

## **Adjudicator’s Field Manual Chapter 21.4(d) – Petition by Citizen or Lawful Permanent Resident for a Child, Son or Daughter**

(d) Adjudicative Issues Pertaining to Relationship Between Petitioner and Beneficiary . The following list of issues provide guidance on specific familial relationships. Adjudicators should also be aware of the issues discussed in the relevant precedent decisions pertaining to petitions for a child, son or daughter (see Chapter 23.4(g)).

(1) Child Born in Wedlock (Formerly Referred to as “Legitimate Child”) . See 8 CFR 204.2(d)(2)(i) for information regarding primary evidence for a child, son or daughter born in wedlock. (**Note:** “The phrase “child, son or daughter born in wedlock” includes an individual born to a couple in a “common law” marriage, if the common law marriage is recognized by the State or foreign country in which the couple resides (see Appendix 21-1 of this field manual.)

(2) Step Child . See 8 CFR 204.2(d)(2)(iv) for information regarding primary evidence for a stepchild.

(A) Creation of the Stepparent-Stepchild Relationship . A stepchild relationship is created whenever a parent of the child marries someone (other than the child’s other parent) before the child’s 18th birthday. The relationship is created automatically as a result of the marriage, assuming that the marriage is not a sham or does not violate the Defense of Marriage Act - see *Matter of Teng* , 15 I. & N. Dec 516 (BIA 1975) and Chapter 21.3 of this field manual.)

(B) Termination of Stepparent-Stepchild Relationship . Normally, a step relationship terminates when a marriage ends, especially if it ends in divorce. See *Matter of Simicevic* , 10 I. & N. Dec. 363 (BIA 1963). However, under certain circumstances a step relationship may continue after the death of the natural parent or even after the legal separation or divorce of the stepparent and natural parent if there is an ongoing relationship between the stepparent and stepchild (see *Matter of Pagnerre* , 13 I. & N. Dec. 173 (BIA 1971), *Matter of Mowrer* , 17 I. & N. Dec. 613 (BIA 1981), and *Matter of Mourillon* , 18 I. & N. Dec. 122 (BIA 1981)). If the marriage ends in annulment, however, the step relationship is deemed to have never existed because legally the marriage never existed.

**Note:** The creation of a step relationship in no way terminates the relationship between the child and his or her other natural parent (i.e., the one who did not marry the stepparent). It is neither unusual nor improper for a child who acquired LPR status through a stepparent to later petition for the other natural parent once the child naturalizes and reaches the age of 21.

(C) Petition by Wife of Natural Father . In some cases, although a natural father may be ineligible to petition for his illegitimate child, a stepparent-stepchild relationship may exist under the Act between the child and the wife of the natural father even if she has never seen or cared for the child. See *Matter of McMillan* , 17 I. & N. Dec. 605 (BIA 1981).

(3) Legitimated Child . See 8 CFR 204.2(d)(2)(ii) for information regarding primary evidence for a legitimated child or son or daughter.

Some nationalities are not concerned with the formal legalization of a relationship; therefore, a child may be raised in a household in a parent-child relationship when legally there is no relationship. A petition based on that relationship could not normally be approved.

In considering petitions for parents or children, you must take into account the laws governing the places of residence of the parents and of the child in addition to the restrictions of the Act. Some countries require formal court action to legitimate a child, while others do not. You may find a case where the father of an illegitimate child acknowledges paternity of a child, but that acknowledgment may or may not have constituted legitimation. If the petitioner fails to establish that the beneficiary has been legitimated, you should then consider whether the beneficiary may qualify as a child born out of wedlock with whom the petitioner has a bona-fide parent-child relationship (see paragraph (4)).

(4) Child Born out of Wedlock (Formerly Referred to as “Illegitimate Child”) . See 8 CFR 204.2(d)(2)(iii) for information regarding primary evidence for a child, son or daughter born out of wedlock.

(A) Petition by Mother for a Child Born Out of Wedlock . The mother of an illegitimate child always qualifies as a petitioner.

(B) Petition by Natural Father for a Child Born Out of Wedlock . Section 101(b)(1)(D) of the Act was amended to enable the natural father of a child born out of wedlock to petition for that child, if the father has or had a bona fide parent- child relationship with the child. A bona fide parent-child relationship is established when the father has or had evinced an active concern for the child's support, instruction and general welfare. The parent-child relationship must be established while the child is unmarried and under twenty-one (21) years of age. Benefits sought via this amendment may only be obtained on the basis of relative petitions filed on or after November 6, 1986, the effective date of the amendment. See Matter of Atembe , 19 I. & N. Dec. 427 (BIA 1986).

**Note:** See also paragraph (2)(C) of this chapter regarding a petition filed by a step-mother.

(5) Child Adopted While Under the Age of 16 . See 8 CFR 204.2(d)(2)(vii) for information regarding primary evidence for an adopted child or son or daughter.

(A) General Provisions . Section 101(b)(1)(E) defines an adopted alien child as “(i) a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: Provided, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act; or (ii) subject to the same proviso as in clause (i), a child who: (I) is a natural sibling of a child described in clause (i) or subparagraph (F)(i); (II) was adopted by the adoptive parent or parents of the sibling described in such clause or subparagraph; and (III) is otherwise described in clause (i), except that the child was adopted while under the age of 18 years[.]”

(B) Relationship Through Adoption The regulations incorporate the definitions for both legal custody and physical custody (legal residence) in paragraphs (vii)(A), (vii)(B), and (vii)(C) of 8 CFR 204.2(d)(2). You need to be aware of these and their applicability.

It is important that you determine if the petitioner and beneficiary are related through adoption or if their natural relationship was severed through an adoption. Aliens who gain permanent resident status in the U.S. through adoptive parents are not eligible to pass on immigration benefits to their natural parents. Also, the beneficiary's date of birth, the date of the adoption and time spent residing with and in the legal custody of the adoptive parents are critical in establishing the validity of the relationship. See 8 CFR 204.2(d)(2)(vii) for the evidence necessary to establish petitioner's right for the benefits sought. See also Matter of Cuello, 20 I. & N. Dec. 94 (BIA 1989) and Matter of Marquez, 20 I. & N. Dec. 160 (BIA 1990).

**Note:** While the petition asks the petitioner if the relationship between the petitioner and beneficiary is an adoptive relationship, in some cases you must evaluate the evidence and information presented in order to make the determination. Often, the only clue you will have to indicate a person was adopted is a birth certificate which indicates that birth occurred a number of years before it was registered but with no indication that the document is a delayed birth certificate. Most states in the U.S. do not annotate birth certificates issued for adoptive children to indicate the adoption.

(C) Primary Parental Control. The petitioner, as adoptive parent, has the burden of proof in establishing that primary parental control has been exercised by him/her during the requisite residence period. 8 CFR 204.2(d)(2)(vii)(B) lists some types of evidence of that may be submitted to establish such parental control. Once the petitioner submits such evidence, the relationship is presumed bona fide, absent any evidence indicating otherwise. See Matter of Cuello, 20 I. & N. Dec. 94 (BIA 1989).

(D) Petition by Adopted Child for Natural Parent(s) Prohibited. If a woman or couple give up a child for adoption, and that adoption meets the requirements set forth in section 101(b) of the Act, the natural parent(s) can gain no immigration benefit from that child (see Matter of Li, 20 I. & N. Dec. 700). Accordingly, such child is prohibited from petitioning for his or her natural parent(s), since the relationship between the child and the natural parent(s) was severed at the time of the adoption. This prohibition is in effect regardless of whether the child gains any immigration benefit through his or her adoptive parents (Matter of Li overruled prior precedent decisions in this regard).

However, if the adoption in question does not meet all of the requirements of section 101(b) of the Act (e.g., if the child was over age 16 at the time of the adoption), then the relationship between the child and his or her natural parent(s) was not severed, and the child is not prohibited from petitioning for such natural parent(s).

(E) Special Provision for Sibling of Child Adopted by Same Parents. Pub. L. 106-139 amended the Act to provide that an adopted alien child who is under the age of eighteen may be considered a "child" as defined in the Act, if the child is adopted with or after a natural sibling

who is also considered a “child” under the Act. This change in law only applies when the sibling has been or will be adopted by the same adoptive or prospective adoptive parents. The legislation addresses the two definitions of an adopted alien child under section 101(b)(1)(E) and section 101(b)(1)(F) of the Act. Section 101(b)(1)(E) defines a “child” as including “a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: Provided, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act.” Pub. L. 106-139 amends section 101(b)(1)(E) of the Act to add that a child who is a natural sibling of an adopted child described above, and who was adopted by the adoptive parent or parents of the sibling while the child was under the age of eighteen, is also a “child” as defined by the Act. The child must otherwise fall under the definition of a child under paragraph (E) except that the child was adopted while under the age of eighteen. The exceptions apply equally if either the adopted alien child or natural sibling has been adopted after being in the guardianship of the U.S. citizen parent(s) for more than two years as defined in paragraph (E) or falls under the definition of an orphaned child under paragraph (F). (See Chapter 21.5 of this field manual for a discussion of section 101(b)(1)(F) cases.)

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