9 FAM 42.42
NOTES

(CT:VISA-2085; 04-28-2014)
(Office of Origin: CA/VO/L/R)

9 FAM 42.42 N1 NOTICE OF PETITION APPROVAL

(CT:VISA-1415; 04-02-2010)

a. A consular officer must not issue an immigrant visa (IV) without receipt from the Department of Homeland Security (DHS) of an approved immigrant visa petition:
   (1) Form I-130, Petition for Alien Relative;
   (2) Form I-600, Petition to Classify Orphan as an Immediate Relative;
   (3) Form I-800, Petition to Classify Convention Adoptee as an Immediate Relative;
   (4) Form I-140, Immigrant Petition for Alien Worker; or
   (5) Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant.

b. In emergency situations only, consular officers may issue a visa based on the following:
   (1) Cable notification of such approval;
   (2) Official notification Form I-797, Notice of Action, of such approval;
   (3) An electronic case record provided by the National Visa Center (NVC); or
   (4) Faxed notice of approval of Form I-600 received directly from the approving DHS office.

9 FAM 42.42 N2 PETITION VALIDITY

9 FAM 42.42 N2.1 When Relationship Is Terminated

(CT:VISA-1617; 01-13-2011)

Unless an application is terminated pursuant to INA 203(g) (see 9 FAM 42.83) or revoked pursuant to 8 CFR 205.1, the approval of a petition to classify an alien as an immediate relative under INA 201(b) or a preference applicant under INA

203(a)(1), (2), (3), or (4) must remain valid for the duration of the relationship to the petitioner, and of the petitioner's status, as established in the petition. A petition filed by a battered or abused spouse or child under INA 204(a)(1)(A)(iii)(I) or INA 204(a)(1)(B)(iii), however, may not be revoked solely due to termination of the relationship.

9 FAM 42.42 N2.2 Death of Petitioner with Petition Pending

(CT:VISA-1676; 09-06-2011)

USCIS regulations allow for the automatic conversion of a Petition for Alien Relative, Form I-130, to a Petition for Amerasian, Widow(er), or Special Immigrant, Form I-360, upon the petitioner's death in the case of an immediate relative spouse (now widow(er)) of a U.S. citizen. No further action is required on the part of USCIS to automatically convert the petition, nor does any revocation and reinstatement need to be performed. See 8 CFR 204.2(h)(2).

9 FAM 42.42 N2.3 Widow(er)s with Petition Pending

(CT:VISA-1617; 01-13-2011)

Widow(er)s married less than two years may also self petition, and are included in the auto conversion regulation. Children of the widow(er) are also included on the widow(er)'s Form I-130/Form I-360 converted petition without the need for a separate I-360 or I-130 petition (see the 2010 FY DHS Approps Act, Public Law No 111-83, Section 568(c)).

9 FAM 42.42 N2.4 Petitioner Killed in September 11, 2001 Terrorist Attack

(CT:VISA-1617; 01-13-2011)

Under section 421(b)(1)(B)(i) of the USA PATRIOT Act, a petition approved for the spouse or child, son, or daughter of an alien killed in the September 11, 2001 terrorist attacks must remain valid indefinitely and continues as if the petitioner had not died. The beneficiary may retain his or her priority date.

9 FAM 42.42 N3 FAMILY-BASED PETITIONS UNDER USA PATRIOT ACT

9 FAM 42.42 N3.1 When Family-based Petition Has Been Filed

(CT:VISA-1415; 04-02-2010)

a. Section 421(b) of the USA PATRIOT Act preserves immigration benefits for certain surviving family members of a LPR who died as a result of the September 11, 2001 terrorist attacks for whom petitions had been filed on or before September 11, 2001.

b. Under Section 421 of the Act, the spouse or child may self-petition for special immigrant status. (See 9 FAM 42.32(d)(9) N3.) The derivative child of such applicant must follow-to-join the principal applicant by September 11, 2003.

c. Under Section 423 of the Act, the petition for the spouse or child remains valid indefinitely and the applicant may continue to be processed as if the LPR had not died. The beneficiary may retain his or her priority date.

d. Under Section 424 of the Act, any alien who is the beneficiary of a petition filed on or before September 11, 2001, and whose 21st birthday occurs after September 30, 2001, must be considered to be a child for 45 days after the alien's 21st birthday.

9 FAM 42.42 N3.1-1 Applying for Status Under USA PATRIOT Act

(CT:VISA-1617; 01-13-2011)

Under Section 421, applicants must file a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, with the Department of Homeland Security (DHS) service center that has jurisdiction over their place of residence. A new petition is not required to retain the priority date already granted.

9 FAM 42.42 N3.1-2 Consular Processing

(CT:VISA-1617; 01-13-2011)

a. Immigrant Visa (IV) processing under Section 421 of the USA PATRIOT Act is standard once the approved Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, is received from DHS via National Visa Center (NVC), except no Form I-864, Affidavit of Support Under Section 213A of the Act, is required and INA 212(a)(4) (8 U.S.C. 1182(a)(4)) does not apply.

b. IV Processing is standard once the priority date becomes current and post receives from the NVC Form I-130, Petition for Alien Relative, filed by the lawful permanent resident (LPR) on or before his or her death on September 11, 2001, except no Form I-864, Affidavit of Support Under Section 213A of the Act, is required and INA 212(a)(4) (8 U.S.C. 1182(a)(4)) does not apply. Applicants will be issued IR-1 visas. As such petitions remain valid for years and are already in the "pipeline," there will be no notation on the petition that

beneficiaries continue to qualify under the USA PATRIOT Act despite the death of the petitioner. This information would likely only come to a consular officer's attention during document collection and the IV interview.

c. Under 423(b) of the Act, petitions for a spouse, child or unmarried son or daughter remain valid indefinitely and may continue to be processed as if the LPR petitioner had not died. The beneficiary retains his or her priority date.

d. Under 424 of the Act, a child who is the beneficiary of a petition filed prior to September 11, 2001, must be considered a child for 45 days after the alien's 21st birthday.

e. Posts should annotate visas issued under the USA PATRIOT Act as follows:

"SP—beneficiary of section _____, USA PATRIOT ACT"

9 FAM 42.42 N3.2 When No Family-based Petition Had Been Filed

(CT:VISA-1415; 04-02-2010)

Under Section 423(a) of the USA PATRIOT Act, if no family-based petition was filed for a surviving spouse, child or adult son or daughter of a LPR killed in the September 11 attacks, such alien may file a self-petition using Form I-130, Petition for Alien Relative. The applicant will be processed for an IV as if he or she would be permanent resident had not he or she died as a result of the September 11 attacks. In addition to the usual documentary requirements, such petitioners and derivatives must demonstrate that they were present in the United States on September 11, 2001, that the spouse or parent was killed as a result of the September 11 attacks (see 9 FAM 40.1 N12), and that the LPR had status on September 11, 2001.

9 FAM 42.42 N3.2-1 How to Apply

(CT:VISA-1415; 04-02-2010)

The applicant must file a Form I-130, Petition for Alien Relative, with the Department of Homeland Security (DHS) service center that has jurisdiction over the applicant's place of residence. It is, however, likely that any eligible beneficiaries are in the United States and will file at a DHS office.

9 FAM 42.42 N3.2-2 Consular Processing

(CT:VISA-1435; 05-28-2010)

Immigrant Visa (IV) processing is standard once an approved petition is received. Under Section 213A of the Act, no Form I-864, Affidavit of Support Under Section 213A of the Act, may be required and applicants are exempt from INA 212(a)(4) (8 U.S.C. 1182(a)(4)) ineligibility. The class of admission codes should be as if a normal second preference visa.

9 FAM 42.42 N3.3 Cases for Which Both the USA PATRIOT Act and the Child Status Protection Act Apply

(CT:VISA-1568; 10-04-2010)

For further information on cases in which both the USA PATRIOT Act and the Child Status Protection Act (CSPA) apply, see 9 FAM 42.42 N12.8.

9 FAM 42.42 N4 EMPLOYMENT PREFERENCE

(CT:VISA-1415; 04-02-2010)

Unless an application is terminated pursuant to INA 203(g) (8 U.S.C. 1153(g)) (see 9 FAM 42.83 N2.1 and 9 FAM 42.83 PN5.1) or is revoked under 8 CFR 205.1, the approval of an employment preference petition based on an approved labor certification is valid indefinitely until the alien immigrates or adjusts status.

9 FAM 42.42 N4.1 Change in Job Location

(CT:VISA-677; 01-25-2005)

Except for a Schedule A labor certification, which is valid anywhere in the United States, a labor certification is valid only for the area within normal commuting distance of the site of the original offer of employment. (Any location within a Metropolitan Statistical Area is deemed to be within normal commuting distance.) If there is a change in job location, the consular officer must return the petition to the DHS jurisdiction office for action, and the petitioner must file a new petition with the DHS Service Center having jurisdiction over the intended place of employment.

9 FAM 42.42 N4.2 Change of Employer

(CT:VISA-677; 01-25-2005)

If the beneficiary of an approved petition changes employers, the consular officer should send the petition to the DHS jurisdictional office. DHS will reaffirm the validity of a previously approved petition only when there is a successor-ship in interest (i.e., when the business is merged, acquired, or purchased by another business). In addition, the new employer must offer the same wages and working conditions, offer the beneficiary the same job as stated on the original labor certification, and must continue to operate the same type of business as the original employer.

9 FAM 42.42 N4.3 Company Name Change

(CT:VISA-677; 01-25-2005)

A situation may arise whereby a petitioning business will have changed its name between the time a petition is approved and the date of the beneficiary's visa issuance. In such instances, DHS does not need to review the petition or issue any further documentation if the only change is the change in the name of the company. If the consular officer is satisfied that the evidence presented makes clear that only the company name has changed, as opposed to a change of ownership or company location, DHS need not be consulted. The visa must be annotated; e.g., "abc, inc. formerly xyz, inc."

9 FAM 42.42 N5 SELF-PETITIONING FOR IMMEDIATE RELATIVE (IR) OR FAMILY PREFERENCE STATUS

9 FAM 42.42 N5.1 Widow/Widower of U.S. Citizen

(CT:VISA-1568; 10-04-2010)

a. The spouse of a deceased U.S. citizen may file a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, for classification as an immediate relative under INA 201(b) (8 U.S.C. 1151(b)) provided the spouse:

   (1) Was the U.S. citizen’s legal spouse;

   (2) Was not legally separated at the time of the spouse’s death;

   (3) Has not remarried; and

   (4) Either files a petition under INA 204(a)(1)(A)(ii) (8 U.S.C. 1154(a)(1)(A)(ii)) within two years of the spouse’s death; or

   (5) Is the beneficiary of a Form I-130, Petition for Alien Relative, filed on the widow(er)’s behalf by the U.S. citizen spouse prior to his or her death. Such petitions will automatically convert to a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, so long as, on the date of the U.S. citizen spouse’s death, the beneficiary qualified as an immediate relative under the INA.

b. The child of a qualifying widow or widower is also entitled to status as a derivative if accompanying or following-to-join the principal beneficiary.

9 FAM 42.42 N5.2 Battered and/or Abused Spouse or Child of U.S. Citizen or Lawful Permanent Resident (LPR)

9 FAM 42.42 N5.2-1 General

(CT:VISA-1568; 10-04-2010)

Section 40701 of the Violent Crime Control Act (Public Law 103-322), also known as the Violence Against Women Act of 1994 (VAWA), signed into law on September 13, 1994, amended INA 204 (8 U.S.C. 1154) to allow certain spouses and children of U.S. citizens and permanent resident aliens to self-petition for immediate relative (IR) and family second preference classification. Although it is anticipated that most applicants will seek adjustment of status, some aliens may apply for visas. (See 9 FAM 42.42 PN4.)

9 FAM 42.42 N5.2-2 Requirements for Battered/Abused Spouse or Child

(CT:VISA-1435; 05-28-2010)

The alien spouse or child who has been battered by, or subjected to extreme cruelty committed by, a U.S. citizen or permanent resident spouse or parent may file a petition for IR or family second preference classification if the:

(1) Alien is residing in the United States with the spouse or parent;

(2) Alien is of good moral character;

(3) Alien may be classified as a spouse or child under INA 201(b)(2)(A)(i) (8 U.S.C. 1151(b)(2)(A)(i)) or INA 203(a)(2)(A) (8 U.S.C. 1153(a)(2)(A));

(4) Marriage was entered into in good faith;

(5) Alien or the alien's child has been battered by, or has been the subject of extreme cruelty perpetrated by the alien's spouse; and

(6) Alien's deportation would result in extreme hardship to the alien or the alien's child.

9 FAM 42.42 N5.2-3 Priority Date of Self-Petition

(CT:VISA-1910; 10-02-2012)

The priority date of a self-petition is the date on which the petition is properly filed, provided it is properly signed and executed, the required fee is attached, and it otherwise complies with 8 CFR 103.2. If the alien is the beneficiary of an earlier-filed visa family-based visa petition by the abuser to accord the self-petitioner immigrant classification as his or her spouse or child, the earlier priority date may be assigned.

9 FAM 42.42 N5.2-4 Effect on Other Approved Petitions

(CT:VISA-1415; 04-02-2010)

The approval of a self-petition has no effect on a relative petition. A spouse or child may be both the beneficiary of a self-petition and the beneficiary of a relative visa petition filed by the abuser. Qualified persons may seek immigrant visas (IVs) based on either petition whichever is most advantageous.

9 FAM 42.42 N5.2-5 Spousal Self-Petitions Based on Abuse of Child

(CT:VISA-1415; 04-02-2010)

A spouse may file a self-petition based on abuse committed against the spouse's child born in wedlock, a stepchild, a legitimate child, a child born out of wedlock, or an adopted child.

9 FAM 42.42 N5.2-6 Petition Conversion

(CT:VISA-1415; 04-02-2010)

a. A self-petition on behalf of a child will be automatically converted and the priority date will be preserved in the following instances:

   (1) The approved self-petition for IR classification for a child of a U.S. citizen must be automatically converted to a second or fourth preference petition when the self-petitioner either reaches 21 years of age or marries; and

   (2) The approved self-petition for second preference status for a child of a lawful permanent resident (LPR) must be automatically converted to a petition for classification as the unmarried son or daughter of a LPR when the unmarried self-petitioner reaches 21 years of age.

b. There is, however, no automatic upgrade of the second preference petition to IR classification if the abuser becomes a U.S. citizen, although the abused child can file a new self-petition for IR classification. Renunciation of citizenship or abandonment of LPR status by the abuser will not affect the validity of an approved petition.

9 FAM 42.42 N5.2-7 Where to File a Petition

(TL:VISA-485; 11-06-2002)

See 9 FAM 42.42 PN4.

9 FAM 42.42 N6 IMMEDIATE RELATIVE (IR) PETITIONS

(CT:VISA-1415; 04-02-2010)

See 9 FAM 42.21 N2.1.

9 FAM 42.42 N7 ORPHAN PETITIONS

(TL:VISA-470; 10-07-2002)

See 9 FAM 42.21 N13.2.

9 FAM 42.42 N8 FAMILY-SPONSORED PETITIONS

(TL:VISA-470; 10-07-2002)

See 9 FAM 42.31 Notes.

9 FAM 42.42 N9 EMPLOYMENT-BASED PETITIONS

(CT:VISA-1415; 04-02-2010)

See 9 FAM 42.32(a) Related Statutory Provisions; 9 FAM 42.32(b) Related Statutory Provisions; 9 FAM 42.32(c) Related Statutory Provisions; 9 FAM 42.32(d)(1) Related Statutory Provisions; 9 FAM 42.32(d)(2) Related Statutory Provisions; 9 FAM 42.32(d)(3) Related Statutory Provisions; 9 FAM 42.32(d)(4) Related Statutory Provisions; 9 FAM 42.32(d)(5) Related Statutory Provisions; 9 FAM 42.32(d)(6) Related Statutory Provisions; 9 FAM 42.32(d)(7) Related Statutory Provisions; and 9 FAM 42.32(e) Related Statutory Provisions.

9 FAM 42.42 N10 DIVERSITY PETITIONS

(CT:VISA-1415; 04-02-2010)

See 9 FAM 42.33 N5.2.

9 FAM 42.42 N11 DERIVATIVE STATUS FOR SPOUSE OR CHILD

(CT:VISA-1910; 10-02-2012)

a. A spouse or child acquired prior to the principal alien's admission to the United States or the alien's adjustment of status to that of a lawful permanent resident (LPR), or a child born of a marriage that which existed prior to the principal alien's admission to the United States as an immigrant, or adjustment of status, who is following-to-join the principal alien should be accorded derivative status

under INA 203(d) (8 U.S.C. 1153(d)). No second preference petition is required.

b. Although the spouse or child is entitled to derivative status, a recession of the cut-off date in the derivative category resulting in the unavailability of a number in the derivative category might encourage the filing of a second preference petition. However, there is normally a substantial amount of time involved before the petition could be approved, and the second preference might also be delayed. The decision to file or not to file a second preference petition must be the petitioner's. Consular officers must neither encourage nor discourage the filing of a second preference petition but may provide copies of recent Visa Office bulletins, which indicate the movement of priority dates. In unusual circumstances, it is possible that slow movement in the beneficiary's derivative class might indicate that the filing of a second preference petition may be beneficial.

9 FAM 42.42 N12 FAMILY-BASED PETITIONS UNDER THE CHILD STATUS PROTECTION ACT

9 FAM 42.42 N12.1 The Child Status Protection Act (CSPA)

(CT:VISA-2056; 12-03-2013)

a. The Child Status Protection Act (CSPA), Public Law 107-208, permits an applicant for certain immigration benefits to retain classification as a child under the INA, even if he or she has reached the age of 21. If an alien qualifies for CSPA benefits, the alien's age is frozen at the age calculation provided for in the CSPA. An alien whose CSPA age is determined to be younger than 21 and is unmarried will continue to be treated as a child for immigration purposes throughout the processing of the case.

b. The CSPA potentially applies to virtually all immigrant visa cases including: immediate relatives, family and employment-based visa classifications, derivatives in Diversity Visa (DV) cases, derivatives in Special Immigrant Visa (SIV) cases, beneficiaries under the Violence Against Women Act (VAWA), and derivatives in asylee and refugee cases (for classes not covered by CSPA, see 9 FAM 42.42 N12.3).

9 FAM 42.42 N12.2 Applicability of the CSPA

(CT:VISA-1568; 10-04-2010)

a. The CSPA was enacted into law on August 6, 2002 and applies to any alien who had an approved immigrant visa (IV) petition prior to the enactment of the CSPA, but had not yet applied for permanent residence (either an IV application

or an application for adjustment of status).

b. In immediate relative (IR) cases and immediate beneficiary (IB) cases under the Violence Against Women Act, if the alien was under the age of 21 at the time a petition was filed by his or her parent for classification as an IR or IB the alien will not age out provided the alien did not have a final decision prior to August 6, 2002 on an application for permanent residence or an immigrant visa application.

c. The CSPA also applies to an alien whose visa became available on or after August 7, 2001 and who did not apply for permanent residence within one year of the visa availability, but would have qualified for CSPA coverage had he or she applied but for prior guidance from USCIS concerning the CSPA effective date.

9 FAM 42.42 N12.3 Inapplicability of the CSPA

(CT:VISA-1568; 10-04-2010)

a. Notwithstanding the visa classifications for which the CSPA does apply (see 9 FAM 42.42 N12.2), the CSPA does not apply to any alien:

(1) who, prior to August 6, 2002, the date the CSPA was enacted, had a final decision on an IV application or adjustment of status application based on an IV petition in which the applicant claimed to be a child; and

(2) who aged-out (i.e., had reached the age of 21) before August 6, 2002.

b. The CSPA applies only to IV classifications expressly specified in the statute. The CSPA does not provide child age protection for nonimmigrant visas (NIVs) (e.g. K or V). Additionally, beneficiaries of petitions and their derivatives under the following programs are not specifically provided for in the CSPA:

Nicaraguan Adjustment and Central American Relief Act (NACARA, see 9 FAM 42.33 N1)
Haitian Refugee Immigrant Fairness Act (HRIFA)
Family Unity (see 9 FAM 40.92 N4.2)
Cuban Adjustment Act
Chinese Student Protection Act
Special Immigrant Juvenile (see 9 FAM 42.32(d)(6))

9 FAM 42.42 N12.4 Calculation of CSPA Age for Preference Categories and Derivative Petitions

(CT:VISA-1910; 10-02-2012)

a. For preference category and derivative petitions, the "CSPA age" is determined on the date that the visa, or in the case of derivative beneficiaries, the principal alien's visa became available (i.e., the date on which the priority date became current and the petition was approved, whichever came later). The CSPA age is

the result of subtracting the number of days that the IV petition was pending with USCIS (from date of receipt to date of approval, including any period of administrative review) from the actual age of the applicant on the date that the visa became available. You should note that in some cases, such as employment preferences cases based on the filing of a labor certification, the priority date is not the same as the petition filing date. The petition filing and petition approval dates are the only relevant dates. Time waiting for a labor certification to be approved or for a priority date to become current is not taken into account.

b. For DV cases the time period during which the "petition is pending" is necessarily different. That time period is calculated using the first day of the DV application period for the program year in which the principal alien qualified and the date on which notifications that entrants had been selected become available. That time difference will be subtracted from the derivative alien's age on "the date the visa becomes available" to the principal alien. **The date a visa becomes available for a DV case is the first day on which the principal alien's rank selection number is current for visa processing.**

c. For SIV cases (other than special immigrants from Iraq and Afghanistan who will have a petition approved by USCIS) the time period during which the petition is pending is calculated using the time between approval by the Department and when the consular post acts on the DS-1884. The date a visa becomes available for an SIV case is the date on which the consular post acts on the approved DS-1884.

d. If you need to determine the date on which a particular priority date first fell within the cut-off date (for purposes of determining what the alien's age was on the date the case became current), posts should refer to their monthly Visa Bulletin files. Alternatively, officers may access this information through the CCD:

   (1) Go to the Consular Consolidated Database Web site, then go to the "Public" tab and scroll down to the "IV Cutoff Dates by Visa Class." Here, enter a post code and a time period.

   (2) If post's records or this online site do not have the necessary information, posts may contact CA/VO/F/I for further assistance on historical movements of the cut-off dates. Posts should note that in following to join cases the date of first visa availability is not the date when the principal alien adjusted status in the U.S. Adjustment of status often does not take place until long after a visa is first available to the principal alien.

e. If an alien benefits from both the 45-day provision of the USA PATRIOT Act (see 9 FAM 42.42 N3.1 paragraph d) and the age-out protection in the CSPA, posts should apply both statutes to the advantage of the alien beneficiary. (See 9 FAM 42.42 N12.8.)

f. While the CSPA may prevent the alien's age from changing, the alien must still

meet the other criteria for "child" status, including being unmarried. Therefore, if the alien marries, the alien will lose "child" status (even though the alien's age, for immigration purposes, may be under 21 as a result of the CSPA). A subsequent divorce may not restore "child" status if it occurs after the child's 21st birthday.

9 FAM 42.42 N12.5 Conversion of Petition Status

(CT:VISA-1568; 10-04-2010)

CSPA coverage may vary depending on the changed circumstances affecting visa petitions, as noted in some of the examples below. This is true for both immediate relative and preference beneficiaries.

9 FAM 42.42 N12.5-1 Visa Classification Under an IR Category

(CT:VISA-1568; 10-04-2010)

a. For IR and IB cases, if the alien beneficiary is under the age of 21 on the date of the petition filing, mathematically the alien cannot age-out. The alien beneficiary will qualify as a child as long as he or she does not marry.

b. For petitions filed for an alien beneficiary as the child of a lawful permanent resident (LPR) where the petition was subsequently changed to an immediate relative petition due to the naturalization of the parent while the alien beneficiary was younger than 21, then mathematically the alien cannot age out.

9 FAM 42.42 N12.5-2 Visa Classification Under a Preference Category

(CT:VISA-1568; 10-04-2010)

a. If it is determined that the child of the beneficiary of a second preference petition is over the age of 21 for CSPA purposes, and the petitioner naturalizes, the petition is automatically converted to either first or third preference (provided the marriage occurred after the naturalization of the petitioner). In such instances the beneficiary will retain the priority date.

b. Beneficiaries of family second preference petitions filed as F2B that were automatically converted to family first preference F1 upon the petitioning parent's naturalization may exercise the right to "opt-out" of the conversion. This also applies even if the petition in question was originally filed in the F2A category but has now been converted to F2B. Such automatic conversion from second to first preference status could disadvantage an applicant due to the less favorable cut-off dates for certain oversubscribed nationalities.

c. Currently, only USCIS can approve "opt-out" requests. Petitioners, beneficiaries, and their legal representatives should be advised that they must file a request in writing with the USCIS District Office having jurisdiction over

the beneficiary's place of residence (see 9 FAM Appendix N, Exhibit II). The District Office should notify the appropriate visa issuing office if the request has been approved.

d. For a derivative beneficiary in family and employment based cases, DV cases, and SIV cases, if the derivative beneficiary's 'CSPA age' is under 21, the alien must seek to acquire lawful permanent resident (LPR) status within one year of visa availability in order for CPSA coverage to continue (see 9 FAM 42.42 N12.6). Be aware, however, that retrogression of visa numbers that affects visa availability during that year may extend possible CSPA coverage (see 9 FAM 42.42 N12.7 Retrogression of Visa Numbers).

9 FAM 42.42 N12.6 Sought to Acquire LPR Status Provision

(CT:VISA-2085; 04-28-2014)

a. In family and employment-based preference, DV, and SIV cases the alien must seek to acquire LPR status within one year of visa availability. The one year requirement does not apply in IR or immediate beneficiary IB cases. The one year requirement generally means that the applicant must have submitted the completed *Form* DS-260 within one year of a visa becoming available. *(Note that you can also accept submission of Form* DS-230*, the form that preceded Form DS-260).* However, if the principal applicant adjusted to LPR status in the United States and the derivative seeks a visa to follow to join, then the law requires generally that the principal has filed a Form I-824 within one year of a visa becoming available. The submission of a *Form* DS-260 that covers only the principal applicant will not serve to meet the requirement for the alien child. You should be aware that because the *Form* I-824 did not have a field specifically to list derivative beneficiaries, there is no requirement that the principal applicant attempt to amend the form to reflect the names of derivative applicants. Therefore, the timely filing of the *Form* I-824 by the principal applicant in the United States will meet the CSPA requirement to seek to acquire LPR status within one year of visa availability. The filing of a Form I-485, Application to Adjust Status, by the principal alien in the United States does not satisfy the sought to acquire provision on behalf of a following to join derivative.

b. INA 203(h) requires that an alien beneficiary seek to acquire LPR status within one year, not that the alien actually did so acquire such status within one year. Therefore if the alien files a *Form* DS-260 but has his or her IV refused or is the beneficiary of a *Form* I-824 that is denied, the act of filing Form*DS-260* or Form I-824 still satisfies the statute.

9 FAM 42.42 N12.7 Retrogression of Visa Numbers

(CT:VISA-1568; 10-04-2010)

In order to seek to acquire lawful permanent residence an alien beneficiary must actually have one full year of visa availability. If a visa availability date retrogresses (e.g., employment-based third preference numbers are unavailable) or the preference category changes (e.g., F1 converts to F3) within one year of visa availability and the visa applicant has not yet sought to acquire LPR status, then once a visa number becomes available again the one year period starts over. The alien beneficiary's age under the CSPA is redetermined using the subsequent visa availability date.

9 FAM 42.42 N12.8 Applicants Qualifying Under Section 424 of the USA PATRIOT Act or the CSPA

(CT:VISA-1754; 10-24-2011)

a. In all cases in which an applicant qualifies under section 424 of the USA PATRIOT Act for visa validity for 45 days beyond the applicant's 21st birthday, the visa should be issued for the additional 45 days. The USA PATRIOT Act applies to petitions filed on or before September 11, 2001 for which the applicant aged out after September 11, 2001.

b. Posts must override the age 21 cutoff date in the IV software in order to apply the extra days. Some cases will qualify under the 45 days of the USA PATRIOT Act and the CSPA. In those cases the 45 days of the USA PATRIOT Act should be included in calculation of the alien's age under the CSPA (see 9 FAM 42.42 12.4 paragraph e).

c. Any post that is not able to process either a USA PATRIOT Act case or a CSPA case to conclusion using the IV system should request assistance from the CA support Desk or by e-mail at CAServiceDesk@state.gov.

d. For more information on processing applicants qualifying under the USA PATRIOT Act, see 9 FAM 42.42 N3.

9 FAM 42.42 N12.9 Consular Processing in CSPA Cases - Advisory Opinions

(CT:VISA-2085; 04-28-2014)

a. The Department recognizes the complexity of the CSPA legislation. Advisory opinions (AOs) should be submitted to the Department (CA/VO/L/A) in two specific instances:

(1) If the alien applied before August 6, 2002 and was refused under 221(g) or on some other ground besides 'aging-out', but that other refusal ground has been overcome/waived; or

(2) If the officer encounters a case involving a derivative following to join a legally admitted immigrant, or adjusted principal, who has not filed Form I-824, Application for Action on an Approved Application or Petition, on the derivative's behalf within the required time frame, but the consular officer determined that the derivative has taken some other concrete step to obtain LPR status within the required one year time frame.

b. If post has any questions about the applicability of the CSPA in a particular case, an advisory opinion request may be submitted to the Department (CA/VO/L/A). Any such requests should include the following information:

(1) The alien's date of birth;

(2) The IV category;

(3) Whether the alien is a principal or derivative;

(4) Whether the petitioner naturalized and, if so, the date of naturalization;

(5) The alien's marital status and, if ever married, the dates of marriage and dates of divorces;

(6) The priority date of the petition;

(7) The date the petition was filed;

(8) The date the petition was approved;

(9) The date the priority date became current;

(10) The alien's age on the date that a visa became available (i.e., age on date of petition approval or on date priority date became current, whichever is later);

(11) The date the alien submitted the Form DS-230 Part I, Form DS-260 or the date the principal filed Form I-824;

(12) The date(s) the principal and relevant derivative alien applied for the IV; and

(13) If any IV application(s) were made prior to the effective date of the CSPA, the outcome of the prior application(s).

9 FAM 42.42 N13 PETITIONS THAT CANNOT BE APPROVED

9 FAM 42.42 N13.1 Certain Second Preference Petitions by Aliens Attaining Lawful Permanent Resident (LPR) Status on Basis of Previous Marriage

(CT:VISA-1910; 10-02-2012)

The following conditions must be met before a second preference petition can be approved for the spouse of an alien who obtained lawful permanent resident (LPR) status through an earlier marriage:

(1) Petitioner has been a permanent resident for at least five years; or

(2) Petitioner's prior marriage on the basis of which the alien obtained LPR was terminated through the death of the spouse; or

(3) Petitioner establishes by clear and convincing evidence that the prior marriage was not entered into for the purpose of evading immigration laws.

9 FAM 42.42 N13.1-1 Petitions Filed at Consular Offices Abroad

(CT:VISA-1568; 10-04-2010)

If a consular officer is presented a petition for approval and is satisfied that the petitioner has been a permanent resident for at least five years, or that the previous marriage was terminated through the death of the spouse, the consular officer may approve such petitions. However, consular officers must consider all other petitions filed by a petitioner who attained LPR status on the basis of a previous marriage, "not clearly approvable" and should send them, along with the supporting documents, to DHS. (See 9 FAM 42.41 N4.)

9 FAM 42.42 N13.1-2 Petitions Approved by Department of Homeland Security (DHS)

(CT:VISA-1568; 10-04-2010)

If the consular officer receives a DHS-approved petition and upon review determines that the petitioner's previous marriage, which served as the basis for attaining LPR status, appears to have been entered into solely to evade the immigration law, the consular officer must return the petition to the DHS approving office for review and possible revocation. (See 9 FAM 42.43 N2.2.)

9 FAM 42.42 N13.2 Petitions Based on Marriage Occurring While Alien is in Exclusion or Deportation Proceedings or Related Judicial Proceedings

9 FAM 42.42 N13.2-1 Background

(CT:VISA-1568; 10-04-2010)

a. The Marriage Fraud Amendment Act of 1986 (Public Law 99-639), prohibits the approval of petitions for aliens seeking to receive an immigrant visa (IV) on the basis of a marriage which was entered into after November 10, 1986, and while administrative or judicial proceedings were pending regarding the alien's right to enter or remain in the United States until the alien has resided outside the United States for a two-year period beginning after the date of the marriage.

b. Section 702 of the Immigration Act of 1990 (Public Law 101-649), amended INA 204 (8 U.S.C. 1154) and INA 245 (8 U.S.C. 1255), to provide for an exception to the prohibition if there is clear and convincing evidence that the marriage was entered into in good faith. (See 9 FAM 42.42 Related Statutory Provisions.)

9 FAM 42.42 N13.2-2 Two-Year Residency Outside United States

(CT:VISA-1568; 10-04-2010)

a. A petition may not be approved to grant an alien immediate relative (IR) status or preference status by reason of a marriage which was entered into during administrative or judicial proceedings regarding the alien's right to be admitted or remain in the United States until the alien has resided outside the United States for a two-year period commencing after the date of the marriage.

b. An exception to the above may be made if there is clear and convincing evidence that the marriage was entered into in good faith.

9 FAM 42.42 N13.2-3 Petitions "Not Clearly Approvable"

(CT:VISA-1910; 10-02-2012)

Consular officers receiving a petition which appears to fall within the category described in 9 FAM 42.42 N13.1-1 above must consider the petition "not clearly approvable" and must send the petition, along with the supporting documents to DHS for reaffirmation or revocation.

9 FAM 42.42 N13.3 Aliens Attempting or Conspiring to Enter Into Marriage to Evade Immigration Laws

(CT:VISA-1568; 10-04-2010)

Section 204(c) of the Marriage Fraud Amendment Act of 1986 prohibits the approval of a visa petition filed on behalf of an alien who has been accorded, or sought to be accorded, an IR or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws or the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The petition should be denied regardless of whether the alien received a benefit through the attempt or conspiracy. Although it is not necessary for the alien to have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence must be documented in the alien's file.

9 FAM 42.42 N13.3-1 Petitions Filed at Consular Offices Abroad

(CT:VISA-1568; 10-04-2010)

If the consular officer is presented with such a petition for approval, the petition should be considered "not clearly approvable" and should be sent, along with the supporting documents, to the appropriate DHS regional office.

9 FAM 42.42 N13.3-2 Petitions Filed with Department of Homeland Security (DHS)

(CT:VISA-1568; 10-04-2010)

If the consular officer receives a DHS-approved petition and upon review determines that the marriage was entered into for the purpose of evading the immigration laws, the consular officer must return the petition to the National Visa Center (NVC), which will forward to DHS for review and possible revocation. (See 9 FAM 42.43 N3.)

9 FAM 42.42 N14 NATURALIZATION SUBSEQUENT TO PETITION

(CT:VISA-1568; 10-04-2010)

See 9 FAM 42.21 N6.

9 FAM 42.42 N15 VISA PETITION REVOCATION

(CT:VISA-1568; 10-04-2010)

See 9 FAM 42.43 Related Statutory Provisions.