"It's a Family Affair" Part I: Putting Together a Non-Marriage-Based Case

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Family-Based Immigrant Visas

A two-step process:

Step 1: The family visa petition (I-130)
Step 2: Application to immigrate or become a permanent resident

(Adjustment of Status vs. Consular Processing)

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Eligibility

Who can immigrate through a family-based visa petition?

IMMEDIATE RELATIVE INA §201(b)	Spouse, Children, and Parents of USC -A USC must be 21 years old to apply for parent -A child must be under 21 and unmarried
FIRST PREFERENCE INA §203(a)(1), 8 U.S.C. §1153(b)	Unmarried, over 21 sons and daughters of USC
SECOND PREFERENCE: **2A →** INA §203(a)(2)(A) and (B), 8 U.S.C. §1153(a)(2)(A) and (B) **2B →**	Spouse and unmarried children (under 21) of LPR Unmarried Sons and daughters of LPR who are over 21
THIRD PREFERENCE INA §203(a)(3), 8 U.S.C. §1153(a)(3)	Married Sons and Daughters of USC
FOURTH PREFERENCE INA §203(a)(4), 8 U.S.C. §1153(a)(4)	Brothers and Sisters of USC (if USC is over 21)

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How long is it going to take?

I. Priority Dates - Generally, the priority date is the date the I-130 Petition was filed.

I. Visa Bulletin - can be found on web at http://travel.state.gov/visa/bulletin/bulletin_1360.html

(Sign-up to receive the Visa Bulletin by e-mail each month!)

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From the Visa Bulletin for June of 2012

FAMILY-SPONSORED PREFERENCES

First: (**F1**) Unmarried Sons and Daughters of U.S. Citizens: 23,400 plus any numbers not required for fourth preference.

Second: Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, plus any unused first preference numbers:

A. (**F2A**) Spouses and Children of Permanent Residents: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;

B. (**F2B**) Unmarried Sons and Daughters (21 years of age or older) of Permanent Residents: 23% of the overall second preference limitation.

Third: (F3) Married Sons and Daughters of U.S. Citizens: 23,400, plus any numbers not required by first and second preferences.

Fourth: (F4) Brothers and Sisters of Adult U.S. Citizens: 65,000, plus any numbers not required by first three preferences.

On the chart [on the next screen], the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are available for all qualified applicants; and "U" means unavailable, i.e., no numbers are available.

NOTE: Numbers are available only for applicants whose priority date is **earlier** than the cut-off date listed below.

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Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA – mainland born	INDIA	MEXICO	THE PHILIPPINES
F1	22JUN05	22JUN05	22JUN05	15MAY93	01JUL97
F2A	01JAN10	01JAN10	01JAN10	08DEC09	01JAN10
F2B	15APR04	15APR04	15APR04	01JAN92	08DEC01
F3	01APR02	01APR02	01APR02	15JAN93	22JUL92
F4	08JAN01	15DEC00	08JAN01	01JUN96	22JAN89

*NOTE: For May, F2A numbers EXEMPT from per-country limit are available to applicants from all countries with priority dates earlier than 15OCT09. F2A numbers SUBJECT to per-country limit are available to applicants chargeable to all countries EXCEPT MEXICO with priority dates beginning 15OCT09 and earlier than 15NOV09. (All F2A numbers provided for MEXICO are exempt from the per-country limit; there are no F2A numbers for MEXICO subject to per-country limit.)

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I-130 Filing Checklist
For Family-Based (non-marriage) Petitions

- Filing Fee (or Fee Waiver)
- G-28 - Notice of Entry of Appearance as Attorney of Record
- Form I-130 – Petition for Alien Relative (original signed and dated)
- Supporting evidence to show:
  1) Petitioner's status, and
  2) qualifying relationship

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Supporting Evidence

1. To prove the Petitioner's status (as a USC or LPR or Conditional Resident)
2. To prove an qualifying relationship

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Adjustment of Status to Permanent Residence

- Status, whether lawful or unlawful, is only acquired upon entry to the U.S.
- Status, whether immigrant or nonimmigrant, can only be changed (adjusted) within the U.S.
- Visas, whether immigrant or nonimmigrant, are granted (issued) only outside the U.S. at embassies or consulates.

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LPR Adjustment of Status: the I & N Act

- §245 -- most classes of applicants for LPR status
- §245A -- Legalization ("Amnesty", 1986 Act)
- §249 -- Registry (Residing in the U.S. since 1971)
- §210 -- Special Agricultural Workers (1986 Act)

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§245 (a) and (c)

(Immigrant visa immediately available (Visa Bulletin))

Inspected and admitted or paroled; or a VAWA

- Admission must be a **lawful** admission
- Exclusions: Crewmen, TWOV, Visa Waiver
- No unauthorized employment or unlawful immigration status **ever**
- Exceptions: Immediate relatives, 180 days for EB cases
- Must be admissible. Waivers and the waiver process

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§245 (i)

- Waives §245(a) and (c) requirements except visa availability
- Petition or labor certification filed before 4/30/2001 and physical presence in U.S. by principal applicant on 12/21/2000
- Spouse and children included in many instances
- Petition or labor certification filed after 01/14/1998

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Visa Processing Department of State

- Outside U.S.: Embassy or Consulate; no court review
- Waiveable 3 and 10 year bars: §212(a)(9)(B)
- Limited class of qualifying relatives for hardship waiver: USC or LPR spouse or parents, not children
- "Permanent" 10 year bar: §212(a)(9)(C); VAWA exception

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Waiver Procedure in A/S & Visa Processing

- Waivers of inadmissibility: 3/10 year bar, fraud, crime, previous deportation, smuggling (family)
- In A/S: USCIS…AAO...IJ...BIA…Federal Court
- In visa processing: USCIS…AAO…No court review of any kind …Long waiting time outside the US
- Proposed new procedure for 3/10 bar IR cases

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Special Evidentiary Considerations

- Alternative Supporting Evidence:

  - Affidavits of Birth – 8 CFR §103.2(b)(2)(i)

  - DNA Tests –AILA InfoNet Doc. #08032430; www.aabb.org

  - Customary Marriages & Divorces

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Special Evidentiary Considerations

- Special Issues Concerning Children:

  - Adopted Children
    1) Pre- and non-Hague cases

    2) Hague Convention on Intracountry Adoption

  - Illegitimate Children

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Special Evidentiary Considerations

- Criminal Issues:

  - Adam Walsh Act

  - Petitioner with outstanding criminal warrant(s)

  - Petitioner in jail

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Questions & Answers

Remember! The court cases are listed in the materials!

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Case References for issues discussed in "It's a Family Affair – Putting Together a Non-marriage Based Case"

These are a sampling of instructive cases found in AILALink, *Kurzban's Immigration Law Sourcebook*, and other common legal research sources pertaining to our discussion today. All new attorneys should thoroughly research these issues on their own, as new and different cases may be available for analysis.

1. <u>Procedural Regularity in Admission</u>

Matter of Quilantan, 25 I&N Dec.285 (BIA 2010). Relates to the issue of entry via "procedural regularity"; questioning by immigration officer not necessary to find lawful admission to U.S. Where the beneficiary presented him/herself for inspection and was allowed to enter; no specific admission status required.

2. <u>INA § 245(i) Issues</u>

Matter of ILICH, 25 I&N Dec. 717 (BIA 2012). Recent BIA case, seems to suggest that the derivative in the original 245(i) qualifying petition can be the principal in the subsequent petition, retaining 245(i) eligibility, even if he or she does not meet the physical presence requirement. This is as long as the principal in the original petition meets the physical presence requirement. In any event, the case reviews most of the BIA positions on 245(i) issues.

Matter of Lemus, 25 I&N Dec. 734 (BIA 20212). Reviews 245(i) jurisprudence and emphasizes that 245(i) does not waive inadmissibility for anything else, except to allow adjustment of status where consular processing would usually be the only option because of 245(a) or (c).

3. <u>INA § 212(a)(9) – 3 / 10 / Permanent Bars</u>

Matter of Arrabally, 25 I&N Dec. 771 (BIA 2012). Recent case that discuses what kind of departure triggers the 3/10/permanent bar(s). Contrary to previous understandings, this case suggests that some kinds (maybe not all kinds) of advance parole do not trigger the bar(s).

4. <u>Customary Marriages and Divorces</u>

Matter of Kodwo, 24 I&N Dec. 479 (B(A 2008). Reversed USCIS's rejection of a customary divorce. In Ghanaian law, affidavits were sufficient to establish a divorce and USCIS was required to recognize Ghanaian law in this respect.

Matter of Lovo, 23 I&N Dec. 746, 748 (BIA 2005). The relevant analysis is to determine first if marriage is valid in jurisdiction in which it was completed, then look to the INA for other issues.

U.S. v. Gomez-Orozco, 28 F.Supp.2d 1092, 1095-98 (C.D. Ill. 1998), *rev'd on other grounds*, 188 F.3d 422 (7th Cir. 1999). Where a state recognizes common law marriage, the marriage would normally be valid for immigration purposes.

Ma v. Ashcroft, 361 F.3d 553 (9th Cir. 2004). The PRC would not register a marriage based on the beneficiary's age of 22, and their own population control policies. The court found he should be considered a spouse for asylum purposes.

Matter of Ceballos, 16 I&N Dec. 754 (BIA 1979). A religious marriage in Colombia recognized by the state same as civil marriage. Multiple other related and instructive cases available in *Kurzban's*.