



# IMMIGRATION LAW

WEEK NINE

# Homework

Franca from Brazil comes in to see you because he wants to marry his American girlfriend but wants to do things the right way so that he will have no problems with his immigration application. On questioning, he tells you that he met her here when he entered eight weeks ago. She is pregnant. They had not planned things this way, but now they feel they have no choice but to marry and to do it soon so that Franca can work legally to help prepare for the baby.

What information can you give to Franca about any issues he might expect to encounter and how might he overcome them?

# Family-Based Immigration

## ▶ THE PLAYERS

- ▶ Petitioner

- ▶ U.S.C.

- ▶ LPR

- ▶ Beneficiary: qualifying family members



# Family-Based Immigration

- ▶ QUALIFYING FAMILY MEMBERS FOR U.S.C.
  - ▶ Immediate relatives
    - ▶ Spouse
    - ▶ Minor children under 21 yrs. old
    - ▶ Parents
  - ▶ Other relatives
    - ▶ Unmarried sons and daughters over 21 yrs old
    - ▶ Married sons and daughters, any age
    - ▶ Siblings

# Family-Based Immigration

- ▶ QUALIFYING FAMILY MEMBERS FOR LPRs
  - ▶ Spouse
  - ▶ Unmarried children under 21 yrs old
  - ▶ Unmarried sons and daughters over 21 yrs old

# Preference Relatives

Family 1st (1<sup>st</sup> Preference): Unmarried son or daughter of U.S. Citizen over 21

Family 2A: spouse or minor child under 21 of LPR

Family 2B: unmarried child over 21 of LPR

Family 3rd: Married son or daughter of U.S. Citizen

Family 4th: Siblings of U.S. Citizen

# Treatment of Immediate Relatives vs. Preference Relatives

- ▶ Immediate Relatives: NO QUOTAS
- ▶ Preference relatives: wait time depends on family relationship and country quotas depicted in the DOS VISA BULLETIN
- ▶ Reading the VISA BULLETIN
  - ▶ <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html>

# Derivative Relatives

- ▶ Available for those immigrating under preference categories
- ▶ No derivatives for immediate relatives
- ▶ Applies to spouse and child (<21 yrs) of principal beneficiary
- ▶ Visa petition required only for principal, but may be advantageous to file individual applications



# Cross Chargeability

- ▶ Because of the quota system, it may be beneficial to “charge” an application to a particular foreign country of a family member.
- ▶ Example: James from the Philippines is being sponsored by his mother, a U.S. citizen. He is married to Michiko from Japan. It is more beneficial to consider/charge the application as coming from a Japanese national due to shorter wait times for Family First visas for Japanese nationals.

# Spouses in Family-Based Immigration

- ▶ WHO IS A SPOUSE?
- ▶ The marriage must be legal in the jurisdiction where it occurred
  - ▶ Marriage certificate
  - ▶ Free to marry
  - ▶ Effect of foreign marriages
  - ▶ Proxy marriage
  - ▶ Common-law marriage
  - ▶ Same-sex marriage

# *Bona Fides* of Relationship

- ▶ Intent to establish life together?
- ▶ Objective facts to shed light on subjective state of mind
- ▶ Cohabitation and consummation not prerequisite:
- ▶ Conduct prior to marriage:
  - ▶ Reasonable Gov't interview: Inconsistent statements can lead to denial

# Discussion Question

Edward, a U.S. citizen, and his girlfriend, Ana, from El Salvador, have been dating for nine months. They love each other and have decided they will marry one day. Ana obtains a visa to visit the United States so that she can meet Edward's family and friends. She realizes that life here is easier than she is used to in her country and decides she does not wish to return, mainly because she has a tendency to be jealous and has become suspicious about some of Edward's female friends that he has known since childhood. She persuades Edward that they should marry while she is visiting so that she will not have to return home. She wants to be certain that Edward's eye will not stray.

- Will the couple violate immigration rules if they marry and apply for Ana to remain in the United States?
- Explain your answer.



# Viability of Marriage

- ▶ Separation of parties no basis for denial: *Matter of McKee*, 17 I&N Dec. 332 (BIA 1980)
- ▶ Separation relevant to fraud at inception
- ▶ Subsequent behavior doesn't prove lack of intent: *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975)

# Who is a Child in Family-Based Immigration?

- ▶ Unmarried minor under the age of 21, including:
  - ▶ Biological child
  - ▶ Child born in or out of wedlock
  - ▶ Stepchild: if parents married when child was 18 yrs or less
  - ▶ Adopted child: 16 yrs or less, residing with parents for 2 years
  - ▶ Certain orphans

# Child Born out of Wedlock

- ▶ A child born to a mother is automatically considered the mother's child.
- ▶ A father must show that he is the natural father AND that a bona fide parent-child relationship was established when the child or son or daughter was unmarried and under twenty-one years of age. Such a relationship will be deemed to exist or to have existed where the father demonstrates or has demonstrated an active concern for the child's support, instruction, and general welfare. [8 C.F.R. 204.2(d)(2)(iii)]

# Child Status Protection Act

- ▶ Effective date: August 6, 2002
- ▶ Extends age of child for benefits purposes
- ▶ U.S.C. Children:
  - ▶ Petition filed pre-21 yrs? Never age out.

- ▶ LPR Children:

Calculates date petition was pending and deducts the amount from the child's age

The formula to calculate eligibility is on p. 271 of text.



# Adam Walsh Child Protection and Safety Act

Petitioners who have committed certain offenses cannot file a petition for a beneficiary in any preference category, or their qualifying relative

Most offenses involve sexual crimes, listed on p. 265 in text

# Discussion Question

Alexis is from Costa Rica. When he was just 17, he became a father. He never married Esther, the mother of his son Jaime, and they never lived together. His name is not on his son's birth certificate. At 20, Alexis acknowledged to his family that he is the father of Jaime. Alexis' parents were elated because this is their first grandchild. They established a relationship with Esther and began to take Jaime into their home for weeks at a time to take care of him so that Esther could work to support herself and her son. Alexis maintained little contact with his son and traveled to the United States three years later, where he met his wife, a U.S. citizen. After Alexis became an LPR, he began to think about his son in Costa Rica, who is now living exclusively with his parents because Esther abandoned him to them when she found a new partner. Alexis has occasionally sent money to his parents to help them take care of Jaime. Alexis and his wife learn that they cannot have children and decide they would one day like to apply for Jaime to come to the United States to live with them.

- Based on the nature of the relationship between Alexis and Jaime currently, is it likely that a family-sponsored immigrant visa petition would be approved?
- If not, what could Alexis do now to improve the chances of an approval?

# Discussion Question

Violet, a Jamaican citizen, is the mother of two children, ages 8 and 12. She and her childhood sweetheart, Cedric, marry during one of his visits to Jamaica to visit his family. The couple has agreed that they will live in the United States where Cedric lives and works. Currently, he is an LPR but qualifies to apply to become a U.S. citizen. He comes to you for help on which would be the best way to file an application for Violet and her children.

- What factors would he need to bear in mind before deciding whether to apply for Violet as a U.S. citizen or an LPR?

# Petitioning is Two Step Process

- ▶ Step 1: file an I-130 petition to establish relationship and eligibility

Petitioner files this for the beneficiary

- ▶ Step 2: beneficiary files adjustment of status, I-485, if in U.S., or does consular processing, if overseas



## Favored Treatment to Immediate Relatives Who Overstay

- Can adjust status in the U.S.
- Overstay is forgiven
- Unlawful employment forgiven

# Revocation/Termination of Visa Petition

- ▶ Petitioner dies although can substitute for affidavit of support. See also widow's petition.
- ▶ Termination of marriage
- ▶ Unmarried son or daughter's marriage
- ▶ Termination of LPR status

# Death of U.S.C. Before Petition is Filed

- ▶ Legal spouse at time of death
- ▶ Marriage was bona fide
- ▶ No legal separation prior to death or remarriage after
- ▶ No inadmissibility issues
- ▶ Meets adjustment requirements and warrants favorable exercise of discretion
- ▶ File Form I-360: Self-petition within 2 years of death

# Death of Petitioner After the Petition is Filed but not Approved

Allows visa petition and adjustment of status to be approved if:

- ▶ Beneficiary resided in United States at time of petitioner's death and continues to do so through decision on pending petition
- ▶ Beneficiary of a petition filed by a U.S.C., LPR, employer, refugee, asylee, or derivative of a U, T, or asylum application



# Death of Petitioner After the Petition is Approved

- ▶ Beneficiary may seek a substitute sponsor who can complete the affidavit of support from a long list of relatives.

# Determining Household Size

- ▶ Sponsor's spouse
- ▶ Sponsor's children under 21
- ▶ Intending immigrant
- ▶ Dependents on sponsors tax return
- ▶ Other immigrants sponsor might have sponsored previously who are not yet USC's

# What if Sponsor/Petitioner has Insufficient Income?

- ▶ Can use 20% of sponsor/petitioner's assets
- ▶ Can add income of household members by completing I-864A, Contract between Sponsor and Household member
- ▶ Can find a joint sponsor
- ▶ May be able to include beneficiary's income if s/he has permission to work
- ▶ Can include beneficiary's assets (20%)

# Can Sponsored Immigrant Get Public Benefits?

- ▶ No means tested benefits
  - ▶ Food stamps, medical assistance, cash welfare, SSI
- ▶ Some states allow medical assistance funded by the state
- ▶ Sponsor and Jt. Sponsor can be sued by the state if immigrant obtains public benefits
- ▶ Or petitioner by pending immigrant if s/he isn't supported.



# Public Charge Issues

- ▶ Applicants likely to rely on government benefits to support themselves may be considered subject to “public charge” grounds of inadmissible and denied adjustment of status.
- ▶ In the past, a completed Affidavit of Support, Form I-864 overcame any public charge concerns.
- ▶ New regulations published by the Department of Homeland Security on August 14, 2019 the Affidavit of Support would be changed to a Declaration for Self-Sufficiency and heighten the standard for overcoming public charge concerns.

# Applying for Adjustment of Status

- ▶ What if no proof of entry?
- ▶ What if entry EWI?
- ▶ INA §245(i)
- ▶ Last filing date: April 30, 2001
- ▶ Prior filing date: January 14, 1998; requires physical presence in U.S. on December 21, 2000

# Form I-765, Application for Employment Authorization

- ▶ Authorization to work
- ▶ Category: (c)(9)
- ▶ Valid one year
- ▶ File if approvals for work authorization will occur before an approval of the I-485
- ▶ Beneficiary may be able to use the income from employment if it helps meet 125% of poverty level

# Application for Travel Document, Form I-131

- ▶ Advanced Parole
- ▶ Allows person who is filing an adjustment of status application to leave country without abandoning application
- ▶ Matter of Arrabally and Yerrabelly, 25 I&N Dec. 771 (BIA 2012)



# Immigration Marriage Fraud Amendments Act 1986

- ▶ Marriage during removal proceedings: IMFA §5, INA §§204(g)
  - ▶ Prove by clear and convincing evidence marriage was entered in good faith: higher standard
  - ▶ If not, remain outside U.S. for aggregate of 2 years before reentering, unless,
  - ▶ Divorce and remarry outside U.S.

# Conditional to Permanent Residency

- ▶ Married < 2yrs, conditional residence
- ▶ Apply to have conditions removed 90 days before 2nd anniversary
- ▶ Joint application: Form I-751 Petition to Remove Conditions on Residence
- ▶ Documentation of living together

# Conditional to Permanent Residency

- ▶ Waivers: INA §216(c)(4)
  - ▶ Extreme hardship arising in conditional period
  - ▶ Good faith
    - ▶ Battered or subjected to extreme cruelty
    - ▶ Marriage terminated other than through death

# Processing Steps

1. I-130 is approved by USCIS
2. The approval letter is sent to the petitioner; the approved petition is sent to the National Visa Center (NVC)
3. When the priority date is current, the NVC contacts the petitioner. The process continues using Consular Electronic Application Center ([ceac.gov](http://ceac.gov).) All documents are submitted electronically.



# Processing Steps

4. Applicant/beneficiary fills out Choice of Agent Form DS-261 submitted through [ceac.gov](https://ceac.gov), if needed; all fees must be paid through [ceac.gov](https://ceac.gov)
5. Applicant/beneficiary completes the DS-260 and sends to [ceac.gov](https://ceac.gov)
6. Affidavit of Support, Form I-864 and required civil documents sent through [ceac.gov](https://ceac.gov)
7. Information about the overseas interview sent to applicant/beneficiary and legal representative, if any. Instructions for medical exam sent to the applicant/beneficiary.

# The Overseas Interview and Entry

An overseas interview at a consular post is scheduled for the applicant/beneficiary.

- ▶ The applicant is approved for an immigrant visa. S/he must travel within six months of approval,  
OR
- ▶ The visa is not approved, and the petition is sent back to USCIS for possible revocation.

# The Overseas Interview and Entry

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- ▶ When the visa is approved, the applicant travels to the U.S. and is given entry by CBP and the “green card” arrives to the applicant’s home.

OR

- ▶ The applicant travels and CBP denies entry, and the applicant is placed in removal proceedings, detention or immediately sent home by CBP.

# Public Charge Issues

- ▶ The Consular Office must determine if the applicant/beneficiary is likely to be a “public charge” because s/he will rely on public benefits for support. If so, the applicant will be denied a visa based on the public charge ground of inadmissibility
- ▶ In the past, a completed I-864, Affidavit of Support would overcome any public charge concerns.
- ▶ Now, Consular Officers are instructed by the FAM to use a “totality of the circumstances” review of each applicant, assessing their age, health, family status, assets and financial status and education and skills.



# LPR Children Who Become Citizens Upon Entry

## **Child Citizenship Act of 2000**

Children under 18 who

- ▶ Have at least one American citizen parent by birth or naturalization;
  - ▶ Live in the legal and physical custody of the American citizen parent;
- and—

# LPR Children Who Become Citizens Upon Entry

- ▶ Are admitted as an immigrant for lawful permanent residence.

Become U.S. citizens upon entry as an LPR

Form I-864W Intending Immigrant's Affidavit of Support  
Exemption is used instead of Form I-864

# Unlawful Presence and Provisional Waivers

- ▶ Those who enter Enter Without Status (EWI) cannot apply to adjust status in the U.S. They must apply for an immigrant visa at a consular office abroad.
- ▶ When the foreign national leaves, s/he triggers the accrual of unlawful presence. Unlawful presence of 6 months to a year in the U.S. bars a person from re-entering for three years; unlawful presence for a year or more bars re-entry for ten years.

# Unlawful Presence and Provisional Waivers

- ▶ A foreign national who can show her/his absence would cause extreme hardship to a qualifying relative may apply for a waiver of the three- or ten-year bar so they can re-enter the U.S. sooner with an immigrant visa.
- ▶ Qualifying relatives include a spouse, son or daughter of a U.S. citizen or permanent resident.
- ▶ NOTE THAT U.S CITIZEN CHILDREN ARE NOT QUALIFYING RELATIVES FOR THE WAIVER.



# Unlawful Presence and Provisional Waivers

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- ▶ Waiver request filed on Form I-601, Application for Waiver of Ground on Inadmissibility.
- ▶ In some cases, the waiver can be filed while the foreign national is in the U.S. using Form 601A.
- ▶ If approved, it can then be submitted to the consular office abroad when the individual applies for an immigrant visa.

# Form I-129F, Petition for Alien Fiancé(e) (K Visa)

- ▶ Allows entry in order for marriage to take place in U.S.
- ▶ Nonimmigrant visa petition
- ▶ Entry for 90 days only
- ▶ Must have met at least once in last 2 yrs; waivable
- ▶ Intend to marry
- ▶ Legally able to marry

# K/Fiancé(e) Visas

- ▶ Apply for AOS after marriage
- ▶ No need for Form I-130 unless marriage is outside 90 days
- ▶ Conditional resident status granted; must be married to original K-1 petitioner
- ▶ Children < 21 yrs given K-2
- ▶ K-3 available for spouse and children of U.S.C. if received Form I-130 receipt notice
- ▶ K-4 for children of K-3 who are < 21 yrs

# Discussion Question

Kristin, a U.S. citizen, has returned from South Africa leaving her husband David behind. She wants to file a relative petition for him but is anxious about how long it will take for David to join her because she is pregnant with their first child and she has no family support. You inform her that the relative petition is taking approximately ten months to process, after which you will need about a month to send necessary documents to the National Visa Center that will then send David's application to the consular office in Johannesburg so that an appointment for an interview can be arranged in three months' time. Kristin is visibly upset and asks if there is any other way for David to come here sooner.

- What can you tell her?
- If it is possible for David to join her sooner, what will she need to do?