OUR PRACTICE

Family Sponsorship

Family unity is one of the primary objectives of U.S. Immigration law. Family relationships play an important part of many immigration situations, but there are special paths to permanent residence based specifically on a close family relationship to a U.S. citizen or permanent resident. An adult citizen can sponsor any parent, spouse, child or sibling. An adult permanent resident can sponsor a spouse or unmarried child (any age). Children under 21 cannot sponsor their parents, and more distant relationships do not qualify.

The time it takes to complete the multi-step process can range from several months to many years, and sometimes proving a relationship can be difficult. Demonstrating necessary financial support can also be problematic. The immigration service ("USCIS") website also contains extensive information on family-based permanent residence, but we provide a helpful overview here linking to specific pages from government sites. There are many possible special considerations for marriage relationships, including processing, relationship validity, conditional permanent residence, and abuse. A U.S. citizen's spouse or fiance outside the U.S. may need to obtain an interim nonimmigrant status to come to the U.S. more quickly. Special procedures also apply to adoption of children as orphans or under the Hague Convention.

The Process

The process for obtaining permanent residence is as follows:

- Sponsor files an immigrant petition for the foreign national relative to show she is one of the types of people generally eligible for permanent residence. Where to file (USCIS service center in the U.S., USCIS overseas office, or even U.S. consulate abroad) depends on where both parties live and whether the preference category is subject to a waiting list. The possibilities are complex, and a better choice can shave months or years off the process. We help people determine and pursue the best option.
- Wait for a "visa number" to become available, depending on the type of relationship, the immigration status of the sponsor, and the sponsored foreign national's age, marital status, and country of birth. One's place on the waiting list (the "priority date") is determined by the date the immigrant petition was filed with USCIS. When the filing date is "current" on the State Department's monthly Visa Bulletin, the next step can be taken.
- Apply for adjustment of status within the U.S., if present in the U.S. and eligible, or process for an immigrant visa at a U.S. consulate abroad. In most cases, the sponsored foreign national's spouse, and children who are unmarried and under age 21 at the time of their final processing, may "derive" permanent residence from that one petition and can accompany or follow to join him without having separate petitions approved specially for them. When the petition was by a U.S. citizen for a parent, spouse or child ("immediate relatives" for whom there never is a waiting list), the spouse and children do not derive permanent residence that way, but the U.S. citizen can petition directly for a spouse's children, as stepchildren. All direct and derivative beneficiaries of a family petition must have an affidavit of support in compliance with complex rules.

The Preference Categories

The law divides family-based immigrants into 4 preference categories ("FB-1" through "FB-4"), each with its own requirements, potential citizen's waiting lists, and sub-categories. Below is a table outlining the categories,

relationships and general waiting lists for each. For information about the most current waiting lists, check the most recent Visa Bulletin issued by the State Department.

"Immediate Relatives" of a U.S. citizen, with no waiting lists for any country.

- Spouse (fiance uses special procedure to enter), including a widow(er) married for 2 years before the citizen's death.
- Unmarried child under age 21, including orphan child
- Parent, as long as sponsor is at least age 21

FB-1: U.S. citizen's unmarried child of any age. Waiting list usually 5-6 yrs worldwide, with extended waiting list for Mexico and the Philippines.

FB-2: Permanent resident is sponsor.

- A: Spouse or unmarried child under age 21. Waiting list 5 years worldwide, with slightly extended waiting list for Mexico. (Certain beneficiaries of an FB-2A petition that was filed more than 3 years ago and before December 21, 2001 may process for the new "V" nonimmigrant classification to keep from waiting for a visa number outside the U.S. or in unlawful status inside the U.S.)
- B: Unmarried child of any age. Waiting list 9 years worldwide, with extended waiting list for Mexico and the Philippines.

FB-3: U.S. citizen's married child of any age. Waiting list 8 years worldwide, with extended waiting list for Mexico and the Philippines.

FB-4: Brother or sister of U.S. citizen who is over age 21. Waiting list 10 years worldwide, with extended waiting list for Mexico, China and India, and the extraordinarily long waiting list of 22 years for Mexico the Philippines.

The sponsor-status, relationship and age limitations for a particular preference must be met from the time the petition is filed until the time the sponsored foreign national completes permanent residence processing, but if a change in those variables occurs at any point in between, the case automatically converts to any other applicable preference. Thus, if an F-2A child turns 21, it converts to F-2B; then the sponsor naturalizes, and it converts to F-1. The date of original filing of the petition remains the "priority date" marking the place in line in each new preference to which it converts. Note: if an F-2B child marries before the parent naturalizes, there is no preference to which to convert, and the petition is invalidated, but arguably a new petition after naturalization can inherit the earlier petition's priority date.

Proof of Sponsor's Status and Family Relationship

The sponsor must be either a citizen or permanent resident of the U.S. To prove citizenship, the sponsor normally must submit a U.S. state's birth certificate, unexpired U.S. passport, certificate of naturalization, certificate of citizenship, or consular report of birth abroad. To prove permanent residence, an I-551 (Permanent Resident Card) or temporary I-551 stamp in a foreign passport or on an I-94 card is required.

The USCIS provides a detailed (and potentially confusing) set of pages describing how to prove the appropriate relationship of a sponsor to a spouse, child, parent, or sibling. The types of parent-child relationships that are recognized for permanent residence sponsorship purposes include biological, legitimate, legitimated, illegitimate with a personal relationship, step- (relationship created before age 18), and adoptive (child must have been adopted before age 18, and been both in legal and physical custody of parent for two years). There are special procedures for orphans adopted or to be adopted.

Obviously, to prove a marital or parent-child relationship, a marriage certificate or birth certificate, or both, are required. Whenever a marriage must be proved, any prior divorce must be proven with a final court order of divorce. Unfortunately, those family documents are not always obtainable even from the government authority where the event occurred, either because that government did not record such event officially at the time, the records have been destroyed in a war or otherwise lost, or some other reason.

The availability of birth and marriage records, and the types of alternative evidence preferred, are set forth for each country in the State Department's Visa Reciprocity and Country Documents Finder. The USCIS states a preference for the actual certificate. If it is unavailable, it is important to obtain a written statement from the government agency that presently maintains that type of record in that country, stating that the record needed is not available there and why. In addition, some type of alternative record, such as a record of some other institution, or even an affidavit, is required to prove the relationship, as set forth in the instructions to Form I-130.

Although copies should be submitted with the original petition, the petitioner should be ready to produce originals at the time of adjustment of status or visa interview. Documents in another language should be provided with a translation of the essential information in the document, along with a translator's statement.

The USCIS or State Department may also require blood tests or even "suggest" DNA tests to confirm a relationship.

Affidavits of Support

In all family-based sponsorship cases, at the time of final processing for permanent residence the applicant must provide a special Affidavit of Support (Form I-864) signed and notarized by the sponsoring family member, attaching a copy of the sponsor's last three years" federal income tax returns (including W-2s) plus current evidence of income and/or assets. The income of a household member may be added through a related Form I-864-A. If the form and evidence do not demonstrate income (or assets according to a formula) sufficient to support the sponsor's household members plus all sponsored foreign nationals at 125% of the latest poverty guidelines (110% for certain military sponsors), then a "joint sponsor" must also provide an affidavit. The Affidavit of Support forms contractually and legally bind the sponsor(s) to support the sponsored person and to repay any governmental "means-tested public benefits" provided to a sponsored person until that person has worked for 40 quarters (normally 10 years) or become a U.S. Citizen, even if the family relationship involved is terminated; thus, someone should think carefully and discuss the matter with his own lawyer before signing it. The sponsor also must notify USCIS of any change of address within 30 days of the change using a special form. The rules and procedures are quite complex and are explained on the websites by the USCIS and the State Department.

Special Issues Relating to Spousal Relationships

There are special issues and arrangements in sponsoring a spouse for permanent residence. The options for processing present confusing options, and a wrong choice can result in huge delays and complications. The ease of creating a marriage relationship (at least as a technical matter!) has caused temptation to people to enter sham marriages, and that has caused the U.S. government to make special rules to prevent them and punish their participants. The unfortunate tendency of some Americans to abuse their foreign national spouses has led to special rules designed to protect battered spouses and children. The misfortune of some foreign national spouses who did not sponsor them before they died has led to a procedure for certain widow(er)s to self-petition.

A. Processing Options

A permanent resident sponsoring a spouse always must file a petition with USCIS and then wait to get through a long waiting list or naturalize. But a U.S. citizen sponsoring a spouse or fiance faces a confusing array of options which should be considered with an experienced immigration lawyer:

- Bring the fiance into the U.S. using the K-1 nonimmigrant visa procedure, which involves a petition in the U.S., a visa application abroad, marriage in the U.S. within 90 days of entry, and then adjustment of status within the U.S.
- If the foreign national spouse is already in the U.S., file the immigrant petition and adjustment of status papers together in the local USCIS office. The relative simplicity of this procedure tempts foreign national spouses to enter the U.S. as a visitor, before or after a wedding, but this can involve a misrepresentation to the consulate and/or USCIS inspector and pose the prospect of being refused the privilege of adjustment of status or even being found permanently inadmissible (with the possibility of a waiver to avoid "extreme hardship" to the citizen spouse). But entry in some other classification, particularly H or L, may be possible in some situations.
- If the foreign national is or will be outside the U.S. after marriage, the process can be pursued in one of the following ways:

  - File the petition in the U.S. (with up to a year processing in some USCIS service centers), followed by immigrant visa processing through the National Visa Center.
  - File the petition in the U.S., but then promptly file a K-3 petition with another USCIS service center (who is supposed to approve that more promptly than the immigrant petition), have the foreign national obtain a K-3 visa at a consulate abroad and enter the U.S., and then process for adjustment of status once the initial petition is approved. The foreign national's children can obtain K-4 visas.
  - If the citizen is residing outside the U.S., file the petition at the overseas USCIS office in that country (if any) followed by consular processing, often in the same building.
  - If the citizen is residing outside the U.S. or can travel physically to the consulate, there is no USCIS overseas office in that country, and the case involves emergent or humanitarian concern in the national interest (such as a very young child who has unexpectedly lost his or her caretaker or military or U.S. Government employees facing transfer), the consulate might be willing to allow the parties to file both the petition and the immigrant visa papers together with the consulate.

B. Validity of the Relationship

Most types of marriages will usually be recognized for immigration benefits and usually the law of the place of the marriage celebration or consummation generally controls the validity.

Many people have been tempted to enter a marriage solely or primarily for the purpose of evading the immigration laws, rather than for the real purposes of a marriage (love, mutual support, shared life), and often this has involved the foreign national paying money to a U.S. citizen for entering a marriage, signing papers, and enduring USCIS interviews. This is a crime for both parties. Short of criminal prosecution, a USCIS finding of a sham marriage results in a permanent, non-waivable bar on approval of any petition--that is, no permanent residence, ever. We strongly advise against sham marriages, and we will not represent people who seek to use one for immigration purposes.

Most USCIS or consular marriage interviews are surprisingly perfunctory, but a suspicious officer can not only put the couple through intensive interviews, together and separately, but can arrange an investigation of the relationship even unbeknownst to the couple. Couples should avoid strange (though legitimate) living arrangements while their cases are pending, and they should attend their interview with evidence that they have indeed shared their life together as married people usually do.

Many legitimately married couples experience difficulty, and marriages involving a foreign national are no different. Immigration benefits may still be bestowed even if the couple is having difficulties or has unofficially separated as long as the marriage was entered into in good faith. In this instance, however, it is especially important to establish the good faith intention of entering into a marriage as fully as possible because the present state of the marriage can be considered when looking to the couple's intent at the inception of the marriage.

C. Conditional Permanent Residence

If, at the time the permanent residence based on a marriage is granted, the marriage has not reached its second anniversary, the permanent residence granted will be only conditional. In that case, within the 90-day window preceding the second anniversary of the permanent residence (which will be the expiration date of the Permanent Resident Card issued), the foreign national will need to file a petition to remove the conditions. That petition is best made jointly by a couple who is still together, but the foreign national can file alone for a waiver if the spouse has died, the marriage has been terminated, the spouse or family has battered the foreign national, or the foreign national would suffer extreme hardship from removal. Legal representation in a waiver petition is strongly advised.

As a conditional permanent resident, the foreign national spouse may work, travel, and basically do all the things a permanent resident can do. Time toward eligibility for naturalization accrues as well. But if the joint petition is not filed in time, or if the foreign national and spouse fail to appear for an interview, the USCIS may terminate the foreign national status and also begin removal proceedings. If the failure to file was excusable, often the USCIS district counsel will be willing to seek agreed termination of removal proceedings to let USCIS decide the petition.

In the event that the USCIS denies a petition to remove conditions, either for fraud or termination of the marriage or other reasons, the foreign national's permanent residence will be terminated and the foreign national will be put in removal proceedings.

D. Abuse

In 1994 and 2000, Congress made many amendments to immigration law in order to "enable battered immigrant spouses and children to free themselves of abusive relationships and report abuse without fear of immigration law consequences controlled by their abusive citizen or lawful permanent resident spouse or parent." Sadly, U.S. citizens or permanent resident spouses may manipulate their foreign national spouse or children by hinging maintaining a spousal or parent-child petition upon the foreign national spouse's acceptance of marital or child abuse. Thankfully, now the alien spouse and/or child of a citizen or permanent resident may file their own petition, or convert a petition filed by the abusing spouse, under the Violence Against Women Act (VAWA). The petition can be filed during the marriage or, in some situations, within two years after divorce. The procedures can be quite complex.

Orphan and Hague Country Adoptions

Normally, for an adopted child to be sponsored for permanent residence (or to derive permanent residence through an adoptive parent), the child must have been adopted before age 16 (18 if a sibling was adopted before age 16) and have been in the legal and physical custody of the adoptive parent for at least two years. Since these custody requirements would prevent the adoption of children abroad without requiring the parents to go live with them for two years abroad. Thus, if the child meets the definition of an orphan, the law eliminates the custody requirements and substitutes some detailed procedures designed primarily to protect the adopted children and to prevent international sale of children. USCIS website has an impressive collection

of information about "Inter-country adoptions." The State Department has its own collection about "International Adoptions," including flyers about each country's adoption environment.

On April 1, 2008, the United States began to operate under the Hague Convention on Intercountry Adoptions. For children adopted from one of the implementing countries, the Convention removes the requirement that the child be either an “orphan” (i.e., abandoned) or have spent two years in the legal and physical custody of the adoptive parents. Instead, the "Central Authority" in the child's country determines whether the adoption and immigration is in the child's best interest and issues a certificate. Meanwhile, similar to the orphan procedures, the adoptive family files a petition with USCIS to show it is eligible and suitable to adopt. The child must be adopted by a U.S. citizen and spouse jointly, or by an unmarried U.S. citizen, and must be under the age of 16 at the time an "immediate relative" petition is filed. Parties must work with agencies that are accredited by the "central authority" of the respective countries. The State Department has a wealth of information on its web site about the Hague Convention and the developing procedures.

How We Can Help

Baker Donelson's Immigration Group has helped countless families achieve their ultimate goal of being together by helping them obtain family-based U.S. immigration benefits. Some of the many ways we can help include: demonstrating a qualifying relationship when primary documents are unavailable; helping couples who intend to marry decide which immigration route is best for them based on their location in our out of the U.S. and the location of the wedding ceremony; advising clients on the realities and considerations involved in international adoption and working with adoption agencies to complete the immigration process expeditiously to entry and citizenship; aiding newly married couples overcome USCIS accusations of marriage fraud by establishing that their marriage was in good faith; counseling and assisting clients on obtaining benefits such as work authorization, travel documents and permanent residency as quickly and efficiently as possible by avoiding delays due to paperwork and filing errors; docketing dates for removal of conditions on permanent residence; and helping clients continue to pursue their U.S. immigration goals after a divorce or abuse.

Important Links

- Sponsoring a Family Member
- Family Immigration
- Intercountry Adoption
- Hague Convention