

## § 204.1

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AUTHORITY: 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1182, 1184, 1186a, 1255, 1641; 8 CFR part 2.

### Subpart A—Immigrant Visa Petitions

#### § 204.1 General information about immediate relative and family-sponsored petitions.

(a) *Types of petitions.* Petitions may be filed for an alien's classification as an immediate relative under section 201(b) of the Act or as a preference immigrant under section 203(a) of the Act based on a qualifying relationship to a citizen or lawful permanent resident of the United States, as follows:

(1) A citizen or lawful permanent resident of the United States petitioning under section 204(a)(1)(A)(i) or 204(a)(1)(B)(i) of the Act for a qualifying relative's classification as an immediate relative under section 201(b) of the Act or as a preference immigrant under section 203(a) of the Act must file a Form I-130, Petition for Alien Relative. These petitions are described in § 204.2;

(2) A widow or widower of a United States citizen self-petitioning under section 204(a)(1)(A)(ii) of the Act as an immediate relative under section 201(b) of the Act must file a Form I-360, Petition for Amerasian, Widow, or Special Immigrant. These petitions are described in § 204.2;

(3) A spouse or child of an abusive citizen or lawful permanent resident of the United States self-petitioning under section 204(a)(1)(A)(iii), 204(a)(1)(A)(iv), 204(a)(1)(B)(ii), or 204(a)(1)(B)(iii) of the Act for classification as an immediate relative under section 201(b) of the Act or as a preference immigrant under section 203(a) of the Act must file a Form I-360, Petition for Amerasian, Widow, or Special Immigrant. These petitions are described in § 204.2;

(4) A U.S. citizen seeking to have USCIS accord immediate relative status to a child based on the citizen's adoption of the child as an orphan, as defined in section 101(b)(1)(F) of the Act, must follow the procedures in § 204.3.

(5) A U.S. citizen seeking to have USCIS accord immediate relative status to a child under section 101(b)(1)(G) of the Act on the basis of a Convention adoption must:

(i) File a Form I-800A, Application to Determine Suitability as Adoptive Parents for a Convention adoptee; and

(ii) After USCIS approves the Form I-800A, file a Form I-800, Petition to Classify Convention adoptee as Immediate Relative, as provided in 8 CFR part 204, subpart C.

(6) Any person filing a petition under section 204(f) of the Act as, or on behalf of, an Amerasian for classification as an immediate relative under section 201(b) of the Act or as a preference immigrant under section 203(a)(1) or 203(a)(3) of the Act must file a Form I-

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360, Petition for Amerasian, Widow, or Special Immigrant. These petitions are described in § 204.4.

(b) *Filing fee.* Forms I-130 and I-360 must be accompanied by the appropriate fee under 8 CFR 103.7(b)(1).

(c) *Filing date.* The filing date of a petition shall be the date it is properly filed under paragraph (d) of this section and shall constitute the priority date.

(d) *Proper filing.* A petition shall be considered properly filed if:

(1) It is signed by the petitioner, and

(2) A fee has been received by the Service office or United States Consular office having jurisdiction.

(3) If, during normal processing, a delay results from deficiencies in the initial filing, the priority date will be established only when the petition is properly signed by the petitioner and the fee has been collected by the Service. If questions arise concerning the filing of the petition which cannot be resolved through a check of the Service fee receipting system (FARES) or other fee collection system, then the director may consider the date of receipt of the petition to be the priority date.

(e) *Jurisdiction.* A petition described in this part must be filed in accordance with the instructions on the form. A United States consular officer in a country in which USCIS does not have an office may accept and approve a relative petition or a petition filed by a widow or widower if the petitioner resides in the area over which the post has jurisdiction, regardless of the beneficiary's residence or physical presence at the time of filing. In emergency or humanitarian cases and cases of national interest, a United States consular officer may accept a petition filed by a petitioner who does not reside within the consulate's jurisdiction. While consular officers are authorized to approve petitions, they must refer any petition which is not clearly approvable to the appropriate USCIS office. Consular officers may consult with the appropriate USCIS office abroad prior to stateside referral, if they deem it necessary. A consular official may not accept or approve a self-petition filed by the spouse or child of an abusive citizen or lawful permanent resident of the United States under section 204(a)(1)(A)(iii),

204(a)(1)(A)(iv), 204(a)(1)(B)(ii), or 204(a)(1)(B)(iii) of the Act. These self-petitions must be filed with a USCIS office in the United States as indicated in the instructions to the applicable petition form as prescribed by USCIS.

(f) *Supporting documentation.* (1) Documentary evidence consists of those documents which establish the United States citizenship or lawful permanent resident status of the petitioner and the claimed relationship of the petitioner to the beneficiary. They must be in the form of primary evidence, if available. When it is established that primary evidence is not available, secondary evidence may be accepted. To determine the availability of primary documents, the Service will refer to the Department of State's Foreign Affairs Manual (FAM). When the FAM shows that primary documents are generally available in the country of issue but the petitioner claims that his or her document is unavailable, a letter from the appropriate registrar stating that the document is not available will not be required before the Service will accept secondary evidence. The Service will consider any credible evidence relevant to a self-petition filed by a qualified spouse or child of an abusive citizen or lawful permanent resident under section 204(a)(1)(A)(iii), 204(a)(1)(A)(iv), 204(a)(1)(B)(ii), or 204(a)(1)(B)(iii) of the Act. The self-petitioner may, but is not required to, demonstrate that preferred primary or secondary evidence is unavailable. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service.

(2) Original documents or legible, true copies of original documents are acceptable. The Service reserves the right to require submission of original documents when deemed necessary. Documents submitted with the petition will not be returned to the petitioner, except when originals are requested by the Service. If original documents are requested by the Service, they will be returned to the petitioner after a decision on the petition has been rendered, unless their validity or authenticity is in question. When an interview is required, all original documents must be

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presented for examination at the interview.

(3) Foreign language documents must be accompanied by an English translation which has been certified by a competent translator.

(g) *Evidence of petitioner's United States citizenship or lawful permanent residence*—(1) *Primary evidence*. A petition must be accompanied by one of the following:

(i) A birth certificate that was issued by a civil authority and that establishes the petitioner's birth in the United States;

(ii) An unexpired United States passport issued initially for a full ten-year period to a petitioner over the age of eighteen years as a citizen of the United States (and not merely as a noncitizen national);

(iii) An unexpired United States passport issued initially for a full five-year period to the petitioner under the age of eighteen years as a citizen of the United States (and not merely as a noncitizen national);

(iv) A statement executed by a United States consular officer certifying the petitioner to be a United States citizen and the bearer of a currently valid United States passport;

(v) The petitioner's Certificate of Naturalization or Certificate of Citizenship;

(vi) Department of State Form FS-240, Report of Birth Abroad of a Citizen of the United States, relating to the petitioner;

(vii) The petitioner's Form I-551, Permanent Resident Card, or other proof given by the Service as evidence of lawful permanent residence. Photocopies of Form I-551 or of a Certificate of Naturalization or Certificate of Citizenship may be submitted as evidence of status as a lawfully permanent resident or United States citizen, respectively.

(2) *Secondary evidence*. If primary evidence is unavailable, the petitioner must present secondary evidence. Any evidence submitted as secondary evidence will be evaluated for authenticity and credibility. Secondary evidence may include, but is not limited to, one or more of the following documents:

(i) A baptismal certificate with the seal of the church, showing the date and place of birth in the United States and the date of baptism;

(ii) Affidavits sworn to by persons who were living at the time and who have personal knowledge of the event to which they attest. The affidavits must contain the affiant's full name and address, date and place of birth, relationship to the parties, if any, and complete details concerning how the affiant acquired knowledge of the event;

(iii) Early school records (preferably from the first school) showing the date of admission to the school, the child's date and place of birth, and the name(s) and place(s) of birth of the parent(s);

(iv) Census records showing the name, place of birth, and date of birth or age of the petitioner; or

(v) If it is determined that it would cause unusual delay or hardship to obtain documentary proof of birth in the United States, a United States citizen petitioner who is a member of the Armed Forces of the United States and who is serving outside the United States may submit a statement from the appropriate authority of the Armed Forces. The statement should attest to the fact that the personnel records of the Armed Forces show that the petitioner was born in the United States on a certain date.

(3) *Evidence submitted with a self-petition*. If a self-petitioner filing under section 204(a)(1)(A)(iii), 204(a)(1)(A)(iv), 204(a)(1)(B)(ii), or 204(a)(1)(B)(iii) of the Act is unable to present primary or secondary evidence of the abuser's status, the Service will attempt to electronically verify the abuser's citizenship or immigration status from information contained in Service computerized records. Other Service records may also be reviewed at the discretion of the adjudicating officer. If the Service is unable to identify a record as relating to the abuser or the record does not establish the abuser's immigration or citizenship status, the self-petition will

be adjudicated based on the information submitted by the self-petitioner.

[57 FR 41056, Sept. 9, 1992, as amended at 58 FR 48778, Sept. 20, 1993; 61 FR 13072, 13073, Mar. 26, 1996; 63 FR 70315, Dec. 21, 1998; 72 FR 19106, Apr. 17, 2007; 72 FR 56853, Oct. 4, 2007; 74 FR 26936, June 5, 2009]

**§ 204.2 Petitions for relatives, widows and widowers, and abused spouses and children.**

(a) *Petition for a spouse—(1) Eligibility.* A United States citizen or alien admitted for lawful permanent residence may file a petition on behalf of a spouse.

(i) *Marriage within five years of petitioner's obtaining lawful permanent resident status.* (A) A visa petition filed on behalf of an alien by a lawful permanent resident spouse may not be approved if the marriage occurred within five years of the petitioner being accorded the status of lawful permanent resident based upon a prior marriage to a United States citizen or alien lawfully admitted for permanent residence, unless:

(1) The petitioner establishes by clear and convincing evidence that the marriage through which the petitioner gained permanent residence was not entered into for the purposes of evading the immigration laws; or

(2) The marriage through which the petitioner obtained permanent residence was terminated through death.

(B) *Documentation.* The petitioner should submit documents which cover the period of the prior marriage. The types of documents which may establish that the prior marriage was not entered into for the purpose of evading the immigration laws include, but are not limited to:

(1) Documentation showing joint ownership of property;

(2) A lease showing joint tenancy of a common residence;

(3) Documentation showing commingling of financial resources;

(4) Birth certificate(s) of child(ren) born to the petitioner and prior spouse;

(5) Affidavits sworn to or affirmed by third parties having personal knowledge of the bona fides of the prior marital relationship. (Each affidavit must contain the full name and address, date and place of birth of the person making

the affidavit; his or her relationship, if any, to the petitioner, beneficiary or prior spouse; and complete information and details explaining how the person acquired his or her knowledge of the prior marriage. The affiant may be required to testify before an immigration officer about the information contained in the affidavit. Affidavits should be supported, if possible, by one or more types of documentary evidence listed in this paragraph.); or

(6) Any other documentation which is relevant to establish that the prior marriage was not entered into in order to evade the immigration laws of the United States.

(C) The petitioner must establish by clear and convincing evidence that the prior marriage was not entered into for the purpose of evading the immigration laws. Failure to meet the "clear and convincing evidence" standard will result in the denial of the petition. Such a denial shall be without prejudice to the filing of a new petition once the petitioner has acquired five years of lawful permanent residence. The director may choose to initiate deportation proceedings based upon information gained through the adjudication of the petition; however, failure to initiate such proceedings shall not establish that the petitioner's prior marriage was not entered into for the purpose of evading the immigration laws. Unless the petition is approved, the beneficiary shall not be accorded a filing date within the meaning of section 203(c) of the Act based upon any spousal second preference petition.

(ii) *Fraudulent marriage prohibition.* Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt