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New instructions on priority dates for spouse & child

When an alien is admitted as a permanent resident in the US, does it follow that his spouse and child immediately get their green card as well?

Yes, if the spouse and child relationship were acquired prior to the principal alien's admission to the US. They are entitled to the same status and thus, the same priority date if they are "accompanying" or "following to join" spouse or child.

But this means that the spouse or child must apply for the immigrant visa simultaneously with the principal alien or within 120 days from the alien's admission to the US.

This preference priority date however is linked to the underlying petition and qualification for that particular status. Loss of entitlement to status, like when the spouse or child dies or the child attains the age of 21, results in the loss of the priority date.

Furthermore, the recently released State Department instruction note that the child of a marriage which existed prior to the principal alien's admission into the US is considered to have been previously acquired and thus is entitled to the same status and priority date as the "accompanying" or "following to join" parent.

On the other hand, a spouse or child acquired after the principal alien's admission to the United States, except a child of a marriage existing at the time of the principal's alien's admission into the United States, is not accorded derivative status, and thus is not entitled to the priority date of the principal alien. The principal alien must file a second preference petition for such spouse or child.

In one of our cases, a nurse got married after she obtained her green card under the Nursing Relief Act. Said spouse could not be accorded derivative status as "following to join" because the marriage took place after the nurse's admission to permanent residence.

However, we found out that the Nursing Relief Act application filed by the nurse was based on her sixth preference petition.

Since she also had a 3rd preference petition which was then current, we advised her to reapply for a green card and the US consul accepted the new immigrant visa application with the husband as derivative applicant.

What about the case of an alien who gets married or begets a child after the issuance of his immigrant visa but before he gets admitted into the US. (Note that visa issuance is done by the US Consul in Manila while admission into the US occurs at the port of entry).

The INS says that yes, there is derivative status but notes that although the law provides that a spouse or child acquired after visa issuance but prior to the principal alien's admission into the United States shall be entitled to the derivative status

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and the priority date of the principal alien, often the determination of that priority date maybe time consuming and difficult.

No record would exist at post in the name of a spouse or child acquired after the issuance of the visa but prior to the entry of the principal alien. Therefore, if the principal applicant's date of admission for permanent residence is earlier than the cutoff date for the numerical limitation applicable to the spouse and children, the consular officer may use that date and need not attempt to determine the principal applicant's actual priority date.

However, if the principal applicant's date of admission is not earlier than the applicable cutoff date, the consular officer must take the necessary steps to determine the principal applicant's priority date and use that date as the priority date for the spouse and children.

Other instructions recently promulgated by the State Department are as follows:

- The death of a petitioner prior to the beneficiary's travel to the United States results in the automatic revocation of the petition and the loss of the alien's priority date. However, if the consular officer believes that special humanitarian reasons exist which would warrant consideration by INS of the reinstatement of the petition, the consular officer may prepare a memorandum requesting such consideration and forward it with the petition to INS.

- In the case of the death of the principal beneficiary prior

to admission to the United States, neither the petition nor the priority date would remain valid for a derivative beneficiary.

- An alien issued an immigrant visa who fails to enter the United States would be entitled to the priority date previously established by the petition. However, since the visa has expired, the alien must apply for a new visa. If all the circumstances remain the same, the consular officer may proceed with issuing the visa. If, however, the same circumstances do not exist, the consul should refer the case to the Department for an advisory opinion.