Basic Concepts in I-130 Preparation

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PURPOSE OF THE I-130

The Form I-130, Petition for Alien Relative, is filed by U.S. citizens or lawful permanent residents seeking to establish qualifying relationships with alien relatives who wish to immigrate to the United States. The petition must establish whether the person is an immediate relative of a U.S. citizen and has a visa number immediately available, *or* if he or she is subject to the numerical limitations and must wait for a priority date to become current in order to immigrate.

Practice Pointers (but details beyond the scope of this article): With respect to whether a priority date is current, do not forget to assess your client's eligibility for the following:

- A Western Hemisphere Priority date
- Under the Child Status Protection Act
- For cross-chargeability
- For INA §245(i) grandfathering

THE QUALIFYING RELATIONSHIPS

U.S. citizens may file an I-130 for a spouse (excluding same-sex marriages), unmarried child under the age of 21, unmarried son or daughter age 21 or older, married son or daughter of any age, brother or sister (citizen must be 21 years of age or older), or a parent (citizen must be 21 years of age or older). Spouses, unmarried children under the age of 21, and parents qualify as "immediate relatives," while the other qualifying relationships are subject to the numerical limitations.

Lawful permanent residents may file an I-130 for their spouse (excluding same-sex marriages), unmarried child under the age of 21, and unmarried son or daughter age 21 or older. All qualifying relationships with a lawful permanent resident are subject to the numerical limitations.

Practice Pointer: Do not forget about derivative beneficiaries. Derivative beneficiaries are (a) the spouse or (b) unmarried, under 21-year-old child of a preference category principal beneficiary. *Immediate relatives do not have derivative beneficiaries.* If a principal's child turns 21 prior to completing the immigration process, he or she will "age out" of eligibility and will not be eligible to immigrate with the principal. **[[Page 673]]**

DOCUMENTS THAT PROVE U.S. CITIZENSHIP

Persons born in the United States should provide a copy of their birth certificate issued by a civil registrar, vital statistics office or other civil authority. In recent years, U.S. Citizenship and Immigration Services (USCIS) has scrutinized delayed-issued birth certificates and births registered by midwives.

Practice Pointer: In delayed-issued birth certificate cases, it is advisable to also include church records that show a rite that occurred within two months of birth, early school records, census records, and/or affidavits from persons with personal knowledge of the birth. Whenever possible, persons with such birth certificates should also include a copy of the biographical page of their unexpired United States passport.

Persons born abroad or who have successfully asserted a claim to U.S. citizenship should provide

copies of any naturalization certificates, certificates of citizenship issued by USCIS or legacy INS, or Form FS-240 Report of Birth of Abroad of a Citizen issued by an American embassy or consulate. In the alternative, an original statement from a consular officer verifying that the petitioner is a U.S. citizen should be submitted.

DOCUMENTS THAT PROVE LAWFUL PERMANENT RESIDENCE

Lawful permanent residents should provide a copy of the front and back of their permanent residence card. If the card has not yet been received, copies of the biographical page of the resident's passport along with a copy of an I-551 stamp issued by USCIS.

DOCUMENTS THAT PROVE A QUALIFYING RELATIONSHIP

Spouse

The primary document that proves a relationship between a husband and wife is the marriage certificate, but the bona fides of the relationship must also be established. Documents that establish the bona fides of the relationship include deeds to jointly owned property, lease agreements for a joint tenancy, bank statements or other financial documents showing a co-mingling of financial resources, birth certificates of children born to the marriage, or affidavits from persons with personal knowledge of the bona fides of the relationship.

The government, however, may not require that the couple be co-habitating or that they spend a certain amount of time together. The bona fides of the relationship are sufficiently established once the couple is able to demonstrate that they intend on establishing a life together. *[1: See Matter of McKee, 17 I&N Dec. 332(BIA 1980).]* Both the U.S. Sixth and Ninth Circuit Courts of Appeals, have held that this determination can be made by looking at the actions of the parties after they were married, such as whether they commingled funds in a joint banking account, filed joint tax returns, purchased assets under both of their names, or assumed joint liabilities. *[2: See El-Hadi v. INS, 1999 U.S. App. LEXIS 25549 (6th Cir. 1999) (unpublished opinion); see also Bark v. INS, 511 F.2d 1200 (9th Cir. 1975) (holding that any attempt to regulate a couples' lifestyle, such as prescribing the amount of time they must spend together, or designating the manner in which either partner elects to spend his or her time, in the guise of specifying the requirements of a bona fide marriage will raise serious constitutional questions).]*

Child

If the petitioner is the mother, she should submit a copy of the child's birth certificate showing her and the child's name, regardless of whether the child was born in wedlock. If the petitioner is the father and the child was born in wedlock, he should submit a copy of the child's birth certificate that shows both parents' names and his marriage certificate. If the child was born out of wedlock and was not legitimated before his or her 18th birthday, the father must provide evidence that a bona fide parent-child relationship existed between the father and child before the child turned 21. Such evidence may include proof that the father lived with the child, supported him or her financially, or that the father showed a continuing parental interest in the child's welfare.

Practice Pointer: Establishing a parent-child relationship will sometimes necessitate the use of DNA evidence, such as when the parents are not married or a parent's name is not on the birth certificate. DNA testing can only be recommended and not required. The government cannot recommend DNA testing as an attempt to disprove a relationship. It should be noted that in I-130 applications where the qualifying relationship is **[[Page 674]]** based solely on DNA evidence, USCIS has exclusive jurisdiction. Consular officers must forward such cases to USCIS for adjudication. All DNA collections must be taken by lab technicians employed by the embassy or consulate's panel physician and must be witnessed by a consular officer or American citizen employee of the consulate who has a national security clearance.

Siblings

Siblings should submit a copy of each of their birth certificates showing that they have at least one common parent. If the siblings have a common father but different mothers, then they must also include copies of the marriage certificates of the father to each mother along with any relevant divorce decrees. Relations through a step-parent or siblings who have not been legitimated will be discussed below.

Parents

The primary documents to establish a relationship between a U.S. citizen and their mother is a birth certificate with the citizen's name and the mother's name. To establish a relationship with a father, the citizen son or daughter should submit a birth certificate showing both parents' names. It is also advisable to submit copies of any marriage certificate that establish that the citizen's father was married to the citizen's mother before the citizen's birth. Citizens who are sponsoring their adoptive parents must include a copy of the adoption decree and may not sponsor their natural parents after having immigrated.

Stepparent/Stepchild

A stepparent-stepchild relationship is established with a copy of the marriage certificate of the stepparent to the child's natural parent showing that the marriage occurred before the child's 18th birthday. The stepchild's birth certificate showing the natural parent's name should also be submitted along with any relevant divorce decrees of either the natural or stepparent.

Adoptive Parent or Adopted Child

Relationships based on adoption must include a copy of the adoption decree showing that the adoption occurred before the child's 16th birthday. If the sibling of a child already adopted is also adopted, then the decree must show that the adoption occurred prior to the child's 18th birthday. In either scenario, the petitioner must also submit evidence that each child was in the legal custody of and resided with the adoptive parents for at least two years before or after the adoption.

FILING FORM I-130

Stand-Alone vs. Concurrent Filing

There are two ways to file an I-130. The first way to file an I-130 by itself is called a "stand-alone" filing. Situations that qualify for stand-alone filings are:

- A U.S. citizen is married to a foreign national who is outside the United States (and thus will immigrate via consular processing);
- The petitioner files for a beneficiary in a preference category where visa numbers are not immediately available (*i.e.*, brother or sister); or
- A U.S. citizen marries a foreign national who is in removal proceedings.

The I-130 may be submitted concurrently with the beneficiary's I-485 Application for Adjustment of Status. This is available for an immediate-relative relationship because a visa will be immediately available. This can take place only if the beneficiary is in the United States and eligible to adjust status under INA §245(a) or §245(i). Examples of such situations include a U.S. citizen married to a foreign national or filing for a child who is under 21, or if the U.S. citizen is filing for a parent physically present in the United States.

Supporting documents for the I-130 vary depending on the type of relationship between the petitioner and the beneficiary of the I-130 that is filed.

Practice Pointer: The USCIS website at http://www.uscis.gov is an excellent source for information on filing an I-130. In general, the documents required for an I-130 are as follows:

- Signed G-28 from the petitioner and beneficiary; **[[Page 675]]**
- Proof that the petitioner is a Permanent Resident or U.S. citizen (as noted above);
- Proof of the relationship between the petitioner and beneficiary (as noted above);

- Passport-style photographs (one each) of the petitioner and beneficiary in a for a spousal I-130 filing. A concurrent filing requires the beneficiary to submit 4 photos (1 of petitioner and 1 of beneficiary for the I−130 and another 2 of beneficiary for the I-485);

  Practice Pointer: If the beneficiary is in removal proceedings, you must submit a written request for exemption signed by the petitioner with accompanying documents showing the bona fides of the marriage and explaining why the beneficiary was placed in removal proceedings.

- The USCIS filing fee is currently $355. Make a check payable from your trust account to the U.S. Department of Homeland Security, or the client can purchase a money order.

The location to file the I-130 is dependent on the type of I-130 and the petitioner's residence. Stand-alone I-130 filings are sent to the following addresses, and by either certified or express U.S. mail; *courier deliveries such as Federal Express will not deliver to a P.O. box*:

Petitioners who reside in Alaska, Arizona, California, Colorado, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oregon, South Dakota, Utah, Washington, Wisconsin, or Wyoming should file their stand alone I-130 with the USCIS Lockbox Facility using the following address:

USCIS
P.O. Box 804625; Chicago, IL 60680-4107

Petitioners who reside in Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, U.S. Virgin Islands, West Virginia or District of Colombia should file their stand alone I-130 with USCIS Lockbox using the following address:

USCIS
P.O. Box 804616; Chicago, IL 60680-4107

I-130 petitions concurrently filed with an I-485 application are submitted to the National Benefits Center lockbox at the following address:

USCIS
P.O. Box 805887; Chicago, IL 60680-4107

Any courier delivery must use the following address:

USCIS Lockbox
ATTN: SAI-130
131 South Dearborn-3rd Floor; Chicago, IL 60603-5517

Petitions that are filed at the Chicago Lockbox will be routed, and adjudicated at the appropriate service center based on the petitioner's place of residence in the United States. AILA is working with the Lockbox to set up a liaison relationship to address problems and issues with I-130 filings.

THE I-130 IS APPROVED: NOW WHAT?

Benefits of Approved I-130

After approval, if the I-130 is an immediate relative petition (*i.e.*, no quota wait), if the beneficiary's priority date is now current (*i.e.*, the beneficiary now has an immigrant visa available), then the beneficiary either completes consular processing or files for adjustment of status in the United States. The I-130 approval offers **[[Page 676]]** little or no benefit, as it does not provide protection from removal, does not allow the beneficiary to travel outside the United States, nor to work. *[3: With exceptions for beneficiaries who are eligible for V visas or Family Unity, but that is beyond the scope of this article.]*

Revocation

USCIS may revoke an approved petition. 8 CFR §205.1. Automatic revocation can take place in a variety of circumstances. For example:

- When the petitioner or the beneficiary dies:

  Practice Pointer: If the petitioner was a USC filing for a spouse, the beneficiary may qualify for a widow/widower petition.

  Practice Pointer: After the I-130 has been approved, CIS may reinstate the I-130 for "humanitarian purposes."
- In the context of a spousal petition, automatic revocation occurs when the marriage is terminated following a final divorce decree.

  Practice Pointer: there may be an exception for battered spouses or children.
- A petition for a son or daughter of an LPR will automatically revoke if the son or daughter marries.
- If the LPR petitioner loses his or her LPR status, the I-130 is automatically revoked.
- When a beneficiary concludes or fails to pursue consular processing, the I-130 will be returned to a service center for revocation.

AN I-130 IN REMOVAL: FOR BETTER OR FOR WORSE?

General Issues

When an I-130 is filed after removal proceedings have commenced, there is a higher standard and a written exemption is required. INA §204(g).

Practice Pointer: A finding of marriage fraud bars approval of any future petitions. *[4: INA §204(c).]*

Who adjudicates the I-130?

I-130 family petitions are adjudicated by USCIS, and are filed with the service center with jurisdiction over place of the petitioner's residence. Marriage after a Notice To Appear (NTA) is issued will require a USCIS interview. I-130s filed after removal proceedings have commenced will certainly trigger an interview as well.

Keep in mind that the Executive Office for Immigration Review (EOIR) and the Board of Immigration Appeals (BIA) have no jurisdiction to adjudicate an I-130. They do have the ability to adjudicate the I-485 Adjustment of Status application that results from the approved I-130. Thus, a person cannot file the I-130 with EOIR during removal proceedings: the I-130 must first be approved and a visa immediately eligible in order for the beneficiary to file for adjustment of status with the immigration court.

How can I expedite my I-130 now that I am in proceedings?

If your I-130 is filed with a service center, request immediate transfer to your local district office for interview and adjudication, otherwise it will remain on the standard course of adjudication for that service center. All I-130s will require an interview once the applicant is in removal proceedings.

Practice Pointer: Be sure to ask the ICE counsel to transfer the file to USCIS adjudications for the I-130 interview in order not to further delay the I-130 adjudication.

Be prepared for I-130 interview during proceedings.

As with all USCIS interviews, make sure your client is well prepared for interview. USCIS will employ higher scrutiny on cases where the marriage was entered into after proceedings commenced (*i.e.*, after NTA issued) based on the Marriage Fraud Act. The standard of proof is that respondent must show by clear and **[[Page 677]]** convincing evidence that marriage is bona fide. Be aware that USCIS will require strong proof of a bona fide marriage in such instances. Be sure to provide as much documentary evidence as possible. Part of interview preparation is ensuring that your client knows how the interview will proceed and what kinds of questions might be asked. Be sure to explain the concept of a *Stokes*

interview (petitioner and beneficiary of marriage-based I-130 questioned separately and extensively) to the clients so they are not caught off guard.

When the I-130 is Approved While in Removal Proceedings

Remember, approval of the I-130 does not end removal proceedings. The beneficiary must apply for adjustment of status, his or her relief from removal, by filing the I-485 with the court.

Practice Pointer: An "arriving alien" seeking a waiver of inadmissibility does not require "readjustment." And thus can submit a stand-alone waiver application. *[5: Matter of Abosi, 24 I&N Dec. 204(BIA 2007).]*

Practice Pointer: Lawful Permanent Residents facing grounds of inadmissibility and removal can "readjust" to deal with the grounds of inadmissibility, and another form of relief [§212(c)] to waive a ground of removal.

Use of an approved I-130 to immigrate is a one-shot deal. In other words, an individual cannot use an approved I-130 petition more than once to gain residency, so a new I-130 (even if the same petitioner and beneficiary) may be necessary. *[6: Matter of Villarreal-Zuniga, 23 I&N Dec. 886 (BIA 2006).]*

Bear in mind that approval of the I-130 does not create an automatic stay of removal proceedings. *[7: Morgan v. Gonzalez, 445 F.3d 549 (2d Cir. 2006).]*

Continuances

If your client has been served with an NTA and an eligible relative subsequently files an I-130 petition, that you check "yes" to question 16 on page 1 of the application. Be sure to file the I-130 as soon as have determined that your client would be adjustment of status eligible, but for an approved I-130.

The immigration judges is not required to grant a continuance if a family petition is not for an immediate relative or if the immigrant visa quota is current or very close to current. Counsel must argue strenuously for a continuance in the case of an immediate relative petition, as going forward with the merits hearing prior to approval of the I-130 may result in an appeal and remand, thus wasting everyone's time. If a previous marriage-based I-130 has been denied, the trial attorney may claim that the denial was based on a lack of bona fides.

Practice Pointer: If counsel believes it was not properly adjudicated, file an appeal of the I-130 denial directly with BIA and file a new I-130 petition while finding some other way of legally keeping your client in the United States.

If your client was granted voluntary departure previously but failed to timely depart, depending on jurisdiction, will not barred by *Matter of Shaar. [8: Matter of Shaar, 21 I&N Dec. 541(BIA 1996).]*

Be sure to read *Matter of Velarde-Pacheco [9: Matter of Velarde-Pacheco, 23 I&N Dec. 253 (BIA 2002).]* regarding a motion to reopen to allow respondent to adjust status although marriage took place after proceedings initiated. A "*Velarde* hearing" is used to show the court that the respondent has a bona fide marriage and is worthy of a continuance to allow the I-130 to be adjudicated. Motions for continuance should, as a general rule, be favorably exercised where a prima facie approvable visa petition and adjustment application have been submitted in the course of a deportation hearing or upon a motion to reopen. *[10: Matter of Garcia, 16 I&N Dec. 653, 657 (BIA 1978).]*

Most recently, the BIA *In Re Hashmi [11: In Re Hashmi, 24 I&N Dec. 785(BIA 2009).]* outlined five factors to be considered by immigration judge when deciding a motion for continuance: **[[Page 678]]**

- DHS's position on the Motion;
- Whether the visa petition is prima facie approvable;
- Respondent's statutory eligibility for adjustment of status;
- Whether respondent's adjustment of status application merits a favorable exercise of discretion; and
- Other reasons for the continuance and any other relevant procedural factors.

In conclusion, before preparing an I-130 for a client, be sure to have all the facts and supporting documents before beginning. As with any type of application process, be aware of the potential ethical issues associated with a family-based petition, especially spousal petitions, have been considered, including potential conflict of interests. **[[Page 679]]**