction of a juvenile court, eligible for long term foster care, and it is in his or her best interest not to be returned to the country of origin, due to abuse, neglect or abandonment.

A Form G-28 "Notice Of Appearance" of attorney should also be attached to the I-360 if an attorney is representing the child in the immigration process. There is no fee for this form. If neither an attorney nor a BIA-accredited representative (paralegal who has been certified by the government to handle immigration matters) is representing the child – for example, if a social worker is handling the application -- do not file the form G-28.

B. Form I-485

Form I-485 and instructions are available at:
An application for adjustment of status must contain the following completed forms and documents. Note that multiple copies are required in some cases; follow the instructions on the form.

* Form I-485/Application for Permanent Residence (adjustment of status application);

* Form G-325A/Biographical Information (in quadruplicate), if the applicant is 14 years or older;

* 3 "green card" size photographs that meet specified requirements;

* I-485 Filing fees or request for waiver of fees;

* Fingerprinting fee (only children 14 years old or older need to be fingerprinted);

* Birth certificate or other proof of age (translation into English is required)

* Form I-693 medical exam completed by INS-approved doctor (while the I-485 instruction sheet directs applicants to wait until after filing the I-485 form before getting a medical exam, apparently some INS offices want the medical exam at the time of the I-485 filing);

* Form I-765/Request for Work Authorization, if desired (for current fee see:
http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=3faf2c1a6855d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=db029c7755cbb9010VgnVCM10000045f3d6a1RCRD)

* A passport, Form I-94, or I-186 card showing lawful entry into the U.S.; if any exist (in many cases, children will have entered the U.S. without papers, won’t have these documents, and don’t need to show them);

* "Adit" sheet -- Some INS offices have an administrative sheet they ask applicants to complete. Talk with local
practitioners to see if your office has such a form.

ii. Initial documents needed in support of petition

8 CFR § Sec. 204.11 (d) lists the initial documents that need to be submitted in support of the petition:

“(1) Documentary evidence of the alien's age, in the form of a birth certificate, passport, official foreign identity document issued by a foreign government, such as a Cartilla or a Cedula, or other document which in the discretion of the director establishes the beneficiary's age; and

(2) One or more documents which include:

(i) A juvenile court order, issued by a court of competent jurisdiction located in the U.S., showing that the court has found the beneficiary to be dependent upon that court;

(ii) A juvenile court order, issued by a court of competent jurisdiction located in the U.S., showing that the court has found the beneficiary eligible for long-term foster care; and

(iii) Evidence of a determination made in judicial or administrative proceedings by a court or agency recognized by the juvenile court and authorized by law to make such decisions, that it would not be in the beneficiary's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or of his or her parent or parents.”

Proving Age: The INS regulation requires every applicant for special immigrant juvenile status to submit some documentary proof of age. The evidence can take the form of a “birth certificate, passport, official foreign identity document issued by a foreign government, such as a Cartilla or a Cedula, or other document which in the discretion of the director establishes the beneficiary's age..."32 Immigration practitioners should note that the requirement is for some proof of age, a much looser standard than the usual proof of birth. There is no requirement that the person submit a birth certificate. Children have been granted SIJS who did not even know what country they were born in, and did not personally know their year of birth. The statute recognizes that these children come from abusive, chaotic, or interrupted homes, and does not impose the strict requirements of proof of birth that appear in regular family immigration.
Obtaining Documentation to Prove Age. The following practice tips may help you to obtain documents. Because the search for documents can be time consuming (for example, it might take several weeks to hear back from a foreign registry), it is critical to start as soon as the application for SIJS becomes a possibility. For example, if a social worker or probation officer identifies that the child is undocumented and is waiting to transfer the matter to another part of the agency for handling, that person could do the child a tremendous service by immediately beginning the search for documents.

Foreign birth certificates, if you can obtain them, are the ideal proof of age.

(1) The easiest way to obtain a foreign birth certificate is to contact helpful family or friends in the home country who will travel to the local or national registry to obtain a certified copy. Unfortunately, abused children often lack these connections.

(2) Send away for the birth certificate yourself. You will need a letter written in the language of the country and addressed to the registrar in the town where the child was born (or, more importantly, where she believes her birth was registered) or to national registry. You will need an international money order. The letter should state the name, birth date and birthplace of the child and if possible the names of both parents. There are relatively inexpensive "express mail" services to Mexico and Central America in most large cities.

The Foreign Affairs Manual (FAM) of the Department of State is an important resource. The FAM provides information on how to obtain foreign birth certificates from various countries. If birth certificates from a particular country appear in a different form, such as family registration certificates, or if they are generally unavailable and therefore not required, the FAM will state this. To find the FAM, go to a local law library or contact a local immigration agency or attorney. If you are in northern California, you may contact the Immigrant Legal Resource Center, Attorney of the Day at (415) 255-9499, ext. 6263. The Attorney of the Day will send you copies of the pages from the FAM that relate to the country you're dealing with. (3) Contact the local consulate from the child's country and ask for their assistance. Foreign identity documents: Any foreign identity document, including a military document and perhaps a school identity card, should be accepted as proof of age. Other substitute documents: If you cannot obtain a birth certificate, the regulation provides that the applicant can submit any "other document which in the discretion of the [INS district director]
establishes the person's age." The regulation creates a generous standard because it is well known that some of these children will not have necessary information or will have a hard time obtaining documents.

One good guide for what definitely must be acceptable substitute documents is the INS regulation defining substitute documents for birth certificates in family visa petitions. See 8 CFR § 204.1(f) and (g)(2). This is a fairly strict standard for substitute documents that is imposed in regular family immigration cases. Substitute documents may include (1) a baptismal certificate with the seal of the church, showing date and place of birth and date of baptism; (2) affidavits from people who are personally aware of the birth; (3) early school records showing date of admission to the school, the child's date and place of birth, and the name and place of birth of the parent or parents. You must also describe the efforts you made to locate the birth certificate. The best proof is a statement from the registrar explaining that the child's birth certificate cannot be found there. But that guide is not a requirement for SIJS. The INS District Director can accept any document in his or her discretion to prove age in an SIJS case. If you have nothing else, offer a state court order on the child's age. Regular civil courts can make all kinds of findings, including age. For example, under California Welf. & Inst. Code § 362, a juvenile court can make any and all reasonable orders for the care of a minor.

When submitting foreign documents, be sure to demonstrate that you diligently searched for original documents and were unable to find them. This is required. Be prepared to show correspondence with a registrar in the home country, and/or a declaration by the worker of the steps taken to locate documents or information.

Must submit proof of age with initial filing? INS regulation lists proof of age under "Initial documents which must be submitted in support of the petition." While you should be able to file without a birth certificate, it is possible that a local INS will refuse to accept the application without some evidence. If possible, present proof that the birth certificate is not available – such as a letter from a registrar or other in the home country saying it is not available – and/or proof that you are pursuing other means. If nothing else,

45 These are the "secondary evidence" acceptable under federal regulation to prove birth in the U.S. in family visa cases when "primary evidence" (birth certificate, etc.) is not available. See 8 CFR § 204.1(f), (g)(2).
include a sworn statement by the child or social worker and cite the regulation stating that the INS District Director has discretion to accept any document. With that, the INS should accept the papers for filing and leave it to the interview officer to decide whether the document is sufficient, and hopefully by the interview you will have something more.

iii. Retaining Juvenile Court Jurisdiction

The INS regulation states that the person applying for special immigrant status must remain under juvenile court jurisdiction throughout the entire application process, i.e. until INS approves the applications for special immigrant juvenile status and adjustment to permanent residency. Thus, if an applicant is under juvenile court jurisdiction when he or she files the SIJS and adjustment applications with INS, but leaves court jurisdiction during the several month long wait for the INS interview, the INS will deny the application. This regulation has caused tremendous problems by requiring juvenile courts to retain jurisdiction over older youth longer than the courts normally would. Hopefully a new statute or regulation will change the rule, so that the applicant only needs to be under juvenile court jurisdiction at the time she files the application with INS, not all the way until the INS gets around to deciding the application. But until the rule is changed, you must attempt to comply. Advocates who are running out of time should pursue two strategies simultaneously:

1) **Ask the juvenile court judge to retain jurisdiction** over the child and schedule last hearing a few weeks after the interview date. Some courts have taken an affirmative stand on this issue. In Los Angeles, the presiding judge of juvenile court, Jaime R. Corral, distributed a memorandum to all juvenile court judges requesting that they maintain jurisdiction past the age of 18 for juveniles who may qualify for this relief; this may be of use in informing or convincing other judges. Advocates report that in some instances, judges have agreed to retain the children as dependents while stopping other forms of foster care support.

2) **Ask the INS to expedite the application** (give a quicker date for the interview). This is a discretionary decision. In some areas of the country, the INS has agreed to move up the SIJS adjustment interview if the applicant is about to age out of juvenile court.

Find out from local immigration practitioners if the INS has a history of doing this in other time-urgent cases, to use as a precedent (for example, family immigration cases in which a child is about to turn
21 and go into a less advantageous immigration category.) If you believe that the INS may not immediately be open to your request, it may be helpful to ask civic organizations such as the local bar association volunteer services program to join in the request and ask for a meeting, ask a respected local immigration lawyer, who may have good contacts in the INS, to take on the case and make the request, or ask the member of the U.S. Congress that represents the district where your client lives to intervene on your client’s behalf with the INS.

In some areas, immigration and children’s agencies and civic organizations have formed an ongoing local Task Force on SIJS. In San Francisco, children’s and immigration law staff, county workers, city attorneys, probation officers, the Bar Association and other civic groups formed a Bay Area Task Force to exchange information and discuss problems. This became useful in policy work, as both the INS and the local county systems were responsive to considering concerns raised by the Task Force.

When the applicant goes to the INS adjustment interview, s/he bring a copy of the minutes from his or her most recent court hearing to establish that s/he remains under juvenile court jurisdiction.

Mandatory injunction and/or writ of mandamus: If the applicant can establish that INS has taken an unreasonable amount of time to process the application, a lawyer acting on behalf of the client may ask a federal court to order a mandatory injunct and/or writ of mandamus to force INS to act on the case. Whether INS has taken an unreasonable time in processing an application will depend on the facts of the particular case. It will be the court’s discretion to decide if the agency delay is unreasonable.

In the case of Yu v. Brown, the plaintiff filed an application for SIJS and adjustment to legal permanent resident. INS had taken no action on the application for more than a year. As a result, the plaintiff alleged that the INS had unreasonably delayed the processing of the SIJS application and sought a writ of mandamus/injunction to compel the INS to act on the application. The court in this case found that the delay was unreasonable. Further, the court determined that whether a delay is unreasonable will depend on the facts of the particular case. However, a writ of mandamus/injunction was determined to be an appropriate remedy for the unreasonable delay.

iv. Adjustment Interview
When the interview finally arrives, the child will meet at the INS office with the INS officer. An attorney can be present, and it is almost never a problem for the social worker or “next friend” to be present as well. If the officer attempts to bar a non-attorney from accompanying the interview with the child, ask to see a supervisor.

During the interview the INS officer will ask routine questions about the adjustment application. He may go through each question on the I-360 and I-485 forms. Practice all of these questions with the child in a role-play beforehand. Some of the questions are quite strange (“Are you a Communist? A drug dealer?”) and the child should be prepared. The INS officer already will have received the report from the FBI describing any criminal or juvenile delinquency record the person may have. The officer also will have the medical exam, which will tell if the person is HIV positive or has venereal disease or tuberculosis, or had illegal drugs in her system.

Hopefully the interview will be short and courteous, and just cover basic information on the form. In some cases, however, overzealous INS officers have tried to ask about the details of abuse or abandonment, or other family issues such as when the father last visited. While we hope that this does not occur, you should be prepared just in case, in order to avoid possibly retraumatizing the child at the INS interview. Our position is that such questioning is not appropriate, and isn’t legally relevant. First, the INS does not need the details, but only needs to know that the juvenile court made certain findings. Second, even if it did need details, it should not get them from interviewing the child. If you do decide to provide the INS with more details about the child’s difficult situation, tell the INS officer that you will provide these in writing or with your own statements, so that the officer does not question the child. This is the INS’ own policy, and in its “Memorandum #2” it sets out a procedure for how a social worker or other agency employee should give written information.57 The child should not be present for these discussions.

Again, bad interviews are relatively rare, and most INS officers understand the need not to interrogate the child. To prevent bad INS interviews, your office may wish to establish a relationship with the local INS office and discuss what the interview will be like. Most importantly, make sure that a lawyer or other advocate attends the interview with the child. If the interviewer insists on asking the child about sensitive subjects, insist on speaking with a supervisor and if needed, end the interview (especially if you are not in a very bad time crunch). It can be rescheduled. If needed, you can request a meeting with a higher-level INS officer to work out a system for
these interviews. If you do this, it is a good idea to get children's and/or immigrants' rights organizations, the bar association, local officials, member of congress, etc. on your side to meet with INS.

e.  *Perez-Olano v. Holder*

*Perez-Olano v. Holder* is a class-action lawsuit filed on behalf of juvenile aliens who may have been eligible for SIJ status or SIJ-based adjustment of status because they were abused, abandoned, or neglected. The *Perez-Olano* Settlement Agreement took effect December 14, 2010 and expires December 13, 2016. The Settlement Agreement defines class members as all juveniles, “including, but not limited to, SIJ applicants, who, on or after May 13, 2005, apply or applied for SIJ status or SIJ-based adjustment of status based upon their alleged SIJ eligibility.” Settlement Agreement at ¶ 3. Juveniles whose applications for SIJ status or SIJ-based adjustment of status were denied or revoked since May 13, 2005, may be eligible to file a motion to reopen. The class-specific standard for eligibility to file motions to reopen, particularly with regard to timeliness, is distinct from the general standards for eligibility to file motions to reopen under 8 CFR 103.5. These are excerpts from the April 4, 2011 policy memorandum issued by USCIS.

For the entire memorandum see:

In accordance with the Settlement Agreement, USCIS will not, based on age or dependency status, deny or revoke any SIJ petition if, at the time the class member files or filed the petition, the class member was under 21 years of age and was the subject of a valid dependency order that was later terminated based on age. Similarly, USCIS may not, based on age or dependency status, deny an (sic) SIJ-based application for adjustment of status if, the class member files or filed the application when he or she was under 21 and was the subject of a valid dependency order.

In addition, to comply with the Settlement Agreement, this guidance applies to all SIJ petitions and SIJ-based applications for adjustment of status that are filed while the Settlement Agreement is in effect. USCIS will not, based on age or dependency status, deny or revoke any new, pending, or reopened SIJ petition if, at the time of filing, the petitioner was under 21 years of age and was the subject of a valid dependency order that was later terminated based on age. Similarly,
USCIS may not, based on age or dependency status, deny any new, pending, or reopened SIJ-based application for adjustment of status if, the class member filed the application when he or she was under 21 and was the subject of a valid dependency order.47

i. Filing Requirements

Class members filing a motion to reopen under the Settlement Agreement will file Form I-290B, Notice of Appeal or Motion, with the appropriate fee or Form I-912, Request for Fee Waiver, if desired, at:

U.S. Postal Service (USPS): or Courier/ Express (non-USPS) Deliveries:
USCIS P.O. Box 5510
USCIS Attn: Perez-Olano Settlement Agreement
Chicago, IL 60680-5510
or
“POSA” 131 S. Dearborn – 3rd Floor
131 S. Dearborn – 3rd Floor
Chicago, IL 60603-5517

When filing a Form I-290B, class members are instructed to:

· Check “box F” in “Part 2,” Information about the Appeal or Motion, and
· Write “Perez-Olano Settlement Agreement” or “POSA” in Part 3, Basis for the Appeal or Motion.

These specific Settlement Agreement filing instructions are posted on the landing page of the Form I-290B at www.uscis.gov.

The Lockbox will forward the Forms I-290B to the National Benefits Center (NBC) for standard pre-processing. The NBC will then route the Form I-290B and the underlying Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, and, if applicable, the Form I-485, Application to Register Permanent Residence or Adjust Status, to the appropriate field office for adjudication, along with an appropriate cover sheet identifying it as a Settlement Agreement case. It is the responsibility of the NBC to forward the A-file to the proper field office if the juvenile has

47 These are excerpts from the April 4, 2011 policy memorandum issued by USCIS. For the entire memorandum see: http://www.uscis.gov/USCIS/Laws/Memoranda/2011/April/perez-olano-settlement.pdf.
moved jurisdictions.\textsuperscript{48}

ii. Adjudication

The field office that denied the underlying Form I-360 and, if applicable, the Form I-485 has jurisdiction over each Motion to Reopen filed under the Settlement Agreement, as stated in 8 CFR 103.5(a)(1)(ii). If the applicant has moved to the geographical jurisdiction of a different field office, that field office assumes jurisdiction.

The immigration service officers (ISOs) will grant the Motion to Reopen if the case meets all four prongs of the following test:

1. The applicant applied for SIJ status or SIJ-based adjustment of status on or after May 13, 2005.
2. The applicant filed a complete Form I-360 for SIJ classification before his or her 21st birthday.
3. At the time of filing the Form I-360, the applicant was the subject of a valid order(s) issued by a state juvenile court within the U.S. that:
   - Made a finding of abuse, abandonment or neglect, or a similar basis found under state law (see Juvenile Court Orders below for more information); \textit{and}
   - Determined that it would not be in the applicant’s best interest to be returned to the applicant’s or parent’s previous country of nationality or country of last habitual residence; \textit{and}
   - Did one of the following:
     - Declared the applicant dependent on the court, \textit{or}
     - Legally committed the applicant to or placed the applicant under the custody of a state agency or department, \textit{or}
     - Placed the applicant under the custody of an individual or entity appointed by a guardianship.
4. The Form I-360 was denied or revoked \textit{solely} because of one of the three following reasons:
   - The applicant, who was under 21 years of age at the time of filing, turned 21 years of age after filing the Form I-360 but before adjudication of the Form I-360 or Form I-485 (age-out); \textit{or}
   - The applicant’s dependency order, which was valid and in effect at the time of filing the Form I-360,

\textsuperscript{48} Id.
was terminated based on age after filing the Form I-360 but before adjudication of the Form I-360 or Form I-485 (dependency age-out); or

· The applicant did not receive a grant of specific consent before invoking the jurisdiction of the state juvenile court and the juvenile court order did not determine or alter the applicant’s custody status or placement. As a reminder, specific consent from the Department of Health and Human Services (and, before December 23, 2008, U.S. Immigration and Customs Enforcement) is needed only if the applicant was in federal custody at the time the juvenile court issued the order and the juvenile court order altered or determined custody status or placement. (Such an order is more than a restatement of current placement; it requires a change to the applicant’s placement.) If the Motion to Reopen is granted, the ISO will adjudicate the Form I-360 in accordance with INA § 101(a)(27)(J), as amended by the TVPRA 2008, and in accordance with the Settlement Agreement. Denials of a Motion to Reopen and of a reopened Form I-360 can be appealed to the Administrative Appeals Office. 8 CFR 103.5(a)(6).

iii. Juvenile Court Orders

Before enactment of the TVPRA 2008, INA § 101(a)(27)(J) required SIJ applicants to have been deemed eligible by a juvenile court for long-term foster care due to abuse, neglect, or abandonment. USCIS will not deny or revoke an SIJ petition or SIJ-based adjustment application on account of ineligibility for long-term foster care, as this is no longer a statutory requirement. But where a class member files a Motion to Reopen and the juvenile court order submitted in support of the original Form I-360 contains the outdated statutory language of eligibility for long-term foster care, adjudicators do not need to request an updated juvenile court order. Some Motions to Reopen will be from applicants who, due to their age, will no longer be able to invoke the jurisdiction of the juvenile court to obtain an updated order. In those cases, adjudicators can rely on the original juvenile court order to establish the current statutory requirement of non-viability of reunification with one or both parents due to abuse, neglect, abandonment, or a similar basis found under State law.
4. Asylum and Refugees
   a. Overview:

   In order to properly and comprehensively discuss the status, rights and
   obligations of refugees, there are two major underlying concepts that must be
   understood: 1) non-refoulement and 2) asylum.

   Nonrefoulement

   Refugee status in the U.S. is a basic human right first guarded under the
   general legal principle of non-refoulement.

   i. Definition of Non-refoulement

   As recognized by the UN High Commissioner for Refugees the essence of
   the principle of non-refoulement is "that a State may not oblige a person to return
   to a territory where he may be exposed to persecution". (U.N. High Comm’ner on
   Refugees The Principle of Non-Refoulement as a Norm of Customary
   International Law. Response to the Questions Posed to UNHCR by the Federal
   Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93,
   2 BvR 1953/93, 2 Bv R 1954/93, ¶ 1

   This doctrine was then further clarified in the Convention on the Status of
   Refugees July 29, 1951, 189 U.N.T.S. 150), which not only created the UN High
   Commission on Refugees, but reinforced the international concept of non-
   refoulement.

   As stated in Article 33(1): "No Contracting State shall expel or return
   ('refouler') a refugee in any manner whatsoever to the frontiers of territories
   where his life or freedom would be threatened on account of his race, religion,
   nationality, membership of a particular social or political opinion" (Convention
   Article 33(1))

   As defined under the Convention, a refugee is one who: “. . . owing to [a]
   well-founded fear of being persecuted for reasons of race, religion,
   nationality, membership of a particular social group or political opinion, is
   outside the country of his nationality and is unable or, owing to such fear,
   is unwilling to avail himself of the protection of that country; or who, not
   having a nationality and being outside the country of his former habitual
   residence as a result of such events, is unable or, owing to such fear, is
   unwilling to return to it"49

   This Convention was then quickly followed by the Protocol Relating to the

49 Convention on the Status of Refugees, Art. 1
worth noting that two major distinguishing aspects of the Protocol were 1) the U.S. consented to become a party and 2) the Protocol widened the definition of refugee.

While not changing the wording, the Protocol allowed all persons falling under the definition to be considered refugees, regardless of the date or origin of their flight. Prior to this, the Convention had only permitted Europeans who had fled their home countries prior to January 1st, 1951 to be so considered.

Along with the Convention and later Protocol, non-refoulement is a key provision of several other widely recognized international conventions. These include the freedom to seek asylum guaranteed by articles 13(2) and 14(1) of the Universal Declaration on Human Rights and the freedom of intra-country movement codified in Article 12(1) of the ICCPR and reproduced in Article 22(1) of the American Convention on Human Rights. Finally, the Convention Against Torture and other Cruel and Inhumane Treatment (CAT) specifically requires that a State Party’s duty to guard against torture includes ensuring that a person will not be returned or transferred to any country where such harm is likely to occur.

ii. Jurisdiction and Venue

The Jurisdiction or scope of persons protected by the doctrine of non-refoulement has been a source of tension for international law. The UN High Commissioner has stated that “...the principle of non-refoulement has become a rule of international customary law... Since the purpose of the principle is to ensure that refugees are protected against such forcible return, it applies both to persons within a State’s territory and to rejection at its borders” (The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR ¶ 2

Asylum

Although less defined as a concept than non-refoulement, asylum is certainly of greater significance to refugees. While non-refoulement requires countries to refrain from sending back foreign nationals to countries where they may face persecution, asylum generally is understood to mean refugees are given the right to lawfully reside in their destination country. As such, it obliges to the host country not only to abstain from removing said refugee, but also to permit them similar freedoms granted to the country’s own citizens. These freedoms include the right to seek work, take part in government and enjoy public benefits. However, asylum rights are generally only permitted for refugees who are considered lawfully in the host country when the petition for this status. The major provisions of the Refugee Convention, Protocol and related international agreements asserted a protection akin to non-refoulement by requiring States to abstain from forcibly returning asylum-seekers to countries where they would face persecution.
Nonetheless, many of the remaining articles of these documents are focused on reserving asylum rights for refugees. These include Article 17 of the Convention which extends work authorizations to refugees. Likewise, the Convention’s Articles 23 and 24 focus on providing social security benefits.

While the asylum provisions are not as obligatory as the nonrefoulier provisions, they are still generally observed by most developed countries. Furthermore, as many asylum-seekers are able to meet the nonrefoulement requirements of having a well-founded fear of persecution, most States are unlikely to seek removal. As such, States will normally will afford these individuals proper legal status through asylum so that they can become a productive and incentivized member of the new host country.

b. History of Refugee Status in U.S. Law

Before 1965 the U.S. immigration laws made no specific provisions for admitting refugees. This is not to say that immigrants did not obtain sanctuary in the U.S., they usually came to the U.S. and then were admitted under the general authorizations of the immigration laws.

Immigration opportunities for refugees suffered a setback with the enactment of numerical limitations which came about in 1921. The first legislative enactment regarding refugees was the Displaced Persons Act of 1948. This act and its subsequent amendments allowed for the immigration of 400,000 refugees over the next four years. Eventually, the quotas and the time limitations allowing for greater refugee protection.

a. Refugees

The major statute that defined the rules and admission of refugees is the Refugee Act of 1980. That act also made the provision for the grant of refugee status designated as asylum. There is no prescribed limit to the number of aliens who may be granted asylum status. The grant of asylum may allow the asylee to apply for permanent residence after a year of asylum status.

Today, asylum and refugee protection in the U.S. are governed by three major provisions. First 1) is S.101(a)42 of the INA which sets forth the definition for a refugee. Second is 2) the 1980 Refugee Act that established asylum and refugee classification as a separate immigration status in US immigration law. Finally 3), S.207-208 of the INA covers both the process and eligibility requirements for seeking asylum.

In keeping with the Protocol on the Status of Refugees, to qualify as an asylum seeker/refugee under S.101(a)42, it must be shown that you have suffered persecution or face a “well-founded fear” (discussed below) that you will suffer persecution due to: race, religion, nationality, membership in a particular

---

social group or political opinion.51

The persecution must be of an individualized nature regarding an immutable characteristic that makes you part of a particular social group so targeted for violence and oppression (Matter of Kasinga 21 I&N Dec. 357 (BIA 1996)). While a political opinion is not necessarily immutable, persecution for a political belief or the refusal to support a belief (for reasons other than the fear of harm) are nonetheless valid grounds for asylum (INS v. Elias Zacarias (302 U.S. 478 (1992), INS v. Cardozo-Fonseca, 480 U.S. 421 (1987))

Furthermore, this persecution cannot be part of a legitimated government policy or punishment, but must come from actions that the person’s home government is unable or simply unwilling to suppress (Matter of O-Z and I-Z, 22 I&N Dec. 23 (BIA 1998), Singh v. INS, 315 F.3d. 1186 (9th Cir. 2003)).

In order to be considered for asylum in the U.S., you must meet three provisions of the INA: (1) the definition of a refugee Section 101(a)42 (2) the definition and eligibility requirements for asylum under Section 208 and (3) the annual admission quotas for refugees and asylum seekers under Section 207.

Finally, asylum determinations are discretionary and handled by the Office of the U.S. Attorney General under S.208(b)1(A). As such, unlike other immigration matters, such as removal or deportation, asylum cases are not heard by an immigration judge, but by this office. In the alternate, these claims may also be heard by the Director for Homeland Security.

Note on Withholding of Removal for Refugees

The 1980 act is also responsible for granting refugee status in the form of withholding deportation. This form of refugee protection is found under S.241(b)(3) and is essentially the basic protection of non-refoulement insofar as it only affords the successful refugee from being returned to their home country for fear of persecution

Unfortunately, in order to qualify for this protection, U.S. courts have held that a petitioner cannot show proof merely of a well-founded fear. Instead, they must demonstrate that, in keeping with the general withholding of removal standard, there is a “clear probability of harm” should removal to his home country be permitted. (See INS v. Cardoza-Fonseca)

51 USCIS website at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=1f1c3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=1f1c3e4d77d73210VgnVCM100000082ca60aRCRD
Furthermore, not only does it require a higher standard of proof to be met, it also only a temporary measure that provides far less protection than a S.101(a)42 refugee status arising out of a S.208 grant of asylum.

However, unlike the 208 asylum petition, withholding of removal under 241(b)3 is not subject to the discretion of the Attorney General but will be granted once the standard of proof is met that there exists a “clear probability of persecution”.

c. Refugee defined – INA § 101(a)(42)

“The term "refugee" means (A) any person who is outside any country of such person's nationality … and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances… any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.”

i. Elements of Refugee definition

The elements of refugee requires that the applicant prove that s/he has a well-founded fear of persecution in the future, or has suffered persecution in the past, on account of race, religion, nationality, membership in a particular social group, or political opinion.52 The Board of Immigration Appeals53 (BIA) has listed the following four elements to satisfy the definition:

52 INA § 101(a)(42)
• Fear of persecution
• The fear must be well-founded
• The persecution must be on account of race, religion, nationality, membership in a particular social group, or political opinion
• An inability to return to the country of nationality or last residence because of persecution or a well-founded fear of persecution.

A. Persecution

The statute does not define persecution, although the courts have provided some guidance. The 7th Circuit defined it as “punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate.”

The Ninth Circuit defined it as, “[p]ersecution is an extreme concept that does not include every sort of treatment our society regards as offensive.”

It further added “Discrimination on the basis of race or religion . . . does not ordinarily amount to persecution within the meaning of the [Refugee] Act [of 1980]. The Board [of Immigration Appeals] has held that discrimination can, in extraordinary cases, be so severe as to constitute ‘persecution’. (Ghaly at 1431).

The closest, or at least most succinct, definition came from Judge Posner in Osaghae v. INS (when he stated: “Persecution’ means, in immigration law, punishment for political, religious or other reasons our country does not recognize as legitimate” (Osaghae at 1163).

The overall issue with asylum applications is that they fail to meet the standard of persecution by claiming general bad treatment or discrimination instead of asserting oppressive treatment or discrimination for belonging to a specific group.

B. Well-Founded Fear

Again, like, “persecution,” “well-founded fear” is not defined

---

it Mitev v. INS, 67 F.3d 1325, 1300 (7th Cir. 1995).
54 Ghaly v. INS, 58 F. 3d 1425, 1431 (9th Cir. 1995).
55 942 F.2d. 1160 (7th Cir. 1991)
within the statute. While the Supreme Court has held that an application for withholding removal under S.241 must establish a there is a clear probability that s/he would be singled out for persecution, this is not the case for seeking asylum as a refugee under S.207.\textsuperscript{56}

In \textit{INS v. Cardoza-Fonseca}, the Supreme Court held that “well-founded fear” in asylum cases is more generous than the clear probability standard that governs restriction on removal.

“There is obviously some ambiguity in a term like well-founded fear, which can only be given concrete meaning through a process of case-by-case adjudication.”\textsuperscript{57}

This standard requires both the subjective and objective parts. The applicant has to prove not only that s/he is subjectively fearful of persecution should they return to their country but that the fear is objectively well-founded.

This standard therefore requires considering both 1) the applicant’s state of mind and 2) whether a reasonable person would believe there is a possibility of persecution.

\textbf{EXAMPLE:}

Thomas is seeking an asylum claim based on the fact that he is fearful of persecution for voting against an incumbent in a past election. Even if Thomas is genuinely fearful of persecution, he still has to prove that the fear is well founded. He would fail to meet this standard if there was no evidence that the incumbent was persecuting people who voted against him.

Evidence of oppressive conditions will not be sufficient. Conversely, even if subjective fear is established, it must have some objective basis for the claim to be valid.

\textbf{EXAMPLE:}

Joe is seeking an asylum claim, unlike Thomas above, there is proof that the incumbent is persecuting people who voted against him. If Joe did not vote against the incumbent then

\textsuperscript{57} 480 U.S 421(1987).
his claim will fail. He will be able to show that a fear of persecution is well founded, but he will not be able to show that he has a genuine fear of persecution.

To meet the objective requirement, the applicant must show that:

- The applicant possesses a characteristic or belief that a persecutor seeks to overcome in others by means of punishment
- The persecutor is already aware, or could become aware that the applicant possesses this belief or characteristic
- The persecutor has the capability of punishing the applicant
- The persecutor has the inclination to punish the applicant.

It is not necessary for the applicant to show that s/he has actually been persecuted; s/he must only show that s/he is similarly situated to persons being persecuted. The following approach has been codified in the regulations to prove well-founded fear:

1. there is a pattern or practice in the applicant’s country of origin to persecute groups of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group or political opinion
2. the applicant is included in, and identifies with such groups such that his or her fear is reasonable

C. Past Persecution

59 “Since objective, corroborative evidence often is unavailable, it may be unnecessary for the asylum applicant to prove that he would be singled out for persecution, if he can ‘adduce objective evidence that members of his group, which includes those with the same political beliefs of the petitioner, are routinely subject to persecution.”
60 8 C.F.R. § 208.13(b)(2)(iii)
If the child has already suffered persecution that is an independent ground for asylum eligibility because it is presumed that the child has a well-founded fear of future persecution. However, if there is fundamental change in circumstance such that a well-founded fear would no longer be logical then there will be no presumption of a well-founded fear of persecution.

Even if there is a fundamental change a child can still be granted asylum based on the adjudicators exercise of discretion. The basis for such discretion is either because the applicant has compelling reasons for not wanting to return to his or her country of origin or if the applicant can show that s/he would suffer severe harm if returned.

The presumption of well-founded persecution can also be rebutted if it is found that the applicant/child could return to his/her country of origin safely.

62 8 C.F.R.§ 208.13(b)(1)(iii)
“Grant in the absence of well-founded fear of persecution. An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker’s discretion, if: (A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or (B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.” Id.

63 8 C.F.R. § 208.13(b)(1)(i)(B).

“Discretionary referral or denial…. an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence… The applicant could avoid future persecution by relocating to another part of the applicant’s country of nationality or, if stateless, another part of the applicant’s country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.”
Generally, asylum claims are required to demonstrate that the persecution in question of the person or their particular group is being perpetrated by the government of their home country. (See e.g. Tagaga v. INS, 217 F.3d. 646 (9th Cir. 2000), INS v. Elias Zacarias, Chen v. Gonzales 490 F.3d. 180 (2nd Cir. 2007)). However, while this broad rule is logical in most cases, its practical application can lead to various geopolitical issues.

**Issue 1: Uniform National Policies**
This dynamic was well documented in the BIA case *Matter of Cheng*, 20 I&N Dec. 38 (BIA 1989). This 1989 case dealt with the controversial One Child Policy of the People's Republic of China. The petitioner sought asylum arguing that the forced sterilization the PRC required of persons opposing the policy constituted persecution. As Cheng was a vocal opponent of the One Child program, he submitted that he therefore had a well-founded fear of the forced sterilization process.

Despite the controversial nature of the policy, the Board refused asylum. Instead, they asserted that as this was a uniform national policy that was done in a practical, if somewhat severe, effort by the government to secure provisions and general population control that had come last in a long line of less stringent efforts. As such, the Board stated that the policy was legitimate and could not be grounds for seeking asylum.

In order to bolster this ruling, the Board further asserted that Cheng had not submitted any evidence beyond witness testimony of the mandatory nature of the sterilization program.

Nevertheless, due to the domestic outcry caused by the Board’s position as well as the underlying policy, in 1996
Congress retroactively legislated that any population control programs enacted by foreign government would be valid ground for seeking asylum.

**Issue 2: Non-governmental actors**

While persecution typically requires government involvement, there are two major exceptions to this rule. These are 1) when the home government is unwilling to take action stemming from persecution by private parties and 2) when the home government is unable to take such action.

The Ninth Circuit referenced this in asserting: "...persecution, within the meaning of the [the INA] includes persecution by non-government groups . . . where it is shown that the government of the proposed country of deportation is either unable or unwilling to act." \(\text{McMullen v. INS, 656 F.2d. 1312, 1315 n.8 (9th Cir. 1991).}\)

The most notorious instance in which an asylum claim was heard due to a government unwilling to take action against a prevailing social norm was in the Kasinga case that has been referenced earlier. The refusal of the government to take any action against the widespread custom of female genital mutilation constituted sufficient basis for the Board to overlook the non-governmental nature of the practice.

Unwillingness or inability to act by the government, specifically the state police forces, was central to the cases \textit{Matter of O-Z and I-Z} 22 I&N 23 (BIA 1998) as well as \textit{Singh v. INS} 94 F.3d. 1353 (9th Cir. 1996). In the Matter of O-Z and I-Z, the police’s ignorance, refusal or simple inability to aid a Jewish man who had been subjected to numerous attacks by anti-Semitic groups was clear enough grounds of religious violence to constitute persecution.

Similarly, in \textit{Singh v. INS}, the 9th Circuit asserted that the ubiquitous acts of violence by Native Fijians against Indians residing in Fiji was tantamount to persecution as the government seemed either unwilling or wholly incapable of maintaining order or even a sufficient police presence.

D. On the Basis of Race, Religion, Nationality, Membership in a Particular Social Group or Political Opinion.

An application for asylum will be successful, only if the persecution is based on one of these five grounds: race,
religion, nationality, membership in a particular social group or political opinion.

Race
In order to meet the requirement of persecution on the basis of race, the applicant must be able to show that the government, of the applicant’s country of origin, has in some manner participated in conduct that would cause the applicant to fear persecution because of his/her race.

This requirement can also be met by a showing that the government allowed others to engage in threatening actions on the basis of race.64

In Tagaga v. INS, 217 F.3d. 646 (9th Cir. 2000), the 9th Circuit further extended racial discrimination based protection for refugees. Tagaga was a Fijian colonel who sought asylum because of his refusal to persecute the Indo-Fijian minority in his home country. Over the opposition and initial refusal of the INS, the 9th Circuit found that this constituted valid grounds to seek asylum on the basis of race.

Religion
Applicants must show that they fear persecution because of their religious beliefs. However, this requirement includes several things, for example it could also be met if there is a restriction on a religious practice.65

The International Religious Freedom Act of 1998 does not provide additional rights to refugees but it allowed for immigration officials to be more thoroughly trained on religious persecution issues.

64 Note: meeting the asylum requirement on the basis of race is extremely difficult and rare.
65 “There are degrees of persecution. If a person is forbidden to practice his religion, the fact that he is not imprisoned, tortured, or banished and is even allowed to attend school, does not mean that he is not a victim of religious persecution. If a government as part of an official campaign against some religious sect closed all the sect’s schools (but no other private schools) and forced their pupils to attend public school, this would be, we should think, although we need not decided, a form of religious persecution.”

Bucur v. INS, 109 F. 3d 399, 405 (7th Cir. 1997).
Nationality
In order for an applicant to be able to successfully prove that they have a fear of persecution based on nationality, they must show that the government has participated in hostile conduct against members of a certain nationality. It is not sufficient that there is violence against members of a nationality. The government must have participated in that violence.

Practice Tip
Discrimination based on nationality will not necessarily be persecution.

Membership in a Particular Social Group
There have been many different definitions for a social group. The BIA has defined it as “persecution that is directed toward an individual who is a member of a group of persons all whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as military leadership or land ownership.”

A social group will rarely be found when it is applicable to a large section of the nation.

EXAMPLE:
The Bureau of Immigration Appeals denied an asylum

66 The 7th Circuit has defined social groups as, “discrete, homogenous groups targeted for persecution because of assumed disloyalty to the regime.” Bastaniour v. INS, 980 F.2d 1129, 1132 (7th Cir. 1992). The 1st Circuit states that it is, “a characteristic that either is beyond the power of an individual to change or that it ought not be required to be changed.” Ananeh-Firempong v. INS, 766 F.2d 621, 626, 2 Immigr. Rep. (1st Cir. 1985).

67
application based on violence in El Salvador directed against the social group of working-class males of military age who had not demonstrated support for the government.

Practice Tip
To be able to meet the asylum requirements for persecution for membership in a social group the application should show the follow:

- That it a social group
- The applicant has membership in the group
- The group has been targeted for persecution on account of the characteristics of its members
- If there are special circumstances present to warrant regarding mere membership in the group as per se eligibility for asylum.

Children

Children are considered a social group under immigration law, and their youth maybe helpful in the application process. However, case law in this area has been mixed.

EXAMPLE:

In Matter of Kasinga, the BIA found that the child had a well-founded fear of persecution because of the threat of female genital mutilation. The social group was found to be, young women of the tribe who had not undergone the mutilation and opposed the practice.

In Matter of Luna-Lorezana, the court found that there was an identifiable social group of underage males forcibly recruited and illegally placed into the military who have been subjected to physical, social and emotional abuse.

Political Opinion
Persecution because of political opinion has been defined as, “the particular belief or characteristic a persecutor seeks to overcome in an individual is his political opinion. Thus [it] refers not to the ultimate political end that may be served by persecution, but to the belief held by an individual that causes him to the object of persecution.”

Furthermore, political opinion has been considered valid grounds for obtaining asylum even when it is not the beliefs of the petitioner, but those of a family member, that make them likely targets for persecution. In INS v. Cardozo-Fonseca, the Supreme Court held that although the petitioner was not a political activist in her home country of Nicaragua, the knowledge that her brother was an activist would make her a target for the Sandinistas. As such, she could establish a well-founded fear of persecution on these grounds.

In addition to persecution for a particular political opinion or belief, case law has also asserted that political neutrality or refusal to follow a political belief can also be grounds for seeking asylum if will lead or has led to similar persecution.

However, the major ruling in this area, INS v. Elias Zacarias, 502 U.S. 478 (1992), made particular effort to note that political neutrality will not be considered viable grounds for persecution if it is being used as a means to avoid danger.

Practice Tip
To meet the requirement for asylum on the basis of political opinion the applicant must satisfy the following:

- The victim must have been the subject of persecution

- The victim must have a political opinion

- The victim must show that his or her political opinion

- The persecution was on account of the opinion
b. Applying for Asylum

To apply for asylum the child must be physically present in the U.S. Applying for asylum is free and but must be done within one year from the date of arrival to the U.S. In order to apply the child must file Form I-589, Application for Asylum and for Withholding of Removal. 69

To obtain asylum through the affirmative asylum process the child must be physically present in the U.S. Immigrants can apply for asylum status regardless of how they arrived in the U.S. or his/her current immigration status. During this time Asylum officers will decide the case if the immigrant is in immigration court proceedings or s/he filed an application with an asylum office. You must attend your immigration court hearings and should follow the Immigration Judge’s instructions.

INA § 208. (a) Authority to Apply for Asylum
(1) In general. - Any alien who is physically present in the U.S. or who arrives in the U.S. . . . irrespective of such alien’s status, may apply for asylum in accordance with this section or, where applicable, section 235(b).

(2) Exceptions. -

(A) Safe third country. - Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien’s nationality or, in the case of an alien having no nationality, the country of the alien’s last habitual residence) in which the alien’s life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the U.S.

(B) Time limit. - Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of

69 For this form and further instructions please see appendix A or visit the USCIS website at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=de9814836a14d010VgnVCM1000048f3d6a1RCRD&vgnextchannel=6ca66d26d17d110VgnVCM100004718190aRCRD

65
alien's arrival in the U.S.

[NOTE: The one-year rule does not apply to unaccompanied immigrant children, see p. 74 above.]

(D) Changed conditions. - An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) . . ., if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing the application within the period specified in subparagraph (B).

(E) APPLICABILITY- Subparagraphs (A) and (B) shall not apply to an unaccompanied alien child (as defined in section 462(g) of the Homeland Security Act of 2002 (6 U.S.C. 279(g))).

(b) Conditions for Granting Asylum. -

(1) In general. - (A) ELIGIBILITY- The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security.

1. Present in the U.S.
An immigrant can apply for asylum even if s/he is present in the U.S. illegally, temporarily or on parole, even if s/he is at a port of entry.

It will be remembered from the beginning of this chapter that physical presence is not a requirement for non-refoulement nor is it a qualification under the Convention on the Status of Refugees, its subsequent Protocol, or any of the other relevant international legal provisions regarding refugees. In fact as the UN High Commissioner on Refugees asserted: “The principle of non-refoulement…applies both to persons within a State’s territory and to rejection at its borders” (The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR ¶ 2

The obligation of a country regarding non-refoulement therefore not only extends to those refugees within its territory, but also those who have come to its borders. As such, the U.S. requirement of physical presence markedly contradicts the jurisdictional mandate set by international law for non-refoulement.
This issue came to the fore in Sale v. Haitian Centers Council70. The case revolved around an executive order by President George H.W. Bush requiring the Coast Guard to send back a group of Haitian refugees who had sought sanctuary in the U.S. and were attempting to enter the country illegally. In ruling in support of the President, the Supreme Court asserted the U.S. had a sovereign right to reject persons seeking to enter its territory, regardless of their political status.

This ruling was and continues to be widely condemned by the international community. In fact both the Inter-American Court of Human Rights (IACHR) and the UN High Commission on Refugees have formally denounced this decision as contrary to international law and a direct violation of Article 33(1) of the Refugee Convention regarding the U.S’ jurisdictional non-refoulement obligations.

2. One Year
An applicant for asylum must show through clear and convincing evidence that s/he applied for asylum within one year of arriving in the U.S. There is an exception for extraordinary circumstances.

3. Minors applying through their Parents
A spouse or child present in the U.S. may be included on the application at the time of filing or until a final decision is made on the case. Any child included on the petition as a derivative must be under 21 and unmarried.

4. Minors applying on their own
There are two ways a minor can apply for asylum, (1) individually when their parents have a case, or (2) as an unaccompanied minor.

**Individual application**

In order for a minor to apply for asylum individually, s/he must be under 18 years of age and want to have a case separate from his/her parents or spouse.

**Unaccompanied Minor**

In order for a minor to apply for asylum as an unaccompanied minor s/he must be (1) under 18 years of age, (2) have no parent or legal guardian in the U.S who can provide care, (3) separated from
his/her parents or legal guardians, (4) Entered the U.S. with a
parent or adult guardian but left that person's care, or (5) have a
deceased parent(s) and there is no legal guardianship arrangement.
Unaccompanied Children Seeking Asylum May Begin Process In
Non-Adversarial Setting

On March 23, 2009, the provisions of the William Wilberforce
Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)
applicable to unaccompanied alien children took effect. In a
“Questions and Answers” memorandum dated March 25, 2009, the
USCIS, Office of Communications, published the following
information, in relevant part,

U.S. Citizenship and Immigration Services (USCIS) are
now responsible for initial adjudication of applications for
asylum from Unaccompanied Alien Children, (UAC). The
new procedures were created to carry out the William
Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). The TVPRA
provides USCIS with initial jurisdiction over any asylum
applications filed by unaccompanied children.

On Dec. 23, 2008, former President Bush signed into law
TVPRA, Public Law 110-457. The provisions of the
TVPRA that apply to unaccompanied alien children took
effect on March 23, 2009. Under one of these provisions,
unaccompanied alien children who have been issued a
Notice to Appear in immigration court will now file their
initial application for asylum with USCIS. The TVPRA
also provides an opportunity for unaccompanied alien
children, who did not previously file for asylum with
USCIS and who have a pending claim in immigration
court, on appeal to the Board of Immigration Appeals, or
in federal court, to have their asylum claim heard and
adjudicated by a USCIS Asylum Officer in a non-
adversarial setting.

NOTE: The TVPRA amended the INA so that one-year filing
deadline does not apply to UACs.

In addition, the TVPRA makes the following changes that affect
UACs applying for asylum:
1. The Immigration and Nationality Act (INA) is amended so that
the one-year filing deadline and any safe third country
agreements do not apply to UACs.
2. The Department of Health and Human Services (HHS) shall ensure pro bono counsel, to the greatest extent practicable and consistent with section 292 of the INA, for all UACs who either are or have been in its custody or in DHS custody.

3. HHS is authorized to appoint independent child advocates for child trafficking victims and other vulnerable unaccompanied alien children.

   A. Interviewing Procedures for Minor Applicants

   According to the USCIS, “Asylum officers' conduct child appropriate interviews taking into account age, stage of language development, background, and level of sophistication.” The USCIS website provides a link to “Guidelines for Children’s Asylum Claims.” For a link to this publication and further information about the interviewing procedures, please visit the following website http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=21bf011522a9c110VgnVCM1000004718190aRCRD&vgnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD.

   B. Social Security Card

   Once you are granted asylee status, you may apply for an unrestricted Social Security card a Social Security Office. In order to get a Social Security Card, you must contact the Social Security Administration. For more information, please visit their website at https://www.socialsecurity.gov/ssnumber/.

   C. Working in the U.S.

   You have authorization to work in the U.S. once you are granted asylum, even if you do not have an Employment Authorization Document (EAD). If you do not receive an EAD after being granted asylum, you should contact the asylum office that granted your case. The EAD may be used as a List A document on the Form I-9, Employment Eligibility Verification Form. In addition, you are also eligible to use employment services from One-Stop Career Centers. Please call (877) 872-5627 for more information.

   D. Permanent Residence (Green Card)

   By law, you are required to apply for permanent residence (a green card) one year after being admitted to the U.S. as a
refugee. If you were admitted to the U.S. as a refugee, you are required by law to apply. You must file a Form I-485, Application to Register Permanent Residence or Adjust Status, for yourself and each qualifying family member who wants to become permanent residents.

E. Traveling

If you intend on leaving the U.S., you must obtain a Refugee Travel Document prior to leaving. Please visit the USCIS website for more information at http://www.uscis.gov/USCIS/Resources/D4en.pdf.

F. Eligibility Determination

A specially trained USCIS officer will interview the applicant and determine whether she/he will have refugee status. The interview is non-adversarial and the decision is made on a case-by-case basis.

G. Process Priorities

According to the USCIS, the following are priorities currently in use:

**Priority 1**: Cases that are identified and referred to the program by the United Nations High Commissioner for Refugees (UNHCR), a U.S. Embassy, or a designated non-governmental organization (NGO).

**Priority 2**: Groups of special humanitarian concern identified by the U.S. refugee program.

**Priority 3**: Family reunification cases (spouses, unmarried children under 21, and parents of persons lawfully admitted to the U.S. as refugees or asylees or permanent residents (green card holders) or U.S. citizens who previously had refugee or asylum status). For information on the current nationalities eligible for Priority 3 processing, see the "U.S. Department of State" link to the right.

**NOTE**: The information above came directly from the USCIS website, specifically the U.S. Refugee Admissions Program (USRAP) Consultation & Worldwide Processing Priorities, which can be viewed in full at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=796b0eb389683210VgnVCM100000082ca60aRCRD&vgnextchannel=385d3e4d7
H. Coming to the U.S.

After approval as a refugee, you will receive all of the following:

- a medical exam
- a cultural orientation
- help with your travel plans
- a loan for your journey to the U.S.

c. Limits on Eligibility

There are three limitations to an immigrant’s ability to apply for asylum.\(^1\) First, if the immigrant can move to another country based on an agreement. Before an immigrant can be denied asylum because of this limitation the Attorney General must determine that the immigrant will have access to procedures for or an equivalent asylum program.

Second, the alien must show by clear and convincing evidence that the application was filed within one year of arriving in the U.S., as discussed above.

Third, an immigrant who has previously applied for asylum and been denied cannot re-apply.

\(^1\) INA § 208(a)(2)(A)-(C)

“(A) Safe third country. - Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit. - Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of alien's arrival in the United States.

(C) Previous asylum applications. - Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.”
d. Changed Conditions

e. Eligibility for Restriction on Removal

If an illegal immigrant is in removal proceedings the immigration laws may protect him/her from being removed from the U.S. because his/her life would be threatened.

"Restriction on removal to a country where alien's life or freedom would be threatened [] the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."

The well-founded fear requirement of a proactive asylum application is not incorporated into this section. Instead, to qualify for restriction on removal, the immigrant child must show that there is a clear probability of persecution.

This determination is mandatory, meaning, if the immigrant can show that his or her life will be threatened then s/he cannot be removed.

NOTE: The mandatory nature of this determination is only if the immigrant's life is threatened because of his/her race, religion, nationality, membership in a particular social group, or political opinion.

Practice Tip

To establish that the immigrant faces a clear probability of persecution s/he must show that s/he is at a greater risk than the general population, and that the threat is a serious one. The claim must be supported by specific or concrete, factual evidence that the immigrant is more likely than not to be subject persecution.

The following immigrants are ineligible for restriction on removal:
- Persecutors
- Aliens convicted of serious crimes
- Reasons to believe alien committed a serious nonpolitical crime
- Reasonable grounds to believe alien is a danger to the security of the U.S.

72 INA § 241(b)(3)
73 INA § 241(b)(3)(B)(i)-(iii)
Persecution Bar

Under S.208(b)2(A), any immigrant who has participated in the persecution of another person because of race, religion, nationality, membership in a particular social group or political opinion is not eligible for the restriction on removal.

The ineligibility for asylum status based on persecution was originally extended to persons such as petitioner Majano who was in danger of being forced to participate in persecution of a particular group as they had previously participated in such actions. In the Matter of Rodriguez Majano, (19 I&N Dec. 811 (BIA 1988)). Despite the petitioner’s apparent unwillingness and fear of likely being required to once again take part in such actions, the Board held that his previous commission of persecution made him ineligible to claim asylum under S.208 or withholding of removal under S. 241.

However, in its recent decision in Negusie v. Holder, the U.S. Supreme Court has found that, when considering a petitioner’s eligibility for asylum, the BIA is in fact permitted to take into account whether a petitioner was coerced into committing persecutory acts. (Negusie v. Holder 555 U.S. 511 (2009)) According to the Court “[t]he BIA and Fifth Circuit [erred in] mandating that whether an alien is compelled to assist in persecution is immaterial for prosecutor-bar purposes”. (Id.) As such, a petitioner’s forced participation in persecutory acts no longer requires a mandatory refusal of asylum status. Instead, such a situation is left to the discretion of the BIA. (Id.)

Committed a serious crime

A serious crime is defined as an aggravated felony and the immigrant must have been sentenced to a prison term of longer than five years.

Prior political crimes have also been considered grounds for denying asylum. However, case law has asserted that if the crime was committed as part of a political statement or movement, it can be excused. However, in order for such an exemption, the petitioner must have clearly had a justifiable political motive in undertaking the apparently illegal action.

In the case INS v. Aguire-Aguire, 526 U.S. 415 (1999) the Supreme Court held that petitioner Aguire was ineligible for the commission of a serious crime despite his contention that the underlying action was part of a political uprising. In so ruling, the Court held that the criminal action Mr. Aguire was charged with; the burning of several

"Exception.-Subparagraph (A) does not apply to an alien deportable...or if the Attorney General decides that- (i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual’s race, religion, nationality, membership in a particular social group, or political opinion; (ii) the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States; (iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or (iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.”
buses and charges of assault, could not be considered in any way proportional or justifiable as part of a political revolt.

Security Threat or Possible Danger to the U.S.

General Prohibition

The INA asserts that if a petitioner is deemed a threat to national security because of prior or possible involvement with terrorist groups, they will not be able to seek S.208 asylum pursuant to 208(h)2(A)v.

In addition, aliens who are found to be a possible security threat to the U.S. will not only be denied asylum but are expressly not permitted to exercise the nonrefoulement exception to withhold S. 241 removal under INA S.241(h)3(B)iv.

These measures are intimately tied to the inadmissibility provisions of S. 212(a)3(B). Under this provision persons deemed to pose such a threat are also considered inadmissible and will even be refused entry at the U.S. border, despite any claims of asylum or nonrefoulement.

Given the international outcry to the Supreme Court ruling in Sale v. Haitian Centers Council (supra) these strict measures against possible asylum seekers would seem at odds with the general amnesty for refugees and asylum seekers observed in customary international law. However, these prohibitions are actually in keeping with the provisions of the Refugee Convention. Under Article 33(3) persons found to be a threat to the national security of either their host state or their home country can be refused asylum or refugee status.

Terrorist Exclusion and 9/11

While security threats to the U.S. have therefore been traditionally excluded from seeking any sort of amnesty as refugees, the bar for asserting said exclusion has been drastically changed since the attacks of September 11th, 2001 and the revamping of domestic security under the Homeland Security Act of 2002.

Prior to this, qualification as a threat to national security required clear involvement in organizations that conducted terrorist activity. For example, in the case McAlister v. Attorney General, 444 F.3d. 178 (3rd. Cir. 2006) the petitioner was denied asylum as he had not only been involved in the Irish National Liberation Army (INLA) but was wanted for the death of a British soldier in furtherance of the group’s goals.

However, subsequent to the Act’s passage, the exclusion was extensively expanded. Under the new inadmissibility grounds of S.212(a)(3)(B)(iv)(V) persons could be found to constitute security threats if they had in any way provided “material support” to known terrorist groups. By “material support” S.212 means a person will qualify for the exclusion if they gave any aid whatsoever to “an individual the actor knows, or reasonably should know, is involved in terrorist activity.” (S. 212(a)(3)(b)(iv)(V).
Using this definition, courts have broadly applied the security threat category to validate a number of controversial, or at the very least questionable, exclusions. For example, in the case of Singh-Kaur v. Ashcroft, 365 F.3d. 293 (3d. Cir. 2004) the Third Circuit held that petitioner had materially supported terrorist activity when he had unknowingly provided food and drink to members of a Sikh militant group during a religious ceremony.

Similarly, in the Matter of S-K 23 I&N Dec. 936 (BIA 2006), petitioner was considered to have materially supported terrorist activity when she donated $985 to the Chin National Army. The Board maintained its ruling despite the fact that 1) the donations was for religious reasons and 2) the Chin National Front was fighting the Burmese government alongside organizations that were known to have U.S. financial and military support.

Due to the severe consequences that such interpretations of the material support bar have engendered, in 2007 the DHS announced efforts to tighten the standard of a security threat. While this did not include a rewording of the definition currently in use, it has included the creation of two sets of waivers. The first of these is for refugees that supported particular organizations such as the CNF, while the second set are more generic and are aimed at aiding persons found to have supported terrorist activity under duress. Of course, due to the difficulty of validating a duress based refugee petition, the latter group of waivers comes with a rather high burden of proof. (See 72 Fed. Reg. 9954, 9956 (March 6, 2007)

5. Member of a Special Category
   If you fall into one of the following categories, you may be eligible for a green card, 1) battered child or spouse of a U.S. citizen; or 2) obtained V nonimmigrant status.
   
   a. Battered child or spouse of a U.S. Citizen74

   The Violence Against Women Act of 2000 (VAWA 2000) created the U-visa for immigrant victims of criminal activity. This visa offers temporary lawful status to victims of certain criminal activity if the victim has suffered substantial physical or mental abuse as a result of the crime. The victim must have information about the crime and a law enforcement official (e.g. police, prosecutor) or a judge must certify that the victim has been helpful, is being helpful, or is likely to be helpful in investigating or prosecuting the crime. The purpose of this legislation was to:

---

74 The following information is from the U Visa Manual Chapter (OVW Lex Nov 12-13, 2007) produced by Legal Momentum.
create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate and prosecute cases of domestic violence, sexual assault, trafficking and other crimes … committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the U.S.

This form of relief gives the applicant temporary legal immigration status and the possibility of lawful permanent residence. The maximum number of U-visas for available in any one year is 10,000 for the primary applicants. Spouses and children of U-visas applicants, as well as parents of applicants who are under 16, may also qualify for a U-visa under certain circumstances. There is no limit on the number of visas available for these qualifying relatives.

i. Eligibility
In order to be eligible for U-visa status, the immigrant victim must:

1. Have suffered substantial physical or mental abuse as a result of having been a victim of the one or more of the criminal activities listed;

2. Possess information concerning the criminal activity;

3. Obtain a certification from a law enforcement official, prosecutor, judge, Immigration official, or other federal or state authority that he or she is being, has been, or is likely to be helpful to a federal, state, or local investigation or prosecution of a form of listed criminal activity;

4. The criminal activity violated the laws of or occurred in the U.S.

Substantial Physical or Mental Abuse

In order to be eligible for U-visa status, an applicant must have suffered substantial physical or mental abuse as a result of being a victim of the criminal activity. In determining whether the abuse is substantial, DHS will consider:

• The nature of the injury;
• Severity of the perpetrator’s conduct;
• The severity of the harm suffered;
• The duration of the infliction of harm;
• Permanent or serious harm to appearance;
• And health, physical, and mental soundness.

DHS will take into account any of all of these factors but no one factor is required. DHS has discretion to include pre-existing conditions as well to consider the severity of the perpetrator’s conduct even if the actual impact may have been less than intended by the perpetrator.

Victim of an enumerated criminal activity

Congress created an extensive list of criminal activities that qualify under the U-visa.

**Crimes Covered:**

<table>
<thead>
<tr>
<th>Crime</th>
<th>Crime</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rape</td>
<td>Kidnapping</td>
</tr>
<tr>
<td>Torture</td>
<td>Abduction</td>
</tr>
<tr>
<td>Trafficking</td>
<td>Unlawful criminal restraint</td>
</tr>
<tr>
<td>Incest</td>
<td>False imprisonment</td>
</tr>
<tr>
<td>Domestic violence</td>
<td>Blackmail</td>
</tr>
<tr>
<td>Sexual assault</td>
<td>Extortion</td>
</tr>
<tr>
<td>Abusive sexual contact</td>
<td>Manslaughter</td>
</tr>
<tr>
<td>Prostitution</td>
<td>Murder</td>
</tr>
<tr>
<td>Sexual exploitation</td>
<td>Felonious assault</td>
</tr>
<tr>
<td>Female genital mutilation</td>
<td>Witness tampering</td>
</tr>
<tr>
<td>Being held hostage</td>
<td>Obstruction of justice</td>
</tr>
<tr>
<td>Peonage</td>
<td>Perjury</td>
</tr>
<tr>
<td>Involuntary servitude</td>
<td>Slave trade</td>
</tr>
</tbody>
</table>

This list is not an exclusive list and CIS will consider substantially similar criminal activity to fall within the activity covered.

Indirect victims may also apply for U-visa in specific circumstances. If the criminal activity renders the primary victim deceased (e.g. murder, manslaughter) or incompetent or incapacitated, the Spouse, Children under 21 years of age, and if the direct victim is under age 21, the parents and siblings under age 18 qualify as victims.

Indirect victims are eligible to file their own applications for a U-visa when the crime is murder or manslaughter or when the primary victim is under age 16, incapacitated, or incompetent. This provision will allow eligible indirect victims to apply even when the primary victim is or was a U.S. Citizen or Lawful Permanent Resident (LPR or green card holder) and not in need of her own U-visa.

Possess Information
The U-visa was enacted to encourage victims of criminal activity to feel safe in reporting crimes against them without adverse immigration consequences. U-visa applicants must prove that they possess information about the criminal activity. Their knowledge of the criminal activity against them is a critical component of the U-visa application. Applicants who were under 16 when the criminal activity occurred or lack the capacity or competence do not have to prove that they possess information if a parent, guardian, or next friend possesses that information. The next friend is a person who acts in a legal proceeding on behalf of an individual who is incompetent or incapacitated.

**Obtain certification**

DHS requires all applicants to provide certification from a state, local, or federal agency (Form I-918 Supplement B) in order to grant U-visa status. The form requires the law enforcement official, judge, or other authorized state, local, or federal employee to certify that the applicant has been, is being, or is likely to be helpful and that the applicant is a victim of a qualifying criminal activity. The certification form also requires the government signatory to demonstrate their authority as a supervisory or designated agent to sign on behalf of their department and that their agency is eligible to certify.

The requirement that an applicant “has been helpful, is being helpful or is likely to be helpful” includes past, present, and future helpfulness. Congress adopted this approach to ensure that certifications were not limited to cases in which prosecutions were underway. Prosecution could not occur if victims were not given protection from deportation and intimidation by crime perpetrators that kept victims from reporting crimes and participating with investigations of criminal activity whether or not the case was ultimately prosecuted or a conviction obtained. For this reason, victims were granted access to U-visa protection very early after reporting crimes. The U-visa is available to an individual crime victim who is “helpful, was helpful, or will be helpful” in the investigation or in the prosecution of criminal activity. Whether or not cases move forward in the criminal justice system is complex. A key congressional goal is to encourage victims to come forward and report crimes and to secure their assistance in criminal investigations, not only prosecutions. For this reason, U-visas are available to victims regardless of whether he or she serves as a witness, whether the investigation or prosecution results in a conviction, when there is an investigation of criminal activity that has not yet or does not result in a prosecution, when the criminal
case is dismissed, and when the case is initiated and the perpetrator evades services.

In assessing how helpful one has to be, advocates should understand some critical clarifications.

► The criminal activity does not have to be prosecuted.
► If prosecuted, there is no requirement that the prosecuted criminal activity is a qualifying criminal activity enumerated for U visa applicants
► The perpetrator need not be convicted of any criminal activity.

Though it is not required that the case be prosecuted, the applicant must continue to cooperate through the duration of the U-visa status. If the case is prosecuted and the victim is perceived not to be helpful, the law enforcement agent may contact DHS with this information and the U-visa may be revoked. It is critical for victims who are reporting criminal activity to understand that although they can obtain U-visa status based on reporting criminal activity, their helpfulness does not end with the initial report of the criminal activity.

Though the certification is mandatory in U-visa applications, many different agencies qualify as certifying agencies eligible to sign the certification form. The eligible agencies and individuals include:

► Federal, state, and local law enforcement agencies (e.g. police, sheriffs, Assistant U.S. attorneys, federal marshals)
► Federal, state, and local prosecutors
► Federal, state, and local judges
► Child Protective Services
► Equal Employment Opportunity Commission
► Department of Labor
► Other Federal, state, and local Investigative Agencies

The certification must be signed by a supervisor or a person designated by the supervisor. There are very few jurisdictions that had any established protocol at the time the U-visa regulations were issued. As a result, the initial applicants may encounter law enforcement or other government agencies that lack the understanding or protocols to respond to certification requests. It will be critical for advocates to work with law enforcement, prosecutors, and other government agencies (e.g. EEOC, labor or child abuse investigators) to understand the role of the certification.
and help them to establish procedures and protocols that encourage signing of certifications.

**Violated the laws of or occurred in the U.S.**
The final requirement is that the criminal activity either violated the laws of the U.S. or occurred in the U.S. DHS has defined the U.S. broadly to include all of the following:

- Indian land including any Indian reservation within U.S. jurisdiction, dependent Indian communities, and Indian allotments
- Military installations including transportation (vessels, aircrafts) under Department of Defense jurisdiction or military control or lease
- U.S. territories including American Samoa, Swain Islands, Bajo Nuevo (the Petrel Islands), Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Atoll, Navassa Island, Northern Mariana Islands, Palmyra atoll, Seranilla Bank, and Wake Atoll.
- U.S. territories include Guam, Puerto Rico, and the U.S. Virgin Islands

Criminal activities violating the laws of the U.S. occurring outside the U.S. include any criminal activities described in federal statutes that extend extraterritorial jurisdiction. Any activity that would violate the laws of the U.S. but that takes place abroad would not satisfy this requirement.

**U VISAS FOR CERTAIN FAMILY MEMBERS OF THE CRIME VICTIM**

U-visas are also available for family members of the direct or indirect victims of the criminal activities. A U-visa victim applicant can include or later add to the U visa application, petitions for her family members. For those over age 21, family members include the spouse or children. For victims under age 21, family members include the spouse, children, parents, and unmarried siblings under age 18.

Spouses and children of U-visa applicants as well as parents of U-visa applicants who are under the age of 16 can also receive U-visas if:

- they can demonstrate that receipt of the visa is necessary to avoid extreme hardship; or
• a government official certifies that the investigation or prosecution would suffer without the assistance of the spouse, child, or parent.

There is no cap on the number of U-visas that can be issued to the spouses, children or parents of U-visa recipients. A sibling’s age is determined as of the date when the sibling’s U-visa application is filed. Family members who received interim relief and are no longer meet the age criteria, are still eligible under the U-visa statute and should apply based on those requirements. Family members who are perpetrators of the crime are not eligible. Family members also include children who are born after the application is approved as long as an additional application is filed on their behalf.

Removal Proceedings

Many potential U-visa applicants may be or have been in immigration removal proceedings, which take place in immigration court. They begin with a document called a Notice to Appear. This form if in the applicant’s possession will help advocates to identify for a victim’s immigration attorney that a potential applicant has had a case in removal proceedings. It is critical that any attorney working with the victim know this information.

Victims who are currently still in removal proceedings or in detention may apply for a U-visa. An attorney can assist an applicant in applying for a motion to terminate removal proceedings that would end the applicant’s case in removal proceedings. Family members who are eligible to apply for U-visas are also eligible to terminate their removal proceedings. Those who already have a final removal order may file a motion to stay their removal. This would prevent them from being removed from the U.S. while their U-visa application is pending. After the U-visa is approved, any final order the U-visa holder has will be effectively cancelled. However, if a U-visa is denied, the applicant may be reissued a Notice to Appear and once again placed in removal proceedings.

ii. Benefits

The U-visa is a four year non-immigrant visa, which means that it is a visa of a limited duration not intended as permanent status to remain in the U.S. However, Congress also created a provision allowing certain U-visa holders to apply for Lawful Permanent Resident Status (LPR or green card folder) allowing an immigrant to remain permanently in the U.S. This visa creates an opportunity
for immigrant crime victims who may not have any other immigration relief to remain permanently in the U.S.

The U-visa has some critical benefits including allowing those approved to lawfully accept employment in the U.S. U-visa holders are automatically granted an employment authorization document that allows them to accept employment. This ensures immigrant victims the ability to provide for themselves and safely remain in the U.S. after being victimized.

U-visa applicants may also include their family members in their application and help them obtain U-visa status. It allows families to remain together in the U.S. rather than be separated as crime victims participate in a criminal investigation process. U-visa applicants may also obtain U-visas for family members abroad. Beyond family reunification, this may be extremely useful for women whose family members will assist her in child care and support so that she can economically empower herself and her family. It may also be an urgent safety precaution as many immigrant crime victims face threats to their family members in their home country if they cooperate with law enforcement officials in the U.S.

iii. Adjustment of Status

If a U-visa holder has been physically present in the U.S. for three years after being granted U-status, he or she may apply for adjustment of status to lawful permanent residence (a "green card"). The applicant must demonstrate that lawful permanent residency is justified on humanitarian grounds, to ensure family unity, or because it is in the public interest. Applicants may be required to file for waivers of inadmissibility. Because fee waivers are not currently being accepted, applicants may want to wait for DHS to request the submission of the inadmissibility waiver. If inadmissibility red flags occurred after obtaining a U-visa the victim can apply for an inadmissibility waiver under INA Section 212(d)(14). DHS also has the discretion to adjust the status of a spouse, child, or parent of a U-visa holder whose status has been adjusted if it is necessary to avoid extreme hardship. This applies to family members who were not originally granted U-visa relief. If these family members are outside the U.S., they may obtain an immigrant visa abroad at a U.S Consulate. Applications for lawful permanent residency cannot be filed by U-visa holders until U-visa adjustment regulations are published.
b. Obtained V nonimmigrant status

While U.S. immigration law still includes a provision for the V visa category for qualified spouses and children (under age 21) of U.S. lawful permanent residents (LPRs), we do not foresee that any V visas will be issued, since potential applicants will not meet the criteria explained below.

The Legal Immigration Family Equity Act (LIFE Act), enacted on December 21, 2000, created a nonimmigrant visa category, the V visa, with specific provisions for certain spouses and children of U.S. lawful permanent residents (LPRs). The purpose of the LIFE Act was to reunite families who had been or could be separated for long periods during the process of immigrating to the U.S. V visas, therefore, allowed these family members to be in the U.S. with their LPR spouses and parents while waiting to complete the immigration process.

To qualify for a V visa, a spouse or child (under age 21) of a U.S. lawful permanent resident (LPR) must meet all of the following criteria:

- The U.S. LPR spouse and/or parent MUST have filed Form I-130, Petition for Alien Relative, with the U.S. Citizenship and Immigration Services (USCIS) on behalf of his or her spouse/child(ren) on or before December 21, 2000;
- The petition's priority date must be at least three years old;
- The priority date must not be current;
- The applicant must not have already had an immigrant visa interview or be scheduled for an interview;
- The petition must not already be at a U.S. embassy or consulate for immigrant visa processing; and
- The applicant must be otherwise eligible as an immigrant.

U.S. embassies and consulates have not issued any V visas for the past several years because applicants with priority dates on or before December 21, 2000, were able to apply for immigrant visas as their priority dates became current. Review the Visa Bulletin for information on the priority dates of petitions for spouses and children of U.S. lawful permanent residents that are currently being processed for immigrant visas.

6. Non Immigrant Status

a. Foreign Students

Foreign students have been able to study in U.S schools because of the immigration laws that created a specific law for the admission, since 1924. Though an impermanent return to their previous place has been made, the
agreement of the national policy, has given back a recent administrative practice, in which it supports and makes it less difficult the educational goal of bona fide foreign students.

The U.S. has benefited from this policy in many ways. First, an exposure to foreign students of the culture and traditions of the Untied States will insure a fund of good will that will be used to assume positions of power and influence in their home countries. Second, students will be able to provide support in their home countries with the knowledge and skills acquired in which it will stabilize the country’s political and economic uncertainly and as for the U.S. they will have the advantage of having their objects completed. Third, a large amount of foreign students have taken the opportunity of the educational institutions in the U.S. During 1993-1994, over 449,000 foreign students were enrolled in U.S colleges and universities, many of which were dependent on foreign students for a substantial portion of their funds.  

Under the Immigration Act of 1924, students were classified as nonquota immigrants, but were admitted for only a limited stay. This classification was something as a permanent defective, since a student was not for permanent residence only a temporary stay. Therefore the Act of 1952 properly classified students as nonimmigrants. In doing so, Congress recognized the importance of cultural interchanges and disclaimed any intention of hindering aliens who wished to come to the U.S. to pursue bona fide courses study.

The 1952 Act originally prescribed a single, inclusive nonimmigrant category for alien students. A 1961 amendment added to the nonimmigrant student category the alien spouse and minor children of such an alien student, if accompanying or following to join him or her. A major revision in 1981 placed students at vocational or other nonacademic

76 Act of May 26, 1924 sec. 4(e), 43 Stat. 153.
78 See S. Rep. No. 1515, 81st Cong., 2d Sess. 509 (1950); Mashi v. INS, 585 F.2d 1309, 1314 (5th Cir.1978) (citing the Treatise).
schools in a separate M nonimmigrant category, designed to insure stricter controls.\textsuperscript{81}

The statute now has two separate provisions for alien students. The first, which can be described as relating to academic students, substantially retains the\textsuperscript{82} original language, and provides: “(F)(i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the U.S. temporarily and solely for the purpose of pursuing such a course of study consistent with section 214(1) at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program in the U.S., particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any such alien if accompanying him or following to join him.”

The second category, added in 1981, relates to vocational or nonacademic students, and provides: \textsuperscript{83}

“(M)(i) an alien having a residence in a foreign country which he has no intention of abandoning who seeks to enter the U.S. temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than in a language training program) in the U.S. particularly designated by him and approved by the Attorney General, after consultation with the Secretary of Education, which institution shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant nonacademic student and if any such institution fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any such alien if accompanying him or following him.”

An illegal immigration reform law was passed by Congress in 1996. The law had two sections, which concern foreign students. These sections are for foreign students who wish to attend public elementary school or adult public education programs, whose status bar is F-1. The sections also prohibit foreign students from attending a public secondary school unless

\textsuperscript{81} INA Amendments of Dec. 29, 1981, Pub. L. No. 97 116, sec. 2(a), 95 Stat. 1611 (limiting the F student category to students at academic institutions and creating a new M category for students at vocational or other recognized nonacademic institutions).

\textsuperscript{82} INA sec. 101(a)(15)(F), 8 U.S.C. sec. 1101(a)(15)(F)

\textsuperscript{83} INA sec. 101(a)(15)(M), 8 U.S.C. sec. 1101(a)(15)(M)
the aggregate period of their F-1 status does not exceed a year and the alien reimburses the school for the full amount of unsubsidized costs.\textsuperscript{9.1} Below, these provisions are discussed in more detail in sec. 18.03 [2].

The 1996 law imposed additional recordkeeping requirements on academic institution. These provisions are discussed in more detail in sec.18.02 [5] below.\textsuperscript{9.2}

Visa Symbols and Classifications

The academic student’s visa classification symbol is F-1. F-2 is for the students’ spouse or child. A student at a vocational or other nonacademic institution the visa symbol is M-1. The student’s spouse or child is designated M-2.\textsuperscript{10} Alien students’ personal or domestic servants may be admitted to the U.S. as B-1 temporary visitors, as indicated in Chapter 12 above.

Bona fide student applicants may be given B-2 visas if they have not yet made a final decision on the school they wish to attend, with the B-2 visas they are temporary visitors for pleasure so that they may come to the U.S. to select a school, with the understanding that they will apply for change to student status after the selection is made. In such cases the consul will place the following notation on their visa: “Prospective Student; school not selected.”\textsuperscript{11} Qualified students in possession of Form I-20-A-B from a school they have selected who seek to enter the U.S. more than 90 days before their reporting date likewise can be granted B-2 classification, with the understanding that they will apply for change to student status before beginning their studies. In such cases an appropriate notation is placed on their Form I-20A-B.\textsuperscript{12}

The amount of students who have come to this country has increased because of the interest in education and in exchange of mutual knowledge and skills. Very often students are sent under official programs, and some of these may properly be classified as government officials, exchange aliens, or industrial trainees.\textsuperscript{13} But if they do not seek entry under these

\begin{thebibliography}{13}
\bibitem{9.2} IIRAIRA sec. 641.
\bibitem{10} 22 C.F.R. sec. 41.12 Nonimmigrant categories and visa symbols are listed in sec. 12.03 [1] [a] supra.
\bibitem{11} U.S Dep’t of State, 9 Foreign Affairs Manual (FAM) sec. 41.61 n.9.2, reprinted in Volume 10 infra.
\bibitem{12} 9 FAM sec. 41.61 n.9.1
\bibitem{13} See 9 FAM sec. 41.20. For discussion of the different classes of nonimmigrants discussed above, see sec.12.03 [1] supra.
\end{thebibliography}
categories they may be classified as nonimmigrants students. In spite of that most students who come to this country provide for themselves, as well as finance their education or their families, or private organizations finance it. In this chapter are the students whom are primarily concerned for.

School Approval, Withdrawal; Recordkeeping

The statute stipulates that the student must plan to attend a specific school approved by the Attorney General and that the school must agree to report to the Attorney General the name of each nonimmigrant student who stops attending school. The qualifications of nonimmigrant students and the continuance of their status depend on the school's report. These requirements are to make sure that the school is legitimate and that the asserted student status is bona fide INS district directors are required to conduct periodic reviews at the schools to determine whether students and schools are complying with prescribed requirements.

Designated School Officials
Petition for Approval

For the problems that emerge from the standpoint of the student and the school official, most schools designate an official known as a foreign student advisor or designated school official (DSO). The regulations require each school seeking to recruit foreign students to have a DSO who is regularly employed by the school, who has an office and who is not compensated by commissions for recruiting foreign students. The DSO is authorized to perform various functions specified in the regulations and may not delegate the responsibilities. A school could have up to five DSOs at one time. Multi-campus institutions may have up to five DSOs at each campus; expect that an elementary or secondary school system may have no more than five designated officials at any one time.

NAFSA: Association of International Educators, 1875 Connecticut Ave., N.W., Suite 1000, Washington, DC 20009-5728, phone: (202) 462-4811, supports colleges and universities in reinforcing their programs for students from other countries and regularly holding regional and national meetings to discuss problems in the administration of the student visa program.

Obtaining Approval to Receive Nonimmigrant Students

14 22 C.F.R. sec. 41.61
2 8 C.F.R. sec. 214.3 (i)
3 8 C.F.R. sec. 214.3 (1)(1).
4 Id.
5 Id.
Petition for approval

Any school that desires to receive nonimmigrant students must file with the district director in its locality a petition for approval. Approval for attendance of academic students (F-1) may be solicited by a college or university that that awards recognized bachelor's, master's, doctor's, or professional degrees; a community or junior college that provides instructions in the liberal arts or the professions and awards recognized associate degrees; a seminary; a conservatory; an academic high school, an elementary school; or an institution that provides instructions language training instructions in the liberal arts, the fine arts, or the professions, or instruction in one or more of these disciplines. Approval for attendance of nonacademic students (M-1) may be solicited by a community college or junior college that provides vocational or technical training and awards associate degrees; a vocational high school; or a school that provides vocational or nonacademic training other than language training. A school may be approved for both F-1 and M-1 students, and in such cases the student’s classification as F or M will depend on the student’s primary educational goals. Depending of the petitioning school’s nature of the detail in the supporting documents and information.

A school or school system in a public educational system in a public educational system operated by federal, state, or local government merely submits a certification to that effect signed by the appropriate public official. A private or parochial elementary or secondary school system submits a certification by an appropriate public official stating that it meets the requirements of the state or local public educational system. Any other school submits a certification by an appropriate official stating that it is licensed, approved, or accredited. A school approved for study of veterans may submit a statement of recognition signed by an appropriate state official. All schools other than those in public educational systems, and other officially listed institutions of higher education, must also submit a school catalogue or a detailed statement describing its plant, facilities, staff, salaries, attendance, and grading policy, supervisory and consultative services, and finances. Vocational, business, and research institutions must show that they are fulfilling educational objectives. Failure to comply with these requirements may result in denial of the petition.

6 8 C.F.R. sec. 214.3 (a)(1)
7 8 C.F.R. sec. 214.3 (a)(2)(i). After the INS issued revised student regulations in 1983, each previously approved school was required to submit a petition for recertification. 8 C.F.R. sec. 214.3 (h)
8 8 C.F.R. sec. 214.3 (a)(2)(ii).
9 8 C.F.R sec. 214.3 (a)(2)(iii)
10 8 C.F.R. sec. 214.3 (b).
The statute requires that petitions for approval of schools be considered by the Attorney General after consultation with the U.S. Department of Education. However, in 1993 the INS revised its regulations to remove the need for individual consultations with the Department of Education.

The following are recognized by recent regulations, as approved schools:

- Federal, state, and local government operates a school as a public educational institution; and
- a school accredited by a nationally recognized accrediting body.

A petitioning school must submit certification from the appropriate official indicating that it is licensed, approved, or accredited. For the petition's approval is filed in duplicate on Form-17 with the district director in the school's locality. Unless the petition seeks merely a continuation of a prior approval, the petition must be accompanied by a fee. The form must be signed by an officer of the institution who has authority to sign contracts, and must be accompanied by the supporting documents described above. Separate petitions are required for different schools in the same school system located within the jurisdiction of different district directors.

A petition for a school system must include the names and addresses of the schools. The petition must state whether approval is sought for the approval of academic students (F-1), nonacademic students (M-1), or both. An institution of higher education not within the above categories that confers academic or professional degrees accepted by at least three accredited institutions of higher education must submit evidence. An elementary or secondary school not within the above categories must submit evidence that it satisfies the state compulsory attendance requirements and qualifies graduates for acceptance by accredited

15 8 C.F.R. sec. 214.3 (b), (c); Matter of Brandon’s Professional Schools, 11 I. and N. Dec.397 (Reg. Comm’r 1965) (English courses not approved by state educational authorities or by U.S Dep’t of Education); Matter of Peninsula School, Ltd., 11 I. and N. Dec. 411 (Reg. Comm’r 1965) (school facilities did not satisfy requirements); Matter of [name not provided], File NYC 214.f 1535, 10 Immig. Rptr. B2-78 (AAU Sept. 15,1992) (AAU upheld denial of petition for F-1 school approval where institution failed to meet the requirements of 8 C.F.R. sec. 214.3 (a)(2), but remanded for further fact finding on whether school qualified as postsecondary business school for purposes of M-1 regulations).
16 8 C.F.R. sec. 103.70(b) should be consulted for the appropriate fee.
17 Instructions on INS form I-17
18 8 C.F.R. sec. 214.3 (a)(1)
19 Id
schools of higher educational level.\textsuperscript{20} For an entire school system there may be one petition filed. A petition on behalf of a public school system must be made by the school board and signed by its president or chairman.\textsuperscript{21}

Before the petition is adjudicated, an authorized representative of the petitioner must appear for an interview by an immigration officer.\textsuperscript{22} If the petitioner is not a public or officially accredited school, approval will not be given unless it establishes that it is a bona fide institution of learning; possesses the necessary facilities, personnel and finances; engages in instruction of students in recognized courses; and (if it is an institution of higher education) confers upon its graduates a recognized degree or credits recognized and transferable for such a degree.\textsuperscript{23} The provisions of the statute and regulations for approval of schools have been judicially upheld as providing reasonable safeguards against evasions and impositions.\textsuperscript{24}

Decision and Appeal

The application for approval submitted by a school is passed and a notice is given by the district director, of the decision by endorsing it on a copy of Form I-17 and mailing the endorsed copy to the petitioning school. If the petition is denied, the petitioner is notified of the reasons for such denial and of the right to appeal.\textsuperscript{25}

Duration of Approval

For a school to have the approval to receive nonimmigrant students continues to be uncertain. As a result there is no need to renew approvals once granted. But, from time to time the INS within a district reviews all the school approvals. Though the district director may require the school to submit a new Form I-17 with the required supporting documents and without a fee because of the in connection with such a review. In addition, the school must report immediately to the INS district director having jurisdiction over the school any material modification to its name, address

\textsuperscript{20} 8 C.F.R. sec.214.3 (b)
\textsuperscript{21} Id
\textsuperscript{22} 8 C.F.R. sec. 214.3 (d)
\textsuperscript{23} 8 C.F.R. sec. 214.3 (e); Matter of Franklin Pierce College, 10 I. and N. Dec. 659 (reg. Comm’r 1964) (approval denied).
\textsuperscript{25} 8 C.F.R. sec. sec. 103.3 (a)(1), 214.3 (f). The procedure for such appeals is discussed in sec. 3.03 [8] supra. The procedure in considering applications is discussed in sec. 3.03 [9] supra.
or curriculum for a determination of its continued eligibility.\footnote{26}{8 C.F.R. sec. 214.3 (e)(2).} If the district director believes that the school is no longer eligible, he or she may institute proceedings to revoke its approval in the manner described in sec. 18.02 [4] below.\footnote{27}{8 C.F.R. sec. 214.3 (h)} At one time the Service issued a list of approved schools but this publication has been discontinued. The Service maintains records concerning schools that have received approval, and any interested person or institution can ascertain from the relevant district director whether a particular school has been approved.\footnote{28}{In 1983, the INS announced a comprehensive revision of the student regulations and required each previously approved school to comply with a one-time recertification process.}

Schools approved to accept foreign students may advertise such approval in any advertisement or literature issued by them only in the following form: “This school is authorized under Federal law to enroll nonimmigrant alien students.”\footnote{29}{8 C.F.R. sec. 214.3 (j)}

Withdrawal or Termination of Approval

In General

The INS can withdraw its approval of a school for many reasons, including the following:\footnote{30}{8 C.F.R. sec. 214.4 (a)(1)}

- failure to maintain required records or to submit required reports;
- issuance of certificates of eligibility (Forms I-20A or I-20M) to unqualified students;
- failure to operate a bona fide institution of learning;
- failure to employ qualified professional personnel;
- failure to maintain proper facilities for instruction;
- willful issuance by a designated official of a false statement or certification or engaging in conduct that does not comply with the regulations;
- designation of an unqualified designated official;
- failure to maintain necessary accreditation or licensing;
- failure to maintain the physical plant, curriculum and teaching staff in the manner represented by the petition for school approval; or
- failure to comply with the procedures for issuing certificates of eligibility (Form I-20A and I-20M)

The regulations provide for automatic termination of approval if the school ends its operations.\footnote{31}{8 C.F.R. sec. 214.4 (a)(2)} If the school changes ownership, approval is
automatically with drawn unless the school files a new petition for approval within 60 days after the change. The INS will begin withdrawing proceedings if such a petition reveals that the school is no longer eligible for approval. Automatic withdrawal of approval does not eliminate filing a new petition for approval. However, withdrawal of a school’s approval on notice, in the manner described in the succeeding paragraphs, bars the filing of a new petition for approval for one year after the effective date of the withdrawal.

Procedure for withdrawal of approval

The INS improved and formalized its procedure for withdrawing approval in response to judicial criticism of earlier procedures. A district director who believes a school is no longer entitled to approval serves upon its authorized representative, known as the respondent, a notice of intention to withdraw the approval and the reasons for the proposed action. The notice informs respondent of the right to file written representations under oath supported by documentary evidence within 30 days and to request in writing for an interview before the district director, as well as the right to be represented by counsel. If respondent admits the allegations, or fails to file an answer within the 30-day period, or does not request an interview, the district director notifies the respondent of the decision withdrawing the approval. No appeal lies from that decision. If the respondent files an answer denying the allegations, the answer may request an interview before the district director. The district director prepares a summary of the evidence submitted at the interview and includes it in the record. The interview may be recorded at the discretion of the district director.

The district director’s written decision withdrawing approval or granting continued approval is communicated to the parties, who may file with the district director an appeal to the Administrative Appeals Unit (AAU) within 15 days.

32 Id See Service instructions for such recertification upon change of ownership, reproduced in 62 Interpreter Releases 84 (January 25, 1985).
33 8 C.F.R. sec. 214.4 (a)(1)
34 Blackwell College v. Att'y Gen., 454 F2d 928 (D.C Cir. 1971).
35 8 C.F.R. sec. 214.4 (b), (c).
36 8 C.F.R. sec. 214.4 (d).
37 8 C.F.R. sec. 214.4(f)(1)
38 8 C.F.R. sec. 214.4 (f)(2)
39 8 C.F.R. sec. 214.4 (g), (h)
In 1993 the INS issued new guidelines for district directors in handling the withdrawal of school approval. 40 The guidelines are meant to guard against the loss of approval for behavior other than bad faith behavior to comply with approval regulations. The new guidelines stress that district directors should exercise discretion to determine if a DSOs to explore other avenues before issuing a notice of intent to withdraw approval. The discretion done by the district director must be moderate, reasonable, and supported by appropriate facts.

The guidelines instruct district directors to take the following steps before issuing a notice of intent to withdraw approval:41

- Review the school’s/ student’s files to determine whether a pattern of violations exists;
- Contact the DSO by telephone or informal letter to appraise the school of the apparent violation and request an explanation; and
- Request additional information to determine the extent of the violation.

The district director shall withdraw the school’s approval if these steps display a pattern of violations bad faith on the part of the school.

Recordkeeping Requirements

In general

There was a time in which the Service required a school to notify when a student’s actual attendance began or ended. Now it is no longer required. A revised system of control, effective since 1983, 42 requires an approved school to keep records containing the following information and documents relating to each F-1 or M-1 student attending the school:

- Name.
- Date and place of birth.
- Country of citizenship.
- Address.
- Status, i.e., full or part time.
- Date of commencement of studies.
- Degree program and field of study.
- Whether the student has been certified for practical training, and the beginning and end dates of certification.

41 Id
42 8 C.F.R. sec. 214.3 (g)(1)
• Termination date and reason, if known.
• The documents required for issuance of a certificate of eligibility.
• The number of credits completed each semester.
• A photocopy of the student’s I-20 ID Copy.

A service officer may request any or all of the above information on any individual student or class of students upon notice. A school has three workdays to respond to any request for information concerning an individual student, and 10 workdays to respond to any request for information concerning a class of students. If the Service request information on a student who is being held in custody, the school will respond orally on the same day the request was made after the fact, if the school so desires. The Service will first attempt to gain information concerning a class of students from the Service’s record system.43

In addition, the Service periodically (but not more frequently than once a term) sends each approved school a list of all F-1 and M-1 students shown by Service records to be attending the school. The designated school official must note the status and current addresses of all listed F-1 and M-1 students not listed by the Service. The list, as noted and amended, must be returned to the Service within 60 days.44

Student Exchange Visitor Program
Recordkeeping

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) imposes several additional record keeping requirements on schools and exchange visitor programs.45 IIRAIRA sec. 641 directs the Attorney General to electronically collect information pertaining to F, J, and M nonimmigrants from approved institutions of higher education, other approved educational institutions,47 and designated exchange visitor program in the U.S..48 The following is to be collected information:

• Identity and current address;
• Nonimmigrant classification, date of visa issuance, date of extension or change of status;

43 Id
44 8 C.F.R. sec. 214.3 (g)(2)
46 IIRAIRA sec. 641 (c)(3)
47 “Other approved educational institutions” was added by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001, Pub. L. No. 107-56, sec. 416 (c), 115 Stat. 272. The phrase includes air flight schools, language training schools, and vocational schools.
48 IIRAIRA sec. 641 (a)(1)
• For students, their current academic status, including information on whether the student is maintaining full-time status;
• For exchange visitors, information on whether visitor is satisfying the terms and conditions of the program;
• For students, any disciplinary action taken by the institution as a result of a criminal conviction;
• For exchange visitors, any change in the J program participation as a result of being convicted of a crime.\(^\text{49}\)

Although institutions and exchange visitor programs are not required to report criminal activity per se, they must report disciplinary action by the institution as the result of a criminal conviction. For exchange visitor programs, the program sponsor must report a change in the J’s participation in the program as a result of a criminal conviction. This reporting of disciplinary action or change in program comes about only when there is a conviction (not an arrest or other action). In addition, the institution or exchange visitor program is not responsible for reporting all criminal convictions, but only those for which disciplinary action was taken by institution (for students) or whose program was affected by the conviction (for exchange students).\(^\text{50}\)

If the information is not reported or not reported accurately, the responsible institution will lose authorization to issue I-20s and/or DS-2019s\(^\text{51}\).

Implementation

The INS is planning to implement IIRAIRA sec. 641 through a program called the Student and Exchange Visitor Program (SEVP, formerly the Coordinated Interagency Partnership Regulating International Students, CIPRIS).\(^\text{52}\) To collect information, the INS tests the SEVP as an Internet-based system using the Worldwide Web.

The system is being implemented the SEVP Direct Voice/Faxback Response system, which is designed to allow overseas consular posts and

\(^{49}\) IIRAIRA sec. 641 (c).
\(^{51}\) IIREIRA sec. 641 (d)(1)(B)(2).
all ports-of-entry direct access to information on foreign students and exchange visitors.

IIRIRA sec. 641 requires the INS to collect fees from foreign students and exchange visitors to fund this new program. The fee may not exceed $100 initially, but the Attorney General may revise the fee from time to time to account for increased expenses. In December 1999 the INS proposed a rule to require a $95 fee to be paid by J-1 exchange visitors and nonimmigrant students in two other visa categories.

53 IIRIRA sec. 641 (e)
54 64 Fed. Reg. 71,323 31 (Dec. 21,1999)
Chapter 2.
Rights of Children Subject to Deportation, Removal or Inadmissibility

2.1 Types of Removal

The INA has two major avenues for denying (continued) presence of a foreign national in the U.S. The first is inadmissibility and is extensively covered in S.212 of the INA. The second is termed removal but is infamously referred to as deportation and is covered in S.237 and 240-241.

2.1.1 Inadmissibility S.212

Overview

Inadmissibility as defined under S.212(a) is the determination by which aliens and noncitizens of the U.S. will be found “…ineligible to receive visas and ineligible to be admitted into the U.S.” (INA S.212(a)).

A finding of admissibility is done at one of three times;

1) when an alien applies for a visa
2) when an alien submits to inspection at a U.S. point of entry such as a port or at the border
   Note: Under 101(a)13(C) this also applies to returning LPRs, especially those who have left the U.S. for a period longer than six months and are considered to have presumptively forfeited their status
3) when an alien attempts to adjust their status (i.e. from one visa to another or when changing from an immigrant to LPR status)

This determination is termed an admissibility inspection and is performed by either Border Patrol or ICE. Failure of an alien to submit to such an inspection during any of the above instances is considered an “entry without inspection” (EWI) and is grounds for immediate removal upon discovery.

In addition to the procedural grounds of failing to appear for inspection upon entry or adjustment, S.212 also lists a number of substantive grounds for being considered inadmissible. These will be considered below, but first it may be necessary to provide a greater contrast of inadmissibility and deportation.

Deportation vs. Inadmissibility

History

Prior to 1996, both inadmissibility and deportation were included in the broad term of “exclusion”. However, with the passage of the Illegal immigration Reform and Immigrant Responsibility Act (IIRIRA), a distinction was drawn between these two removal procedures.
This change was made to counter the growing issue of illegal immigration and specifically set up the EWI category. While the pre-'96 exclusion provisions did provide for removal proceedings that dealt with deportation, there was no formal reference made to those persons who entered the country without submitting to proper inspection by Border Patrol, Customs or the pre-DHS immigration enforcement agency of the INS.

As such, the new admissibility and inadmissibility determinations were set up in part to underscore the formal entry requirement in response to the illegal entry do undocumented aliens. Therefore, under the modern reading of the INA, removal by inadmissibility and deportation are far more carefully delineated in light of the IIRIRA.

**Contrast**

Unlike deportation/removal under S.237, admissibility and inadmissibility is determined prior to the formal entry of an alien into the country. This is therefore conducted at a border, port as oppose to removal of an alien under S.237 who has already been given already attained a recognized right to be in the U.S. through acquisition of non-immigrant, immigrant or LPR status. The one exception is of course for EWIs, who may already be inside the U.S> but are not considered to have been formally granted entry,

It should also be clarified that aliens qualifying for either S.237/240 removal or S.212 inadmissibility will generally be subjected to removal proceedings. However, while a full hearing is required under S.240 for a S.237 deportation, and 235(a) admission inspection for many provisions of S 212; persons deemed inadmissible under one of the available grounds of S.212(a)(C) or S.212(a)7 are dealt with in “expedited removal” hearings (S.235(b)1).

**Inadmissibility Grounds**

While prior to the IIRIRA there totaled 33 grounds for the counterpart “exclusion” determination, this has been sufficiently altered, partially because of the convoluted and oftentimes outdated justifications said exclusions relied upon. For example, homosexuality, a major exclusionary ground, was finally removed from the list with the passage of IIRIRA.

Presently, the INA recognizes several procedural and substantive grounds for being found inadmissible under S.212. While a fuller list can be found in Appendix ( ), there are several provisions that are pertinent to this manual.

These include; a) health related concerns, b) fraud and other violations of immigration law c) criminal history, d) threat to national security and (of particular importance here) e) determination of a public charge.

   a. Health-Related Concerns (S.212(a)1)

As stated under S.212(a)(1) a determination of inadmissibility will be found
if: “In general, any alien who is determined (in accordance with regulations prescribed the Secretary of Health and Human Services) to have …

(i) “...a communicable disease of public health significance....
(ii) “...who seeks admission....and has failed to present documentation of having recent vaccinations against vaccine preventable diseases”
(iii) “...to have a physical or mental disorder
   (I) ...and behavior which poses or has posed a threat to the property, safety or welfare of the alien or others”
   (II) ...and a history of behavior associated with the disorder....which...is likely to lead to other harmful behavior”
(iv) “...to be a drug abuser, or addict...”

As set forth in S.212(a)1, there are therefore four (4) major health related grounds for finding inadmissibility: (1) contraction of a communicable disease, 2) failure to have proper vaccine documentation, 3) having a potentially dangerous mental or physical disorder, and finally, being considered a drug addict or drug abuser.

The first is a finding that the alien seeking admission, entry or adjustment of status has contracted a communicable disease deemed by the Secretary of Health and Human Services to have “public health significance” (S.212(a)1(i))

The second is a finding that the alien seeking admission, entry or adjustment does not have proper documentation demonstrating his receipt of vaccines for vaccine preventable diseases.

While there may be a more exhaustive requirement as to what illnesses the alien must have been vaccinated against, those named in this subsection are; “mumps, measles, rubella, polio, tetanus...diphtheria, pertussis, influenza type B and hepatitis B” (S.212(a)(1)(ii).

Note on documentation requirement for children

An exception to the documentation requirement is available for children under 10 years of age. Under S.212(a)(1)(C), children under the age of 10 will be exempted from this requirement if they 10 years of age or younger (212(a)(C)(i)).

However, if they are also seeking an IR visa under S.201(b), with an affidavit from the petitioning relative that they will be properly vaccinated within 30 days. This applies as well for prospective parents who have adopted the child abroad (S.212(a)(I)(C)(ii-iii)).

Thirdly, a person may be turned away from the U.S. under either 212(a)1(iii)(i) or 212(a)(1)(iii)(ii) if there it is determined that they have a potentially dangerous mental or physical condition.

Under 212(a)(1)(iii)(l), they can be turned away if it is found that the mental or physical disorder they possess “poses” a danger to property or the welfare of the alien and others. This section focuses on any
CURRENT condition that the alien possesses that could endanger life or property.

S.212(a)1(iii)(II) widens this ground to further include any past mental or physical disorders the alien had possessed. More specifically it denies admission if there is found a “history of behavior” that have made the alien a threat to himself or others in the past.

Finally, persons deemed by federal regulation and/or the Secretary of Health and Human Services to be drug addicts or to habitually abuse drugs will be deemed inadmissible under S.212(a)(I)(iv).

b. Violations of Federal Immigration Law

Inadmissibility will also be found under S.212(a)6( if the alien commits a violation of federal immigration law. This covers not only 1) a substantive violation, such as failure to gain formal admission, but also either 2) fails to attend removal proceedings against them or 3) attempts to pass an admission inspection through fraud or misrepresentation.

1) Violation of Federal Immigration Law
Under S.212(a)6(A), straightforward violations of federal immigration law will result in an automatic determination of inadmissibility.

These include the heavily policed issue of entry without inspection, (S.212(a)6)(A)(i)). As stated under the section, if an alien is present in the U.S. or arrives at any time or place not properly designated for inspection by the office of the Attorney General, will be considered to have entered the country illegally and will be found inadmissible.

S.212(a)(i)A also extends inadmissibility to persons who have already been deemed inadmissibly but once again seek entry prior to the inadmissibility determination being lifted.

2) Failing to attend removal proceedings
Under 212(a)6(B), an alien will automatically be labeled inadmissible if they have already been called in for removal proceedings and have failed to appear at the appointed date and time.

As such, it is of extreme importance that, should an a client be called in for removal, they MUST APPEAR at the proceeding at all cost.

3) Fraud or misrepresentation S.212(a)6(C)i
The final, and most severe inadmissibility category under S.212(a)6 focuses on fraudulent representation regarding immigration status. As defined under the subsection, immigration fraud will be found if it
is determined that the alien committed a willful misrepresentation of material fact in procuring or seeking to procure a visa, proper documentation, actual entry into the U.S., or any other benefit provided under the INA.

This includes not only forgery of visa or immigration documents, but also false material statements made to proper officials such as Border Patrol officers, ICE agents, or Port Authority inspectors during admission based inspections.

This misrepresentation must have been committed on the alien's behalf, but may have been done by the alien, their agent or even their attorney. As such, despite the complexity of many INA provisions, an applicant will still be held accountable for any misrepresentation done by their attorney.

However, it should be noted a person can be excused from inadmissibility if they can demonstrate that the misrepresentation was the result of the alien being misinformed about facts outside of his capacity to properly appreciate\textsuperscript{84}.

Furthermore, silence to visa/entry applications will not constitute fraud. Instead, the misrepresentation must be voluntary, willful and knowing to qualify the alien for inadmissibility (S.212(a)6(C)i).

4) False Claim to U.S. Citizenship S.212(a)6(C)ii
A separate inadmissibility ground is provided if an alien's false statements or misrepresentation to immigration enforcement authorities constitute a false claim to U.S. citizenship.

**Exception for CERTAIN Aliens under the CCA:**
Under the Child Citizenship Act of 2000 (CCA)\textsuperscript{85}, certain aliens will be exempted from inadmissibility if the statements they have made to proper officials are found to be fraudulent.

The CCA caused some confusion in general immigration law as it altered the jus soli/sanguine (see Section 1.1) rules for foreign born/adopted children of U.S. citizens. While prior to the Act, those children born or adopted by U.S. citizens would become citizens themselves at birth (or upon adoption) the Act changed this to require that these children were only considered LPRs and would

\textsuperscript{84} Matter of Cervantes-Gonzales 22 I & N Dec. 560 (BIA 1999); purchasing false birth certificate for work and later used to misrepresent immigration status constitutes conscious knowledge of attempt to defraud

\textsuperscript{85} 8 U.S.C. 1431-33
only be granted citizenship UPON ARRIVAL to the U.S.

The Act was designed in part to curtail the rising confusion surrounding a rising number of Korean and Vietnamese aliens claiming citizenship by asserting that their fathers were former U.S. servicemen. Many times even the U.S. father in question had been unaware of the existence of the child.

As such, the Act required that children who are residing outside of the U.S. after the passage of the Act did not become U.S. citizens automatically, but instead were considered LPRs.

Of course, the result of this was that many alien children attempt and have attempted to claim U.S. citizenship prior to formally entering the U.S. Under the strict reading of S.212, they therefore are in violation of making fraudulent statements to U.S. immigration officials and can be held as inadmissible. Hence it became vital to read the following exception into the Inadmissibility provisions.

In order for this exception to apply, the child must be able to show that they believed they were a citizen of the U.S. as
- Their natural or adoptive parents were born or naturalized U.S. citizens
- The alien had in fact resided in the U.S. prior to attaining the age of 16 and
- The alien reasonably believed that they were a U.S. citizen when they made this statement.

If an alien can demonstrate all three requirements, they will not be found inadmissible. However, they generally will not be considered U.S. citizens but LPRs. Furthermore, as many such claimants would have been over the age of 18 when the Act was passed, they are not automatically given citizenship upon entry, but must apply citizenship through the customary naturalization process for green card holders (LPRs).

Note Expedited Removal:
Both provisions of S.212(a)6(C) (fraud or misrepresentation of immigration status and false claims of U.S. citizenship) are subject to S.235(b) expedited removal proceedings (discussed below).
Along with these gourds, expedited removals are also only used for S.212(a)7 exclusions based on lack of proper documentation.

c. Criminal History (S.212)a)(2)
Aliens can be deemed inadmissible for the commission of certain
crimes. These include; 1) crimes of moral turpitude, 2) controlled substance offenses, 3) commission of multiple offenses, and 4) trafficking in controlled substances.

1. Crimes of Moral Turpitude (S.212(a)6(2)(A)(I)

An alien found to have committed what are considered crimes of moral turpitude (CMT) will automatically be subject to inadmissibility upon entering the country. Commission of a CMT while legally present in the U.S. will also subject an otherwise authorized alien to S.237 removal proceedings.

The major concern with this category is that the term “moral turpitude” is not necessarily defined under U.S. criminal law and is really found only in the INA. As such, it is critical to determine which crimes will and will not fall under this category.

Moral turpitude has been defined as “act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen or to society in general, contrary to the accepted and customary rule of right and duty between man and man.”

While this dicta provides some insight into what crimes will constitute moral turpitude, there are several categories of crimes that will likely always be so considered. These include crimes against the person: rape, prostitution, kidnapping, abandonment of a minor, manslaughter, murder, and mayhem. Also included in this category are crimes against a relationship, and extend CMT designations to convictions of bigamy, lewdnessness, and adultery. Crimes against property: These include both fraud based crimes as well as crimes of “evil intent” (such as arson, blackmail, burglary, larceny, robbery, theft, forgery and false pretenses. Crimes against Government Authority: These will include mail fraud, counterfeiting, bribery, perjury and harboring of a fugitive. Conspiracy or Attempt for any of the above listed crimes

While there are therefore a host of crimes that may constitute CMT offenses, they will not necessarily lead to an automatic finding of inadmissibility or removal. For an offense to qualify as a CMT they must both;

- Be considered a crime of moral turpitude within the definition set forth above and in S.212 and 101(a)43

86 Chadwick v. State Bar, 49 Cal. 3d 103, 110, 776 P.2d 240, 260 Cal.Rptr. 538 (1989); Sosa-Martinez v. United States AG, 420 F.3d 1338, 1341 (11th Cir. 2005)
- The criminal penalty for the offense must be for imprisonment for longer than one year (a felony) with time served being no less than six months\(^87\)
- The offense was committed before the alien was 18 AND the alien is attempting entry no less than five years after being released\(^88\)

Therefore, while certain crimes have been categorized as Demonstrating moral turpitude, (adultery, lewdnessness, indecent exposure) they will not result in automatic inadmissibility.

Furthermore, while CMTs may be expunged from an alien’s record if committed when they were a minor, it will nonetheless result in inadmissibility if entrance into the U.S. is attempted less than five years after the alien was released for the particular offense.

2) Controlled Substances Violation
Inadmissibility will also be found if an alien is found to have committed a controlled substance related offense that is considered a violation of U.S. federal state law.

This also extends to the commission of controlled substance related violations according to the law of the alien’s home country.

Inadmissibility under this provision will also be found if said alien was convicted of conspiracy to commit the aforementioned violations in either the U.S. or his home country. Therefore, even if an alien has not directly violated a controlled substance regulation domestically or in his home country, it is important to determine whether he was found to have adequately conspired to commit said offense.

However, it should be noted that the same exceptions for commission of a CMT can be used to avoid this inadmissibility ground as well. As such, an alien will not be inadmissible for violating controlled substance related regulations if he either
- Was under 18 when convicted of the offense and waited 5 years after release of his prison term before applying for U.S. admission OR
- Conviction for the offense did not exceed one year, of which he served no longer than six months

3) Multiple Criminal Convictions (S.212(a)2(B)

\(^87\) INA S.212(a)2(A)ii(II)
\(^88\) INA S.212(a)2(A)ii(I)
An alien will be found inadmissible under this provision if they committed two or more crimes for which the aggregate sentences totaled five (5) years or more.

Unlike the CMT/controlled substance standard, inadmissibility will be found so long as the prison sentence is five years or more in total between the aggregate crimes. This means there is no exception if the alien only served a portion of these sentences, so long as the total time sentenced was at least five years.

Furthermore, the convictions and sentencing need not arise out of the same criminal proceedings, nor do the crimes need to come out of the same overall “scheme of misconduct”.

Example: If an alien was charged and sentenced to a crime in 1996 and served a sentence of three years, then charged and sentenced with another completely different crime for which the term was two years, he will be considered inadmissible for entry into the U.S.

Political Crimes Exception
It should be noted however, that crimes that are considered “political” in nature will not be counted towards the five year total. Therefore, if alien’s two year sentence was the result of a political protest he took part in, he will not be found inadmissible for entry under the multiple crimes subsection. (He could still be inadmissible if the three year sentence was for a CMT and he was over 18 at the time of its commission).

4. Trafficking in Controlled Substances
While an inadmissibility ground for general violations of controlled substances, (see above) a special category was reserved for traffickers of controlled substances.

Controlled substances are generally defined under the Controlled Substances Act. As such, any person found to have been an “illicit trafficker” of such substances in his home country or within the U.S. will be considered inadmissible.

Due to the coordination and cooperation often required in drug

89 S.212(a)2(B)
90 21 U.S.C. 802: "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.
trafficking, the inadmissibility bar has not only been attached to anyone found to have been directly involved in the transport and sale of controlled substances. Instead, persons deemed a “knowing aider, abettor, assister, conspirator, or colluder...n the trafficking of such substances”. (S.212(a2(C)i) Therefore, inadmissibility will further be found for any person who was found to have knowingly conspired or in any way aided or colluded in the trafficking of such substances.

Financial beneficiary provision

Of particular importance is subsection (ii) of 212(a2(C). This provision extends inadmissibility not only to persons involved in, or in some way aided or colluded in the trafficking of illicit substances. But also persons who BENEFITED financially from such activity within the past five years.

This subsection is especially relevant when it is noted that this provision was made with the immediate family of drug traffickers in mind. The provision expressly states persons found to be “...the spouse, son, or daughter of an alien inadmissible "under this section will also be considered ineligible for entry.

In order to meet this bar, it must be shown only that

- The person benefited financially from the drug related activity of the trafficker
- The beneficiary knew or should have known that the financial support came from drug trafficking activities and
- said benefit had come within the last five years

Therefore, although it is unlikely that a child could be found inadmissible for actively participating in drug trafficking, this may still be the case if it can be shown that they received financial benefit from such activity within the last five years. (It should be noted that these requirements can still be met even if the child is not an immediate relative of a drug trafficker)

It is possible to fight a determination on these grounds if it can be shown that the child could not independently meet the third requirement set forth in that (s)he did not know or have reason to know that the financial support came from drug related activities.

5. Other Criminal Grounds
S.212(a)2 recognizes several other criminal grounds for denying inadmissibility. These include:

i) S. 212(a02(D) commercialized vize such as
prostitution or the procuring/importing of a prostitute within the last 10 years,
ii) S.212(a)2(E) aliens who have been granted immunity for serious criminal activity.
ii. S. 212(a)2(G): Foreign Gov’t officials who have committed serious violations of religious freedom
iv. S. 212(a)2(H) Significant human trafficking: All persons who have been involved in, or believed by the Attorney General or the DHS to have aided or alluded in human trafficking will be found inadmissible.

As with drug trafficking, this extends to all persons who have knowingly financially benefited from this activity within the last five years.

However, it should be noted that an exception is read in to the beneficiary provision for certain sons and daughters of human traffickers.

v. S. 212(a)2(I) Money laundering Any person who has engaged in or aided, abetted or colluded in money laundering.

Note on Aggravated felonies

It is important to note that while aggravated felons, as defined under INA 101(a)43, are considered grounds for removal under S.237(a)2(A) they are not formally recognized as grounds for inadmissibility under S.212(a)2.

Instead, many of the crimes defined as aggravated felonies are included as individual sections (i.e. 212a(2)(C) drug trafficking) or within the inadmissibility grounds of S.212(2) for crimes of moral turpitude.

d. Threat To National Security: S.212(a)3
While this area is of particular importance regarding the sovereign right to the U.S. to maintain the safety of its territory, these provisions are at best only tangentially relevant to the issues covered in an manual regarding the rights of immigrant children. Therefore, while the inadmissibility grounds of S.212(a)3 will be outlined, it is advisable that other sources should be sought for a deeper discussion of these provisions.

With that caveat in mind, the Security related inadmissibility grounds of S.212(a)3 are as follows

1. S.212(a)3(A): Inadmissibility based on espionage, seditious, or unlawful activity:
   This provision permits an Attorney General or consular officer to

91 INA 237(a)2(A), discussed in greater detail in the removal section (see p.
deem an alien inadmissible based on a reasonable belief that they seek to engage in activities constituting attempts to commit

i) espionage (212(a)3(A)i)
ii) unlawful activity (212(a)3(A)iii)
iii) or sedition/insurrection

in violation of the laws and government of the U.S.

NOTE: Due Process and Inadmissibility

Although this will be covered more in later sections, it is important to note that inadmissibility determinations based solely on the reasonable belief of a consular officer or Attorney General do not constitute a violation of due process.

In the seminal case of Knauff v. Shaughnessey, a 6-3 ruling by the Supreme Court asserted that there is a broad grant of executive discretion to the Attorney General/consular officer in determining the right of an alien to enter the U.S. It further stated that as the alien has not entered the territory of the U.S., they are not privy to the substantive due process rights of U.S. residents but only allowed those assurances permitted them by the grace of the U.S. government. As the Court stated: “The admission of aliens to this country is not a right, but a privilege, which is granted only upon such terms as the U.S. prescribes”. (id at 542)

This should be contrasted to the due process rights of aliens already residing in the country. In Yamataya v. Fisher, the Supreme Court articulated that all resident aliens have the right to procedural due process and cannot be simply deported from U.S. as this would be a deprivation of liberty without proper hearing. As such, S.237 removals of aliens legally residing in the U.S. must require more than a determination by the Attorney General, but a proper hearing regarding removal and deportation. This has been codified in S.237 and 241 of the INA.

2. 212(a)(3)(B) terrorist activity
As with activities deemed sedition or espionage, a consular officer or Attorney General is given discretion to determine whether a person has been involved in, or has aided and abetted terrorist activity. Inadmissibility can then be exercised upon a reasonable belief that the alien has participated in any way with such activities.

A greater discussion of the proof needed for finding inadmissibility under these grounds can be found on page

CHILDREN AND SPOUSES OF ALIENS INVOLVED WITH

92 338 U.S. 537 (1850)
93 189 U.S. 88 (1903)
TERRORISM

As with the immediate relative provisions of aliens connected to human trafficking, any spouse or child of an alien determined inadmissible due to terrorist activity will also be held inadmissible.

However, as with the trafficking provisions, to be found inadmissible, the spouse or child must have been shown to
- have known or had reasonable grounds to know of the alien’s involvement in said activity AND
- the alien’s involvement in such activity must have occurred within the last five years

Therefore, if a child or spouse can show either 1) they were reasonably unaware of the terrorist activity or 2) said activity occurred more than five years ago, they cannot be deemed inadmissible.

No financial support requirement

While the immediate relative provision is very similar to both trafficking provisions already discussed, there is one major difference that must be highlighted. While both the drug and human trafficking provisions will only hold the immediate relative inadmissible if they gained financial benefit from the activity, there is NO such requirement in the terrorist activity provisions.

3. Adverse Foreign Policy Consequences (S.212(a)3(C)) Excepting foreign government officials94, the Secretary of State may exclude from U.S. territory any alien whose entry they deem may have adverse consequences to U.S. foreign policy.

This exclusion cannot, however, be on the basis of past or current statements, beliefs or associations that would be lawful domestically.95

4. Membership in a Totalitarian Party (S.212(a)3(D))
This ground will be waived if the alien can prove to the consular officer that
- they were involuntarily admitted to said party
- Their membership in said party ended 2 years prior to the date of application

---

94 S.212(a)3(C)ii. This exception does not however extend to those officials inadmissible for severe criminal actions against religious freedoms under S.212(a)2(G)
95 S.212(a)3(C)iii
- Their membership in the party ended five years prior to application IF the party was in power of their home country
- AND they are not a threat to national security

An exception can be made for immediate family members of LPRs and U.S. citizens if they can demonstrate they are not a threat to national security.\(^{96}\)

5. Participants in Nazi Party, Persecution, Genocide or Any Act of Extrajudicial killing or torture (S.212(a)3(E))
If the alien is found to have participated in the Nazi party or have committed any internationally defined crime against humanity (CAH) they will be inadmissible for entry into the U.S.

6. Association with Terrorist Organizations (S.212(a)3(F))
While S.212(a)3(B) already recognizes inadmissibility based on involvement with terrorist organizations, a special category is found here for persons determined to be entering the country principally to further terrorist actions against the U.S. or other countries.

This determination is to be made by the Secretary of State upon consultation with the Attorney General, or vice versa.

7. Recruitment or Use of Child Soldiers (S.212(a)3(G)):
Inadmissibility based on the recently recognized CAH after the passage of the Convention of the Rights of Children (CRC)\(^{97}\) and the SCSL\(^{98}\) case *Prosecution v. Sam Hinga Norman*\(^{99}\).

f. Public Charge Determination (212(a)4)
Of particular importance to this manual is the inadmissibility provisions of S.212(a)4. This states that an alien, or alien child, will not be allowed entry into the U.S. if it is determined they will likely become a public charge dependent on government support and housing.

As defined by the USCIS, a public charge is “an individual who is likely to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance, or institutionalization for long-term care at government

\(^{96}\text{212(a)3(D)iv}\)
\(^{98}\text{Special Court of Sierra Leone}\)
\(^{99}\text{Case No.SCSL-2004-14-AR72(E)}\)
This determination is either made
- by the consular officer at the time the alien applies for a visa or
- by the Attorney General when the alien attempts to adjust status
or apply for admission

The Attorney General or consular official have often used their broad
discretion to deny admission to entrants. Historically this has been a
response to state-based concerns that an unchecked influx of aliens will
result in a huge tax burden on taxpayers as new arrivals generally have a
much more difficult time trying to become self sufficient. (See e.g. Mayor
of New York v. Miln, 36 U.S. 102 (1837), the Passenger Cases, 48 U.S.
283 (1849)).

As such, the broad discretion of either official has been a major reason the
public charge provision becoming one of the most significant
inadmissibility grounds under § 212. As stated in the provision, the
inadmissibility determination can be made by the requisite official if they
feel “at any time” the alien applying for a visa/adjustment/entry could
become a public charge. As a result, the vast majority of initial
inadmissibility based refusals have come from a public charge determinat.
For example, in 1999 alone, out of the 90,000 refusals for properly filed
visa applicants, almost 75,000 were based on a public charge
determination.101

Driven in part by the lack of certainty such broad discretion entailed, in
1996 Congress set forth several factors that officials must take into
account in determining inadmissibility based on §212(a)4. Therefore, in
making this determination, the current §212(a)4(B) requires either officer
to consider “at a minimum” the following factors regarding the alien’s
- age
- health
- family status
- education and skills

Furthermore, the provision mentions affidavits
of support are permitted for consideration by the consular officer
or Attorney General. Since their inclusion, these affidavits have not only
informed public charge determinations, but as will be discussed further
below, they have become instrumental to these determinations. In fact, as

100 Field Guidance on Deportability and Inadmissibility on Public Charge Grounds,” 64 FR 28689 (May 26, 1999)
101 1999 Report of the Visa Office 147-49, Table XX. It should be noted however, that
36,000 of these initial refusals were eventually overturned
stated by the USCIS, “No single factor, other than the lack of an affidavit of support, if required, will determine whether an individual is a public charge”.

**Note 1: Cash Based Public Benefits:**

While the factors listed above are important in determining the likelihood an alien will become a public charge, in the 15 years a special emphasis has been placed on whether the alien will be likely to seek public benefits.

As stated in the definition put forth by the USCIS, an individual will be found a public charge if they “are primarily dependent on the government for subsistence...as demonstrated by....cash assistance for income....or institutionalization for long term care at the government’s expense” (Field Guidance on Deportability and Removal).

As such, while there is generally a totality of circumstances test for determining inadmissibility, taking of government provided cash assistance will be considered critical in making this determination. Cash assistance will include: Social Security income (SSI), cash based benefits from the Temporary Assistance For Needy Families Program (TANF), or state and local “general assistance programs.

While it is therefore important to caution clients of the inadmissibility dangers of seeking such benefits, it is also important to note **that enrollment in other non-cash public programs cannot be considered for public charge determinations.** These include;

- Medicaid and other government funded health insurance/health service programs
- Nutrition Programs such as the Supplemental Nutrition Assistance Program (SNAP – Food Stamps)
- Housing benefits such as the Section 8 programs
- Emergency Disaster Relief
- Job Training Programs
- Energy Assistance Programs such as the Low Income Housing Energy Assistance Program (LIHEAP)

Furthermore, non-cash benefits or benefits that have been considered “earned” by the alien will not go towards inadmissibility. These include non-cash based benefits and support from programs like TANF or receipt

---

102 USCIS Public Charge Fact Sheet, Released April 29, 2011. URL: http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=775d23cbea6bf210VgnVCM100000082ca60aRCRD&vgnextchannel=8a2f6d26d17df110VgnVCM1000004718190aRCRD
of Social Security to individuals who had paid into it as a result of a lifetime of work.

**Non-Cash Benefits for Children**: Of particular importance here are the number of non-cash based programs available to immigrant children. These can be enrolled into and cannot be grounds for finding inadmissibility under S.212(a)4. Included are

- Education Assistance Programs
- Adoption and Foster Care Assistance programs
- the Children’s Health Insurance Program (CHIP)
- Child Care Services

While non cash benefit programs such as Section 8 and LIHEAP (discussed above) are available for immigrant children, those listed here are specifically designed to support the growth and well being of immigrant children.

**Note 2: Affidavits of Support**

The second factor that has begun to play a major role in inadmissibility determinations over the last 15 years has been the inclusion of an affidavit of support with an alien’s application for entry, adjustment of status or visa. Furthermore, S.213A of the INA lists the required statements and obligations needed of the affiant/sponsor in providing this statement.

An affidavit of support is provided during applications by family sponsored aliens (the third determination factor) or, in rare instances for work based applicants (fourth determination factor). In fact, failure by the sponsor to supply said affidavit in either of these instances will generally result in the visa applicant being considered inadmissible as a public charge.

Said affidavit is used to certify that an alien will be supported by the affiant (the sponsor) from the time of their arrival until they are either deemed self-sufficient (generally a 10 year period), or have naturalized, departed or passed away. If, during this time the alien becomes dependent on “federal based public benefits”, under S. 421 of the Welfare Act of 1996, the program or entity providing the benefits is entitled to seek reimbursement from the affiant.

Determinations of whether the affiant is capable of supporting the alien for the given period of time generally center around an analysis of the

103 8 C.F.R. 213(a) and 299, 22 C.F.R. S.40.41
104 The Personal Responsibility and Work Opportunity Reconciliation Act, 8 U.S.C. 1631
sponsor’s assets and income. A sponsor will only be found capable of support the applicant, and the applicant therefore admissible, if they have an income totaling at minimum 125% over the national poverty line (or $25,812 as of 2007).

**Alien’s Right to seek Support:** In addition to the government’s right to seek reimbursement under S.412 of the Welfare Act, the sponsored alien may also sue the sponsor for the promised support should this cease. Of course, this claim can only be made during the 10 year period (40 Social Security quarters) the affiant agreed to sponsor the alien. This private claim for support can be found in INA S. 213(A)(b).

**Affidavit Waiver for Battered Spouses and Children:** It is important to note that S.212(a)4 recognizes an exemption to the affidavit of support requirement for family sponsored applicants. This is for alien spouses and children of U.S. citizens who have suffered domestic abuse from the citizen family member and therefore cannot be required to seek their affidavit of support to gain LPR status.

Instead, so long as the applicant falls into the definition of battered spouse or child as defined under the Violence Against Women Act (VAWA), they are permitted to self-petition for entry, an immigration visa or adjustment of status. This petition will not be permitted to fail under S.212(a)4 for lacking a S.213A affidavit of support.

g. Entry without proper visa, passport or documentation (S.212(a)7)

S.212(a)7 requires resident and non-resident aliens (immigrants and non-immigrants) to present proper documentation when attempting to enter (or for resident immigrants, re-enter) the U.S.. Failure meet the requirements of S212(a)7(I) (for immigrants) or S.212(a)7(II) for non-immigrants will result in inadmissibility and exclusion for the respective applicant.

1. S.212(a)7(I) Documentation requirement for immigrants

   Immigrants will be found inadmissible at the border or other point of entry based on lack of documentation if they
   
   i. fail to present a valid non-expired visa, re-entry permit, or border crossing card AND a valid passport, travel document, or other document of national identity
   
   ii. OR if the visa, re-entry permit or border crossing card presented has not been issued in compliance with the INA

2. S. 212(a)7(II) Lack of documentation for non-immigrants.

   Non-immigrants will be excluded from entry if they are not in possession of

   i. A valid passport with a date of expiration that is at least six months after the end of the alien’s expected departure from the U.S.
ii. A valid non-immigrant visa and/or border crossing card at the time admission is sought.

Note: As with inadmissibility determinations based on S.212(a)2(C) fraud, aliens found inadmissible under S.212(a)7 will be subject to S.235(b)1 expedited removal proceedings. (Discussed below).

Other Inadmissibility grounds
S.212(a) contains several other inadmissibility grounds. However, generally, however, they are rather straightforward in stating the particular cause for inadmissibility. These sections include:
1. S.212(a)6(D): stowaways
2. S.212(a)6(E): Smugglers
3. S.212(a)6(G): Student Visa Abusers
4. S.212(a)8(B): Draft evaders
5. S.212(a)10(A): Immigrant Polygamists
6. S.212(a)10(C): International Child Abduction
7. S.212(a)10(D): Unlawful Voter
8. S.212(a)10(E): Expatriate who renounced to avoid taxes
9. S.212(e): Former Exchange Visitors
10. S.212(f): Individual detrimental to U.S. Interests
11. S.212(a)5(B): Unqualified Physician
12. S.212(a)5(C): Unqualified health care workers

Procedure for Determining Inadmissibility

Determinations of the above inadmissibility grounds are generally performed in admission inspections which are described under S.235. Should inadmissibility be found, a) the alien is generally the turned over for S.240 removal proceedings (S. 235(b)2(A). However, as will be explained, S.240 removal hearings are not available for persons deemed eligible for b) expedited removal, c) asylum seekers or d) possible threats to U.S. security.

a. General (In)admissibility Procedures
As stated in S. 235(a)1 this procedure focuses on all applicants of admission, by which it is meant:

“-An alien present in the U.S. who has not been admitted, or who arrives in the U.S. (whether or not at a designated port of arrival and including an alien who is brought to the U.S. after having been interdicted in international or U.S. waters”

(S. 235(a)1).

It should also be noted that S.235(a)2 extends these inspections to stowaways (as defined under S. 212(a)6(D)). However, the stowaway consideration also
provides instructions on what steps should be taken if the alien stowaway intends to declare asylum under S.208.

Finally, S.235(a)3 states all alien crewmen and transportation personnel intending be admitted, re-enter, or even pass through U.S. territory must submit to admissions inspections when so required.

During these inspections, an immigration official typically asks information regarding the applicant’s reason and extent of stay and requests presentation of proper documentation. Furthermore, the relevant consular official or Attorney General is able to ask all questions needed to determine whether the applicant is ineligible based on any of the inadmissibility grounds listed above.

Finally 235(d), officials are permitted to search any conveyances said entrants are using to cross into U.S. territory.

**Burden of Proof**

In determining admissibility, the reviewing officer will not admit an alien if they cannot find **beyond a reasonable doubt** that the alien deserves to be admitted\(^{105}\). Resulting determinations are not submitted to any administrative appeal\(^{106}\) and a broad grant of discretion in these matters is given to the consular officer or Attorney General. However, determinations permitting admission of an alien can be challenged by other immigration officials\(^{107}\).

If the immigration official cannot find beyond a reasonable doubt that an alien should be admitted, the applicant will be detained and turned over for S.240 removal proceedings\(^{108}\). These proceedings normally consist of a full hearing regarding inadmissibility done before an immigration judge who performs the examination of the alien. For a greater discussion of S.240 removals please consult p. .

**b. Expedited Removal for S.212(a)2(C) and S.212(a)7 Violations**

While most violations based on inadmissibility are generally subject to the general removal proceedings outlined above, a relatively new procedure known as expedited removal is implemented for inadmissibility violations under S 212(a)(2)(C) or S.212(a)7 (lack of visa, passport, or required documentation).

As set forth under S.235b1(a), during the initial screening process, an immigration official may determine that an alien is inadmissible for entry because

---

105 INA (235(b)2(A))
106 INA 235(b)(1)(C)
107 INA 235(b)3)
108 INA 235(b)2(A)
he either a) is attempting to make fraudulent statements regarding his immigration status or falsely claiming U.S. citizenship or b) lacks proper documentation such as a valid visa, passport or other travel document indicating nationality.

In either instance, the determination is made by the immigration official. This ruling is generally not subject to administrative appeal. Once this determination is made, removal is immediately performed immediately. As stated in the provision itself:

“If an immigration officer determines that an alien is inadmissible under section 212(a)(6)(C) or 212(a)(7), the officer shall order the alien removed from the U.S. without further hearing or review unless the alien indicates either an intention to apply for asylum under section 208 or a fear of persecution”

(INA S. 235(b)(A))). Therefore, a finding of inadmissibility on either of the grounds noted will result in removal being immediately ordered without an S.240 removal hearings.

However, an alien may seek prompt review of an exclusion order on the basis of asserting he is either an LPR or admitted for asylum under S.208 or as a refugee S.207. In doing so, they must be informed that they face a penalty of perjury if this claim turns out to be false (28 U.S.C. 1746).

It will also be noted that the last lines of S.235(a)1(A)(l) also state that expedited removal may also be avoided, or at least delayed, if the alien makes an asylum claim. This will be presented in more detail in the following section.

c. Asylum Declarations (S. 235(b)1(A)(II))

Admission inspections may also be used by an applicant to declare asylum. Generally the asylum determinations are based on a determination of whether a credible fear exists (See Note on Withholding of Removal p. 62).

Under S.235(b)(1)A(ii) during the screening process, an immigration official is given discretion to determine whether an alien is eligible for an asylum interview. This discretion rests on whether the officer believes an alien either demonstrates a credible fear of persecution or a clear intention to seek S.208 asylum. At this point, the official will refer the alien to an asylum officer for an interview (S.
In the interview, the asylum officer will seek to determine whether the alien has a credible fear of persecution as defined under S.235(b)2(B)\textsuperscript{114}. Should the asylum officer make such a finding, the alien will be detained for asylum proceedings. However, if the officer finds that there is not enough evidence pursuant to S.235(b)2(B)\textsuperscript{v} to demonstrate credible fear, they can order immediate removal of the alien.

This removal is much like the expedited removal proceedings discussed above insofar as no further hearing or review is generally provided\textsuperscript{115}. However, unlike expedited removals, an alien is able to seek prompt review of an officer's determination under S.235(b)1(B)\textsuperscript{iii(III)}. This hearing is made in a request to the Attorney General and is conducted by an immigration judge between 24 hours and one week after the request.

d. Removal for S.212(a)3(A) Security Related Inadmissibility

Finally, persons found inadmissible under S.212(a)3(A) (espionage or unlawful and seditious activity) will also not be subject to general S.235(b) and S.240 removal proceedings.

Instead, should an immigration officer or immigration judge deem that an alien might be inadmissible under S.212(a)3(A), they must issue an order for removal that is to be transmitted to the Attorney General for review\textsuperscript{116}. No further inquiry is to be held until the Attorney General responds to the request (S.235(c)1(C)).

In responding, the Attorney General is provided a chance to review the security threat determination. If based on

- confidential information and
- consultation with appropriate security agencies

the Attorney General finds that the security threat determination is valid, she will uphold the removal order.

Furthermore, as the information upon which this determination is made is often extremely sensitive, the Attorney General can order the alien removed without further hearing. The only factor in determining this is whether the Attorney General “concludes that disclosure of the information would be prejudicial to the public interest, safety, or security” (S.235(c)2(B)\textsuperscript{ii}).

\textsuperscript{114} “the term "credible fear of persecution" means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208”
\textsuperscript{115} INA S. 235(b)1(B)\textsuperscript{iii(I)}
\textsuperscript{116} INA S. 235(c)1(A)-(B)
Inadmissibility Based Punishments (S. 212(a)9)
Upon a finding of inadmissibility, removal is generally sought (except if an asylum declaration is made). Along with this removal, most inadmissibility determinations also require the alien in question to be banned from attempting to apply to the U.S. These punishments can run anywhere from three years to, in certain extreme cases, lifetime bans.

S. 212(a)9 provides three sections for determining punishment.
A) Punishments for persons found inadmissible upon arrival
B) For Voluntary departures of aliens unlawfully present in the U.S.
C) For Involuntary departures of unlawfully present aliens

a. Inadmissible on arrival (S.212(a)9(A))
The first subsection, (S.212(a)9(A)) governs length of bans for persons found inadmissible upon arrival to the U.S.. As stated here, the first time a person is determined inadmissible, they are typically given a 5 year ban on re-application for entry.

If an alien has been previously removed and is once again found inadmissible upon arrival (2nd time) the length of the ban will increase to 10 years. Finally, a third inadmissibility finding will result in a 20 year ban from attempting to apply for entry.

It should further be noted that while there is no explicit inadmissibility grounds under S.212(a)2, aliens who have been convicted of aggravated felonies will be permanently barred from entry.

In all of the above cases, the Attorney General has discretion to waive the admissions ban. Generally in the case of persons barred from entry, they may seek this waiver by an advance consent procedure outlined in the subsection itself. This is done by filling out an I-212 form and filing it with the proper registration fee.

b. Voluntary departure of Aliens Unlawfully present (S.212(a)9(B))
S.212(a)9(B) (as well as S.212(a)9(C)) was one of the major substantive changes to the INA resulting from IIRIRA. Along with setting up a formal recognition of EWIs, as well as the overall inadmissibility provisions, the 1996 Act paid special focus to the bars that result from unlawful entry and entry without inspection.

As such, the current S.212(a)9(B) establishes the available actions that can be taken against unlawful entrants who voluntarily submit themselves for departure. These are broken up into two sections: i) those EWIs who voluntarily depart after staying over 6 months to one year and ii) EWIs who depart after one year or longer.

i. EWIs who voluntarily depart after staying between six months
and one year will be barred from attempting re-entry for three (3) years
ii. However, if an EWI waits more than a year to voluntarily depart, they
will typically face a 10 year ban on re-entry.

c. Involuntary departure of unlawful entrants (S.212(a)9(C))
As voluntary departure by an EWI even after less than a year of unlawful
presence results in a three year ban on re-entry, it may seem puzzling why any
unlawful entrant would voluntarily submit themselves for removal under either
provision of S.212(a)9(B).

The reason is because, should an unlawful entrant be discovered and
subsequently removed, they will be considered as having involuntarily departed
under S.212(a)9(C). Should this involuntary departure occur after the alien has
stayed in the U.S. for an aggregate period of over a year, they will face a
PERMANENT bar on attempted re-entry.

This permanent bar may be lifted by the filing of an I-212 appeal for AG
discretion pursuant to S.212(a)9A. However, even permission to file such a
form will not be granted until 10 years after the alien received the permanent bar.

As such, given the comparative consequences of involuntary and voluntary
departure, unlawful entrants are encouraged to submit themselves for voluntary
departure as soon as possible (preferably prior to the 1 year cut off).

**Inadmissibility Waivers**

While there are, therefore, quite a number of grounds for inadmissibility, the INA also
provides a number of waivers for many of these concerns. For example, crime waivers
for certain drug related offenses and felonies can be found under S. 212(h). Likewise,
many inadmissibility grounds can be waived by non-immigrants under the provisions of
S. 212(d)3. Finally, domestic abuse and extreme hardship waivers for spouses and
children forced to self petition under S.212(a)4(C)ii (public charge provisions) and S.
212(a)9(B)iii-v respectively.

In fact inadmissibility waivers for the inadmissibility grounds form an extremely intricate
web of requirements and loopholes. As such, an attempt to catalogue them here would
be cumbersome and extremely confusing. Instead, a chart of the various inadmissibility
grounds and the corresponding waivers, if present, has been attached in Appendix B.

Furthermore, certain inadmissibility grounds, (such as; immunization, CMT,
membership in a totalitarian party, and family members of drug traffickers and those
involved in terrorist activity) contain particular exceptions which function much the same
way as waivers if the particular requirements are meant. This manual has made
particular effort to ensure said exceptions are included in the discussion of the relevant
inadmissibility ground.
Instead, this section will focus on some of the more significant inadmissibility waivers such as: a) several waivers found under 212(d), b) 212(e), c) 212(g), d) 212(h) and e) 212(I).

NOTE: While this section will attempt to provide as much information as possible about the specified waivers, due to the complexity, nuances, and implications of many of these provisions, it is advised that this overview is used as a primer. For more information on a particular waiver discussed here, further reading is advised.

a. S.212(d) waivers

There are three major waivers found under i) 212(d)3 waiver for nonimmigrants, ii) S.212(d)5, and iii) S.212(d)11

i. S.212(d)3: This waiver is of particular importance to non-immigrant visitors of the U.S. as it can be used to avoid an inadmissibility determination on the vast majority of S.212 inadmissibility grounds. In fact, the only grounds that the waiver will not apply to are

A) Applicants potentially adverse to U.S. Foreign Policy
B) Applicants who are part of the Nazi party or participated in crimes against humanity S.212(a)3(E)

Of course, per the title, only non-immigrants can qualify for this waiver. As such, any person who is applying for an immigrant visa status or is declaring LPR or U.S. citizenship in entering the U.S. CANNOT attempt use of this waiver.

In order to qualify for this waiver, an application must be made to the Attorney General under either the provisions for nationalities requiring visas (S.212(d)3(A) or visa exempt categories (S.212(d)3(B)). The Attorney General will then make a discretionary ruling based on criteria set forth by the BIA ruling in the Matter of Hranka\(^\text{117}\) which include:

A) the risk of harm to the society posed by the applicant
B) if any, the seriousness of any prior immigration law or criminal violation committed by the applicant
C) the reasons for wishing to enter the U.S.

ii. S.212(d)5: humanitarian parole

Persons found inadmissible under S.212 can also attempt to seek parole under S.212(d)5 if they can demonstrate there is an urgent need to stay in the U.S. due to a compelling emergency.

As set forth by the USCIS, parole of otherwise inadmissible aliens will be granted

\(^117\) 16 I&N Dec. 491(BIA 1978)
- To anyone applying for admission into the U.S. based on urgent humanitarian reasons or if there is a significant public benefit
- For a period of time that corresponds with the length of the emergency or humanitarian situation

It must be noted that this parole is not an actual waiver of inadmissibility, if granted it does not provide an approved alien (parolee) who is deemed otherwise inadmissible, with rights or benefits available to those lawfully admitted into the U.S. The Supreme Court made this clear in *Leng May Ma v. Barber*\(^{118}\) when it stated

“The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien’s status, and to hold that petitioner’s parole placed her legally "within the U.S." is inconsistent with the congressional mandate . . . of parole,”

(Id. at 190). As such, persons considered paroled under S.212(d)5 are still considered inadmissible. Once the parole ends or is revoked, said aliens will be required to “return or be returned to the custody from which he was paroled” (S. 212(d)5(A).

Finally, as set forth under S.212(d)5(B), persons deemed refugees cannot use this provision but must instead seek asylum through the screening procedure set forth in S.235(b)1(A)ii (discussed on p. 137). This provision was re-written when Congress passed the Refugee Act of 1980. However, while parole for refugees is prohibited, there is a rather large loophole in S.212(d)5(B) that permits refugees to apply “in individual cases for individually compelling reasons” \(^{119}\)

iii. S.212(d)11 Waiver for Smuggling Family Members
S.212(d) offers a waiver, based on the discretion of the Attorney General, for aliens who have been deemed inadmissible for attempting to smuggle family members into the U.S. in violation of the anti-smuggling provisions of S. 212(a)6(E).

In order to qualify for this waiver, the smuggler must be an LPR who voluntarily left U.S. soil and would have otherwise been admissible for re-entry. Furthermore, the family member(s) being smuggled into the country

---

118 357 U.S. 185 (1958)
119 This loophole was liberally applied in 1980 after 125,000 Cubans arrived on U.S. soil after Fidel Castro opened the port of Muriel for exactly this purpose.
must have been immediate relatives of the alien as defined under S.203(a) (parents, spouses or offspring).\textsuperscript{120}

b. S.212(e) waiver
S. 212(e) focuses on the J visa. This visa is used for non-immigrants who are in the U.S. on the basis of an exchange program such as a government funded program or graduate/medical training.

Generally, it requires that aliens present in the U.S. in such a capacity must spend an aggregate period of 2 years in their home country while holding said visa. Furthermore, until this requirement is not completed, J visa holders cannot attempt re-adjust their status to either other non-immigrant visas or to immigrant visas or LPR.

However, 212(e) does allow waivers on the home country requirement if the alien can show any of the following grounds;

- No objection statement from the Washington D.C. embassy of the home country directly to the Waiver Review Division
- A Request by an interested U.S. federal agency
- Credible belief of persecution: If persecution based on race, religion, or political opinion is feared by the alien, they may file a Form I-612 directly with the Waiver Review Division
- Exceptional hardship for LPR/U.S. citizen spouse or child: This waiver is once again sought by filing a I-612 Form with the WRD
- Request by a State Public Health Department or Equivalent health care facility: Known as the Conrad State 30 Program, this permits medical practitioners holding J visas to remain at a particular health care facility if they can show they have
  - have an offer of full-time employment at a health care facility in a designated health care professional shortage area or at a health care facility which serves patients from such a designated area;
  - agree to begin employment at that facility within 90 days of receiving a waiver; and
  - sign a contract to continue working at that health care facility for a total of 40 hours per week and for not less than three years.

c. 212(g) Waiver of Health Related Gourds
A S.212(g) is used to waive out of the S.212(a)1(A) inadmissibility grounds of failing to be properly immunized, present proper immunization documentation, or suffering from a mental or physical disorder that could cause the alien or those around him harm.

\textsuperscript{120} See Matter of Farias, 21 I&N Dec. 269, 281-282 (BIA 1997), Selimi v. INS, 312 F.3d 854, 861 (7th Cir. 2002)
This waiver is only applicable for persons applying for LPR status or immigrant visas. An S.212(d)(3) waiver will serve the same function for non-immigrants being found inadmissible under either the communicable disease or disorder grounds. (Note: there is no waiver for non-immigrant aliens who lack required vaccinations).

However, in order to qualify for the waiver the alien must show
i. for Communicable diseases (S.212(a)(1)(A)(I)) they are an immediate relative of a U.S. citizen as defined under S. 203

ii. for lack of proper vaccination: that
   1. they have in fact received the required vaccinations (S.212(g)(2)(A))
   2. that a medical professional asserts that said vaccination would be medically inappropriate OR
   3. that the Attorney General reasonably believes such vaccinations would go against the alien’s religious beliefs (S.212(a)(g)(2)(C))

iii. For physical or mental disorders: that the Attorney General believes, upon consultation with the Secretary of Health and Human Services, that the alien does not pose a threat under S.212(a)(1)(A)(iii). (S.212(g)(3).

d. 212(h) Waivers of Inadmission based on Criminal History (S.212(a)(2)
S.212(h) permits the Attorney General to waive, at their discretion an alien’s inadmissibility based on certain criminal violations of S.212(a)(2). In order to permit waive of these grounds the Attorney General must find either

i. That the alien has been rehabilitated AND whose admission would not be contrary to the national welfare, safety, or security of the U.S. OR

ii. The alien’s removal would cause extreme hardship to an immediate family member who is a U.S. citizen or LPR

An S.212(h) waiver can be filed for the following criminal inadmissibility grounds;

- Crimes of Moral Turpitude (a)(2)(A)(I)
- Controlled Substances Violations (a)(2)(A)(II). However, this waiver will only apply for a single offense of possessing no -more than 30 grams of marijuana (S.212h)
- Multiple Criminal Convictions that total more than one year in prison

121 S.212(g)(1)A-B
122 as those terms are defined by section 34.2 of title 42 of the Code of Federal Regulations
123 S. 212(h)1(A)ii-iii
124 S. 212(h)1(B)
- Prostitution or Procuring of a prostitute under (a)2(D) so long as the offense occurred at least 15 years prior to the application for admission (S.212(h)1(A)i)
- Crimes for which the alien asserted immunity from prosecution

It should be noted, however, that an S.212(h) waiver will not be applicable for an alien found inadmissible for commission of murder, aggravated felonies, or crimes involving torture or conspiracy to commit either of the aforementioned acts.

e. S.212(i) Waiver of Fraud or Misrepresentation (S.212(a)6)(C(i)).
Finally, on the basis of extreme hardship, the Attorney General may permit entry of immigrants who have made willful and fraudulent representations to an immigration official regarding their immigration status.

In order for this violation to be waived, the Attorney General must determine that ensuing removal would result in extreme hardship to immediate relatives who are either U.S. citizens or LPRs.

It should be noted that this waiver is for S.212(a)6(C)i ONLY. If the alien attempts to make false claims of his status as a U.S. citizen (S.212(a)6(C)ii), this waiver is inapplicable.

2.1.2 Removal

Immigrants may be deported or otherwise "removed" from the U.S. by a process known as "Removal". This section will cover 1) Grounds for removal of immigrants 2) The removal process and 3) Possible relief that may be discretionarily granted staying a removal.

**Grounds for Removal**

Under INA Sec. 237(a), a non-citizen may be removed if a) he or she is found in violation of federal immigration law or b) he or she is convicted of a crime.

a) Removal for violations of immigration law

According to INA Sec. 237(a)(1), a non-citizen may be removed if he or she either 1) commits a violation of U.S. immigration law, or 2) if he or she is found to assist other immigrants in committing a violation of U.S. immigration law.

1) An Immigrant may be removed if he or she commits a violation of U.S. immigration law

An immigrant may himself or herself be in violation of U.S. immigration law if he or she;
I) was inadmissible when "admitted"
II) is present in the country in violation of immigration law
III) failed to maintain the conditions required for non-immigrant status
IV) or at the termination of his or her Lawful Permanent Resident (LPR) status. For example, a Lawful Permanent Resident who fails to provide proof of his or her intent to maintain LPR status may be placed in removal proceedings pursuant to INA Sec. 240 (see below).

It should be noted that, prior to 1996, an immigrant would not be evaluated for removal upon each "admission" to the country, but rather upon "entry" into the U.S.. However, following the passage of the Immigration Reform and Immigrant Responsibility Act in 1996, Congress amended this language to allow for evaluations of admissibility whenever an immigrant seeks "admission". (IRIRA) As such, according to the BIA, each time an immigrant seeks to adjust his or her status, this may be considered a "new" admission that the government may use when considering removal. (Matter of Alyazji 25 I&N Dec. 397 (BIA 2011))

2) An immigrant may be removed if he or she assist another in violating U.S. immigration law

An immigrant may also be removed if he or she assists another in the violation of U.S. immigration law. According to INA 237(a)(1)E, an immigrant may be eligible for removal if he or she knowingly assists, induces, or encourages an alien to illegally enter the country or to violate their admissibility.

Under INA Sec. 274, an immigrant's "assistance" of an alien includes situations in which he or she 1) helps the alien create or use false documents in order to deceive the government or 2) helps the alien use another person's documentation for the purpose of deceiving the government. Such actions are grounds for automatic removal unless otherwise contested. (INA Sec. 274(c)(2)(B))

b. Removal for commission of crimes

Along with determinations that an immigrant violated U.S. immigration law, an immigrant may also be removed if he or she has committed certain crimes. These crimes include 1) crimes of "moral turpitude" 2) crimes that constitute "aggravated felonies" under federal law and 3) crimes involving controlled substances.

1. Crimes of "Moral Turpitude"
A crime of "moral turpitude" is grounds for removal. "Moral turpitude" under federal law is generally defined as crimes which have a "vile, base, or evil intent". (Gonzales-Alvarado v. INS 39 F.3d 245 (1994)). Generally such crimes warrant removal if either 1) the immigrant was convicted of crime of moral turpitude less than 5 years from the date of admission and sentenced for a year or more or 2) the immigrant has been convicted of two or more separate and distinct crimes involving moral turpitude.

It should be noted that while "evil intent" is sufficient to demonstrate a crime of moral turpitude, the BIA does not require that "evil intent" is necessary to demonstrate moral turpitude. According to the BIA in the Matter of Medina "presence of a corrupt or vicious mind is not controlling". (Matter of Medina 15 I&N Dec. 611 (BIA 1976)). This stance has met dissension within the BIA itself however. According to the Matter of Khourn decision "the Board has held that 'evil intent' is a requisite element of moral turpitude" (Matter of Khourn, 21 I&N 1041 (BIA 1997), See also Matter of Flores 17 I&N Dec. 225 (BIA 1980), holding that "evil or malicious intent is said to be the essence of moral turpitude") But at present, the general rule remains that demonstration of "evil intent" is not necessary to show a crime of moral turpitude.

2. Crimes involving an "aggravated felony".

According to INA Sec. 237(a)(2)(A), an immigrant may be removed for committing an "aggravated felony". Such crimes include crimes relating to "moral turpitude" (see above) or "controlled substances (see below). However, to satisfy the definition of aggravated felony, must 1) "fit categorically" into a federal definition of "aggravated felony" (Argumendo-Perez v. U.S. 326 F.App 293 (5th Cir.). Thus, crimes such as those involving human trafficking are considered 'aggravated felonies' and grounds for removal. (237(a)(2)(F))

It should be noted that, to determine whether a crime fits "categorically" into a federal definition, the courts have generally chosen to look at the "conduct" of the crime as opposed to the title. (Guerrero-Perez v. INS, 242 F.3d 727 (7th Cir. 2001)). As such, in the case of Guerrero-Perez, a 20-year old immigrant who engaged in consensual relations with his 15-year old girlfriend, was convicted of sexual abuse and deported. This is because, though Guerrero-Perez' actions were considered a misdemeanor under state law, the court found that any crime defined as sexual abuse is considered an "aggravated felony" under federal law INA 8 Sec. 101(a)(43)(A). Therefore, "since [Congress] had not specifically

125 The question of the "date of admission" has come more sharply into focus following Congressional amendment of the INA's language via the IRIRA (see Section a(1), above)
articulated that aggravated felonies cannot be misdemeanors, it intended to have the term 'aggravated felony' apply to the broad range of crimes listed in [INA Sec. 101(a)(43)]". As such, Mr. Guerrero-Perez was found to have committed an "aggravated felony" under federal law and deported.

3. Crimes involving controlled substances.

Lastly, an immigrant may be removed for crimes involving controlled substances. Specifically, an immigrant may be removed for crimes involving controlled substances if it can be shown that he or she was engaged in a crime that directly involves with the controlled substance. As such, drug addicts as well as drug dealers may be removed for using or distributing a controlled substance. Conversely, an immigrant who is only convicted of coordinating or otherwise 'organizing' a drug deal may not be subject to removal, as this crime is not "directly" involved with the controlled substance.

Removal Process

Once the government has determined that there are grounds to remove an immigrant either due to a violation of immigration law or by the immigrant's commission of some crime, it will then begin the removal process. This process must be conducted in accordance with INA Sec. 240, and oversees the 1) arrest 2) trial and 3) rights of an immigrant facing removal.


The process begins with summons delivered to the immigrant. According to the law, the immigrant may either be brought before the court after 1) being served with form I-802, or 2) upon arrest. If served, the immigrant may be served either in person or by mail. If arrested, the immigrant may be arrested pursuant to a warrant by an immigration officer.\(^{126}\)

However, it should be noted that an immigration officer may conduct an arrest of an immigrant if he or she possesses a reasonable belief that the immigrant has either i) entered or is about to enter the U.S. in violation of the law or ii) Is present in the U.S. in violation of U.S. Law.

b. Immigration Trial process

Once served or arrested and facing removal, the immigrant is then brought to a removal hearing.\(^{127}\) The hearing process is a two-step procedure. Originally, the immigrant is given a Master Calendar hearing, which considers

\(^{126}\) INA S. 236
\(^{127}\) If arrested, the removal hearing must take place within 48 hours, absent extraordinary circumstances
basic grounds for removable or admissibility. However, if the immigrant can
issues of fact, claim asylum, or demonstrate other grounds for relief which does
not include voluntary departure, the immigrant is then entitled to an individual
merits hearing.

Both hearings are overseen by an Immigration Judge. The Immigration
Judge, acting as a part of the Department of Justice's Executive Office of
Immigration Review 128 The Judge, in accordance with INA Sec. 240(b) is
responsible for issuing oaths, receiving evidence, and examining witnesses. The
Judge may also issue subpoenas for additional evidence. (INA Sec. 240(b)) As
such, Judges are also tasked with providing clear instructions to those charged
with removal129. The Judge will then make a ruling based on whether the
removal is to be executed or stayed.

d. Rights of Immigrants before Hearings.

Similar to criminal courts, an immigrant facing removal is entitled to certain
rights. These rights include 1) the right to counsel (discussed further in Section
2.2) 2) the right to examine, present, and cross-examine evidence or witnesses
as required and 3) the right to have a complete record of the hearing kept by the
court. (INA Sec. 240(b)(4))

Relief from Removal

Though conventionally an immigrant can avoid removal by decision of an
immigration judge, there are other available grounds by which an immigrant may be
provided relief from removal. The following section will consider these - predominately
discretionary - grounds for removal and will examine 1) The agencies that have
discretionary power to stay removal proceedings 2) the grounds that these agencies
consider when staying removal proceedings.

a. Agencies with discretionary power

There are three major agencies with discretionary power to stay a
removal proceeding. These agencies are 1) The Department of Homeland
Security 2) The Department of Justice and 3) The Attorney General's Office.

1) Department of Homeland Security (DHS)
The Department of Homeland Security oversees three main
immigration enforcement agencies, each of which have discretionary
powers for removal purposes. These are
i. Customs and Border Patrol (CBP),
ii. Immigration and Customs Enforcement (ICE), and
iii. Citizenship and Immigration Services (CIS).

---

128 Prior to 1980, Immigration Judges were a part of the INS itself. However
129 (Jacinta v. INS, 208 F.3d 725 (9th Cir. 2001))
Customs and Border Patrol retains limited discretion at border to bring immigrants in for removal hearings. ICE has a broader purview in determining which immigrants may be prosecuted for removal. Finally the CIS is allowed to deny or approve admissions and benefits to immigrants applying for entry or admission.

2. Department of Justice (DOJ)

The DoJ provides the judicial agencies charged with handling immigration law, as it handles the Executive Office for Immigration Review, the Board of Immigration Affairs and Bureau of Immigration Courts, and the Office of Immigration Litigation; which represents the government in immigration proceedings.

3. Office of the Attorney General (AG)

Finally, the Attorney General's Office itself is provided broad discretionary powers in trying and staying cases related to removal and deportation.

b. Discretionary Grounds for staying removal proceedings

There are two major steps an agency considers when evaluating candidates for discretionary relief. The first is that the immigrant must meet one of five legal grounds which merit discretionary relief. The second step is that an agency may then consider specific circumstances upon to stay removal of those immigrants who legally merited discretionary relief.

As stated, an immigrant must first meet one of five legal grounds before being provided discretionary relief. These are;

1) a waiver of criminal offenses under Sec. 212h,
2) a waiver of fraud under Sec. 212c
3) A cancellation of removal by the Attorney General under Sec. 240(a)
4) A voluntary departure by the immigrant, pursuant to Sec. 240(b) and
5) An asylum plea, pursuant to Sec. 280.

It should be noted, however, that each of these grounds require criteria to be met before the relief may be granted. As such, in the case of a "cancellation of removal" by the Attorney General's Office, the cancellation may granted only to;

1) An immigrant with no criminal record who is a Lawful Permanent Status for five years or a permanent resident status for seven years
2) an immigrant with no criminal record who has lived in the country for ten years as a nonpermanent resident and demonstrated good character
3) battered spouses or children of an LPR who have lived in country for three years with good character
4) immigrants who can demonstrate extreme hardship.
Once an immigrant is found to merit one of these five legal grounds, an agency may then evaluate an immigrant's circumstances in deciding whether to stay or execute removal proceedings. Circumstances that would tend to stay an immigrant's removal proceedings include duration of an immigrant's residence, hardship, service in US armed forces, stable property owner and/or employment history, community service, and, if necessary, demonstrated rehabilitation following a conviction. Circumstances that negatively impact an immigrant's removal proceedings include seriousness of crimes for which he/she is being removed, and the extent of his/her violations of US immigration law.

2.2 Right to Counsel and other Representation

a. INA § 292 [8 U.S.C. 1362]– Right to Counsel

INA § 292

In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, a the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

No General Right to Counsel

It must be noted that during deportation hearings, a person cannot assert a fundamental right to have counsel appointed if (s)he is unable to afford one, as is the case during criminal trials. For example, in criminal proceedings where there is threat of imprisonment, a person may provide for counsel at his own expense OR have one appointed by the court (Gideon v. Wainwright, 372 U.S. 335 (1963); right to have counsel appointed during felony trials, Scott v. Illinois, 440 U.S. 367 (1979); right to appointed counsel during misdemeanors where imprisonment may be imposed).

The first modern attempt to explain the disparate judicial protections between deportation hearings and criminal proceedings was set forth in Aguilar-Enriquez v. INS, 516 F.2d. 565 (6th Cir. 1975). Here petitioner Aguilera-Enriquez was sentenced to removal as a result of his plea agreement for a charge of possessing illicit substances. While drug possession is a removable offense under S.241(a)11, Enriquez argued that the removal was unjust as he was neither informed of the removal during the plea bargain, nor provided counsel during the removal proceedings.

In affirming the lower court’s ruling the Sixth Circuit stated that failure to have counsel present at his removal proceeding did not violate the petitioner’s due process rights and as such did not violate what it termed the “fundamental fairness” test. It further bolstered its ruling by noting that as Petitioner was in fact guilty of possessing illegal substances, there were proper grounds to seek his removal under S. 241. However, it must be pointed out that in his dissent, Circuit Judge DiMascio asserted that the fundamental fairness test used to affirm the verdict could not be depended on as its application hinges on a case by case basis.
Nonetheless, the finding in Auilera-Enriquez was supported by the Supreme Court in *Lassiter v. DSS*, 452 U.S.18 (1981). While it confirmed that refusal of appointed counsel in deportation hearings did not violate due process, the Burger Court did not explicitly endorse the fundamental fairness test used by the Aguilera-Enriquez decision. Instead, it held that right to counsel was not required in these hearings since the issue at risk, removal from the U.S. did not in itself constitute a deprivation of either the right to life liberty or property. Instead, while deportation could result in a refusal to remain in the U.S., the Court maintained that this in itself did not constitute a loss of any particular liberty and as such did not require the presence of counsel to inform and defend.

**Right to Counsel for Children**

While the Supreme Court has therefore sustained the general denial of a mandatory right to counsel in removal and deportation proceedings, it is of particular significance here that this holding does not apply to children.

In the 1985 case *Perez-Funez v. District Director*, INS, 619 F.Supp. 656 (C.D. Cal. 1985) the Central District Court of California stated that children who were subject to deportation proceedings were afforded a mandatory right to counsel. In so ruling, the District Court stressed in particular the lack of capacity, as recognized under the law, children possess to make informed decisions regarding their options and ability to stay in the U.S..

While this ruling contradicts the Supreme Court's holding to some extent, it nonetheless has been upheld as valid law both in California as well as in other federal circuits (See e.g. *Orlando-Hernandez v. Thornburgh*, 919 F.2d. 549 (9th Cir. 1990), *Contreras-Aragon v. INS*, 952 F.2d. 1088 (9th Cir.1988), *Perales v. Thornburgh*, 762 F.Supp. 1036 (S.D.N.Y. 1991).

**Therefore, if a client is a minor and brought for deportation hearings, it is of paramount importance that a right to counsel assertion be made.**

b. 8 CFR § 292.1 – Representation of others.

8 CFR § Sec. 292.1 Representation of others.

(a) A person entitled to representation may be represented by any of the following, subject to the limitations in 8 CFR 103.2(a)(3): (Introductory text revised effective 3/4/10; 75 FR 5225 )

(1) Attorneys in the U.S. Any attorney as defined in § 1.1(f) of this chapter.

(2) Law students and law graduates not yet admitted to the bar. A law student who is enrolled in an accredited U.S. law school, or a graduate of an accredited U.S. law school who is not yet admitted to the bar, provided that: (Introductory text revised effective 3/4/10; 75 FR 5225 )

(i) He or she is appearing at the request of the person entitled to representation;
(ii) In the case of a law student, he or she has filed a statement that he or she is participating, under the direct supervision of a faculty member, licensed attorney, or accredited representative, in a legal aid program or clinic conducted by a law school or non-profit organization, and that he or she is appearing without direct or indirect remuneration from the alien he or she represents; (Revised 10/15/96; 61 FR 53609) (Revised effective 6/2/97; 62 FR 23634)

(iii) In the case of a law graduate, he or she has filed a statement that he or she is appearing under the supervision of a licensed attorney or accredited representative and that he or she is appearing without direct or indirect remuneration from the alien he or she represents; and (Revised 10/15/96; 61 FR 53609) (Revised effective 6/2/97; 62 FR 23634)

(iv) The law student's or law graduate's appearance is permitted by the DHS official before whom he or she wishes to appear. The DHS official may require that a law student be accompanied by the supervising faculty member, attorney, or accredited representative. (Revised effective 3/4/10; 75 FR 5225) (Revised effective 6/2/97; 62 FR 23634)

(3) Reputable individuals. Any reputable individual of good moral character provided that:

(i) He is appearing on an individual case basis, at the request of the person entitled to representation;

(ii) He is appearing without direct or indirect remuneration and files a written declaration to that effect;

(iii) He has a pre-existing relationship or connection with the person entitled to representation (e.g., as a relative, neighbor, clergyman, business associate or personal friend), provided that such requirement may be waived, as a matter of administrative discretion, in cases where adequate representation would not otherwise be available; and

(iv) his or her appearance is permitted by the DHS official before whom he or she seeks to appear, provided that such permission will not be granted with respect to any individual who regularly engages in immigration and naturalization practice or preparation, or holds himself or herself out to the public as qualified to do so. (Revised effective 3/4/10; 75 FR 5225)

(4) Accredited representatives. A person representing an organization described in Sec. 292.2 of this chapter who has been accredited by the Board.

(5) Accredited officials. An accredited official, in the U.S., of the government to which an alien owes allegiance, if the official appears solely in his official capacity and with the alien's consent.
(6) Attorneys outside the U.S. An attorney, other than one described in 8 CFR 1.1(f), who is licensed to practice law and is in good standing in a court of general jurisdiction of the country in which he or she resides and who is engaged in such practice, may represent parties in matters before DHS, provided that he or she represents persons only in matters outside the geographical confines of the U.S. as defined in section 101(a)(38) of the Act, and that the DHS official before whom he or she wishes to appear allows such representation as a matter of discretion. (Revised effective 3/4/10; 75 FR 5225)

(b) Persons formerly authorized to practice. A person, other than a representative of an organization described in Sec. 292.2 of this chapter, who on December 23, 1952, was authorized to practice before the Board and the Service may continue to act as a representative, subject to the provisions of Sec. 292.3 of this chapter.

c) Former employees. No person previously employed by the Department of Justice shall be permitted to act as a representative in any case in violation of the provisions of 28 CFR 45.735 - 7.

d) Amicus curiae. The Board may grant permission to appear, on a case-by-case basis, as amicus curiae, to an attorney or to an organization represented by an attorney, if the public interest will be served thereby.

e) Except as set forth in this section, no other person or persons shall represent others in any case.

a. Non-profit Organizations Offering Free Legal Representation

 d. KIND (Kids In Need of Defense) – KIND will assign a pro bono attorney to represent an unaccompanied child as long as the child lives in an area that is supported by KIND. For more information, please visit their website at http://www.supportkind.org/home.aspx.

e. Catholic Charities – This organization provides support and advocacy to immigrants and refugees. For more information, please visit their website at http://www.catholiccharitiesla.org/who-we-are.html.

f. Asian Pacific American Legal Center – 1145 Wilshire Blvd. 2nd Floor Los Angeles, CA 90017 Tel: (213) 997-7500 Fax: (213) 997-7595 www.apalc.org

g. Central American Refugee Center (CARECEN) – 2845 W. 7th St. Los Angeles, CA 90005 Tel: (213) 385-7800 Fax: (213) 385-1094 www.caracen-la.org

h. Catholic Charities – 1530 W. James Woods Blvd. Los Angeles, CA 90015 Tel: (213) 251-3489 Fax: (213) 251-3444 www.catholiccharitiesla.org

i. Coalition of African Refugees & Immigrants Budri – AbdellKhalig Mohamed, M.D.,
2. Right to apply for benefits
   Please see sections 1.1 to 1.8 above.

II. PUBLIC BENEFITS FOR IMMIGRANT CHILDREN

A. CalWORKS

CalWORKs (California Work Opportunity and Responsibility to Kids) is a welfare program that gives cash aid and services to eligible needy California families. The program serves all 58 counties in the state and is operated locally by county welfare departments. If a family has little or no cash and needs housing, food, utilities, clothing or medical care, they may be eligible to receive immediate short-term help. Families that apply and qualify for ongoing assistance receive money each month to help pay for housing, food and other necessary expenses.

The amount of a family's monthly assistance payment depends on a number of factors, including the number of people who are eligible and the special needs of any of those

130 List of agencies taken from LAFLA’s website: http://www.lafla.org/
family members. The income of the family is considered in calculating the amount of cash aid the family receives.\(^{131}\)

Most able-bodied aided parents are also required to participate in the CalWORKs GAIN employment services program.\(^{132}\)

Cash aid is limited to 60 months total in a lifetime for most adults\(^{133}\)

1. Eligibility

The following are basic requirements to qualify for financial assistance through CalWORKS:

- Reside in California and intend to stay
- Have children or are pregnant and:
  - One or both parents are absent from the home, deceased or disabled
  - Both parents are in the home, but the principal wage earner is either unemployed or working less than 100 hours per month at the time they apply for assistance.
- Be a U.S. citizen or a lawful immigrant

CalWORKs is only available to citizens, “qualified” immigrants, or “permanently residing in the U.S. under color of law” that generally means that the INS knows you are in the U.S. and does not plan to deport/remove you. “Qualified immigrants” are:

- lawful permanent residents (persons with green cards);
- refugees, persons granted asylum, withholding of deportation/removal, or paroled into the U.S. for one year or more;
- Cuban or Haitian entrants; and
- certain abused immigrant spouses or children

- Have a Social Security number or have applied for one
- Have a net monthly income less than the maximum aid payment for family size
- Have less than $2000 in cash, bank, accounts and other resources ($3000 if 60 years or older)
- Provide proof of regular school attendance for all school age children

---

131 http://www.cdss.ca.gov/calworks/
132 http://www.ladpss.org/dpss/calworks/default.cfm
133 http://www.cdss.ca.gov/calworks/
• Provide proof of immunizations for all children under the age of six.
• Perform 32 hours of work related activities per week for a single parent household or 35 hours per week in a two-parent household
• Cooperate with child support requirements
• Participate in welfare-to-work activities

a. Property and Resources

For CalWORKs applicants and participants there is a $2,000 or $3,000 (if 60 years or older) property limit. Motor vehicles valued at $4,650 or less may be excluded from the resource limit. If the County agrees, participants may also save up to $5,000 in restricted bank accounts to buy a home, start a business or pay for college or vocational training for a household member. Some resources that do not count include:

• A home, if the family lives in it
• Personal and household items such as furniture, appliances and computers
• Tools needed for employment
• Federal relocation and disaster relief benefits
• If property is owned with someone else, only the participant's share counts

b. School Attendance and Immunizations

All school-age children, except those in the Cal-Learn or other approved teen parent program, must attend school to receive aid. Parents must also show proof that all children not in school and under the age of 6 have received appropriate immunizations within 30 days from the date of eligibility. A financial penalty will be imposed on the parent/caretaker relative for failure to comply with the immunization requirements. In the following situations, the family may be exempt from the immunization rules:

Immunizations are contrary to religious beliefs
Immunizations are medically inappropriate134

2. Which immigration documents do I need to get CalWORKs?

You can show the welfare office that you have one of the following documents:

• INS Form I-797 indicating approval of an I-130 petition filed for a spouse or child of a U.S. citizen/lawful permanent resident (LPR), or adult son or daughter of an LPR;

134 http://www.ladpss.org/dpss/calworks/eligibility.cfm
• INS Form I-797 or I-797C indicating approval or "prima facie" validity of an I-360 petition of a self-petitioning spouse/child of a U.S. citizen/LPR or widow/widower of a U.S. citizen;
• an order or document from the Immigration Court or Board of Immigration Appeals granting suspension of deportation or cancellation of removal under VAWA; or
• a document from the Immigration Court or Board of Immigration Appeals indicating a prima facie case for suspension of deportation or cancellation of removal under VAWA.

Children of battered spouses and parents of battered children who have these documents are also eligible for CalWORKs.

Note: There may be other documents that you can show in order to get benefits as a battered immigrant. Check with an immigration attorney for more information.

3. How to Apply

There are welfare offices located in each of the 58 California counties. For a list of CalWORKS offices see: http://ladpss.org/dpss/maps/default.cfm. The county welfare department is also listed under the County Government Section of the telephone book. Needy qualifying immigrant children may apply for CalWORKs at any office located in the county where they live.

Immigrant children, or parents requesting assistance on behalf of their qualifying children, must complete application forms. The family can ask for immediate help if it has little or no cash and needs emergency housing, food, utilities, clothing or medical care.

Next, the welfare office will set up an interview with one of its workers to obtain facts and verify eligibility. Applicants must provide the County with proof of income and property, citizenship status, age, social security number, residence, shelter costs, work or school status and other information. Similar information may be requested for all of the people in the home.

At the interview, the County will advise applicants of the rules that must be met to be eligible for CalWORKs. If the County determines that the applicants are eligible for CalWORKs, the applicant will receive monthly checks from the county welfare department until determined ineligible.

In order to meet requirements for the application process, the applicant must go to a Department of Public Social Services office of the County of Los Angeles for a full intake interview. This application may not be submitted by mail. The applicant may fill out the application ahead of time and bring it to the Department of Public Social Services office of the County of Los Angeles. For a copy of the application see:

If the applicant is disabled and unable to go to a Department of Public Social Services office of the County of Los Angeles, call 1 (877) 481-1044 and a home visit will be scheduled to assist with the application process.

a. **Fingerprinting**

All eligible adult household members for cash aid and/or food stamps must be fingerprint/photo imaged. If anyone who is required to cooperate with these rules does not get fingerprint/photo imaged, no benefits will be issued to the entire household. The fingerprints are confidential and can only be used to prevent or prosecute welfare fraud.\(^{135}\)

b. **Social Security Number**

A social security number must be provided, it will be used to computer match and check income and resources. The social security number for each applicant/recipient of cash aid must be provided. Proof of a SSN must be provided within 30 of the application for cash aid.\(^{136}\)

c. **Proof of eligibility**

The applicant must supply proof of eligibility, if s/he cannot provide proof, s/he will have to give the name of a person or agency who can be contacted to get proof. The CalWORKS office will assist the applicant in getting proof when necessary.\(^{137}\)

4. **GAIN**

The GAIN program provides employment-related services to CalWORKs participants to help them find employment, stay employed, and move on to higher paying jobs, which will ultimately lead to self-sufficiency and independence. CalWORKs participants receive GAIN services in the GAIN Regional offices.

Participation in GAIN is mandatory for all CalWORKs participants unless exempt. Exemptions require documentation, verification, and approval of a GAIN Services Worker. Exempt participants may volunteer to participate in GAIN. Once a

\(^{135}\) CalWORKS Manual of Policies and Procedures Section 40-105.3
\(^{136}\) CalWORKS Manual of Policies and Procedures Section 40-105.2
\(^{137}\) CalWORKS Manual of Policies and Procedures Section 40-105.1; 40-157.212; 40-157.213
volunteer enters the program she/he must adhere to the rules and regulations of the program as mandatory participant.\textsuperscript{138}

5. Special Rules Regarding Children

a. Up to what age can a child be aided for CalWORKS?

A child may continue to receive CalWORKS benefits until his/her 18\textsuperscript{th} birthday. After the child turns 18, the child may continue to receive cash aid if she/he meets the following requirements:

- She/he is a full-time student (as defined by the school/program) in high school, or in a vocational or technical training program, and is expected to graduate/complete the training program before reaching age 19; or
- Full-time student (as defined by the school/program) in high school, or in a vocational or technical training program, and is not expected to graduate/complete the training program before reaching age 19 due to a disability.

The otherwise eligible 18 year old who attends school full-time and is considered disabled under the below-mentioned criteria shall continue to be eligible for CalWORKS benefits until they graduate, turn 19 or stop attending school full-time, whichever occurs first. To be considered disabled, an eligible 18 year old must:

- Receive or have in the past received SSI/SSP benefits; or
- Receive or in the past received services through a Regional Center Program pursuant to the Lanterman Act; or
- Receive or have in the past received services at school in accordance with his/her Individual Education Plan (IEP) or Section 504 Accommodation Plan; or
- Provide verification of a current or past disability by a health care provider or a trained, qualified learning disabilities evaluation professional, or authorizes the county to obtain information to verify the child’s disability.\textsuperscript{139}

As CalWORKS automatically terminates cash aid for a child upon turning 18 years of age, to continue to aid a child, Eligibility Workers must ensure that the child’s disability or expected graduation date is recorded in the School Information screen.

b. What verification is required when the child is 18 years old and has

\textsuperscript{138} http://www.ladpss.org/dpss/gain/
\textsuperscript{139} http://www.ladpss.org/dpss/calworks/pdf/calworks_policy.pdf
not graduated from high school?

If the applicant is a full-time student expecting to graduate or complete a training program by age 19, verification must include:

• A PA 1725 (LEADER generated), School Attendance/Enrollment Verification, with

  Part B completed by the school verifying current full-time enrollment and that the child is expected to graduate high school or will complete a training program before age 19;
  or

• A current semester’s report card, progress report or other current school document that verifies current full-time enrollment and a statement from the school that the child is expected to graduate high school or will complete the training program before age 19.

c. What verification is required when the child is a full-time student not expecting to graduate high school by age 19 due to a disability?

If the child is a full-time student not expecting to graduate or complete a training program by age 19 due to a disability, verification must include A PA 1725 with Part B completed by the school and one of the following:

• An SSI/SSP award letter
  • A statement from the Regional Center
  • An approved copy of the child’s Individual Education Plan (IEP) or Section 504 Plan
  • An independent verification of a current or Past disability by a health care provider or a trained, qualified learning disabilities evaluation professional.

d. How is a child informed that he/she can continue to get cash aid on their parent’s/caretaker relative’s case if they meet the age requirement?

"The QR 2103, Reminder for Teens Turning 18 Years Old, is centrally mailed to the parents/caretaker relatives of aided teens 60 days before the teen’s 18th birthday. The form provides information on how teens can continue to get cash aid as part of their parent’s/caretaker relative’s case if they meet the educational/training and/or disability requirements. The form also provides information about the options that are available (remaining in the parent’s/caretaker relative’s AU or opening
his/her own case) to a pregnant or parenting teen.”

B. Food Stamps

The Food Stamp Program is a federal nutrition program that is to “promote the general welfare and to safeguard the health and well being of the Nation’s population by raising the levels of nutrition among low-income households.” (7 C.F.R. § 271.1(a)., 7 U.S.C. § 2011) The program is called supplemental nutrition assistance program [SNAP], it is created by federal law and is executed by the States. Each state is responsible to the implementation and application process for it’s residents. In California, the food stamp program is known as CalFresh.

CalFresh benefits are designed to increase a household’s food-buying power and helps households purchase the amount of food they need. They are issued in the form of an Electronic benefit Transfer (EBT) card.140

1. U.S. Code
   a. USC Title 7, Chapter 51 § 2011. Congressional declaration of policy

   It is declared to be the policy of Congress, in order to promote the general welfare, to safeguard the health and well-being of the Nation’s population by raising levels of nutrition among low-income households. Congress finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of the Nation’s agricultural abundance and will strengthen the Nation’s agricultural economy, as well as result in more orderly marketing and distribution of foods. To alleviate such hunger and malnutrition, a supplemental nutrition assistance program is herein authorized which will permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation.

   [U.S. Code, Title 7, Chapter 51 § 2011. Congressional declaration of policy]

140 http://dpss.lacounty.gov/dpss/calfresh/default.cfm
b. Federal Eligibility Standards

“Participation in the [SNAP] shall be limited to those...whose income and other financial resources...are determined to be a substantial limiting factor in permitting them to obtain a more nutritious diet.”\(^{141}\)

“The income standards of eligibility shall...provide that a household shall be ineligible to participate in the supplemental nutrition assistance program if...the household’s income...exceeds the poverty line.”\(^{142}\)

2. Application Process
   a. Who can get food stamps
      i. Households

“Households” get food stamps. The household’s income must be less than the gross income eligibility standard. There is a higher gross income limit if the household includes an elderly or disabled person. The household does not have to meet any gross income limit if all members of the household are elderly and/or disabled.

“A household is composed of... (1) An individual living alone; (2) An individual living with others, but customarily purchasing food and preparing meals for home consumption separate and apart from others; or (3) A group of individuals who live together and customarily purchase food and prepare meals together for home consumption.”\(^{143}\) “The following individuals... must be considered as customarily purchasing food with the others [and]... must be included in the same household... (i) Spouses; (ii) A person under 22... who is living with his or her... parents; and (iii) A child... under 18... who lives with and is under the parental control of a household member other than his or her parent... [this is includes] if he or she is financially or otherwise dependent on a member of the household, unless State law defines such a person as an adult.”\(^{144}\)

   ii. Immigration Status

---

141 USC Title 7, Chapter 51 § 2014(a) Eligible households
142 USC Title 7, Chapter 51 § 2014(c) Eligible households
143 7 C.F.R. § 273.1 (a)
144 7 C.F.R. § 273.1 (b)
CalFresh is available to legal immigrants who: (1) have lived in the country for (5) years, or (2) are receiving disability-related assistance or benefits, regardless of entry date, or (3) are children under 18 years of age regardless of entry date. Non citizens who are in the U.S temporarily, such as students, are not eligible.

iii. Income Requirements

CalFresh households, except those containing an aged or disabled member or where all members receive cash assistance, are subject to gross and net income determination tests. Gross Income – all non-excludable income from any source including all earned income and all unearned income. The maximum gross allowed is 130% of the Federal poverty level (FPL) or 165% of the FPL if the household has an elderly or disabled person who qualifies to be a separate household. If the household passes the gross income test, then the net income test is computed. Net income is computed by deducting the following, if applicable, from gross income. The resultant amount cannot exceed 100% of the FPL.

- Earned income has an allowable deduction of 20% (i.e., 80% of the gross earned income counts in the calculation of benefit levels). Examples of earned income include wages and salaries, striker's benefits, etc.
- Standard Deduction – A deduction allowed per household per month. $147 for households of 1–3 persons, $155 for 4 persons, $181 for 5 persons, and $208 for 6 or more persons (effective 10/1/11).
- Excess Shelter – A monthly shelter cost in excess of 50% of the household’s income after all above deductions are considered. The excess shelter deduction must not exceed the current maximum of $459 (effective 10/1/11).
- Homeless Household Shelter – Available to homeless persons who are not receiving free shelter for the entire month. If the homeless shelter allowance is used, separate utility costs are not allowed because the homeless shelter allowance includes a utility component. The current allowance is $143.
- Standard Utility Allowance (SUA) – Allowed for a household that incurs utility costs, which are separate and apart from the household’s rent/mortgage payment. The current allowance is $329 (effective 10/1/11).
- Limited Utility Allowance (LUA) – Allowed for a household that incurs expenses for at least two separate utilities other than heating and cooling are eligible for a LUA. The LUA allowance is $99 (effective 10/1/11).
• Telephone Utility Allowance (TUA) - A household that is not eligible for the SUA or LUA but incurs a telephone expense or in its absence an equivalent form of communication, is eligible to receive a telephone deduction. The TUA allowance is unchanged and remains $20 (effective 10/1/11).

• Dependent Care – The actual cost, not exceeding the maximum dependent care deduction, for care of a child or other dependent. Up to $200 per month for the cost of dependent care for a child, under 2 years of age and up to $175 per month for each other dependent can be deducted.

• Medical Deduction – The portion of medical expenses, excluding special diets, in excess of the allowable amount of $35 per household per month (incurred by any household member who is elderly or disabled).

Exempt Income

• In-Kind Benefits – Any gain or benefit that is not in the form of money (i.e., meals, clothing, housing provided by the employer, etc.)

• Vendor Payments – Money paid to a third party for a household expense by a person or organization outside of the household.

• Deferred Educational Loans

• Grants and Scholarships

• Cash donations from a charitable organization of not more than $300 in a calendar quarter.

• Income received too infrequently/irregularly to be reasonably anticipated but not more than $30 in a quarter.\textsuperscript{145}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|c|c|c|c|c|}
\hline
\textbf{Family Size} & \textbf{25\%} & \textbf{50\%} & \textbf{75\%} & \textbf{81\%} & \textbf{100\%} & \textbf{133\%} & \textbf{175\%} & \textbf{200\%} & \textbf{250\%} & \textbf{300\%} \\
\hline
1 & $227 & $454 & $681 & $735 & $908 & $1,207 & $1,588 & $1,815 & $2,269 & $2,723 \\
2 & $306 & $613 & $919 & $993 & $1,226 & $1,630 & $2,145 & $2,452 & $3,065 & $3,678 \\
3 & $386 & $772 & $1,158 & $1,251 & $1,544 & $2,054 & $2,702 & $3,088 & $3,860 & $4,633 \\
4 & $466 & $931 & $1,397 & $1,509 & $1,863 & $2,477 & $3,259 & $3,725 & $4,656 & $5,888 \\
5 & $545 & $1,090 & $1,636 & $1,766 & $2,181 & $2,901 & $3,816 & $4,362 & $5,452 & $6,543 \\
6 & $625 & $1,250 & $1,874 & $2,024 & $2,499 & $3,324 & $4,374 & $4,998 & $6,248 & $7,498 \\
7 & $704 & $1,409 & $2,113 & $2,282 & $2,818 & $3,747 & $4,931 & $5,635 & $7,044 & $8,453 \\
8 & $784 & $1,568 & $2,352 & $2,540 & $3,136 & $4,171 & $5,488 & $6,272 & $7,840 & $9,048 \\
\hline
\end{tabular}
\caption{\textbf{\% Gross Monthly Income}}
\end{table}

\textsuperscript{145} http://www.calfresh.ca.gov/PG841.htm
iv. Resource Requirements

A resource is something the household can draw upon or sell for financial assistance. Resource limits are $2,000 for all households except those that have a member who has a disability or who is 60 years of age or older. These households can have up to $3,000 in resources. Any countable resource will be added to the household's resource limit when making an eligibility determination.

Types of Resources:

- **Liquid Resources** – Includes all funds readily available to the household such as cash on hand, money in checking or savings accounts, savings certificates, trust deeds, notes receivable, stocks, or bonds, non-recurring lump sum payments [which includes retroactive payments, funds held in an individual retirement accounts (IRA) and funds held in accessible Keogh plans].
- **Non-Liquid Resources** – Includes personal property, buildings, land, recreational properties, and any other property. The value of non-exempt resources shall be its equity value, which is the fair market value less encumbrances.
- **Excluded Resources** – Resources which are excluded are the home and surrounding property, vehicles, household goods, personal effects, resources with an equity value of $1500 or less (excluding financial instruments), and resources with a cash value that is not accessible to the household (such as irrevocable trust funds, security deposits on rental property, etc.)
- For certain households, there is no limit to resources. Check with your county for further information.

v. Work Requirements

All able-bodied persons (ages 18-49) without dependents must work 20 hours per week (monthly average 80 hours) or participate 20 hours per week in an approved work activity or do workfare. If not, these persons receive only 3 months of CalFresh benefits in a 36-month period. There are some exceptions, so contact your local County Welfare Department to find out if you are eligible.146

vi. Fingerprint

146 http://www.calfresh.ca.gov/PG841.htm#work
All applicants for and recipients of aid under the CalFresh Program, other than dependent children and persons physically unable to provide the necessary images, will be required to provide two fingerprint images and a photo image as a condition of issuance.

This includes:

- Each adult household member who is eligible for CalFresh benefits.
- The fingerprint images of the head of household parent and/or caretaker relative of an aided or applicant child when living in the home of the child; and
- If a household member is under the age of 18 and applies for CalFresh as a separate household.

Expedited service must be issued to a household even if it is not possible to complete the SFIS process in time. However, SFIS compliance should occur prior to the issuance of the household's next allotment.

Exemptions:

- If a household member has a medically-verified permanent physical condition that would make him/her unable to comply with SFIS requirements.
- Counties will determine who is physically unable to comply with the SFIS requirements. Counties will have to reevaluate individuals with a temporary exemption within sixty days.
- A household member under the age of 18 is exempt, unless he/she is applying for CalFresh benefits as his/her own household.
- The County Welfare Department (CWD) shall decide when a household member will receive a postponement from the SFIS process. However, the CWD cannot require a household to make a special trip into the office specifically for the fingerprint imaging process.
- Authorized representatives are not required to comply with SFIS requirements, unless no one in the household, which they represent, is required or able to comply with SFIS requirements.
- A household member is allowed to receive temporary benefits when he/she is unable to complete the fingerprint imaging process due to a SFIS equipment problem.

b. How to Apply

i. Pre Screening
The applicant can use this Pre-Screening tool to determine if he or she is eligible for snap benefits before going through the application process:

http://www.snap-step1.usda.gov/fns/

ii. Application

In California, each county may have a different way to apply for CalFresh benefits, formerly food stamps. Apply in your county, or online at: http://www.benefitscal.org/BenefitsPortal/landing.html

The application can be mailed or delivered to your local county office. An application can be downloaded and printed here: http://www.calfresh.ca.gov/PG847.htm

One adult household member or authorized representative must sign the application for CalFresh benefits under penalty of perjury.

Complete as much of your application as you can. Your name, address and signature are necessary on the application to be accepted by the local CalFresh office. The application will be accepted on the same day it is turned in, even if there is no interview on that day.

As soon as all necessary information is provided and verified for eligibility, you will be able to receive your CalFresh benefits within 30 days of your dated application.147

iii. Interview

An interview is required before certifying a household to get CalFresh benefits. The interview can occur in the county office or by telephone (in most counties). The interview may be held with the head of household, spouse, the authorized representative or any other responsible household family member. An interview is required annually.

An eligibility worker will explain the program rules and help the household complete any parts of the application that have not yet been completed.

After the interview, the CalFresh office will send a notice. If the household does not qualify for CalFresh benefits, the notice will explain why. If the household does qualify, the notice will explain

147 http://www.calfresh.ca.gov/PG847.htm
how much the CalFresh benefit will be for your household. It will also explain how many months the household can receive CalFresh benefits (certification period) before being recertified.

Local CalFresh office officials may waive the face-to-face part of the interview requirement if traveling to the county welfare department would be a hardship for the household. The face-to-face feature must be waived if the household is composed only of elderly or disabled members with no earned income.

**Documents to Bring to Interview**

For a face-to-face interview, the applicant should bring verification of income and expenses. Even if the applicant does not have all the information s/he should still come for the interview because there will be additional time to provide this information. The following are examples of what to bring:

- Proof of identity (driver's license, etc.), alien status.
- Social Security Numbers for all household members.
- If employed, proof of income (wage stubs, earning statements, etc.) for the past 30 days.
- Bank statements for checking accounts, savings accounts, certificates of deposit, credit union accounts, retirement accounts, stocks, bonds, dividends, etc.
- Proof of shelter costs (rent or mortgage payment, lot rent, household, real estate, taxes, utility bills – heat, electricity, water/sewage/garbage, telephone, etc.)

**iv. Verification**

The CalFresh worker will also ask for proof of certain information that has been reported. The following must be verified prior to certification:

- Identification
- Immigration Status (in some cases)
- Sponsored Noncitizen Information (in some cases)
- Residency
- SSN number for all Household Members
- Gross Income
- Evidence of Disability
- Utility Expenses
- Medical Expenses
- Child Support Obligations and Payments
For expedited service, **only** identification is required and other verification can be postponed. Other verification such as shelter costs, dependent care costs, household size, and liquid resources do not require verification unless questionable.

**Categorical Eligibility**

Households in which all members are authorized or receiving cash aid, such as CalWORKS or GA/GR, are considered categorically eligible. This means the CalFresh Program accepts eligibility determinations made by the other program for resources, gross and net income limits, sponsored alien information, county residency, and social security number information. CalFresh Households containing California Food Assistance (CFAP) recipients are not categorically eligible.

v. **Expedited Service**

Households that qualify for expedited service (ES) go through the same application process as all other clients, but not all information has to be verified before benefits are issued. Households may qualify for (ES) based if the household:

- Has less than $150 in monthly gross income and liquid resources of $100 or less; or
- Migrant or seasonal farm workers who are destitute; or
- Combined monthly gross income and liquid resources which are less than the household monthly rent or mortgage and utilities; or
- Is homeless.

vi. **Social Security Number**

If the applicant receives too many food stamp benefits, it will have to be paid them back and/or the benefits may be lowered or stopped. A Social Security Number (SSN) may be used to collect the amount of benefits owed, through the courts, other collection agencies and for federal government collection action.

The applicant’s SSN will be used to check identity to prevent duplicate participation and to verify eligibility and benefits. The SSN will be used in computer matches to check income and resources with records from tax, welfare, employment, the Social Security Administration and other agencies. Differences may be checked out with the applicant and with employers, banks, or others. Fraudulent participation in the Food Stamp Program may result in criminal or
civil action or administrative claims.

Providing an SSN is not required when the application is first submitted. However, the applicant will be asked to give information to figure the eligibility and benefits for other members of their household. Usually the applicant will have provide his/her SSN(s) or proof of application for an SSN(s) before any benefits can be given. We can deny you or any member

3. California Food Assistance Program

Under the federal Food Stamp Program, only immigrants who fall under certain categories are eligible for food stamps. However, qualified immigrants, trafficking victims and U visa applicant/holders who are ineligible for federal food stamps due to their immigration status may qualify for food stamps under California Food Assistance Program (CFAP).

Only those qualified immigrants who are ineligible for CALFresh because of their immigrant status are eligible for CFAP.

Qualified Immigrants

- Legal Permanent Residents
- Refugees
- Asylees
- non-citizen who had deportation withheld under Section 243(h)
- Cuban or Haitian entrant under the Refugee Education Assistance Act of 1980
- Conditional entrant under Section 203(a)(7)
- U visa applicants with petitions pending under 204(a)(1)(A) of the INA

a. Qualifying for food stamps

The household’s “net income” must be less than the net income eligibility standard in order to qualify for food stamps. There are various deductions and credits that reduce the household’s overall earned or other income. Once the deductions and credits are applied, the household’s net income is used to determine whether it meets the threshold net income eligibility standard. The deductions and credits are also used to calculate the amount of benefits the household will receive. To qualify for food stamps, the total value of the household’s property must be under the food stamp resource limit. Households with children (under 18 years old) can be above the food stamp resource limit and still qualify for food stamps because the household is considered to have “modified categorical eligibility.”
Unless exempt, every adult in the household must comply with the food stamp program's work requirements.

If everyone in the household is getting cash welfare assistance (e.g. general assistance or CalWORKs), the household is automatically qualified for food stamps.

Note: In California, those who receive Social Security Income (SSI) cannot get food stamps because the value of the food stamps is already included in their SSI checks.

d. How to Apply

To find out whether you are eligible to receive CalFresh benefits, use the Pre-screening Tool provided at this website [http://www.snap-step1.usda.gov/fns/](http://www.snap-step1.usda.gov/fns/).

For more information on how to apply for CalFresh benefits, please visit [http://dpss.lacounty.gov/dpss/calfresh/how_to_apply.cfm](http://dpss.lacounty.gov/dpss/calfresh/how_to_apply.cfm)
C. Public Housing

Public housing was established to provide decent and safe rental housing for eligible low-income families, the elderly, and persons with disabilities. Public housing comes in all sizes and types, from scattered single family houses to high rise apartments for elderly families. There are approximately 1.2 million households living in public housing units, managed by some 3,300 HAs. The U.S. Department of Housing and Urban Development (HUD) administers Federal aid to local housing agencies (HAs) that manage the housing for low-income residents at rents they can afford. HUD furnishes technical and professional assistance in planning, developing and managing these developments. 148

“It is the policy of the U.S.—to promote the general welfare of the Nation by employing the funds and credit of the Nation,…to assist States and political subdivisions of States to remedy the unsafe housing conditions, [] acute shortage of decent and safe dwellings for low-income families [and to] address the shortage of housing affordable to low-income families….” 149

1. Public Housing and Section 8

Public housing are “[a]partments owned by local public housing authorities that tenants typically rent for a maximum of 30 percent of household income. Local housing authorities administer this program under rules set out by [HUD].” 150

Section 8 vouchers are “[i]ssued by public housing authorities to eligible households to rent apartments or homes from private landlords. The voucher guarantees a payment to the landlord from the local housing authority for the difference between the maximum subsidy and the tenant household’s share, usually 30 percent of income. The rent for the unit may exceed the maximum subsidy. Local housing authorities administer this program under HUD rules.” 151

a. Requirements

“An applicant must meet all eligibility requirements in order to receive housing assistance. At a minimum, the applicant must be a family… and must be income-eligible…. Such eligible applicants include single persons.” 152

149 42 U.S. C. § 1437(a)(1)
150 www.nilc.org/document.html?id=23
151 Id.
152 24 C.F.R. 5.653(b)(1)
i. Immigration Status

“[This section] prohibits HUD from making financial assistance available to persons who are not eligible with respect to citizenship or noncitizen immigration status.”

Public Housing and Section 8 vouchers are available to the following categories of qualifying immigrants:

- **Lawful permanent residents** (LPRs)
- **Lawful temporary residents** under the general amnesty program created by the Immigration Reform and Control Act of 1986
- **Refugees**, asylees, and persons granted withholding of deportation/removal
- **Victims of trafficking**
- **Parolees**
- Citizens of **Micronesia**, the **Marshall Islands**, and **Palau**
  Abused immigrants and Cuban/Haitian entrants are arguably eligible for these programs and have been granted access to public housing in some jurisdictions.

“At least one person in the household must eligible, based on his or her immigration status, to reside in the housing (the eligibility person may be a minor child). Household members ineligible for housing assistance based on their immigration status may live in an assisted unit, but the household’s subsidy will be prorated, resulting in a higher rent.

Immigration documents will be verified for current tenants and new applicants, but not for household member who do claim eligibility based on immigration status.”

Receipt of housing assistance is not considered in “public charge” determinations.

“Federal housing programs do not require reporting to the INS except in rare circumstances.... Immigrants in household with eligible members need not reveal the precise immigration status that makes them ineligible—they can simply indicate that they do

---

153 24 C.F.R. 5.500(a)
154 www.nilc.org/document.html?id=23 as dictated in 24 C.F.R 5.506(a)
155 Id.
not claim to be eligible based on immigration status."156

\textit{ii. Income Requirements}

In general, the family’s income may not exceed 50\% of the median income for the county or metropolitan area in which the family chooses to live. By law, a PHA must provide 75\% of its voucher to applicants whose incomes do not exceed 30\% of the area median income. Median income levels are published by HUD and vary by location.157

Below is a chart showing the income levels for Los Angeles, this will differ from county to county.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
\textbf{Number of Persons in household} & \textbf{Extremely Low Income (30\% of median income)} & \textbf{Very Low Income (50\% of median income)} & \textbf{Low Income (80\% of median income)} \\
\hline
1 & $17,950 & $29,900 & $47,850 \\
2 & $20,500 & $34,200 & $54,650 \\
3 & $23,050 & $36,450 & $61,500 \\
4 & $25,600 & $42,700 & $66,300 \\
5 & $27,650 & $46,150 & $73,800 \\
6 & $29,700 & $49,550 & $79,250 \\
7 & $31,750 & $52,950 & $64,700 \\
8 & $33,800 & $56,400 & $50,200 \\
\hline
\end{tabular}
\end{table}

\textbf{b. How to Apply}

First, the applicant must contact the local housing agency, a list of California offices is available at:
http://www.hud.gov/offices/pih/pha/contacts/states/ca.cfm

Second, the applicant must verify that s/he meets the local eligibility requirements.

Third, the applicant must complete the application at the local housing agency. The application for public housing is different for each area. If,

156 Id.
due to lack of availability, the application process is closed, the applicant should apply to be on a waiting list.

Fourth, if the applicant is applying for a voucher, the applicant will have 60-120 days to locate suitable housing.

2. Family Self-Sufficiency Program

The family Self-Sufficiency Program (FSS) is designed to help Section 8 families gain and maintain independence from welfare. The goal is for families to become independent within five to seven years by providing educational development and technical, trade and vocational skill training.

3. Section 8 Homeless Program

The goal of the Section 8 Homeless Program is to provide permanent affordable housing for the homeless population while insuring them access to supportive services in order to help them maintain independent living.

a. Eligibility

The Housing Authority has contracted with fifteen nonprofit agencies to provide Homeless Program social services and Section 8 referrals. To be eligible for the program individuals or families must be referred by one of these contracted agencies and meet the federal definition of homeless.

b. Homeless Definition

For an individual or family to be considered homeless, they must:

• Lack a fixed, regular and adequate nighttime residence;
  
  and

• Have a primary nighttime residence that is
  
  o A publicly supervised or privately operated shelter designed to provide temporary living accommodations (including welfare/voucher hotels, congregate shelters, or transitional housing designed for homeless persons); or

  o An institution that provides a temporary residence for persons intended to be institutionalized; or

  o A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings (street, park,
D. California Children Services

The California Children Services (CCS) program provides medical services to children under 21 years of age. The medical services include diagnostic and treatment services, medical case management, and physical and occupational therapy services. CSS also provides medical therapy services at public schools.

The legislative authority enabling the CCS program is California Health and Safety Code Section 123800, et seq. “It is the intent…to provide… for the necessary medical services required by physically handicapped children whose parents are unable to pay for these services, wholly or in part[,] [including] the necessary services rendered by the program to physically handicapped children treated in public schools that provide services for physically handicapped children.” California Health and Safety Code, Section 123825.

The California Department of Health Care Services manages the CCS program. Larger counties operate their own CCS programs, while smaller counties share the operation of their program with state CCS regional offices in Sacramento, San Francisco, and Los Angeles. The program is funded with state, county, and federal tax monies, along with some fees paid by parents.

1. Medical conditions covered

CSS-eligible conditions include\textsuperscript{159}, but are not limited to:

- Chronic medical conditions
- Cystic fibrosis
- Hemophilia
- Cerebral Palsy
- Heart disease
- Cancer
- Traumatic injuries
- Infectious diseases major sequelae

2. Eligibility

\textsuperscript{158} http://www.hacla.org/about-hacla/
\textsuperscript{159} “‘Handicapped child,’ as used in this article, means a physically defective or handicapped person under the age of 21 years who is in need of services. The director shall establish those conditions coming within a definition of ‘handicapped child[,]’ phenylketonuria, hyaline membrane disease, cystic fibrosis, and hemophilia shall be among these conditions.” California Health and Safety Code, Section 123830
The child must be under 21 years old\textsuperscript{160}, a resident of California and must have “CSS-eligible” medical conditions. Immigration status does not matter, but the legal guardian must apply for this benefit in the county where the child lives.\textsuperscript{161} In addition to the above requirements, one of the following must also apply:

- Family’s income is $40,000 or less
- Out of pocket medical expenses are expected to be more than 20% of the family’s adjusted gross income
- Has a need for an evaluation to find out if there is a health problem covered by CCS
- Was adopted with a known health problem that is covered by CCS
- Has a need for the Medical Therapy Program
- Has Medi-Cal with full benefits
- Has Health Families insurance\textsuperscript{162}

Family income is not a factor for children who:

- need diagnostic services to confirm a CCS eligible medical condition; or
- were adopted with a known CCS eligible medical condition; or
- are applying only for services through the Medical Therapy Program; or
- have Medi-Cal full scope

3. Services available

"Services," … means any or all of the following:
(a) Expert diagnosis.
(b) Medical treatment.
(c) Surgical treatment.
(d) Hospital care.
(e) Physical therapy.
(f) Occupational therapy.
(g) Special treatment.
(h) Materials.
(i) Appliances and their upkeep, maintenance, care and transportation.
(j) Maintenance, transportation, or care incidental to any other form of "services."

California Health and Safety Code, Section 123840

\textsuperscript{160} “The department shall establish and administer a program of services for physically defective or handicapped persons under the age of 21 years…” California Health and Safety Code, Section 123805
\textsuperscript{161} http://www.mchaccess.org
\textsuperscript{162} http://www.dhcs.ca.gov/services/ccs/Pages/ProgramOverview.aspx
CCS may be able to help your child with a doctor visit and testing to find out if there is a special health problem.

If your child has a special health problem that is covered by CCS, then CCS may pay for or help with:

- Doctor visits and care, hospital stays, surgery, physical therapy and occupational therapy, tests, X-rays, medical equipment, and medical supplies
- Medical case management to help get special doctors and to refer you to other agencies, such as public health nursing and regional centers
- Medical Therapy Program, which provides physical therapy and/or occupational therapy in public school

4. How to Apply

For more information about the California Children’s Service and to apply for benefits, please visit [http://www.dhcs.ca.gov/services/ccs/Pages/apply.aspx](http://www.dhcs.ca.gov/services/ccs/Pages/apply.aspx). Forms are available in English and Spanish.

---

163 [http://www.dhcs.ca.gov/services/ccs/Pages/benefits.aspx](http://www.dhcs.ca.gov/services/ccs/Pages/benefits.aspx)
E. Cash Assistance Program for Immigrants (CAPI)

Cash assistance is available for certain aged, blind and disabled legal non-citizens who are ineligible for Supplemental Social Security Income/State Supplemental Payment (SSI/SSP) because of their immigration status through the Cash Assistance Program for Immigrants (CAPI). CAPI participants may also be eligible for Medi-Cal, In-Home Supportive Services (IHSS), and/or Food Stamps.

For eligibility requirements, the application process or more information about CAPI, please visit their website at http://www.ladpss.org/dpss/capi/default.cfm.

1. Eligibility

a. Immigration Status

The following immigrants are able to qualify for CAPI:

Individuals who are disabled, blind or aged, and entered the U.S. on or before August 21, 1996 (these individuals must provide proof of their Permanent Residence)

Qualified aliens who are disabled, blind or aged, lawfully entered the U.S. on or after August 22, 1996 and have a sponsor, but the sponsor is deceased, disabled or abusive (or the sponsor’s spouse is abusive to the immigrant).

Qualified aliens who are disabled, blind or aged, entered the U.S. on or after August 22, 1996, and do not have a sponsor or have a sponsor who is deceased, disabled or abusive.\(^{164}\)

b. SSI/SSP

The applicant must apply for Supplement Security Income/State Supplemental Payment. They must be determined to be ineligible solely because of their immigration status in order to be eligible for CAPI.

To apply for SSI go to: http://www.ssa.gov/ssi/text-apply-ussi.htm

c. Income

The individual’s monthly income, after certain amounts are disregarded, cannot be greater than the maximum monthly CAPI benefit amount. Income is anything the person receives in cash or in-kind that can be used

\(^{164}\) http://www.ladpss.org/dpss/capi/default.cfm
or sold to meet their needs for food, clothing and shelter.\textsuperscript{165}

d. Resources

The resources a person may own cannot be greater than $2,000 for an individual or $3,000 for a couple. Resources are cash or other property that the person can convert into cash for support. For example: stocks, bonds, mutual funds, mortgages, bank accounts, household goods, boats and vehicles, or land. Some resources are not counted in determining eligibility, such as the principal place of residence (regardless of value), one car (used to provide necessary transportation or does not exceed a certain value), and household goods and personal effects of reasonable value.\textsuperscript{166}

e. Residency

The applicant must be a resident of California. California residence is determined by physical presence in California with the intent to remain in the State.\textsuperscript{167}

2. Application Process

CAPI applications may be filed at any Department of Social Services office. Homebound applicants may call the toll-free Hotline Number 1-877-481-1044 to receive an application by mail. CAPI applications are processed centrally in the Wilshire CAPI District.\textsuperscript{168}

3. Benefits

Direct deposit is one of three options available to participants to receive or access their CAPI benefits. The other two alternatives are through electronic issuance process called Electronic Benefit Transfer (EBT) or by mail.

By law, CAPI payment amounts are $10 less for an individual or $20 less for a couple than the SSI/SSP payment standards. CAPI participants will receive these payment amounts if no other income is received by the household.

CAPI participants may be eligible for Medi-Cal, In-Home Supportive Services (IHSS) and/or Food Stamp benefits. Individuals requesting such benefits must

\textsuperscript{165} \url{http://www.ladpss.org/dpss/capi/default.cfm}
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
file the appropriate application for the other program.\textsuperscript{169}

4. Redeterminations

Redeterminations are done periodically to ensure that only eligible persons receive assistance and in the amount to which they are entitled. All CAPI cases have eligibility redetermined within 12 months.

\textsuperscript{169} http://www.ladpss.org/dpss/capi/default.cfm
F. California Department of Developmental Services

Individuals with developmental disabilities may receive services and support from the California Department of Developmental Services. The “disabilities include mental retardation, cerebral palsy, epilepsy, autism and related conditions. Services are provided through state-operated developmental centers and community facilities, and contracts with 21 nonprofit regional centers. The regional centers serve as a local resource to help find and access the services and supports available to individuals with developmental disabilities and their families.”

1. Developmental Disability Definition

“Developmental disability’ means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual…. this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.” CALIFORNIA WELFARE AND INSTITUTIONS CODE § 4512 (a)

2. Regional Centers

Regional centers are nonprofit organizations that provide diagnosis and assessment of eligibility and help plan, access, coordinate and monitor the services and supports. The diagnosis and eligibility assessment are free. For those who are eligible, most services and supports are free regardless of income or age.

Infants and toddlers may also qualify for services. Other services, such as genetic diagnosis, counseling and other prevention services are available to individuals at risk of having a child with a developmental disability.

Parents with children under eighteen years, who require 24 hour out-of-home services, must share the cost. The shared cost will depend on the parents’ ability to pay.

For more information, please see the Parental Fee Program at the following website http://www.dds.ca.gov/ParentalFee/Home.cfm.

See also Family Cost Participation Program at the following website for information on possible co-payment requirements http://www.dds.ca.gov/FCPP/Index.cfm.

http://www.dds.ca.gov/

170 http://www.dds.ca.gov/
3. **Eligibility**

Requirements for eligibility:
- Disability must begin your 18th birthday
- The disability must be expected to continue indefinitely and
- The disability must constitute a substantial disability for that person pursuant to California Welfare and Institutions Code § 4512.171

Infants and toddlers (age 0 to 36 months) who are at risk of having developmental disabilities or who have a developmental delay may also qualify for services. In addition, individuals at risk of having a child with a developmental disability may be eligible for genetic diagnosis, counseling and other prevention services.172

4. **Lanterman Regional Center**

Frank D. Lanterman Regional Center is one of twenty-one regional centers in California. The Lanterman Regional Center operates under contract with California’s Department of Developmental Services. The Center serves thousands of children and adults with developmental disabilities. The Center also serves individuals who are at high-risk of parenting an infant with a disability.

The Lanterman Regional Center services the following areas: Hollywood-Wilshire, Central Los Angeles, Pasadena, Glendale, Burbank, La Cañada-Flintridge, La Crescenta

Lanterman offers the following services and supports for individuals with developmental disabilities and their families:
- Assessment and diagnosis
- Service and coordination linking people with services
- Lifelong individualized planning
- Assistance in finding and using community resources
- Purchase of services identified in the individual plan
- Advocacy for the protection of legal, civil and service rights
- Early intervention services for at-risk infants and their families

171 [http://www.dds.ca.gov/General/Eligibility.cfm](http://www.dds.ca.gov/General/Eligibility.cfm)

172 For information about these services, see [http://www.dds.ca.gov/EarlyStart/Home.cfm](http://www.dds.ca.gov/EarlyStart/Home.cfm)
• Information and referral
• Family Support
• Training and educational opportunities for individuals and families
• Community outreach, awareness and education about developmental disabilities
• Quality assurance and enhancement activities
• Resource development
• Client benefit coordination\textsuperscript{173}

\textsuperscript{173} http://www.lanterman.org/
G. Job Corps

Job Corps is a program that offers free education and training to help sixteen year olds and older, earning a high school diploma or GED, and to find and maintain a good job. It is authorized by Title I-C of the Workforce Investment Act of 1998 (29 U.S.C. § 2801).

There are 124 Job Corps center campuses throughout the U.S. and Puerto Rico. Job Corps offers hands-on training in more than 100 career technical areas, including: automotive and machine repair, construction, finance and business services, health care, hospitality, information technology, manufacturing, renewable resources, and more. All training programs are aligned with industry certifications and are designed to meet the requirements of today's careers.

Job Corps also offers the opportunity to earn a high school diploma or a GED for those youth who don't have either. For youth who already have a high school diploma, Job Corps can help them prepare for college through partnerships with local colleges. Resources are also available for English Language Learners.

1. Eligibility

To be eligible for Job Corps, you must be between the ages of 16 and 24, and qualify as low income.\(^{174}\)

2. How To Apply

For more information about Job Corps and how to apply, please call (800) 733-JOBS or (800) 733-5627 or visit their website at http://www.jobcorps.gov/home.aspx

3. California Offices
There are 7 Job Corps centers in California:

<table>
<thead>
<tr>
<th>Inland Empire</th>
<th>Long Beach</th>
</tr>
</thead>
<tbody>
<tr>
<td>3173 Kerry Street</td>
<td>1903 Santa Fe Avenue</td>
</tr>
<tr>
<td>PO Box 9550</td>
<td>Long Beach, CA 90810-4050</td>
</tr>
<tr>
<td>San Bernardino, CA 92427-9550</td>
<td>Tel: (562) 983-1777</td>
</tr>
<tr>
<td>Tel: (909) 887-6305</td>
<td></td>
</tr>
</tbody>
</table>

\(^{174}\) http://www.jobcorps.gov/faq.aspx
H. AB - 540

California’s Assembly Bill 540 (AB – 540)\textsuperscript{175} was passed on October 12, 2001 by Governor Gray Davis. This bill allows eligible undocumented students to be exempt from paying the significantly higher out-of-state tuition at California public colleges and universities. Eligible undocumented students can now qualify for the in-state tuition rate, allowing college to be more affordable.\textsuperscript{176}

1. Eligibility

In order for an undocumented student to be eligible for in-state California tuition under AB-540, s/he must meet the following requirements:

- Have attended a California High School for at least 3 academic school years
- Have or will graduate from a California high school or have attained a G.E.D. or received a passing mark on the California High School Proficiency Exam
- Register or be currently enrolled at an accredited institution of public higher education in California
- File or plan to file an affidavit as required by the institution stating that s/he will apply for legal residency as soon as possible
- Not hold a valid non-immigrant visa

2. How to Apply

If an undocumented student meets the requirements of the AB-540 program, they can apply for the benefits by sending the following information to the Enrollment office of their California public college or university:

- AB 540 Affidavit\textsuperscript{177} must be completed prior to enrollment and must state, under penalty of the law of the state of California that the student:
  - has graduated from a California high school or the equivalent.
  - attended high school in California for three years
  - will legalize their residency as soon as possible
  - is not a nonimmigrant alien
  - All information on the schools the student attended for grades 9-12 must be submitted as well as high school transcripts

\textsuperscript{175} Assembly Bill 540 (Stats. 2001, ch. 814) added a new section, 68130.5, to the California Education Code.
\textsuperscript{176} http://ab540.com/WhatIsAb540.html
\textsuperscript{177} The affidavit is found at http://www.csulb.edu/depts/enrollment/forms/.
I. California DREAM Act

The California DREAM Act is separated into two sections: AB 130 and AB 131

1. AB 130

This is the first half of the California DREAM Act, which went into effect on January 1, 2012. This law allowed a person who meets the eligibility requirements to be eligible to receive private scholarships.

[On] January 1, 2012, a student attending the California State University, the California Community Colleges, or the University of California who is exempt from paying nonresident tuition under Section 68130.5 shall be eligible to receive a scholarship that is derived from nonstate funds received, for the purpose of scholarships, by the segment at which he or she is a student.\(^{178}\)

a. Eligibility

In order for an undocumented student to be eligible for private scholarships under AB-130, s/he must meet the following requirements:

- Have attended a California High School for at least 3 academic school years
- Have or will graduate from a California high school or have attained a G.E.D. or received a passing mark on the California High School Proficiency Exam
- Register or be currently enrolled at an accredited institution of public higher education in California
- File or plan to file an affidavit as required by the institution stating that s/he will apply for legal residency as soon as possible
- Not hold a valid non-immigrant visa

b. How to Apply

Students will have submit their parental income and asset information. Additionally, their school may have an additional application

\(^{178}\) Cal. Ed. Code Section 66021.7
2. **AB 131**

AB 131 was signed by Governor Jerry Brown in 2011, it will go into effect on January 1, 2013. It allows undocumented, eligible persons to be eligible for all student aid programs to the extent permitted by federal law.

Trustees of the California State University and the Board of Governors of the California Community Colleges shall, and the Regents of the University of California are requested to, establish procedures and forms that enable persons... to apply for, and participate in, all student aid programs administered by these segments to the full extent permitted by federal law.  

a. **Eligibility**

In order for an undocumented student to be eligible for all student aid programs under AB-131, s/he must meet the following requirements:

- Have attended a California High School for at least 3 academic school years
- Have or will graduate from a California high school or have attained a G.E.D. or received a passing mark on the California High School Proficiency Exam
- Register or be currently enrolled at an accredited institution of public higher education in California
- File or plan to file an affidavit as required by the institution stating that s/he will apply for legal residency as soon as possible
- Not hold a valid non-immigrant visa

b. **How to Apply**

The application process for immigrant students under AB 131 has not been determined.

---

**INA: ACT 320 - Children born outside the U.S. and residing permanently in the**

179 Cal. Ed. Code Section 66021.6
U.S.; conditions under which citizenship automatically acquired 1/

Sec. 320. [8 U.S.C. 1431] (a) A child born outside of the U.S. automatically becomes a citizen of the U.S. when all of the following conditions have been fulfilled:

(1) At least one parent of the child is a citizen of the U.S., whether by birth or naturalization.

(2) The child is under the age of eighteen years.

(3) The child is residing in the U.S. in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

(b) Subsection (a) shall apply to a child adopted by a U.S. citizen parent if the child satisfies the requirements applicable to adopted children under section 101(b)(1).

INA: ACT 322 - Children born and residing outside the U.S.; conditions for acquiring certificate of citizenship 1/

Sec. 322. [8 U.S.C. 1433] (a) A parent who is a citizen of the U.S. 2/ (or, if the citizen parent has died during the preceding 5 years, a citizen grandparent or citizen legal guardian) may apply for naturalization on behalf of a child born outside of the U.S. who has not acquired citizenship automatically under section 320. The Attorney General shall issue a certificate of citizenship to such applicant 2/ upon proof, to the satisfaction of the Attorney General, that the following conditions have been fulfilled:

(1) At least one parent 3/ (or, at the time of his or her death, was) is a citizen of the U.S., whether by birth or naturalization.

(2) The U.S. citizen parent--

(A) has 4/ (or, at the time of his or her death, had) been physically present in the U.S. or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years; or

(B) has 4/ (or, at the time of his or her death, had) a citizen parent who has been physically present in the U.S. or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years.

(3) The child is under the age of eighteen years.

(4) 5/ The child is residing outside of the U.S. in the legal and physical custody of the applicant (or, if the citizen parent is deceased, an individual who does not object to the application).
(5) The child is temporarily present in the U.S. pursuant to a lawful admission, and is maintaining such lawful status.

(b) Upon approval of the application (which may be filed from abroad) and, except as provided in the last sentence of section 337(a), upon taking and subscribing before an officer of the Service within the U.S. to the oath of allegiance required by this Act of an applicant for naturalization, the child shall become a citizen of the U.S. and shall be furnished by the Attorney General with a certificate of citizenship.

(c) Subsections (a) and (b) shall apply to a child adopted by a U.S. citizen parent if the child satisfies the requirements applicable to adopted children under section 101(b)(1).

(d) In the case of a child of a member of the Armed Forces of the U.S. who is authorized to accompany such member and reside abroad with the member pursuant to the member's official orders, and is so accompanying and residing with the member--

(1) any period of time during which the member of the Armed Forces is residing abroad pursuant to official orders shall be treated, for purposes of subsection (a)(2)(A), as physical presence in the U.S.;

(2) subsection (a)(5) shall not apply; and

(3) the oath of allegiance described in subsection (b) may be subscribed to abroad pursuant to section 1701(d) of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136; 8 U.S.C. 1443a).

Application Process

Children who meet the above qualifications are known as Special Immigrant Juveniles (SIJ). To apply for a green card as an SIJ, the child, or a person filing on behalf of the child, must file:

Form I-360, Petition for Amerasian, Widow(er)s, or Special Immigrant
Form I-485, Application to Register Permanent Residence or Adjust Status

In most cases, Forms I-360 and I-485 may be filed together. See our Concurrent Filing page.

Battered Spouse, Children & Parents

As a battered spouse, child or parent, you may file an immigrant visa petition under the Violence against Women Act (VAWA). VAWA allows certain spouses, children and parents of U.S. citizens and permanent residents (green card holders) to file a petition for themselves without the abuser's knowledge. This will allow you to seek both safety and independence from the abuser. The provisions of VAWA apply equally to women and men. Your abuser will not be notified that you have filed for immigration benefits.
under VAWA.

Help is also available from the National Domestic Violence Hotline at 1-800-799-7233 or 1-800-787-3224 (TDD). The hotline has information about shelters, mental health care, legal advice and other types of assistance, including information about filing for immigration status. For more information, visit the National Domestic Violence website.

Those Eligible to File

**Spouse:** You may file for yourself if you are, or were, the abused spouse of a U.S. citizen or permanent resident. You may also include on your petition your unmarried children who are under 21 if they have not filed for themselves.

**Parent:** You may file for yourself if you are the parent of a child who has been abused by your U.S. citizen or permanent resident spouse. You may include on your petition your children, including those who have not been abused, if they have not filed for themselves. You may also file if you are the parent of a U.S. citizen, and you have been abused by your U.S. citizen son or daughter.

**Child:** You may file for yourself if you are an abused child under 21, unmarried and have been abused by your U.S. citizen or permanent resident parent. Your children may also be included on your petition. You may file for yourself as a child after age 21 but before age 25 if you can demonstrate that the abuse was the main reason for the delay in filing.

Eligibility Requirements for a Spouse

**You are:**

- married to a U.S. citizen or permanent resident abuser, or
- your marriage to the abuser was terminated by death or a divorce (related to the abuse) within the 2 years prior to filing, or
- your spouse lost or renounced citizenship or permanent resident status within the 2 years prior to filing due to an incident of domestic violence, or
- you believed that you were legally married to your abusive U.S. citizen or permanent resident spouse but the marriage was not legitimate solely because of the bigamy of your abusive spouse.

**You:**

- have been abused in the U.S. by your U.S. citizen or permanent resident spouse, or have been abused by your U.S. citizen or permanent resident spouse abroad while your spouse was employed by the U.S. government or a member of the U.S. uniformed services, or are the parent of a child who has been subjected to abuse by your U.S. citizen or permanent spouse.
- You entered into the marriage in good faith, not solely for immigration
benefits.
- You have resided with your spouse.
- You are a person of good moral character.

Eligibility Requirements for a Child

You:
- are the child of a U.S. citizen or permanent resident abuser
- were the child of a U.S. citizen or permanent resident abuser who lost citizenship or lawful permanent resident status due to an incident of domestic violence
- have been abused in the U.S. by your U.S. citizen or permanent resident parent
- have been abused by your U.S. citizen or permanent resident parent abroad while your parent was employed by the U.S. government or a member of the U.S. uniformed services
- have resided with the abusive parent
- have evidence to prove your relationship to your parent
- must provide evidence of good moral character if you are over the age of 14

Filing Process

You must complete the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, including all supporting documentation

You must file the form with the Vermont Service Center (VSC)

If you meet all filing requirements, you will receive a notice (Prima Facie Determination Notice) valid for 150 days that you can present to government agencies that provide certain public benefits to certain victims of domestic violence

If your Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant is approved and you do not have legal immigration status in the U.S., we may place you in deferred action, which allows you to remain in the U.S.

Working in the U.S.

If you have an approved Form I-360 and have been placed in deferred action, you are eligible to apply to work in the U.S. To apply to work in the U.S., you must file the Form I-765, Application for Employment Authorization, with the Vermont Service Center.

Your children listed on your approved Form I-360, may also apply for work authorization.
For more information on working in the U.S., visit our Working in the U.S. page.

**Permanent Residence (Green Card)**

If you have an approved Form I-360, you may be eligible to file for a green card. Your children listed on your approved Form I-360 may also be eligible to apply for a green card. For information about filing for a green card, see the Immigration Options for Victims of Crimes Brochure.

For more information on battered spouse, children and parents, visit our Questions & Answers: Battered Spouses & Children page.
III. Removal

Removal proceedings are commonly referred to as deportation. The removal proceeding is actually the hearing in front of an Immigrant Judge. It is during this proceeding that it is decided whether or not an immigrant should be deported from the U.S.. The person is first detained and then presented with a “Notice to Appear,” it is a summons to the Immigration Court. A copy of the Notice is filed with the Immigration Court.

A child can be placed in removal proceedings because of his status or if s/he is the child of an immigrant their parent might be placed in proceedings.

A. Removal Proceedings
   1. Arrest
      Whether a person is detained by police officers depends on the individual police departments. Some police departments do hesitate to enforce immigration laws but others aggressively enforce them. Even a routine traffic stop can result in immigration detention because of advances in immigration documentation.

      Some departments use the Memorandums of Understanding run by the Department of Homeland Security and all have access to the National Crime Information Center run by the Department of Justice which track crimes and older orders or deportation.

      In some stated federal immigration officials routinely check with local jails to prevent immigrants from being released into custody. Even if a stop does not result in a criminal conviction or even a criminal charge immigrations can still be turned over to immigration officials.

      Immigration officials may visit immigrants in jail. It is best to advise clients to do the following:

      - Ask for the agent’s identification
      - Do not answer any questions, even name, country of origin or immigration status regardless of any threats made.
      - Do not sign anything
      - If the client is asked to sign something ask for a copy but still, they should not sign anything
      - Do not lie – the person has the right to speak or say nothing but not to lie
      - Clients should say, I need to speak with a lawyer first
• If possible, give your client a letter stating that they cannot speak to anyone without you present.

2. Locating a Detainee

It can be difficult to locate a person who has been detained by immigration.

Practice Tip

Immigration officials are often unresponsive; the best matter of course is to try frequently and to be persistent

You will need the following information:

• Immigrant’s name and all aliases
• Date of birth
• A-number

FIRST

Contact ICE’s office of Deportation and Removal (ICE-DRO), their website is http://www.ice.gov/about/dro/contact.htm. This will give you all the local offices, start with the office closest to the arrest. You can also call the main number at (202) 305-2734.

SECOND

When contacting the local office ask to speak to the supervising deportation officer or field office director.

THIRD

Contact the immigrant’s consulate. International agreements require that some country’s be notified when one of their citizens are detained. To find the embassy go to: http://www.embassy.org/embassies/

FOURTH

Call detention facilities in the area near to the site of arrest.

FIFTH
If the above steps fail you may have to wait for the immigrant to call, remove any blocks from your phone so you may receive a collect call.

3. Notice to Appear

After the child is placed into removal proceedings, s/he will be served with a Notice to Appear, then s/he will be scheduled for a court date. The court date may be listed on the Notice to Appear in some instances. However, it is more likely that the court will mail the child a separate notice with the time and date of the scheduled hearing.

Practice Tip

You can check on your client’s court date by calling the immigration court’s automated hotline. You will be asked to provide the A-number. It is best to check on the date and time to be sure it has not changed. If your client misses his/her hearing, the Immigration Judge can order him/her deported because of the absence.

Hotline Number: 1-800-898-7180

There are two types of immigration court hearings: master calendar and individual hearings.

Master Hearings
- This will be the first hearing for your client
- Judge will handle future court dates
- This the time to turn in pleadings
- Administrative issues will be handled at this time
- Usually only lasts a few minutes
- Decision is not usually reached at this hearing

Individual Hearings
- Judge will be listening to testimony
- Much longer than a few minutes
- A decision is usually reached at this hearing
4. Voluntary Departure

USCIS officers are able to grant voluntary departure to avoid removal proceedings. There may be certain conditions set for the voluntary departure to be granted, such as bond or detention.

Voluntary departure is most beneficial to immigrants who have overstayed for a short time, students and individuals who do not wish to return. If the immigrant is granted voluntary departure and re-enters, the consequences of that re-entry are not the same as if s/he had an order of removal.

The time for voluntary departure may not exceed 120 days.

The application can be made to any USCIS office and may be done even after the commencement of proceedings.

**Practice Tip**

The Department of Homeland Security will usually not respond to a request for voluntary departure even though this relief is available as soon as the Notice to Appear is served. DHS prefers to allow the Immigration Judge to decide on voluntary departure and will most likely be granted in the following situations:

- Immigrant is detained
- It is unlikely the immigrant will be granted bond
- Immigrant is not eligible for other forms of relief
- Immigrant does not wish to wait for proceedings
- Immigrant is willing and able to leave the U.S.

After removal proceedings have begun, voluntary departure can only be granted if:

- Request is made at the master calendar hearing

---

180 8 C.F.R. § 240.25(a)
181 8 C.F.R. § 240.25(b)
182 8 C.F.R. § 240.25(c)
183 8 C.F.R. § 240.25(d)
Removability is conceded
Complies will all conditions
Waives all appeal rights
No other requests for relief are submitted and any petitions already submitted are retracted
Immigrant has not been convicted of an aggravated felony
Immigrant is economically able to depart
Travel documents are given to DHS

Voluntary departure can only be granted at the termination of removal proceedings if the following are met:
Immigrant can show that s/he has been of good moral character for the past five years
Immigrant has not been convicted of an aggravated felony
Immigrant has the means to travel outside the U.S.
Immigrant has been present in the U.S. for one year
Bond of at least $500 has been posted

B. How to avoid a removal order

There limited options once a person is place in removal proceedings, generally these include:

(a) Adjustment of Status,
(b) Cancellation of Removal for Non Lawful Permanent Residents,
(c) Political Asylum,
(d) Witholding of Removal,
(e) U.N. Convention Against Torture,
(f) Cancellation of Removal for Abused Immigrant Women and Children,
(g) U Nonimmigrant Visas,

(h) Temporary Protected Status

(i) Motions to Suppress Evidence of Alienage;

(j) Derivative or Acquisition of U.S. Citizenship Claims;

(k) Motions to Terminate Based on How a Person was Placed in Removal Proceedings

1. Adjustment of Status

Immigrants who have a petition pending either family-based or work-based with a current date may be able to file for adjustment of status.

EXAMPLE:

Eric is in removal proceedings but married a U.S. Citizen while on a student visa. They have not filed the necessary paperwork for adjustment of status as of his detention. The immigration judge can grant a continuance to allow Eric to file the application and wait for adjudication of the I-130 petition.

2. Cancellation of Removal for Non-Lawful Permanent Residents

3. Political Asylum

4. Withholding of Removal

5. U.N. Convention Against Torture

6. Cancellation of Removal for Abused Immigrant Women and Children

7. U Nonimmigrant visas

8. Temporary Protected Status

9. Motion to Suppress Evidence of Alienage

10. Derivative U.S. Citizen Claims

11. Motion to Terminate Based on Procedural Due Process
C. Prosecutorial discretion

You should not have to choose between one of the forms of relief and prosecutorial discretion/deferred action. If you are eligible to pursue any of the above forms of immigration relief, i.e. Cancellation of removal or Motion to Suppress, you should do so with the advice of an immigration attorney. If you are granted one of the above forms of immigration relief, you may be able to pursue lawful permanent resident status at a later date. However, not all forms of immigration relief listed above leads to lawful permanent resident status. You must consult an immigration attorney. For example, if you believe that ICE violated your constitutional rights when they arrested you, you might want to think about a Motion to Suppress evidence of alienage. If evidence of alienage is suppressed, an Immigration Judge must terminate removal proceedings. Terminating proceedings only puts you back in a position of where you were before you were arrested by ICE which is an undocumented DREAM Act student. Bringing a motion to suppress claim is extremely complex, and you should only do so at the advice of an immigration attorney.

What is Prosecutorial Discretion?

The term prosecutorial discretion is simply a term used in immigration enforcement. “Prosecutorial discretion” is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone. Immigration and Customs Enforcement (ICE) has the authority to exercise prosecutorial discretion all at stages of enforcement starting from the arrest to the issuance of a Notice to Appear to the execution of the actual removal order. For the purpose of this manual, we are limited to discussing prosecutorial discretion when a DREAM Act student has a final Order of Removal or are in Removal Proceedings with no other legal options.

ICE considers the following factors:

»» Immigration status – green card holders merit a favorable exercise of discretion;

»» Length of residence in the U.S. – the longer you lived in the U.S, the better;

»» Criminal history – ICE will factor in the severity of the criminal conduct including evidence of rehabilitation;

»» Humanitarian concerns – these factors include medical conditions affecting the DREAM Act student or his family member, the fact that the DREAM Act student entered the U.S. at a very young age, whether the DREAM Act student has any family ties in the home country, extreme youth or advanced age, and home country conditions;

»» Immigration history – these factors will include whether a DREAM Act student may have reentered the U.S. after a recent removal order, failed to appear at an immigration court hearing, and the seriousness of the immigration violation;
Likelihood of Removing the Person – for example, some home countries are not willing to repatriate all of their nationals;

Whether the Person is Likely To Become Eligible for Immigration Relief – ICE will consider whether there is a legal avenue for a person to adjust their immigration status at a later date, i.e. an immigrant visa will be available at a later date and that person can adjust while they’re living in the U.S.;

Likelihood of Achieving Enforcement Goal by Other Means – ICE will consider other options of departing the U.S. other than a removal order such as: voluntary return, withdrawal of an application for admission or voluntary departure;

Cooperation with Law Enforcement Authorities – any law enforcement authority including the U.S. Department of Labor and National Labor Relations Board;

Military Service – military service in the U.S. with honorable discharge;

Effect of the exercise of prosecutorial discretion on the individual’s future admissibility;

Community Support – letters of support from community members, i.e., congressional representative, expressing an opinion concerning or opposing removal may be considered. There is also a question of whether publicity or media advocacy will assist a request for a deferred action (defined later in this section) and that is to be determined on a case by case basis;

Resources Available to ICE – whether ICE has the resources to carry out the enforcement action in this case.

Is Prosecutorial Discretion available after the Notice to Appear has been filed?

Yes, an Immigration and Customs Enforcement (ICE) attorney may file to dismiss the hearing (with the Immigration Court) even after the initiation of removal proceedings. However, they cannot cancel the Notice To Appear, because under the regulations, they don’t have the authority to issue a Notice To Appear. An ICE attorney may file a motion to dismiss in the following circumstances:

(a.) The person is not deportable or inadmissible; (b.) The person is deceased; (c.) The person is no longer in the U.S.; (d.) The Notice to Appear was carelessly issued; (e.) Circumstances in the case have changed that it is no longer in the Government’s interest to continue removal proceedings;
Once proceedings have been initiated, only an Immigration Judge can terminate proceedings. Procedurally, the respondent's (student's) lawyer would have to file a motion to dismiss and request for time to discuss prosecutorial discretion with the Office of Chief Counsel (ICE attorney). In cases involving DREAM Act students, termination would likely fall under 8 C.F.R. § 239.2(a)(7) based on an argument that circumstances have changed where it is no longer in the Government's interest to continue to deport someone. The respondent's (student's) lawyer can point to the October 24, 2005 Memorandum from ICE Principal Legal Advisor William J. Howard stating "[that] there may be ample justification to move the Court to terminate the case and to thereafter cancel the [Notice to Appear] as improvidently issued or due to a change in circumstances such that continuation is no longer in the government interest."
D. Deferred Action

Deferred Action: What is deferred action?

Deferred Action is a discretionary decision by Immigration and Customs Enforcement (ICE) not to arrest or deport a person for immigration purposes. It is one type of prosecutorial discretion. Only ICE has the authority to grant deferred action. Even if you receive deferred action, it is not for an indefinite period of time.

Under current practice, ICE will not grant deferred action in a DREAM Act case until a student receives a final order of removal (order of deportation). Though nothing in previous memos providing guidance on deferred action require that a removal order be taken before deferred action is granted. Therefore, deferred action should be granted at any stage of a removal proceeding. In DREAM Activist.org’s experience, there have been cases in the past year where deferred action has been granted prior to a final order.

What does Immigration and Customs Enforcement (ICE) consider in granting deferred action?

The factors for consideration in a deferred action application are the same as the above factors in determining "prosecutorial discretion."

See Section on “What Does Immigration and Customs Enforcement (ICE) consider in exercising Prosecutorial Discretion?”

Do you obtain any benefits with deferred action like a green card?

Deferred action does not provide a DREAM Act student with immigration status in the U.S.. It only confers a “limbo” status and in the meantime, a DREAM Act student can apply for an Employment Authorization Document (EAD) aka “work permit” if s/he can establish an economic necessity for employment. Immigration and Customs Enforcement (ICE) does not issue Employment Authorization Documents. These are issued by a separate agency within the U.S. Department of Homeland Security, Citizenship and Immigration Services (CIS). Without a grant of deferred action, a DREAM Act student with a removal order will not be eligible for an EAD. In other words, you won’t be able to apply for a work permit unless ICE gives you deferred action.

How often has Immigration and Customs Enforcement (ICE) granted deferred action?

According to the Spanish-language newspaper, La Opinion, deferred action was granted to 542 individuals in the past year. In 2008, the Bush Administration issued 1,029 grants of deferred action compared to the current administration. The Obama Administration has granted deferred action in only 780 cases (2009) and 542 cases (2010) which is a lower number than previous years. These statistics do not represent a
breakdown of deferred action by issue, age or ethnicity.

**What is the downside to asking for deferred action if Immigration and Customs Enforcement (ICE) will only consider it after an order of removal is taken?**

While many DREAM Act students may desire a work permit, it should not be the sole reason to put yourself in removal proceedings. Requesting deferred action, which can only be done once removal proceedings have been initiated, should only be a strategy of last resort for a DREAM Act student when s/he does not have any other options left. For example, if s/he is eligible for immigration relief in the form of political asylum or cancellation of removal for non-lawful permanent residents, s/he should exhaust those forms of relief first after speaking with an immigration attorney who specializes in removal defense. Deferred action should be pursued when a DREAM Act student has no immigration relief left and is facing an order of removal by an Immigration Judge. In some jurisdictions, ICE may only consider a deferred action request when there is an order of removal. Accepting an order of removal has serious consequences if ICE denies deferred action. The consequences include immediate removal within 90 days of a Judge signing an order of removal; receiving a “bag and baggage” letter ordering a DREAM Act student to report to ICE; and upon removal, a 10-year ban from returning to the U.S., which would force a DREAM Act student to be

**Is there a form that you can use for deferred action?**

No, there is no form specific to deferred action requests. Be sure to make your request in a letter articulating the strengths and weaknesses of your case. You must include evidence in support of your request to bolster your claim that you are deserving of a favorable grant of prosecutorial discretion. The evidence must address all of the factors listed under “What does Immigration and Customs (ICE) consider in exercising Prosecutorial Discretion?” Each DREAM Act student’s case will be different, but this guide includes samples of deferred action requests.

**Where should you file the deferred action request?**

You should file the deferred action application with your local Immigration and Customs Enforcement (ICE) office with the attention to the Field Office Director (FOD). However, in order to get it to the right person, you should call the local ICE office and find out which ICE officer is in charge of the DREAM Act student’s case. Call the ICE officer and inform him/her that you would like to file an application for deferred action. The ICE officer should instruct you as to the best way to file the application.

**What happens after you file the deferred action request?**

If you are granted deferred action, Immigration and Customs Enforcement (ICE) must inform you and your attorney in writing stating the decision and its consequences. However, if you do not receive a favorable exercise of discretion, ICE is not required to
give notice to the DREAM Act student or his/her attorney. Often times, ICE will not respond to you, and in some jurisdictions, they may not necessarily confirm receipt of a request for deferred action. In the meantime, the DREAM Act student could be deported from the U.S.
E. Private Bill – Community Support

A private immigration bill is legislation introduced by a Senator or a Congressional Representative for an individual who is deserving of some form of relief after they have exhausted all administrative and judicial remedies.

Any member of Congress can introduce private legislation for a specific individual if there are compelling equities in a case. This should be done only when there are no other legal options left and the DREAM Act student is facing immediate removal from the U.S.. A private immigration bill can confer lawful permanent resident status or provide for citizenship. However, bills conferring any status are extremely rare in recent years. Still, introducing legislation alone without passage would cause Immigration and Customs Enforcement (ICE) to stay someone’s removal, and perhaps, release them from immigration custody. It is very difficult to convince a Representative or Congressperson to introduce a private immigration bill, especially without strong public support.

In general, very few private immigration bills are actually passed in Congress. If a bill does not pass and ICE has not deported that person, the bill can be reintroduced in the first session of the next Congress.

In order to determine which member of Congress you should approach, you should identify the Senator or Representative that represents the district you live in.

You can locate the appropriate Member of Congress at www.congress.org. In addition, you should also research whether that Member of Congress has ever passed private bills in the past. If your member of Congress has a policy of introducing private bills, you have a good chance of making some strong arguments particularly if there are compelling reasons in your case. Then, you should make the request in a formal written notice to your Member of Congress and follow up to confirm receipt with the staff person who deals with constituent services.
F. If the child’s parent gets removed.

PROTECTING CHILDREN

If the deportee’s children were born in the U.S., they have two choices. The citizen children may return to their parents’ home country or remain in this country with an appropriate caregiver designated by the deportee.

This may help ensure that children are not placed into child protection services and that they can travel with their parents if they are deported. It is important to plan ahead of time and include the POA with immigration papers. Make sure that birth certificates, social security cards and passports are provided for any children. If a birth certificate is needed for a child, contact the Office of Vital Statistics in your state. To download an application for U.S. passport for a minor child, go to: http://travel.state.gov/passport/get/minors/minors_834.html.
APPENDIX A – DEFINITIONS

287(g) Agreement

A Memorandum of Understanding between a local government and the Department of Homeland Security under Section 287(g) of the Immigration and Nationality Act. Under this agreement, ICE briefly trains local law enforcement agents, who are then granted limited immigration enforcement authority to investigate, apprehend and/or detain deportable immigrants. The scope of authority that a 287(g) agreement gives to local governments depends upon the specific agreement and does not override Constitutional and due process protections.

Absconder

A government term for a person with a prior deportation order that knowingly or unknowingly did not leave the country. Many —absconders‖ do not realize that they are considered fugitives and merely believe that they are undocumented. Absconders are one of the most vulnerable categories of deportable immigrants. Once detained, absconders can be deported without the benefit of a hearing in front of an immigration judge.

Aggravated Felony

A federal immigration category that includes more than 50 classes of offenses, some of which are neither —aggravated‖ nor a —felony.‖ This is one of the government’s most powerful tools for deportation because it strips an immigrant of most choices in the deportation process. An immigrant (including a lawful permanent resident) who is convicted of an offense categorized as an —aggravated felony‖ is subject to mandatory detention (no bond) and permanent mandatory deportation (no cancellation/pardon or asylum).

—Conviction‖ (for immigration purposes)

Immigration courts define —conviction‖ broadly to include dispositions where: (1) a formal judgment of guilt was entered by a court, or (2) (a) a judge or jury has found the defendant guilty, the defendant has entered a plea of guilty or nolo contendere or the defendant has admitted sufficient facts to warrant a finding of guilt and (b) the judge has ordered some form of punishment, penalty, or restraint on the immigrant’s liberty be imposed. This broad definition has been held to include some dispositions not considered a —conviction‖ by the criminal court, such as low level violations and convictions that are vacated after successful completion of rehabilitation programs.

Crime Involving Moral Turpitude

Conviction or sometimes simple admission of one or more crimes involving moral turpitude may trigger deportation for some immigrants. This immigration law term-of-art has not been defined by Congress. It has been defined by the U.S. Department of State in its Foreign Affairs Manual, and the term has also been interpreted by courts to
include offenses which are —inherently evil, immoral, vile or base. This term includes crimes which require intent to steal or defraud (such as theft and forgery offenses), crimes in which bodily harm is caused by an intentional act or serious bodily harm is caused by a reckless act (such as murder and certain manslaughter and assault offenses) and most sex offenses.

**Criminal Alien**

This term is used by the Department of Homeland Security for immigrants with convictions, no matter how minor the crime or how long ago the conviction occurred. So-called —criminal aliens‖ are aggressively targeted for deportation, which is an additional penalty after the immigrant has completed his or her criminal sentence. A —criminal alien‖ may be undocumented, applying for a green card, or a green card holder with U.S. citizen family. A wide range of offenses can define someone as a —criminal alien‖ — including a single marijuana conviction, a shoplifting violation, offenses with no time in jail, or in some cases, even admission to a crime without a conviction. Criminal aliens are typically deported after they have served their sentences. Deportation is not part of the criminal sentence, and few immigrant defendants are properly advised that a guilty plea may result in deportation.

**Deportation/Removal**

Expulsion of a noncitizen from the U.S.. Persons who can be deported include noncitizens (including greencard holders) with past criminal convictions; visa overstays; refugee/asylum seekers; and those who entered the country without inspection (jumped the border).

**Detention**

This means jail. People are detained at every step of the immigration process. Detention may occur while the immigrant is waiting adjudication of asylum or adjustment applications or pending immigration proceedings. It may occur when the immigrant is picked up by law enforcement officials and jailed without charges, or even after being ordered deported, while ICE is actively trying to remove the immigrant. The detention may also be indefinite if ICE believes that it may not be able to deport someone with an outstanding order of deportation. **Mandatory detention** (incarceration without the chance to apply for bond) applies to most immigrants with past criminal convictions, asylum seekers, and all noncitizens considered —inadmissible‖ (people physically in the U.S. who were never admitted legally). Detainees may be transferred from one part of the country to another, without regard for access to family and counsel.

**Expedited Removal**

This process was created by a law enacted in 1996. The expedited removal process allows the government to deport many noncitizens without a hearing before an
immigration judge. Expedited removal can be effected against people the government finds —inadmissible at any border entry point. It can also be effected against certain noncitizens with —aggravated felony convictions. Under expedited removal, individuals can be removed on an order issued by an immigration officer, without the opportunity to go before the immigration judge.

**Habeas Corpus Petitions:**

A writ of habeas corpus is a judicial mandate to a prison official ordering that an inmate be brought to the court so it can be determined whether or not that person is imprisoned lawfully and whether or not he should be released from custody. A habeas corpus petition is a petition filed with a court by a person who objects to his own or another's detention or imprisonment (e.g. unlawful detention).

**Institutional Removal Program (IRP)**

In 1988, the government established the Institutional Hearing Program, which was renamed the Institutional Removal Program (IRP) in 1996. Under the IRP immigration agents complete a criminal immigrant’s deportation process while he or she is in federal or state prison. The program is an efficiency measure. It allows deportable persons who are being detained on criminal matters to be taken to either an immigration courtroom which is either located in a prison or broadcast via television. The DHS and the Executive Office for Immigration Review (EOIR) work to conclude the deportation case before the immigrant completes his or her criminal sentence, so that he or she may be deported immediately upon ‘release’. IRP in theory lessens the amount of time a noncitizen spends in immigration detention. In practice, immigrants under IRP generally have little to no knowledge of the process or their rights and no legal representation.

**Lawful Permanent Resident (LPR or Greencard Holder)**

A noncitizen who has been lawfully and permanently admitted to the U.S. to live and work, but who is still subject to deportation upon a violation of the immigration laws. A —greencard—is the identification card for these lawful permanent residents, but one does not lose the status just because the physical card expires or is misplaced.

**National Crime Information Center (NCIC) Database**

This nationwide FBI-operated computerized database was originally created to enable federal, state, and local law enforcement to identify suspected criminals with outstanding warrants. In 2002, Attorney General Ashcroft authorized the use of this tool for civil immigration purposes by entering the names of absconders and individuals who did not comply with special registration into the NCIC.

**Noncitizen**

An individual who was born outside of the U.S. *unless* one of the following is true: (1)
the individual was born outside of the U.S. but has a U.S. citizen parent(s) at birth and automatically acquired U.S. citizenship; (2) the individual was born outside of the U.S. to noncitizen parent(s) but automatically derived citizenship when the noncitizen parent(s) became U.S. citizen(s) while individual was still a minor; or (3) the individual was born outside of the U.S. but lawfully immigrated to the U.S. and later was naturalized (went through the process of applying to citizenship, passing a civics test, and being sworn in). Noncitizens include greencard holders, refugees, asylees, temporary visitors, and the undocumented.

**Post Order Custody Review**

A process precipitated by legislation mandating detention of certain deportable immigrants unless they can show that they are neither a danger to the community nor a flight risk. Under this process, the Office of Detention and Removal officers review the cases and backgrounds of these individuals and decide to release or continue detention. The process is very similar to parole review in the criminal justice system.

**Prosecutorial Discretion**

The permission granted to the attorneys employed by the Departments of Justice and Homeland Security to use their independent judgment to not place an otherwise deportable person in removal/deportation proceedings. The attorneys may suspend or even terminate a deportation proceeding, postpone a deportation, release someone from detention, or even deprioritize the enforcement of immigration laws against an individual because enforcement does not serve the interests of justice. In exercising prosecutorial discretion, the attorneys generally consider such factors as the length of the immigrant's stay in the U.S., honorable service in the U.S. military and community interest in the immigrant.

**Raids**

An informal term used to describe larger-scale operations in which ICE questions and/or arrests people whom they suspect may be deportable en masse. In late 2006, ICE escalated raids at workplaces, residences, and public areas, often in partnership with local parole, probation and other agencies. Typically, DHS claims to be looking for a particular person or persons, however, in practice many more people that the original suspect or arrested.

**Special Interest Detainees**

This term refers to a group of mostly Arab, South Asian, North African and Muslim detainees, who were held initially under suspicion of terrorism, and later on mostly minor immigration charges after 9/11. None of the special interest detainees were ever charged with activities related to 9/11.

**Undocumented**
Undocumented persons are noncitizens who have no government authorization to be in this country. Undocumented people include people who crossed the border without permission, people who came on valid visas but remained past their authorized period of stay and former LPRs (greencard holders) who were ordered to be deported. An undocumented person might have received work authorization (for example, upon filing an application for asylum or other status) from the federal government, but that does not necessarily mean he is now out of this category.

GOVERNMENT AGENCIES AND POSITIONS:

The following is a list of people whom immigrants might encounter during the deportation process. This is not a complete list, but rather is a list of people who are most often involved in detention and/or deportation court cases. Also, note that there may be local differences in the specific structure and practical functions of these actors. For example, in some districts, deportation officers may have more power to make custody decisions, while in others field office directors take a more active role. You should find the local structure

Investigations, Detention, and Deportation:

Deportation Officer (ICE)

Each person in immigration detention or in removal proceedings is assigned to a deportation officer, or DO. The DO is a good source of information about the individual. This officer knows whether an immigrant will be detained, transferred or deported and when such actions may occur. The deportation officer may make or be involved in custody determinations. The Deportation Officers can also be called upon to assist with detention conditions, such as medical and mental health issues.

Special Agents

These agents investigate, arrest and detain immigrants, initiating the deportation process. Special agents often gather information and conduct surveillance in preparation for local raids.

Special Agent-in-Charge (ICE)

These agents sometimes may make custody decisions, and at times may be in charge of arrangements for deportation. If a different agency is interested in a person in detention, then the Special Agent-in-Charge may oversee and coordinate with that agency.

Officer-in-Charge (ICE)

These supervisory officers may be in charge of a specific facility. OICs can make
custody decisions and have the power to respond to abusive detention conditions.

**Field Office Director (ICE)**

This person controls the direction of a district office and supervises the operations of his or her region. The FOD supervises ICE employees' custody determinations, such as whether to detain, parole or grant bond as well as District Counsel/Trial Attorney's decisions, including whether to appeal a decision by an Immigration Judge. The field office director also has the power to exercise prosecutorial discretion, including whether to begin removal proceedings and whether to grant deferred action; plans — special projects, including enforcement Alabama Appleseed Center for Law & Justice projects; works with Department of Justice attorneys representing the government in federal appeals; and reports to ICE headquarters.

**Office of Refugee and Resettlement (Dept. of Health & Human Services)**

The Office of Refugee Resettlement provides people in need with critical resources to assist them in becoming integrated members of American society. This includes unaccompanied immigrant children, refugees, aylees, victims of human trafficking, survivors of torture, Cuban/Haitian entrants and Ameraisans.

**Department of Immigrant Health Services (DIHS)**

Among other activities, DIHS monitors special health issues in detention centers. For example, DIHS monitored pregnant women who were arrested and detained after a raid in Maryland.

**During a deportation (removal) proceeding:**

**Trial Attorney or Office of Chief Counsel (TA or OCC)**

This is the DHS/ICE employee who represents the government in a removal case. The attorney's job is similar to that of a prosecutor in criminal court.

**Immigration Judge (IJ)**

The Immigration Judge is a DOJ employee who has been appointed by the Attorney General to the Executive Office of Immigration Review. This judge presides over the immigration courtroom. The Immigration Judge decides whether an immigrant is eligible for bond and if so, whether to grant bond; decides whether an immigrant is removable/deportable and eligible for relief from deportation; takes evidence, including testimony; and orders deportation or grants relief from deportation.

**Member of Board of Immigration Appeals (BIA)**

This DOJ employee is appointed by the Attorney General to the Executive Office for
Immigration Review.

During federal court review of detention or deportation order:

**DOJ's Office of Immigration Litigation (OIL), US Attorney or Assistant US Attorney (USA or AUSA), Solicitor General**

These are the lawyers representing the government in federal appeals of detention or deportation cases. In most federal district courts and Court of Appeals cases, OIL represents the government. When a case goes to the Supreme Court, the Solicitor General usually represents the government.

**District Court Magistrate or Judge**

These judges decide cases in federal district court, including habeas corpus petitions.

**Court of Appeals Judges**

These judges decide cases in federal Courts of Appeals, including petitions for review challenging orders of removal/deportation and appeals from federal district courts, usually in 3-judge panels.

**Supreme Court Justices**

The nine Justices of the U.S. Supreme Court decide the limited cases that they choose to consider.

**Adjudicate**

Adjudicate refers to making a formal judgment or decision about a problem or disputed matter.

**Adversarial Proceeding**

An adversarial proceeding is a legal system where two advocates represent their parties’ positions before a judge, who acts as a neutral decision maker. In removal (deportation) proceedings, the U.S. Department of Homeland Security is represented by an attorney from the Office of Chief Counsel. Individuals have a right to representation, but an attorney will not be provided for them if they cannot afford one.

**Board of Immigration Appeals (BIA)**

The Board of Immigration is the highest administrative body for interpreting and applying immigration laws. Generally, an individual can appeal a final decision mad in removal proceedings by an immigration judge to the BIA. The BIA usually decides appeals by conducting a “paper review” of cases instead of hearing oral
arguments.

**Circuit Court of Appeals**

Circuit Court of Appeals are federal courts that hear appeals of some decisions issued by the Board of Immigration Appeals (BIA). There are currently thirteen U.S. Circuit Courts of Appeals.

**Conditional Permanent Resident Status**

Under previous DREAM Act proposals, individuals would be placed on a conditional permanent residence status for a certain time period before it can be removed. This is to ensure that individuals fulfill all requirements that are set forth by the DREAM Act before they could gain a permanent resident status. Individuals with conditional permanent resident status would be eligible for work study and student loans except for public benefits.

**Consulate**

A consulate is a government office charged with representing the country’s interests overseas and providing services to citizens living abroad. Consulates are responsible for issuing passports and travel documents to its citizens living abroad.

**Continuance**

A continuance is the postponement of a hearing for a later date. This is requested by either or both parties in dispute.

**Deferred Action**

Deferred action is a discretionary act by the U.S. Department of Homeland Security to not pursue a removal order against or physically deport a particular person. It cannot be granted by the immigration judge.

**U.S. Department of Homeland Security (DHS)**

The U.S. Department of Homeland Security (DHS) is a cabinet department of the federal government engaged in areas involving counterterrorism, border security, immigration enforcement, and disaster preparedness. On March 1, 2003, DHS absorbed former immigration and naturalization services and provides immigration related services. DHS houses the Immigration & Customs Enforcement (ICE), Citizenship and Immigration Services (CIS) and Border and Customs Protection (CBP).

**U.S. Department of Labor**

The U.S. Department of Labor is a department responsible for occupational safety,
wage and hour standards, unemployment insurance benefits, reemployment services, and some economic statistics.

**Discretionary Decision**

A discretionary decision refers to the power or right to make official decisions using reason and judgment to choose from among acceptable alternatives. Law enforcement officers, the president, immigration judges, and administrative agencies are among those who often carry out these types of decisions. Not all decisions are subject to discretion.

**Form EOIR-33**

Known as a Change of Address form, EOIR-33 is filed when an individual changes address during a removal proceeding. This form can be found at www.justice.gov.

**Executive Office for Immigration Review (EOIR)**

The Executive Office for Immigration Review (EOIR) serves the purpose of deciding immigration cases. The EOIR is comprised of Immigration Courts and the Board of Immigration Appeals.

**Green Card**

A green card is used to informally refer to an individual’s permanent residence immigration status. An individual with a green card gives a person the right to live and work in the U.S. provided that they maintain lawful permanent resident status.

**Immigrant Visa**

An immigrant visa is a type of visa which permits an individual to become a lawful permanent resident or a green card holder. Some people must obtain immigrant visas overseas at a U.S. consulate while others are eligible to apply for adjustment of status in the U.S..

**Immigration Courts**

Immigration courts are administrative courts that conduct removal (deportation) proceedings. An immigration judge conducts removal proceedings.

**Immigration and Customs Enforcement (ICE)**

The Immigration & Customs Enforcement (ICE) is a federal law enforcement agency under the U.S. Department of Homeland Security (DHS), responsible for investigating and enforcing U.S. immigration law.
Immigration Judge

Immigration judges conduct formal removal (deportation) proceedings to determine whether an individual should be allowed to remain in the U.S. or should be removed (deported). Their decisions are final unless appealed or certified to the Board of Immigration Appeals.

Jurisdiction

In removal proceedings, immigration courts have jurisdiction over an individual. This means that they have the official power to make legal decisions and judgments.

Limbo

A legal limbo may occur when laws or court rulings leave an individual without any form of remedy. For example, when an individual is granted deferred action, s/he will not be removed but s/he will also not have a lawful status in the U.S..

Motion to Dismiss or Terminate

A motion to dismiss is a party’s request to a court to dismiss a case.

National Labor Relations Board

The National Labor Relations Board is an agency of the U.S. whose responsibility is to conduct elections for labor union representation and investigating and remedying unfair labor practices.

Principal Legal Advisor

The Office of the Principal Legal Advisor is the part of the Department of Homeland Security (DHS) which represents its interests before the Executive Office for Immigration Review. The Office of the Principal Legal Advisor serves a role in removal proceedings similar to that of a prosecutor in criminal matters.

Order of Removal

An order of removal is an administrative order which allows the government to deport a person. Removal orders can be issued following a removal hearing before an immigration judge or in some cases without a formal hearing before an immigration judge.

Pleadings

At some point during removal proceedings, the immigration judge will ask the individual to plead to the allegations and charges listed on the Notice to Appear. An individual has the right to deny all allegations and charges. Denying an allegation or charge does not
mean that you are claiming that it is untrue, it means that you are asking the government to submit proof of the immigration charges. The government must prove the charges and allegations by clear and convincing evidence.

**Removal (Deportation) Proceeding**

A removal (deportation) proceeding is comprised of several court hearings, which determine whether or not an individual will be deported from the U.S.. An individual, if eligible, may apply for immigration benefits and if granted, provide relief from removal.

**Citizenship and Immigration Services (USCIS)**

USCIS is a part of the U.S. Department of Homeland Security tasked with adjudicating applications for immigration benefits including work permits, naturalization certificates, and lawful permanent residence cards, i.e., green cards.

**Voluntary Return (Departure)**

A Voluntary Return/Departure allows an individual to depart the U.S. without receiving a final order of removal. This allows an individual to leave at his/her own expense. However, failing to depart within the period granted can result in severe penalties. Even if timely departing, individuals may still
# Table of Reference Authorities

## Cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ananeh-Firempong v. INS,</td>
<td>62</td>
</tr>
<tr>
<td>766 F.2d 621, 626, 2 Immigr. Rep. (1st Cir. 1985)</td>
<td></td>
</tr>
<tr>
<td><strong>Argumendo-Perez v. U.S.</strong>,</td>
<td>127</td>
</tr>
<tr>
<td>326 F.App 293 (5th Cir.)</td>
<td></td>
</tr>
<tr>
<td>Arizona v. United States,</td>
<td>1</td>
</tr>
<tr>
<td>567 U.S. ___ (2012)</td>
<td></td>
</tr>
<tr>
<td>Bastanipour v. INS,</td>
<td>62</td>
</tr>
<tr>
<td>980 F.2d 1129, 1132 (7th Cir. 1992)</td>
<td></td>
</tr>
<tr>
<td>Bucur v. INS,</td>
<td>61</td>
</tr>
<tr>
<td>109 F. 3d 399, 405 (7th Cir. 1997)</td>
<td></td>
</tr>
<tr>
<td>Chadwick v. State Bar,</td>
<td>103</td>
</tr>
<tr>
<td>49 Cal. 3d 103, 110, 776 P.2d 240, 260 Cal.Rptr. 538 (1989)</td>
<td></td>
</tr>
<tr>
<td>Chen v. Gonzales,</td>
<td>59</td>
</tr>
<tr>
<td>490 F.3d. 180 (2nd Cir. 2007)</td>
<td></td>
</tr>
<tr>
<td>Contreras-Aragon v. INS,</td>
<td>132</td>
</tr>
<tr>
<td>952 F.2d. 1088 (9th Cir.1988)</td>
<td></td>
</tr>
<tr>
<td>Ghaly at 1431</td>
<td>55</td>
</tr>
<tr>
<td><strong>Gideon v. Wainwright</strong>,</td>
<td>131</td>
</tr>
<tr>
<td>372 U.S. 335 (1963)</td>
<td></td>
</tr>
<tr>
<td>Gonzales-Alvarado v. INS,</td>
<td>127</td>
</tr>
<tr>
<td>39 F.3d 245 (1994)</td>
<td></td>
</tr>
<tr>
<td><strong>Guerrero-Perez v. INS</strong>,</td>
<td>73</td>
</tr>
<tr>
<td>242 F.3d 727 (7th Cir. 2001)</td>
<td></td>
</tr>
<tr>
<td><strong>INS v. Elias-Zacarias</strong>,</td>
<td></td>
</tr>
<tr>
<td>502 U.S. 478 (1992)</td>
<td>passim</td>
</tr>
<tr>
<td>Jacinta v. INS,</td>
<td>129</td>
</tr>
<tr>
<td>208 F.3d 725 (9th Cir. 2001)</td>
<td></td>
</tr>
<tr>
<td><strong>Lassiter v. DSS</strong>,</td>
<td>132</td>
</tr>
<tr>
<td>452 U.S.18 (1981)</td>
<td></td>
</tr>
<tr>
<td>Leng May Ma v. Barber</td>
<td>122</td>
</tr>
<tr>
<td><strong>M.A. v. USINS</strong>,</td>
<td>57</td>
</tr>
<tr>
<td>858 F.2d 210, 6 Immigr. Rep. A2-45 (4th Cir. 1988)</td>
<td></td>
</tr>
<tr>
<td><strong>Mathews v. Diaz et al.</strong>,</td>
<td>2</td>
</tr>
<tr>
<td>426 U.S. 67, 81 (1976)</td>
<td></td>
</tr>
<tr>
<td>Mayor of New York v. Miln,</td>
<td>111</td>
</tr>
<tr>
<td>36 U.S. 102 (1837)</td>
<td></td>
</tr>
<tr>
<td><strong>McAlister v. Attorney General</strong>,</td>
<td>74</td>
</tr>
<tr>
<td>444 F.3d. 178 (3rd Circuit 2006)</td>
<td></td>
</tr>
<tr>
<td>McMullen v. INS,</td>
<td>60</td>
</tr>
<tr>
<td>656 F.2d. 1312, 1315 n.8 (9th Cir. 1991)</td>
<td></td>
</tr>
<tr>
<td><strong>Mitev v. INS</strong>,</td>
<td>55</td>
</tr>
<tr>
<td>67 F.3d 1325, 1300 (7th Cir. 1995)</td>
<td></td>
</tr>
</tbody>
</table>
Negusie v. Holder.......................................................................................... 73
Orlando-Hernandez v. Thornburgh,
   919 F.2d. 549 (9th Cir. 1990) ................................................................ 132
Osaghae v. INS............................................................................................. 55
Perales v. Thornburgh,
Perez-Funez v. District Director, INS,
   619 F.Supp. 656 (C.D. Cal. 1985) ......................................................... 132
Perez-Olano v. Holder.................................................................................... 46
Royalton College, Inc. v. Clark,
Sale v. Haitian ............................................................................................... 74
Sale v. Haitian Centers Council ................................................................. 66
Scott v. Illinois,
   440 U.S. 367 (1979) ............................................................................. 131
Selimi v. INS,
   312 F.3d 854, 861 (7th Cir. 2002) ....................................................... 123
Singh v. INS,
   315 F.3d. 1186 (9th Cir. 2003) ............................................................. 53, 60
Singh-Kaur v. Ashcroft,
   365 F.3d. 293 (3d. Cir. 2004) ............................................................... 75
Sosa-Martinez v. United States AG,
   420 F.3d 1338, 1341 (11th Cir. 2005) ..................................................... 103
Tagaga v. INS,
   217 F.3d. 646 (9th Cir. 2000) ............................................................. 58, 61
the Passenger Cases,
   48 U.S. 283 (1849) ............................................................................ 111
United States v. Wong Kim Ark,
   169 U.S. 649 (1898) ........................................................................... 4
Yamataya v. Fisher ....................................................................................... 108
Yu v. Brown,
   101 F.3d. 716 (D.C. Cir. 1996) ............................................................ 44

Statutes
California DREAM Act.................................................................................. 169
California Education Code ........................................................................ 168
California Health and Safety Code Section 123800 .................................. 157
CALIFORNIA WELFARE AND INSTITUTIONS CODE
   § 4512 (a) ............................................................................................. 163
Support our Law Enforcement and Safe Neighborhoods Act (Arizona S.B. 1070) .... 1

Other Authorities
AB-130 ...................................................................................................... 169
AB-540 ...................................................................................................... 168
American Convention on Human Rights ................................................. 51
Convention Against Torture ................................................................. 51, 180, 181
Convention on the Rights of the Child,
International Covenant on Civil and Political Rights ............................... 51
Matter of Brandon’s Professional Schools, 11 l. and N. Dec.397 (Reg. Comm’r 1965). 89
Matter of Franklin Pierce College, 10 l. and N. Dec. 659 (reg. Comm’r 1964) .... 90
Matter of Hranka .................................................................................. 121
Matter of Kasinga ............................................................................. 3, 53, 63
Matter of Khourn .................................................................................. 127
Matter of Luna-Lorezano ..................................................................... 63
Matter of Medina .............................................................................. 127
Matter of Sanchez and Escobar, 19 I&N Dec. 276 ..................................... 54
Matter of S-K 23 I&N Dec. 936 (BIA 2006) ............................................. 75
U.S.T.S. 6223 .................................................................................. 50, 52
The Convention on Protection of Children and Co-operation in Respect of Inter-country
Adoption (Hague Adoption Convention) .................................................. 17
U.N. High Comm’ner on Refugees The Principle of Non-Refoulement as a Norm of
Customary International Law. Response to the Questions Posed to UNHCR by the
Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR
1938/93, 2 BvR 1953/93, 2 Bv R 1954/93, ¶ 1 ........................................... 50
Universal Declaration on Human Rights .................................................. 51

Regulations

24 C.F.R. 5.653(b)(1) ............................................................................... 153
28 CFR 45.735 - 7 ............................................................................. 134
8 CFR § 204.1(f) ................................................................................ 42
8 CFR § 204.11(c) ............................................................................ 29
8 CFR § 292.1 .................................................................................. 132
8 CFR § Sec. 204.11 (d) .................................................................... 40
8 CFR § Sec. 204.11(b) .................................................................... 37
8 CFR 1.1(f) .................................................................................... 134
8 CFR 103.2(a)(3) .......................................................................... 132
8 CFR 103.5 .................................................................................. 46, 48, 49