



# Family-Based Immigration Petitions

## Who's Your Daddy?

BY PATRICIA J. SULLIVAN

*Note: The following article represents the immigration schematic on the day the article was submitted for publication. However, the current administration has signaled via Twitter that it finds “chain migration”—i.e., family-based immigration—problematic and intends to limit or end the process.<sup>1</sup>*

In their most basic form, the immigration and nationality laws of the United States may be reduced to who can come, who can stay, and who has to go. This article addresses a class of people who can come and how they can stay, along with some basic immigration concepts.

### Basic principles

All individuals born or naturalized in the U.S. or its territories automatically become citizens pursuant to the Fourteenth Amendment of the U.S. Constitution: “All persons

born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside.”<sup>2</sup>

For those born outside the U.S. or its territories, there is no automatic right to claim citizenship or to live and work in the U.S. However, despite the current rhetoric of the



Trump Administration to build a wall on our southern border, ban designated foreign nationals, and deport mass numbers of foreign nationals from the U.S.—all designed to remove or keep certain foreign nationals out of the country<sup>3</sup>—the Immigration and Nationality Act provides for legal immigration of people to the U.S. without discrimination as to race or religion.<sup>4</sup> The path to lawful admission to the U.S. of citizens and nationals of other countries can be achieved generally through employment, a visa lottery, a favorable grant of asylum, a favorable grant of status by an immigration judge, or familial relationships.

## FAST FACTS

Those who are present in the United States without a visa, a visa waiver, or who overstayed a visa are considered illegal aliens.

Most aliens who are illegally present in the U.S. are visa overstays; that is, they entered legally but remained in the country beyond their approved period of stay.

Grandparents, aunts, uncles, and cousins do not fall under the purview of “close family” relationships.

By way of background information, there are two ways to legally enter the United States: a nonimmigrant visa and an immigrant visa issued by a U.S. consulate abroad.<sup>5</sup> A nonimmigrant visa allows the holder to come to the U.S. for a specific time and stated purpose, such as for pleasure, employment, or training. At the end of the stated duration of the visa, the nonimmigrant is expected to depart in a timely manner.<sup>6</sup> An immigrant visa requires that the holder come to the U.S. with the intent to make this country his or her permanent home.<sup>7</sup> This visa, issued by a U.S. consulate abroad, entitles foreign nationals to travel to and to seek entry into the U.S.<sup>8</sup>

As a caveat, a visa does not guarantee entry into the U.S.—it allows an individual to travel to a designated port of entry (typically at a land border or international airport) of the U.S. and “knock on the door.”<sup>9</sup> To legally enter the U.S., the individual must be formally admitted to the country.<sup>10</sup> Admission occurs after inspection and authorization of a foreign national by an immigration official.<sup>11</sup> In most cases, that official is an inspecting immigration officer such as a U.S. Customs and Border Protection officer. If an inspecting immigration officer discovers that a foreign national seeks to enter the U.S. for a purpose other than what is authorized by his or her visa classification, the officer can deny the foreign national’s entry into the country.<sup>12</sup>

### Family-based immigration petitions

Immigrating to the U.S. or adjusting status by way of a familial relationship has been one bright light for foreign nationals hoping to obtain lawful permanent resident status in the country. The Immigration and Nationality Act and federal regulations governing immigration law can present

significant roadblocks to anyone attempting to immigrate or obtain status in the U.S. However, since family unification has long been an important value in immigration law, family-based immigration can be straightforward and a rewarding undertaking for the immigration practitioner.<sup>13</sup>

An important note is that, contrary to many misconceptions, aside from birth or naturalization in the U.S., there is no immediate right to any status in the country, and a child born overseas to a U.S. citizen does not obtain automatic citizenship at birth.<sup>14</sup> A foreign national married to a U.S. citizen does not obtain automatic citizenship upon marriage. The foreign national parents of a U.S. son or daughter do not obtain automatic citizenship by virtue of that relationship.

With the exception of a child born abroad to U.S. citizen parents who have obtained approval of the U.S. Department of State in the form of a Certificate of Birth Abroad,<sup>15</sup> by statute, the first step for foreign nationals seeking status in the U.S. is the filing of a petition by either a U.S. citizen or lawful permanent resident (Green Card holder) of the U.S. for approval by the Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS).<sup>16,17</sup> The petitioning family member must complete Form I-130, Petition for Alien Relative, and file it at a USCIS center.<sup>18</sup>

### Immediate relatives and preference immigrants

Not all family relationships serve as a basis to apply for lawful permanent resident status; the relationship must be that of a close family member. Relationships that give rise to who can file for which family members are classified into two categories: “immediate relatives”<sup>19</sup> and “preference immigrants.”<sup>20</sup> Immediate relatives defined by 8 USC 1151(a)(2)(A)(i) include:

- Spouses of U.S. citizens;
- Minor, unmarried children (under 21) of U.S. citizens;
- Parents of U.S. citizens, provided the petitioner is at least 21 years of age; and
- Spouses of deceased U.S. citizens who were married for at least two years at the time of the citizen spouse’s death are eligible for immigrant visas, provided the couple was not legally separated at the time of death, the foreign national spouse files an immediate relative petition within two years of the death of the citizen spouse, and the foreign national does not remarry. Minor children (under age 21 years of age) of deceased U.S. citizens are also considered immediate relatives subject to the same restriction as spouses.

Preference immigrants under 8 USC 1153(a) include:

- First preference—Unmarried sons and daughters (age 21 or older) of U.S. citizens

- Second preference
  - Spouses or children (under age 21) of lawful permanent residents
  - Unmarried sons or daughters (age 21 or older) of lawful permanent residents;
- Third preference—Married sons or daughters (age 21 or older) of U.S. citizens
- Fourth preference—Brothers and sisters of U.S. citizens, provided those citizens are at least 21 years of age

The functional difference between immediate relatives and preference relatives is that there is no waiting period after approval of the U.S. citizen sponsor's petition and the time the immediate relative can apply for lawful permanent status. Priority dates determine the order of visa availability for preference immigrants. For these individuals, the priority date is the date the I-130 petition is properly filed with USCIS in the U.S., or in some circumstances with a USCIS office abroad. Preference immigrants must wait until their number comes up in accordance with a U.S. Department of State visa issuance schedule.<sup>21</sup>

#### The Fiancé(e) Visa

A quick detour here to discuss the Fiancé(e) Visa, known as the hybrid visa because it contains characteristics of both nonimmigrant and immigrant visas, but is limited to use by U.S. citizens only.<sup>22</sup> The terms of the visa allow a U.S. citizen to petition for a foreign national fiancé(e). If the petition is approved, the foreign national fiancé(e) is issued a nonimmigrant visa that requires the foreign national fiancé(e) to travel to the U.S. and marry the citizen petitioner within 90 days of the fiancé(e)'s admission to the country. If the terms of the visa are adhered to and the marriage takes place within 90 days, the nonimmigrant visa becomes an immigrant visa and the foreign national is entitled to remain in the U.S. and apply for U.S. permanent residence (commonly called a Green Card) through a process called adjustment of status within the U.S. If a marriage does not take place within 90 days, the foreign national remains in nonimmigrant status and must depart the U.S. immediately without the ability to change his or her status to another visa category or remain in the country by marrying a different U.S. citizen.<sup>23</sup>

#### Where the family member resides makes a difference

Family-based immigration petitions can be filed for family members who are either physically present in the U.S. or residing outside of the country,<sup>24</sup> and the prerequisite for sponsoring a foreign national family member is that the sponsor is either a U.S. citizen or lawful permanent resident age 21 or older.<sup>25</sup>

If a family member is physically present in the U.S., a petition to classify him or her as a bona fide relative of the



sponsoring U.S. citizen and an application by the family for lawful permanent resident status are sent to a “lock box” and then analyzed by USCIS at a central processing facility.<sup>26</sup> If immigration adjudicators determine sufficient bona fides of the relationship are in place and that the sponsored family member is not inadmissible,<sup>27</sup> the petition and application are forwarded to the USCIS district office in the jurisdiction of the family if the family member is lawfully present in the U.S. An interview with an immigration officer is scheduled for the U.S. citizen/lawful permanent resident petitioner and the foreign national family member.<sup>28</sup> The purpose of the interview is twofold: (1) to confirm the bona fides of the relationship and (2) to confirm that the foreign national family member is admissible to the U.S., i.e., that the family member is a person the U.S. wants to let into its borders and not within a class of inadmissible aliens as set forth by the Immigration and Nationality Act § 212(a), *supra*.<sup>29</sup> If the sponsoring petition is approved after the interview, the family member has adjusted status and receives an I-551 document as evidence of lawful permanent resident status.<sup>30</sup>

If the foreign national family member is outside of the U.S., the process previously outlined is bifurcated and the approved I-130 and other documents are forwarded to the National Visa Center (NVC), which performs all pre-interview functions.<sup>31</sup> The petition by the citizen or lawful permanent resident filed on behalf of the foreign national family member is filed with

USCIS. Once approved by an adjudicator, it is transferred to the U.S. Department of State, Bureau of Consular Affairs, NVC in Portsmouth, New Hampshire. When the NVC completes its review, the petition is sent to the U.S. consulate with jurisdiction over the residence of the foreign national family member. There, U.S. Department of State Consular Services determines whether the family member being petitioned for has a bona fide relationship with the U.S. citizen or lawful permanent resident and is admissible. Admissibility is determined after a background check (or, in popular parlance, “vetting”). If the family member is approved after the consular interview, he or she receives an immigrant visa with which to travel to the U.S. to join the sponsoring family member. An I-551 document, or Green Card, evidencing lawful permanent resident status is issued to the sponsored family member.

### The limitations on lawful permanent resident status

The foreign national family member now has lawful status in the U.S., but that status is limited. Lawful permanent resident status does not confer the right to vote in state, local, or federal elections,<sup>32</sup> and it requires that the lawful permanent resident intend to make the U.S. his or her permanent residence or the individual may be found to have abandoned their residency.<sup>33</sup>

Despite the terminology of being accorded lawful *permanent* resident status, this status is not necessarily permanent. Lawful permanent resident status may be lost by abandonment (such as spending extended periods outside of the U.S.) or taken away by an immigration judge during a removal proceeding after a finding of a deportable offence that violates the Immigration and Nationality Act.<sup>34</sup>

Although it is not required, lawful permanent residents are entitled to file for U.S. citizenship by way of naturalization after maintaining lawful permanent resident status for five years.<sup>35</sup> If permanent resident status was obtained through marriage to a U.S. citizen, the waiting period is three years.<sup>36</sup> Naturalization as a U.S. citizen not only confers the right to vote, but also lifts the code of conduct imposed by the Immigration and Nationality Act on lawful permanent residents that, if violated, can subject lawful permanent residents to deportation.<sup>37</sup> There are no restrictions in the law limiting a citizen’s ability to spend unrestricted periods outside of the country without compromising the ability to return to the U.S. and naturalized citizens are able to petition to confer status on other family members, as discussed throughout this article. ■

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### ENDNOTES

1. Donald Trump (@realDonaldTrump), Twitter (December 29, 2017, 5:16 AM) <<https://twitter.com/realDonaldTrump/status/946731576687235072>>. All websites cited in this article were accessed January 18, 2018.
2. US Const, Am XIV.
3. See generally Diamond, *Trump orders construction of border wall, boosts deportation force*, CNN (January 25, 2017) <<http://www.cnn.com/2017/01/25/politics/donald-trump-build-wall-immigration-executive-orders/index.html>> and Jarrett & Tatum, *Trump administration orders new travel restrictions*, CNN (September 25, 2017) <<http://www.cnn.com/2017/09/24/politics/trump-travel-restrictions/index.html>>.
4. 8 USC 1101 *et seq.*
5. USA.gov, *How to Enter the United States* <<https://www.usa.gov/enter-us>>; 8 USC 1201.
6. 8 USC 1184(a)(1) and 8 CFR 214.1(a).
7. 8 USC 1101(20) and Matter of Huang, 19 I&N Dec 749, 753 (Interim Decision #3079), decided September 28, 1988, available at <<https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/3079.pdf>>.
8. 8 USC 1201.
9. 8 USC 1101(a)(4).
10. 8 USC 1225(a)(1), 8 USC 1225(i)(3), and 8 CFR 235.
11. 8 USC 1101 (a)(13)(A).
12. 8 USC 1225(a)(5), 8 USC 1225(b), and 8 CFR 1.2.
13. 8 CFR 245. See also Kandel, Congressional Research Service, *U.S. Family-Based Immigration Policy* (February 7, 2016) <<https://fas.org/sgp/crs/homesec/R43145.pdf>>.
14. 8 USC 1401(g) and 8 CFR 316.2(a).
15. US Dept of State, Bureau of Consular Affairs, *Birth of US Citizens Abroad* <<https://travel.state.gov/content/travel/en/international-travel/while-abroad/birth-abroad.html>>.
16. 8 USC 1154(a)(1)(A)(i).
17. 8 CFR 204.1(a)(1).
18. 8 CFR 204.1(a)(2).
19. 8 USC 1151(a)(2)(A).
20. 8 USC 1153(a).
21. For updates about the allocation of immigrant visas under 8 USC 1153, see US Dept of State, Bureau of Consular Affairs, *The Visa Bulletin* <<https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html>>.
22. 8 USC 1101(a)(15)(K)(i).
23. *Id.*
24. 8 USC 1201 and 8 USC 1202.
25. 8 USC 1255.
26. US Dept of Homeland Security, US Citizenship and Immigration Services, *I-485, Application to Register Permanent Residence or Adjust Status* <<https://www.uscis.gov/i-485>>.
27. The grounds of inadmissibility are found at 8 USC 1182.
28. 8 CFR 246.6.
29. 8 USC 1182.
30. US Dept of Homeland Security, US Citizenship and Immigration Services, *What is a permanent resident card?* <<https://my.uscis.gov/helpcenter/article/what-is-a-permanent-resident-card>>.
31. 8 CFR 204.2(C)(3)(i); 8 CFR 204.2(g)(3); 8 CFR 204.2(h)(2).
32. 18 USC 611.
33. 8 USC 1101(a)(20), 8 USC 1101(a)(27)(A), and 22 CFR 42.22.
34. 8 CFR 316(5) and 8 USC 1227. See US Dept of Homeland Security, US Citizenship and Immigration Services, *Maintaining Permanent Residence* <<https://www.uscis.gov/green-card/after-green-card-granted/maintaining-permanent-residence#removal>>.
35. 8 CFR 316.
36. 8 USC 1430.
37. *Trop v Dulles*, 356 US 86; 78 S Ct 590; 2 L Ed 2d 630 (1958); 18 USC 611.