

9 FAM 42.43 Notes

(TL:VISA-582; 09-29-2003)

9 FAM 42.43 N1 Suspending Action in Petition Cases

(TL:VISA-333; 11-15-2001)

a. The Immigration and Naturalization Service (INS) possesses exclusive authority over the approval and denial of immigrant visa petitions (except for those filed for aliens classifiable under INA 203(c) or 101(a)(27)(D)). Consular officers should bear in mind that the Department considers the approval of a visa petition prima facie evidence of the relationship between the petitioner and the beneficiary.

b. Therefore, it is the consular officer's responsibility to review, not to readjudicate petitions. However, in the course of that review, if the consular officer obtains sufficient facts so that the consular officer knows or has reason to believe that the beneficiary is not entitled to the status approved in the petition the consular officer shall return the petition to the INS approving office.

9 FAM 42.43 N2 When to Return Petitions

(TL:VISA-333; 11-15-2001)

Consular officers shall suspend action and return the petition to the INS approving office [see 9 FAM 42.43 N3] if:

- (1) The petitioner requests suspension of action;
- (2) The officer knows, or has reason to believe, the petition approval was obtained by fraud, misrepresentation, or other unlawful means; or
- (3) The officer knows or has reason to believe that despite the absence of fraud due to changed circumstances or clear error on the part of the Service in approving the petition the beneficiary is not entitled to the approved status.

9 FAM 42.43 N2.1 "Reason to Believe"

(TL:VISA-333; 11-15-2001)

Although there may be occasions when it will be evident that INS failed to consider a given item of evidence, in general, knowledge and reason to believe must be based upon evidence that the INS did not have available at the time of adjudication. This evidence often arises as a result of or during the consular officer's interview. Reason to believe must be more than mere conjecture or speculation—there must exist the probability, supported by evidence, that the alien is not entitled to status.

9 FAM 42.43 N2.2 Cases of Sham Marriages

(TL:VISA-333; 11-15-2001)

INS has minimum evidentiary standards that must be established before revocation proceedings in a case based upon a marital relationship may begin. These minimum evidentiary standards are:

(1) A written statement from one or both of the parties to the marriage that the marriage was entered into primarily for immigration purposes;

(2) Documentary evidence that money changed hands under circumstances such that a reasonable person would conclude the marriage was a paid arrangement for immigration purposes; or

(3) Extensive factual evidence developed by the consular officer that would convince a reasonable person that the marriage was a sham marriage entered into to evade immigration laws.

9 FAM 42.43 N3 Returning Petition

(TL:VISA-438; 07-10-2002)

When action is suspended the consular officer shall:

(1) Prepare a memorandum which constitutes a comprehensive report to INS explaining in detail the reasons why the beneficiary appears not to be entitled to status [see 9 FAM 42.43 PN1]; and

(2) Send the petition under cover of Form DS-3096, *Consular Return/Case Transfer Cover Sheet*, directly to the appropriate INS office. (NVC and VO do not need to be informed.) Petitions approved at post should be sent to the INS office abroad with regional jurisdiction;

(3) If fraud is suspected, send a copy of the memorandum to the Department (CA/FPP); and

(4) Retain a copy of the petition, the supporting documents and the memorandum.

9 FAM 42.43 N4 Reaffirmation of Visa Petitions

(TL:VISA-333; 11-15-2001)

If INS reaffirms a petition which has been returned, and the consular officer has no additional factual evidence to submit to support the belief that an alien is not entitled to status, except in the rare cases discussed in 9 FAM 42.43 N4.1 below, the consular officer shall process the case to conclusion.

9 FAM 42.43 N4.1 When Consul Disagrees with Reaffirmation But Has No Evidence

(TL:VISA-333; 11-15-2001)

a. In the rare case where the consular officer may irreconcilably disagrees with the INS decision to uphold the validity of the petition. If the consular officer has no new evidence to present which was not previously considered by the INS, the consular officer shall send the entire case to the Department (CA/VO/L/A) for review and discussion with INS/HQ. Such referrals should be rare, however, since the burden of proof still rests with INS and protracted delay without sufficient reason is unfair to the visa applicant.

b. It should be remembered that INS bears a high burden of proof (good and sufficient cause) in revocation proceedings. Although the consular officer may believe that the evidence leads a reasonable person to believe that the alien is not entitled to status, the evidence of record may not be sufficient to meet the higher standard of proof required in these proceedings.

9 FAM 42.43 N4.2 Consul Disagrees with Reaffirmation and Has New Evidence to Present

(TL:VISA-333; 11-15-2001)

Despite the fact that INS reaffirms the petition, if the consular officer discovers substantial new evidence not considered by the INS in its decision to reaffirm, the consular officer may return the petition directly to INS without referring the case to the Department.

9 FAM 43.43 N5 Reconstructing Erroneously Suspended EW3 Petitions

(TL:VISA-333; 11-15-2001)

a. If upon review, the consular officer determines that a petition was erroneously suspended and returned to INS, posts should consider the petition to be readjudicated. In accordance with N3, posts should retain a copy of a petition, along with the supporting documents, which is returned to INS. When applicants reapply for a visa based on these petitions, the consular officer shall strike the cancellation mark for those labor certifications marked canceled. These labor certification should now be treated as valid and marked in the upper right hand corner:

"OVERCOME: LABOR CERTIFICATION CANCELLATION REVERSED"

NOTE: The date, post and consular officer's signature should appear over the post stamp.

b. If the post has not maintained a copy of part of all of the petition, including the labor certification, post are authorized to accept as valid a certified copy of the petition or part of the petition, if there is no reason to believe that such copy is materially different from the original. The post may also obtain documents from the INS service center to which they originally returned the petition, although INS may not have retained a copy.

9 FAM 42.43 N5.1 Packaging the Visa

(TL:VISA-333; 11-15-2001)

If the post issued a visa based on the reconstructed petition, post should package the petition under normal procedures with an additional official notation to INS at the port-of-entry indicating that the petition has been reconstructed by the consular officer, and has been cleared by INS/HQ and should be accepted as valid. The official notification to the INS port-of-entry should include the standard language - "Reconstructed Petition Approved" the date, post and consular officer's signature over the post stamp on the first page of the petition.

9 FAM 42.43 N6 Extending Petition Following Petitioner's Death

(TL:VISA-582; 09-29-2003)

A petition automatically revoked, due to the death of the petitioner may be reinstated, by INS if the consular officer believes that special humanitarian consideration is warranted. [See 9 FAM 42.42 N2.2.]

9 FAM 42.43 N7 Investigation Requests

(TL:VISA-170; 10-01-1997)

In some cases the consul may determine that there is sufficient evidence to justify requesting an INS investigation in order to combine INS' findings with the facts developed at post to make a case for revocation. The consular officer shall submit such a case to INS as an investigation request. [See 9 FAM 42.43 PN4.]

9 FAM 42.43 N8 INS Regulations Governing Revocation of Petitions

(TL:VISA-19; 01-27-1989)

INS regulations governing the revocation of petitions are provided in 9 FAM 42.43 Exhibit I.

9 FAM 42.43 N9 Termination of Action

(TL:VISA-170; 10-01-1997)

The consular officer shall terminate action on a visa petition:

- (1) Upon receipt of notification from INS that the petition has been revoked under 8 CFR 205.1;
- (2) If the petition is automatically revoked under 8 CFR 205.1; or
- (3) If the petition is automatically revoked under INA 203(g). [See 9 FAM 42.43 PN2.]

9 FAM 42.43 N10 Retention/Nonretention of Priority Date When Petition Revoked

9 FAM 42.43 N10.1 Petition Filed by Same Petitioner for Same Beneficiary under Same Preference

(TL:VISA-170; 10-01-1997)

When a visa petition has been approved, and subsequently a new petition by the same petitioner is approved for the same preference classification on behalf of the same beneficiary, the latter approval shall be regarded as a reaffirmation or reinstatement of the validity of the original petition. This is not the case, however, when the original petition has been terminated pursuant to section 203(g) of the Act, or revoked pursuant to 8 CFR 205 or when an immigrant visa has been issued to the beneficiary as a result of the petition approval. [See 9 FAM 42.83 Related Statutory Provisions.]

9 FAM 42.43 N10.2 Family Preference Petition Filed by Different Petitioner or According Different Preference

9 FAM 42.43 N10.2-1 Abandonment of LPR Status to Confer More Beneficial Status

(TL:VISA-170; 10-01-1997)

There is no legal restriction preventing a lawful permanent resident from obtaining another immigrant visa in a different preference status in order to confer derivative status on a spouse or child. There is also no requirement that the alien resident abandon his LPR status.

9 FAM 42.43 N10.2-2 Priority Date Not Retained

(TL:VISA-170; 10-01-1997)

The beneficiary of a new family preference petition may not retain the priority date of a revoked petition if:

- (1) The new petition accords a different preference status;
- (2) The new petition is filed by a different petitioner; or
- (3) The old petition was revoked under INA 203(g).

The preference priority date in such a case is the filing date of the new petition.

9 FAM 42.43 N10.3 Employment Preference Petition Filed by Different Petitioner or According Different Preference

(TL:VISA-52; 12-30-1991)

A petition approved for an alien under INA 203(b)(1), (2) or (3) accords the alien the priority date of the approved petition for any subsequently filed petition under INA 203(b)(1), (2) or (3). This priority date is maintained even if the petitioner is different from the original petitioner. A petition revoked under INA 203(g), 204(e) or 205 will not confer a priority date.