

9 FAM 42.53 NOTES

*(CT:VISA-1760; 10-27-2011)
(Office of Origin: CA/VO/L/R)*

9 FAM 42.53 N1 DEFINITION OF “PROPERLY FILED”

(CT:VISA-1545; 09-27-2010)

A petition will be considered properly filed when the completed, signed petition, including all initial evidence and the correct fee, is filed with the Department of Homeland Security (DHS).

9 FAM 42.53 N2 FAMILY-SPONSORED PREFERENCE PETITIONS

9 FAM 42.53 N2.1 Petitions Filed with the Department of Homeland Security (DHS)

(CT:VISA-835; 08-17-2006)

The priority date of the petition is the date on which the completed, signed petition is properly filed.

9 FAM 42.53 N2.2 Petitions Filed With and Approved by Consular Officer

(CT:VISA-1760; 10-27-2011)

If you accept and approve a family-sponsored petition, the petition filing date is the date on which the petition is received and date-stamped in the consular office, provided the fee has been paid, proper evidence is provided, and the petition has been signed. (See 9 FAM 42.41 N4.2-3 *and* 9 FAM 42.41 N4.2-7.)

9 FAM 42.53 N2.3 Petitions Received by Consular Officer but Forwarded to the Department of Homeland Security (DHS) for Adjudication

(CT:VISA-1545; 09-27-2010)

If you accept a petition with the required supporting documents, collect the fee, and forward the petition to a DHS office for adjudication, the petition is considered to have been filed. Thus, a priority date is established when the petition is received and date-stamped in the consular section.

9 FAM 42.53 N2.4 Retention of Priority Date Despite Conversion to Another Status

(CT:VISA-1128; 12-03-2008)

An applicant's petition automatically converts and retains the original priority date when the applicant's status changes under certain circumstances. (See 9 FAM 42.53 Exhibit I.)

9 FAM 42.53 N2.4-1 When Marital Status Changes

(CT:VISA-1434; 05-27-2010)

- a. An approved first preference petition for an unmarried son or daughter automatically converts to third preference when the applicant marries. The applicant retains the priority date of the original petition, which at the time of filing accorded first preference status.
- b. If a child beneficiary of an immediate relative petition marries, the petition automatically converts to third preference. The applicant's priority date is the filing date of the petition, which originally accorded IR-2 status.
- c. An approved third preference petition converts to a first preference (or IR-2 if under 21) if the applicant is widowed or divorced. The applicant retains the priority date of the original petition, which at the time of filing accorded third preference status.

9 FAM 42.53 N2.4-2 When a Child Reaches Majority

(CT:VISA-1545; 09-27-2010)

- a. When the child beneficiary of an approved IR-2 petition turns 21 years of age, the petition automatically converts to first preference. The priority date is the filing date of the petition, which at the time of filing accorded IR-2 status.
- b. A child in the 2A group who reaches 21 years of age is no longer entitled to 2A status. If such child is the beneficiary of an approved petition, the petition automatically provides the basis for 2B status as of the beneficiary's 21st birthday. No further action by DHS, the petitioner, or the beneficiary is necessary. (The situation is similar to that of an IR-2

applicant who turns 21 prior to visa issuance; that petition automatically converts to provide first preference status.)

- c. A child accorded 2A status derivatively loses entitlement to such status upon reaching the age of 21. Under DHS regulations, the petitioner must file a new petition on behalf of the alien to accord 2B status. The new petition will be accorded the priority date of the initial petition.

9 FAM 42.53 N2.4-3 When the Petitioner Becomes Naturalized

(TL:VISA-173; 11-10-1997)

- a. Upon the naturalization of the petitioner, the approved second preference petition for the spouse automatically converts to status as an immediate relative.
- b. Upon the naturalization of a petitioning parent, an approved second preference petition for a child beneficiary automatically converts to status as an immediate relative. A child who has second preference status derivatively does not benefit from the parent's naturalization, because the child is not the beneficiary of an approved petition and there is no derivative entitlement under the immediate relative provision. Such a child loses second preference status and acquires no other until such time as a petition naming the child as the beneficiary is filed and approved.
- c. If the son and/or daughter who is the named beneficiary of a second preference petition is age 21 or older and the petitioner becomes naturalized, the status accorded by the petition converts to first preference. The applicant retains the priority date of the petition which at the time of filing accorded second preference status.

9 FAM 42.53 N2.5 Family Petition Valid for Purposes of That Petition Only

(CT:VISA-1434; 05-27-2010)

A priority date established by an approved petition for any of the family-sponsored preference classes is valid only for the purpose of that petition. If the petition is revoked under INA 203(g) (8 U.S.C. 1153(g)) or 8 CFR 205, or if a new petition is filed by a different petitioner for the same beneficiary, the priority date of the initial petition is not transferable to the new petition. If, however, the petition has not been revoked under INA 203(g) (8 U.S.C. 1153(g)) or 8 CFR 205, and a new petition is filed by the same petitioner for the same beneficiary in the same classification, DHS deems the approval of the new petition to be a reaffirmation of the initial petition and reinstatement of the priority date of that original petition.

9 FAM 42.53 N3 EMPLOYMENT-BASED PREFERENCE PETITIONS

9 FAM 42.53 N3.1 First Preference

(CT:VISA-1128; 12-03-2008)

Aliens applying for employment-based first preference are not subject to a job offer requirement, and therefore do not require labor certification. The priority date accorded by an employment-based first preference petition is the date the petition is properly filed with DHS.

9 FAM 42.53 N3.2 Second and Third Preference

(CT:VISA-1312; 09-22-2009)

The priority date accorded by an employment-based second or third preference petition based upon an individual labor certification is the date on which the labor certification was accepted for processing by an employment service office in the Department of Labor. The priority date in a case which either does not require a job offer or meets the labor certification requirement under Schedule A or the Department of Labor's Pilot Program is the date on which the petition was properly filed with DHS. (See 9 FAM 42.53 N3.5.)

9 FAM 42.53 N3.3 Fourth Preference

(CT:VISA-1434; 05-27-2010)

The priority date accorded by an employment-based fourth preference petition is the date the petition was properly filed at the appropriate office of DHS or, in the case of a special immigrant described in INA 101(a)(27)(D) (8 U.S.C. 1101(a)(27)(D)) (an employee or former employee of the U.S. Government abroad), at a U.S. consular office abroad.

9 FAM 42.53 N3.3-1 Status Established Prior to October 1, 1991, But Visa Not Issued

(CT:VISA-1545; 09-27-2010)

If an alien had established entitlement to special immigrant status but had not obtained a visa prior to October 1, 1991, the alien must file a petition with DHS (or in the case of an SE applicant, at a consular office abroad) for classification under INA 203(b)(4) (8 U.S.C. 1153(b)(4)). Such petitions have as a priority date the date the alien submitted the application for immigrant status under prior law.

9 FAM 42.53 N3.3-2 Derivative Special Immigrant Visas Not Issued Prior to October 1, 1991

(CT:VISA-1545; 09-27-2010)

DHS and the Visa Office have agreed that the spouse and/or child of a special immigrant who immigrated to the United States may be deemed entitled to status derivatively under INA 203(b)(4) (8 U.S.C. 1153(b)(4)). No separate petition is required. The applicant will be accorded as a priority date the date the principal alien was issued the special immigrant visa. If that information is not available, the priority date will be the date the special immigrant was admitted to the United States. This information is reflected in the principal's passport and/or on the Form I-551, Permanent Resident Card, or can be obtained from DHS.

9 FAM 42.53 N3.4 Fifth Preference

(CT:VISA-1312; 09-22-2009)

The priority date accorded by an employment-based fifth preference petition for an alien entrepreneur is the date the petition was properly filed with DHS. It should be noted that such date may be earlier than October 1, 1991, because DHS permitted filing of Form I-526, Immigrant Petition by Alien Entrepreneur, for priority date purposes (although no adjudication could take place) before the effective date of the DHS regulations pertaining to this class.

9 FAM 42.53 N3.5 Subsequent Petition in Employment-Based Classifications

(CT:VISA-1545; 09-27-2010)

- a. Unless revoked pursuant to 8 CFR 205.2 for fraud or misrepresentation, a priority date accorded by approval of an employment-based first, second, or third preference petition is retained by the beneficiary for any other first, second, or third preference petition approved subsequently for the same beneficiary. In all cases, the beneficiary of multiple petitions is entitled to the earliest of the filing dates of the various petitions.
- b. Subsequent petitions need not be from the same petitioner or for the same type of employment. However, where the applicant is no longer proceeding to work for the first petitioner, it would be reasonable to make inquiries to determine whether the first petition had been revoked. (See 9 FAM 42.53 Exhibit II, 8 CFR 204.5(e).)
- c. A priority date established in the employment-based first, second, or third preference category is not transferable to employment-based fourth or fifth preference petitions or to a family-sponsored petition.

9 FAM 42.53 N3.6 Substitution of Alien Beneficiary

(CT:VISA-1426; 04-21-2010)

Prior to July 16, 2007, an employer was permitted to substitute another employee after a labor certification had been approved. However, Department of Labor (DOL) regulations prohibited substitution of beneficiaries of labor certifications effective July 16, 2007; USCIS has not accepted substitutions to support an immigrant preference petition since that date. In the event that you encounter an application for a beneficiary who was substituted after the labor certification was approved by DOL but before July 16, 2007, keep in mind that the priority date for a petition that is supported by a labor certification substitution is the earliest date the certification was accepted for processing by DOL.

9 FAM 42.53 N4 FORMER WESTERN HEMISPHERE PRIORITY DATES

(CT:VISA-1545; 09-27-2010)

- a. Until 1976, aliens born in independent countries of the Western Hemisphere and the Canal Zone were identified as "Western Hemisphere immigrants" upon establishment of status by obtaining a labor certification or being exempt there-from as the parent, spouse, or child of a U.S. citizen or lawful permanent resident (LPR) alien.
- b. A native of the Western Hemisphere who established a priority date with a consular officer prior to January 1, 1977 and who was found to be entitled to an exemption from the labor certification requirement of INA 212(a)(5)(A) (8 U.S.C. 1182(a)(5)(A)) as the parent, spouse, or child of a U.S. citizen or lawful permanent resident (LPR) alien will continue to be exempt from that requirement, and will retain the priority date for so long as the relationship upon which the exemption is based continues to exist.

9 FAM 42.53 N4.1 Retention of Western Hemisphere Priority Dates

(CT:VISA-1760; 10-27-2011)

Under section 9 of the INA Amendments of 1976 (Public Law 94-571), an alien who was registered as a Western Hemisphere immigrant with a priority date prior to January 1, 1977 retains the priority date and may use that priority date for the purpose of any preference petition subsequently approved in his or her behalf.

9 FAM 42.53 N4.2 Establishing Entitlement to

Western Hemisphere Priority Dates

(CT:VISA-1760; 10-27-2011)

An alien may establish entitlement to a Western Hemisphere priority date in several ways:

- (1) The applicant may present documents received from a consular office indicating that the applicant was registered as a Western Hemisphere immigrant with a priority date prior to January 1, 1977;
- (2) The consular office may still have records reflecting the applicant's pre-1977 registration as a Western Hemisphere applicant;
- (3) The applicant may present proof of the principal alien's priority date and proof that the required relationship existed at the time; or
- (4) The applicant establishes proof of the principal alien's priority date and evidence that he or she is the child of a marriage which existed prior to the principal alien's admission to the United States.

9 FAM 42.53 N4.3 No Cross-Chargeability

(CT:VISA-1760; 10-27-2011)

There is no cross-chargeability for Western Hemisphere priority dates. Thus, a derivative spouse who is entitled to a Western Hemisphere priority date cannot transfer entitlement to the principal alien. If the principal alien, however, married the spouse prior to January 1, 1977, then the principal alien may have acquired a priority date as the derivative beneficiary of the spouse who held the Western Hemisphere priority date.

9 FAM 42.53 N5 CONSULAR OFFICER'S ROLE WITH RESPECT TO PRIORITY DATE

9 FAM 42.53 N5.1 General

(CT:VISA-1312; 09-22-2009)

- a. If a petition is approved by DHS, the DHS adjudicator will indicate the proper priority date in the appropriate box on the face of the petition. You should assume that the adjudicator has appropriately applied the DHS regulation in assigning that date.
- b. If, however, the alien or the alien's representative claims that the date has been incorrectly determined, you will send an e-mail containing a copy of the petition and supporting documents with a full report of the

facts to the National Visa Center (NVC) for verification and/or for forwarding to the appropriate DHS office for reconsideration and determination of the correct priority date. Only if it is conclusive that the date is wrong (for instance, if the priority date is later than the approval date on which the officer is reviewing it) may you make a change in the priority date without referral to DHS.

9 FAM 42.53 N5.2 Western Hemisphere

(CT:VISA-1128; 12-03-2008)

We have traditionally promulgated regulations and instructions regarding Western Hemisphere priority dates. Consequently, if you decide that a Western Hemisphere priority date applies in a case, you should make the adjustment without referral to DHS.

9 FAM 42.53 N6 PRIORITY DATE FOR DERIVATIVE SPOUSE/CHILD

9 FAM 42.53 N6.1 Spouse/Child Acquired Prior to Principal's Admission

(CT:VISA-1128; 12-03-2008)

- a. The spouse or child of a principal alien acquired prior to the principal alien's admission to the United States, if not otherwise entitled to immigrant status and immediate issuance of a visa, is entitled to the same status and thus the same priority date as the principal alien if "accompanying" or "following to join." (See 9 FAM 40.1, Related Regulatory Provisions; 9 FAM 40.1 N7; and 9 FAM 42.53 PN1.)
- b. A preference applicant's priority date is linked to the underlying petition and qualifications for that particular status. A derivative spouse or child's loss of entitlement to status (through principal alien's demise, attaining the age of 21 years, etc.) results in the loss of a priority date.

9 FAM 42.53 N6.2 Child of a Marriage Existing Prior to Principal's Admission

(TL:VISA-61; 06-05-1992)

The child of a marriage which existed prior to the principal alien's admission into the United States 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.

9 FAM 42.53 N6.3 Spouse/Child Acquired After Principal's Admission

(CT:VISA-1128; 12-03-2008)

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 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.

9 FAM 42.53 N6.4 Spouse/Child Acquired After Visa Issuance But Prior to Principal's Admission

(CT:VISA-1128; 12-03-2008)

Although 22 CFR 42.53 (see 9 FAM 42.53, Related Statutory Provisions) provides that a spouse or child acquired after visa issuance but prior to the principal alien's admission into the United States is entitled to derivative status and the priority date of the principal alien, the determination of that priority date is often time-consuming and difficult since no record of the name of the spouse or child would exist at post. 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, you 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 later than the applicable cutoff date, you 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. (See 9 FAM 42.53 PN1.)

9 FAM 42.53 N6.4-1 Use of Admission Date Not Authorized in Certain Circumstances

(CT:VISA-835; 08-17-2006)

The use of the principal alien's date of admission for permanent residence as the priority date for the spouse or child is not authorized when, under special legislation or regulatory provisions, the principal alien's date of admission is a date preceding the actual date on which DHS acted to accord the principal alien permanent resident status.

9 FAM 42.53 N6.4-2 Alien Commuter's Relatives Not Eligible for Benefits

(CT:VISA-835; 08-17-2006)

Pursuant to DHS regulations 8 CFR 211.5(c) (see 9 FAM 42.53 Exhibit II), an alien commuter cannot confer any immigration benefits on behalf of relatives before taking up residence in the United States.

9 FAM 42.53 N6.5 No Derivative Priority Date for Parents

(CT:VISA-1312; 09-22-2009)

22 CFR 42.53(c) regulations (see 9 FAM 42.53, Related Statutory Provisions) provide for a derivative priority date only for the spouse and children of a principal alien. There is no derivative priority date provided by statute or regulation for the parents of an intending immigrant.

9 FAM 42.53 N6.6 No Derivative Priority Date for Offspring of Derivative Child

(TL:VISA-61; 06-05-1992)

There is no derivative priority date provided by statute or regulation for the offspring of derivative children; e.g., a child of an F12 or F43 teenager.

9 FAM 42.53 N7 DEATH OF PETITIONER

9 FAM 42.53 N7.1 U.S. Citizen Spouse

(CT:VISA-862; 02-27-2007)

See 9 FAM 42.42 N5.1.

9 FAM 42.53 N7.2 Other than U.S. Citizen Spouse

(CT:VISA-1760; 10-27-2011)

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 you believe that special humanitarian reasons exist which would warrant consideration by DHS of the reinstatement of the petition, you may prepare a memorandum requesting such consideration and forward it with the petition to DHS. (See 9 FAM 42.42 *N2*.)

9 FAM 42.53 N8 DEATH OF PRINCIPAL BENEFICIARY

(TL:VISA-61; 06-05-1992)

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.

9 FAM 42.53 N9 PRIORITY DATE VALIDITY AFTER VISA ISSUANCE

9 FAM 42.53 N9.1 After Visa Issuance but Before Admission to United States

(CT:VISA-1312; 09-22-2009)

An alien issued an immigrant visa (IV) 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, you may proceed with issuing the visa. If, however, the same circumstances do not exist, you should refer the case to the Department's Office of Legislation, Regulations, and Advisory Assistance, Advisory Opinions Division (CA/VO/L/A) for an advisory opinion (AO). (See 9 FAM 42.74, Related Statutory Provisions.)

9 FAM 42.53 N9.2 After Admission to United States

(CT:VISA-1128; 12-03-2008)

An alien cannot reuse a priority date which was used for the issuance of an immigrant visa (IV) which the alien in turn used to gain lawful admission into the United States.

9 FAM 42.53 N10 EFFECT ON PRIORITY DATE OF NEW PETITION APPROVAL FOR BENEFICIARY OF REVOKED PETITION

(CT:VISA-1434; 05-27-2010)

See 8 CFR 205. (9 FAM 42.43, Related Statutory Provisions).