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In this issue...

Understanding Marriage-Based K Nonimmigrant Visas: The Difficulty in Saying "I Do"

by Josh Lunsford

"I do." Two of the most powerful, controversial, and misunderstood words in the immigration field. For aliens hoping to immigrate to the United States, these words can be the path—and sometimes an immediate one—to acquiring permanent residence. *See, e.g.*, section 201(b)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1151(b)(2)(A)(i). For aliens in the country illegally, these words can be the difference between an order of removal and a grant of relief therefrom. *See, e.g.*, section 240A(b)(1) of the Act, 8 U.S.C. § 1229b(b)(1). For others, these words are nothing more than an open invitation to the backdoor of our immigration system. *See, e.g.*, David Seminara, *Hello, I Love You, Won't You Tell Me Your Name: Inside the Green Card Marriage Phenomenon*, Backgrounder (Ctr. for Immigr. Studies, D.C.), Nov. 2008, *available at* http://cis.org/marriagefraud.

The impact of marriage on today's immigration system is undeniable. Over the past 3 years, more than 800,000 immigrant visas have been issued to spouses of U.S. citizens. Randall Monger & James Yankay, Office of Immigr. Stats., Dep't of Homeland Sec., *Annual Flow Chart: U.S. Legal Permanent Residents: 2012*, at 3 Table 2 (Mar. 2013), *available at* http://www.dhs.gov/sites/default/files/publications/ois_lpr_fr_2012_2.pdf. This is more than the number of visas that were issued to all family-based preference categories and nearly twice that of the employment-based preference categories. *See id.*

On top of having the highest rate of visa issuance for all immigrant categories, the increasing role of marriages in the immigration system prompted Congress to create an entire nonimmigrant category—the K visa—to facilitate marriages between alien and citizen fiancé(e)s and family unity for married couples awaiting approval of an immigrant visa petition. *See* Section 101(a)(15)(K) of the Act, 8 U.S.C. § 1101(a)(15)(K). Despite being in existence for over four decades, courts and scholars have struggled to

define the legal rights of individuals who enter the United States under one of the K nonimmigrant categories. This article explores these uncertainties and tries to clarify the legal consequences of various events with respect to each K nonimmigrant class.

Overview

There are currently four different K nonimmigrant categories. K-1 nonimmigrant visas are for the fiancé(e)s of United States citizens. Section 101(a)(15)(K)(i) of the Act. A nonimmigrant visa will be issued under this section if the alien and U.S. citizen fiancé(e)s can establish that they (1) have a bona fide intent to marry, (2) are legally able to conclude a valid marriage within 90 days of the alien fiancé(e)'s admission into the United States, and (3) met in person at least one time in the prior 2-year period. *See also* section 214(d)(1) of the Act, 8 U.S.C. § 1184(d)(1); 8 C.F.R. § 214.2(k)(2) (providing a waiver for the third requirement upon a showing of "extreme hardship" or if "compliance would violate strict and long-established customs of the K-1 beneficiary's foreign culture or social practice"). K-2 nonimmigrant visas are reserved for the "minor children"[1] of a K-1 beneficiary who are accompanying or following to join the alien fiancé(e) to the United States. Section 101(a)(15)(K)(iii) of the Act.[2] Together, these two categories accounted for over 98% of all K nonimmigrant visas issued last year. U.S. Dep't of State, Nonimmigrant Visas Issued by Classification, 2008-2012 (2013), *available at* http://www.travel.state.gov/pdf/FY12AnnualReport-TableXVIB.pdf ["2008-2012 NIV Statistics"].

The remaining two categories are reserved for K-3 and K-4 nonimmigrants. A K-3 nonimmigrant visa is available to an alien who (1) has concluded a valid marriage with a U.S. citizen, (2) is the beneficiary of an immediate relative visa petition filed by the U.S. citizen spouse, and (3) seeks to enter the United States solely to await approval and availability of an immigrant visa. Section 101(a)(15)(K)(ii) of the Act. The K-4 classification was created for the "minor children" of a K-3 beneficiary who are accompanying or following to join the alien spouse to the United States. Section 101(a)(15)(K)(iii) of the Act. In light of increasingly short processing times for immigrant visas, K-3 and K-4 nonimmigrant visas are not nearly as popular as they once were. *Compare* 2008-2012 NIV Statistics, *supra*, *with* U.S. Dep't of State, Nonimmigrant Visas Issued by Classification, 2003-2007 (2008), *available at* http://www.travel.state.gov/pdf/FY07AnnualReportTableXVIB.pdf (reflecting a change from 15,577 K-3 and K-4 issuances in 2003 to only 362 in 2012).

These eligibility requirements are generally undisputed. Instead, the bulk of the present uncertainty stems from the rights of K nonimmigrants *after* entering the United States—namely, their ability to adjust status to that of a lawful permanent resident. The only statutory provision that provides any guidance on this issue is section 245(d) of the Act, 8 U.S.C. § 1255(d), which provides:

> The Attorney General may not adjust, under subsection (a), the status of a nonimmigrant alien described in section 101(a)(15)(K) except to that of an alien lawfully admitted to the United States on a conditional basis under section 216 as a result of the marriage of the nonimmigrant (or, in the case of a minor child, the parent) to the citizen who filed the petition to accord that alien's nonimmigrant status under section 101(a)(15)(K).

However, this provision only begins to scratch the surface of the numerous issues facing K nonimmigrants in their journey to obtaining permanent residence—and, realistically, fails to do even that.

One Rule, Two Meanings

A straightforward reading of section 245(d) would suggest that all K nonimmigrants are equally obligated to meet the requirements under section 245(a) in order to adjust status—that is, each K nonimmigrant must demonstrate admissibility and visa eligibility and availability and must show that adjustment should be granted as a matter of discretion. And while this statement may be *technically* correct, these requirements are satisfied in rather different manners with respect to each K nonimmigrant category.

The easiest way to understand the requirements related to each K nonimmigrant category is to start at its origin. Added to the Act for the first time in 1970, the K nonimmigrant visa was originally created to provide a means by which a U.S. citizen could arrange for his or her alien fiancé(e) to obtain lawful permanent residence. Act of Apr. 7, 1970, Pub. L. No. 91-225, § 1(b), 84 Stat. 116, 116. Once a K nonimmigrant visa was secured and the

alien fiancé(e) entered the United States, the couple had 3 months to conclude a legally valid marriage. Section 214(d) of the Act, 8 U.S.C. § 1184(d) (1970). Upon conclusion of a timely marriage, and provided that he or she was otherwise admissible, the alien fiancé(e) filed a Form I-485 (Application to Register Permanent Residence or Adjust Status) and the Attorney General was *required* to "record [his or her] lawful admission for permanent residence." *Id*. Although likened to adjustment of status under section 245 and similarly initiated through the filing of a Form I-485, this entire process was "under a separate and distinct provision of the statute, carrying its own requirements, and having no relationship to the requirements of section 245." *Matter of Dixon*, 16 I&N Dec. 355, 357 (BIA 1977).

In response to growing concerns of immigration fraud, Congress passed the Immigration Marriage Fraud Amendments Act of 1986, Pub. L. No. 99-639, 100 Stat. 3537 ("IMFA"). The IMFA made several key changes with respect to K nonimmigrants, including the requirement that the petitioning fiancé(e) meet his or her alien fiancé(e) in person at least one time in the 2-year period prior to filing the petition, the inclusion of conditional permanent resident status for K nonimmigrants, and the bar against adjustment on any basis other than marriage to the petitioning U.S. citizen. *See generally Matter of Sesay*, 25 I&N Dec. 431, 435-41 (BIA 2011) (discussing statutory changes). For purposes of the present discussion, the IMFA's most important change was that it repealed section 214(d)'s automatic adjustment (or recordation) provision and subjected K nonimmigrants to the discretionary adjustment procedure under section 245(a). *See id*. at 437; *see also* Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 7(b), 102 Stat. 2609, 2616 (amending IMFA § 3(b)).

The additional requirements of section 245(a)—namely, visa eligibility and availability—were marked changes for the K nonimmigrant process. As the Board of Immigration Appeals explained, a quintessential element of the fiancé(e) visa has been the procedural overlap between eligibility for a nonimmigrant visa and adjustment of status. *Matter of Sesay*, 25 I&N Dec. at 439. Specifically, applications for K-1 visas were historically "processed like . . . immigrant visa petition[s]" and, once approved, they accorded alien fiancé(e)s the ability to "adjust[] status as the spouse of a United States citizen" without ever filing a visa petition with USCIS. *Id*. at 439, 441. But in moving K nonimmigrants from the adjustment procedures of former section 214(d) to section 245(a), Congress did nothing to either change this practice or provide another method by which alien fiancé(e)s could satisfy the new requirements of visa eligibility and availability. *See id*.

Regardless of the new requirements, the Board concluded that there was no reason to depart from the historical K nonimmigrant process. Instead, to resolve the fact that alien fiancé(e)s "cannot satisfy the literal terms of sections 245(a)(2) and (3)," the Board created a legal fiction by which K-1 nonimmigrants are "recognized as the functional equivalents of immediate relatives for purposes of immigrant visa eligibility and availability." *Id*. at 438. This legal fiction is highlighted by the fact that, unlike other family-sponsored immigrants who are required to establish visa eligibility through the adjudication of a Form I-130 (Petition for Alien Relative), eligibility for both nonimmigrant and immigrant visas is "predicated on the nonimmigrant I-129F visa petition" for K-1 nonimmigrants. *Id*. at 439. In other words, the requirements for obtaining an immigrant visa are coextensive with the requirements for obtaining a K-1 nonimmigrant visa. *See id.* Accordingly, to preserve this practice, "the section 245(a) eligibility requirements [are deemed to be] . . . satisfied *at the time the fiancé(e) is admitted to the United States on the K-1 visa*, conditioned on a subsequent, timely marriage to the fiancé(e) petitioner." *Id*. at 440 (emphasis added).

This same logic has also been extended to an accompanying or following to join child who obtains a visa derivatively though his or her K-1 parent as a K-2 nonimmigrant. *See* 8 C.F.R. § 214.2(k)(3) ("Without the approval of a separate petition on his or her behalf, a child of the [K-1] beneficiary . . . may be accorded the same nonimmigrant classification as the beneficiary if accompanying or following to join him or her."). As the Board has explained, K-2 nonimmigrants were also part of the pre-IMFA streamlined procedure by which permanent residence was automatic once the K-1 parent entered into a timely marriage with the fiancé(e) petitioner. *Matter of Le*, 25 I&N Dec. 541, 545 (BIA 2011). As such, a K-2 nonimmigrant's ability to become a permanent resident was always predicated on the I-129F (Petition for Alien Fiancé(e)) and a timely marriage between his or her K-1 parent and the petitioning U.S. citizen. *See id*. Accordingly, as is the case with his or her K-1 parent, a derivative K-2 child is regarded as "satisfy[ing] the[] requirements [of visa eligibility and availability] *at the*

time of admission . . . with the K-2 nonimmigrant visa, conditioned on the timely, bona fide marriage of the alien fiancé(e) parent to the United States citizen petitioner." *Id*. at 546 (emphasis added).

From 1970 to 2000, the K nonimmigrant visa was devoted solely to fiancé(e)s of United States citizens and the children of such fiancé(e)s. However, in passing the Legal Immigration Family Equity Act, Pub. L. No. 106-553, 114 Stat. 2762 (2000), Congress created two additional K nonimmigrant classifications "to allow the spouses of United States citizens, and the children of such spouses, the opportunity to come to the United States while awaiting the approval of the[] [spouse's] visa petition." *Matter of Akram*, 25 I&N Dec. 874, 876 (BIA 2012), *rev'd*, *Akram v. Holder*, No. 12-3008, 2013 WL 3455692 (7th Cir. July 9, 2013). The K-3 and K-4 nonimmigrant categories were created for such spouses and their children, respectively. Sections 101(a)(15)(K)(ii), (iii) of the Act.

Despite being included in the same category as fiancé(e) nonimmigrants, the spousal-based K nonimmigrant categories are subject to entirely different—yet more "traditional" —rules regarding adjustment of status.

As the Board has explained, the K-3 and K-4 nonimmigrant categories were not created until *after* Congress repealed the streamlined recordation process under former section 214(d). *Matter of Akram*, 25 I&N Dec. at 877-78, 881. Not only did the creation of these categories post-date the inclusion of K nonimmigrants into section 245(a), but Congress also specifically added the requirement that an immediate relative visa petition must be pending on behalf of the alien spouse at the time he or she applies for the K-3 nonimmigrant visa. Section 101(a)(15)(K)(ii) of the Act. Accordingly, since there was no reason to extend the legal fiction from *Matter of Sesay*, the Board held that K-3 nonimmigrants are required to satisfy the literal requirements of visa eligibility and availability through a properly filed and approved I-130. *Matter of Akram*, 25 I&N Dec. at 877-78, 881. Likewise, although derivative K-4 nonimmigrants are not similarly required to be the beneficiary of an I-130 at the time of the nonimmigrant visa application, they "must be the beneficiary of an approved immigrant visa petition filed by [the] K-3 parent's United States citizen spouse" to qualify for adjustment of status. *Id*. at 878; *see also* 8 C.F.R. § 245.1(i).

In short, K-1 and K-2 nonimmigrants are relieved of satisfying the formal requirements of section 245(a)(2) and (3) because they are treated as "the *functional equivalents* of immediate relatives for purposes of visa eligibility and availability," *Matter of Sesay*, 25 I&N Dec. at 438 (emphasis added), whereas K-3 and K-4 nonimmigrants must comply with such requirements through a properly filed and approved I-130, *see Matter of Akram*, 25 I&N Dec. at 877-78. As the following scenarios reveal, this difference is much more than a matter of semantics and, in fact, has caused one circuit to reject the Board's approach outright (at least with respect to K-4 nonimmigrants). *See generally Akram v. Holder*, 2013 WL 3455692.

Issue #1: Divorce After a Legally Valid Marriage

Most immigration scholars would accept the following premise as true: a divorce terminates a pending request for immigration benefits based on the underlying marriage. For example, an alien cannot receive derivative benefits under his or her ex-spouse's asylum application, nor can an alien in removal proceedings establish eligibility for cancellation of removal based on perceived hardships to his or her ex-spouse. *See, e.g.*, 8 C.F.R. § 1208.21(b) (explaining that the spousal relationship must continue to exist until the time of receiving derivative benefits under the spouse's asylum application).

But consider, for instance, the situation of an alien fiancé(e) who is admitted to the United States on a K-1 visa, enters into a timely marriage with the petitioning fiancé(e), and subsequently divorces him or her prior to an adjudication of the I-485 by the United States Citizenship and Immigration Services ("USCIS"). On the other hand, consider the case of an alien spouse who marries a U.S. citizen abroad, enters the United States on a K-3 visa, and subsequently divorces the petitioning spouse prior to being granted adjustment. Would either individual be eligible to obtain permanent residence through his or her now ex-spouse?

An alien fiancé(e) would remain eligible under these circumstances. As noted previously, conditioned on a timely and legally valid marriage to the fiancé(e) petitioner, an alien fiancé(e)'s eligibility for an immigrant visa is "predicated on the nonimmigrant I-129F visa petition" and, thus, is fixed as of "the time [he or she] is admitted to the United States on the K-1 visa." *Matter of Sesay*, 25 I&N Dec. at 439, 440. In other words,

continued on page 12

CIRCUIT COURT DECISIONS FOR MAY 2013

by John Guendelsberger

The United States courts of appeals issued 202 decisions in May 2013 in cases appealed from the Board. The courts affirmed the Board in 179 cases and reversed or remanded in 23, for an overall reversal rate of 11.4%, compared to last month's 13.1%. There were no reversals from the Third, Fifth, Sixth, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for May 2013 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	1	0	1	100.0
Second	33	28	5	15.2
Third	15	15	0	0.0
Fourth	9	8	1	11.1
Fifth	11	11	0	0.0
Sixth	9	9	0	0.0
Seventh	9	6	3	33.3
Eighth	5	5	0	0.0
Ninth	88	76	12	13.6
Tenth	4	4	0	0.0
Eleventh	18	17	1	5.6
All	202	179	23	11.4

The 202 decisions included 106 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 54 direct appeals from denials of other forms of relief from removal or from findings of removal; and 42 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	106	93	13	12.3
Other Relief	54	47	7	13.0
Motions	42	39	3	7.1

The 13 reversals or remands in asylum cases involved credibility (5 cases), nexus (3 cases), well-founded fear (2 cases), Convention Against Torture (2 cases), and level of harm for past persecution.

The seven reversals or remands in the "other relief" category addressed cancellation of removal (three cases), adjustment of status (two cases), crimes involving moral turpitude, and aggravated felony crime of violence.

The three motions cases involved ineffective assistance of counsel, asylum eligibility, and changed country conditions.

The chart below shows the combined numbers for the first 5 months of 2013 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Eleventh	58	44	14	24.1
Seventh	38	29	9	23.7
First	13	10	3	23.1
Tenth	15	12	3	20.0
Ninth	422	348	74	17.5
Second	84	76	8	9.5
Eighth	20	19	1	5.0
Third	100	94	4	4.0
Fourth	51	49	2	3.9
Fifth	52	50	2	3.8
Sixth	46	46	0	0.0
All	899	779	120	13.3

Last year's reversal rate at this point (January through May 2012) was 10.0%, with 1178 total decisions and 118 reversals.

The numbers by type of case on appeal for the first 5 months of 2013 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	437	370	67	15.3
Other Relief	244	212	32	13.1
Motions	218	197	21	9.6

CIRCUIT COURT DECISIONS FOR JUNE 2013

by John Guendelsberger

The United States courts of appeals issued 191 decisions in June 2013 in cases appealed from the Board. The courts affirmed the Board in 171 cases and reversed or remanded in 20, for an overall reversal rate of 10.5%, compared to last month's 11.4%. There were no reversals from the First, Second, Fourth, Fifth, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for June 2013 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	3	3	0	0.0
Second	28	28	0	0.0
Third	11	9	2	18.2
Fourth	7	7	0	0.0
Fifth	12	12	0	0.0
Sixth	5	4	1	20.0
Seventh	4	3	1	25.0
Eighth	1	1	0	0.0
Ninth	103	88	15	14.6
Tenth	4	4	0	0.0
Eleventh	13	12	1	7.7
All	191	171	20	10.5

The 191 decisions included 95 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 38 direct appeals from denials of other forms of relief from removal or from findings of removal; and 58 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	95	83	12	12.6
Other Relief	38	34	4	10.5
Motions	58	54	4	6.9

The 12 reversals or remands in asylum cases involved nexus (6 cases), credibility (2 cases), level of harm for past persecution, the particularly serious crime bar, the 1-year bar to asylum, and pattern and practice of persecution.

The four reversals or remands in the "other relief" category addressed the application of the categorical approach to aggravated felonies (two cases), a section 212(c) waiver, and the right to counsel. The four motions cases each involved changed country conditions.

The chart below shows the combined numbers for the first 6 months of 2013 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	42	32	10	23.8
Eleventh	71	56	15	21.1
First	16	13	3	18.8
Ninth	525	436	89	17.0
Tenth	19	16	3	15.8
Second	112	104	8	7.1
Third	111	105	6	5.4
Eighth	21	20	1	4.8
Fourth	58	56	2	3.4
Fifth	64	62	2	3.1
Sixth	51	50	1	2.0
All	1090	950	140	12.8

Last year's reversal rate at this point (January through June 2012) was 9.8%, with 1302 total decisions and 127 reversals.

The numbers by type of case on appeal for the first 6 months of 2013 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	532	453	79	14.8
Other Relief	282	246	36	12.8
Motions	276	251	25	9.1

John Guendelsberger is a Member of the Board of Immigration Appeals.

RECENT COURT OPINIONS

Supreme Court:

Descamps v. United States, 133 S. Ct. 2276 (2013): The Supreme Court reversed a decision of the Ninth Circuit, which affirmed a district court's sentencing of the petitioner following his conviction as a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). The circuit court determined that the petitioner should be subject to an increased sentence under the Armed Career Criminal Act ("ACCA"), as one who had three prior "violent felony" convictions. The circuit court employed the modified categorical approach to determine that a prior State conviction for burglary under section 459 of the California Penal Code constituted one of the requisite prior "violent felonies." The Supreme Court disagreed. The Court noted that the modified categorical approach may be employed by courts to determine whether a conviction was for a "violent felony" where the conviction in question was governed by a divisible statute. In such cases, the court looks to specified documents that clarify which of the alternative elements that exist under a divisible statute applied to the specific conviction at issue. However, the Court noted that the California statute in question was not a divisible one. Rather, California section 459 employed a single set of elements, covering a broader scope of conduct than what the Court termed the "generic" crime of burglary. The Court held that the modified categorical approach may not be applied to convictions involving a single, indivisible set of elements. The Court concluded that this approach conformed with the legislative intent of the ACCA and with the Court's prior case law limiting the application of the modified categorical approach to a "narrow range of cases" involving divisible statutes. The majority decision was written by Justice Kagan. Justices Kennedy and Thomas wrote concurring opinions; Justice Alito authored a dissenting opinion.

First Circuit:

Moreta v. Holder, No. 12-1902, 2013 WL 3497687 (1st Cir. July 15, 2013): The First Circuit denied a petition for review challenging an Immigration Judge's decision that the petitioner had abandoned her applications for relief. At a hearing before the Immigration Judge, the petitioner stated her intention to file applications to remove the condition on her residence and, alternatively, for cancellation of removal. The Immigration Judge set a filing deadline of 60 days and, through an interpreter, provided the petitioner with notice of the deadline and a warning that if she failed to meet it, her applications would be deemed abandoned. The petitioner indicated that she understood. She then filed the applications 6 months after the filing deadline had passed. At her subsequent merits hearing, counsel stated that the petitioner was aware of the deadline but had not provided the necessary information and fees on time. The Immigration Judge ruled that the applications were abandoned but also denied relief on the merits on the grounds that the petitioner had not submitted evidence sufficient to support the claims for relief. On appeal, the Board upheld the abandonment ruling, but because it deemed this issue dispositive, did not address the Immigration Judge's alternative finding. The court observed that 8 C.F.R. § 1003.31(a) affords Immigration Judges broad authority to set filing deadlines and that both circuit and Board precedent have held untimely applications to be properly deemed as abandoned. The court further declined to hold that an Immigration Judge's authority under the regulation is limited by the petitioner's eventual filing or good intentions. Moreover, the court held that the Board's decision not to consider the Immigration Judge's alternative finding was not an abuse of discretion, because agencies, as a general rule, need not "make findings on issues the decision of which is unnecessary to the results they reach."

Second Circuit:

Pascual v. Holder, No. 12-2798, 2013 WL 3388382 (2d Cir. July 9, 2013): The Second Circuit denied a petition for rehearing of its decision dismissing a petition for review for lack of jurisdiction based on its determination that the petitioner was ineligible for cancellation of removal as one who had been convicted of an aggravated felony. The Immigration Judge found the petitioner's conviction for criminal sale of a controlled substance (cocaine) in the 3rd degree under section 220.39(1) of the New York Penal Law to be for an aggravated felony. The Board affirmed on appeal. The Second Circuit held that the offense was categorically an aggravated felony even though it encompassed offers to sell, noting that the analogous Federal statute also punished the "attempted transfer of a controlled substance." The petition for rehearing argued that this holding was inconsistent with Second Circuit case law. The court did not agree. It first distinguished the Connecticut law that was considered in *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008),

from section 220.39, noting that the former included fraudulent offers ("such as when one offers to sell the Brooklyn Bridge"), which lack the intent to commit a narcotics crime, whereas the New York statute requires a bona fide offer. The court further held that such a bona fide offer, "made with the intent and ability to carry out the transaction," satisfies the "substantial step" element found in the analogous Federal statute.

Seventh Circuit:

Li Ying Zheng v. Holder, Nos. 11-3081, 12-2566, 2013 WL 3466778 (7th Cir. July 11, 2013): The Seventh Circuit granted the petition for review of the Board's decision denying asylum from China based on the birth of two children in the U.S. The petitioner claimed that she had been subjected to a forcible abortion in China and that she would be sterilized on account of the births of her children if she returned to China. The Immigration Judge pretermitted as untimely the asylum application, which was filed 7 years after her arrival in the U.S., and alternatively found that even if the birth of her second child provided a basis for late filing, the birth of two children in the U.S. did not establish eligibility for asylum. The Immigration Judge also denied withholding of removal for the same reason, relying on the 2007 State Department report on China. The Immigration Judge additionally made an adverse credibility finding as to the petitioner's claimed abortion in China. On appeal, the Board assumed arguendo that the application was timely and agreed that the evidence of record did not establish a reasonable possibility of persecution based on the birth of two children in the U.S. The Board noted that according to the State Department report, enforcement of the family planning policies in the petitioner's home province of Fujian was lax. The court relied on a 2012 decision in which it had reached a similar conclusion. However, it noted two decisions from this year containing evidence that "casts doubt upon the proposition" that the authorities in Fujian do not count U.S. born children toward the one-child per family limit. In both cases, the court remanded for the Board to give additional consideration to evidence of record from sources other than the State Department, which the court found raised "considerable uncertainty" as to the application of the one-child policy in Fujian province toward children born abroad. Finding "no sound basis" to treat the present case differently, the court therefore also vacated the Board's decision and remanded for consideration in light of the evidence offered in the other two cases.

Singh v. Holder, No. 12-2424, 2013 WL 3123950 (7th Cir. June 21, 2013): The Seventh Circuit denied a petition for review from a denial of asylum from India. The petitioner was arrested three times in the mid-1990s and subjected to serious mistreatment because of his activities on behalf of the Akali Dal, a Sikh separatist political party in which his father was an active member. The court reversed the determination of the Immigration Judge and the Board that the petitioner had not suffered past persecution and noted that its finding created a presumption that the petitioner possessed a well-founded fear of persecution. The court nevertheless found remand unwarranted because substantial evidence supported the Board's alternative finding that the presumption of fear was rebutted by evidence of significant changes in country conditions in India. While acknowledging reports of some continuing problems in the Punjab region, the court concluded that they were not sufficient to refute the finding of dramatically changed conditions in the country as a whole. The court also found sufficient support in the record for the Board's conclusion that the petitioner could relocate to another part of India and affirmed its determination that the petitioner did not establish that he merited humanitarian asylum. The Board's use in one instance of "China" instead of "India" was not reversible error, since it was clear that the Board applied the correct facts in its evaluation of the claim.

Eighth Circuit:

Mellouli v. Holder, No. 12-3093, 2013 WL 3388052 (8th Cir. July 9, 2013): The Eighth Circuit denied a petition for review challenging the Board's determination that the petitioner's State conviction for possession of drug paraphernalia was a conviction relating to a controlled substance under section 237(a)(2)(B)(i) of the Act. After an arrest for driving under the influence, the petitioner was found with a controlled substance (Adderall) in his sock. He subsequently pled guilty to a reduced charge of misdemeanor possession of drug paraphernalia. He argued that the Board erred in not adhering to its holding in *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965) (holding that the ground had not been satisfied where the State statute covered substances not considered controlled substances under Federal law), and in considering evidence other than that allowed under the Supreme Court's modified categorical approach. The court disagreed, deferring to the Board's decision in *Matter of Martinez Espinoza*, 25 I&N Dec. 118 (BIA 2009), which held that a State court drug paraphernalia conviction is for a crime involving

"conduct associated with the drug trade in general" and therefore relates to a Federal controlled substance crime (irrespective of whether the paraphernalia was used in connection with a federally scheduled drug). As noted by the court, *Paulus* (which related to a pre-1970 conviction) has been found by the Board to be no longer controlling. The court additionally found that it was permissible for the Board to consider outside evidence to conclude that the offense did not fall within the statutory exception involving possession for one's own use of less than 30 grams of marijuana under both the Supreme Court's decision in *Nijhawan v. Holder*, 557 U.S. 29 (2009), and *Matter of Davey*, 26 I&N Dec. 37 (BIA 2012) (holding that the "personal use exception" satisfies the criteria for *Nijhawan*'s "circumstance-specific" inquiry), with which the court agreed.

Ninth Circuit:

Tista v. Holder, No. 08-75167, 2013 WL 3368973 (9th Cir. July 8, 2013): The Ninth Circuit denied a petition for review of the Board's decision finding the petitioner ineligible for special rule cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act ("NACARA"). The petitioner believed that he derived eligibility for relief through his father, who was granted special rule cancellation in 2006 when the petitioner was 27 years old. The Immigration Judge determined that the petitioner was not eligible for derivative status because he did not meet the definition of a "child" at the time his father was granted relief and the Child Status Protection Act ("CSPA") does not apply to applications for relief under the NACARA. The petitioner argued that the CSPA does apply because, otherwise, his due process right to equal protection would be violated. The court disagreed. The court first held that the plain language of the CSPA designated the types of applications to which it applies and does not mention the NACARA, even though it predated the enactment of the CSPA. The court therefore agreed with the Immigration Judge and the Board that the CSPA would not apply to the petitioner's application. Regarding the due process argument, the court cited Supreme Court and Ninth Circuit precedent holding that Federal laws relating to immigration and nationality are subject to "relaxed scrutiny" for equal protection, under which distinctions by Congress among different classes of aliens "are valid unless wholly irrational." While the petitioner argued that it was unconstitutional to treat children of NACARA recipients differently from children of asylees, the court found a meaningful distinction to exist between these two groups based on the eligibility requirements. Moreover, the petitioner had not established that Congress lacked a rational basis to distinguish between the children of these distinct classes.

BIA PRECEDENT DECISIONS

In *Matter of Otiende*, 26 I&N Dec. 127 (BIA 2013), the Board determined that section 204(c) of the Act, which bars an alien spouse from obtaining a visa after engaging in a prior fraudulent marriage, does not prevent the approval of a petition filed on behalf of the spouse's child, which must be considered on its merits to determine whether the child qualifies as the petitioner's "stepchild" under the Act.

The petitioner filed visa petitions on behalf of the beneficiary's mother as his spouse and the beneficiary as his stepson. After denying the petition to confer benefits on the beneficiary's mother because a previous petition for her had been denied under section 204(c), the Field Office Director found that the beneficiary no longer had a valid stepchild relationship with the petitioner and denied the petition filed on behalf of the beneficiary.

On appeal, the Board found that by its plain language, section 204(c) applies only to an alien who sought, or was accorded, status as a "spouse" based on a marriage entered into for the purpose of evading the immigration laws. The Board determined that section 204(c) unambiguously applies only to the alien who entered into, or conspired to enter into, a fraudulent marriage, and it only precludes approval of a petition filed on that alien's behalf. Concluding that the beneficiary was a child who was not a party to his mother's fraudulent marriage and whose stepchild relationship to the petitioner was unrelated to that marriage, the Board found that section 204(c) did not bar approval of the petition filed on behalf of the beneficiary.

Observing that the petitioner bears the burden of proving the validity of his marriage to the beneficiary's mother in order to establish a valid stepchild relationship, the Board sustained the appeal and remanded the record to the Field Office Director to consider the visa petition on its merits.

In *Matter of Rivas*, 26 I&N Dec. 130 (BIA 2013), the Board held that a section 212(h) waiver of inadmissibility is not available to an alien in removal proceedings without a concurrent application for adjustment of status. Additionally, it concluded that a nunc pro tunc waiver is not available to evade the requirement of a concurrently filed adjustment application.

The respondent, a lawful permanent resident, conceded removability under section 237(a)(2)(A)(ii) of the Act and applied for a section 212(h) waiver. The Immigration Judge determined that the respondent had left and reentered the United States after being convicted of the moral turpitude offenses underlying the removal charge, so that he was inadmissible at the time of his reentry and thus eligible for a section 212(h) waiver in accordance with *Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1980).

Citing section 212(h) and 8 C.F.R. § 1245.1(f), the Board observed that the respondent is statutorily ineligible for a "stand alone" section 212(h) waiver because he is neither an arriving alien seeking to waive a ground of inadmissibility nor one seeking to waive inadmissibility in conjunction with an application for adjustment of status. The Board distinguished *Matter of Sanchez*, noting first that the alien in that case had a pending adjustment of status of application. Furthermore, section 212(h) was amended subsequent to the *Sanchez* decision to limit its availability to aliens who are applying or reapplying for a visa, admission to the United States, or adjustment of status. Pointing out that its approach to defining the limits of section 212(h) relief had been affirmed as reasonable by the Fifth and Seventh Circuits, the Board also noted that the Eleventh Circuit held in *Poveda v. U.S. Attorney General*, 692 F.3d 1168, 1177 (11th Cir. 2012), that a section 212(h) "stand-alone" waiver is not available to an alien in removal proceedings.

Additionally, based on the statutory and regulatory language establishing the eligibility requirements for a section 212(h) waiver, the Board concluded that the waiver is not available nunc pro tunc to sidestep the requirement to concurrently file an adjustment application. Noting that Congress amended section 212(h) to require aliens in removal proceedings in the United States to apply for adjustment of status in conjunction with a waiver, the Board reasoned that granting a waiver nunc pro tunc would contravene congressional intent that an alien in removal proceedings must establish eligibility for adjustment of status. In light of this determination, the Board ruled that *Matter of Sanchez* and other precedent issued prior to the 1990 and 1996 amendments to section 212(h) are no longer valid. The appeal was dismissed.

In *Matter of E-S-I-*, 26 I&N Dec. 136 (BIA 2013), the Board outlined the requirements for the Department of Homeland Security's ("DHS") service of a notice to appear on individuals who lack mental competency. In accordance with 8 C.F.R. § 103.8(c)(2), the Board set forth the following procedures:

1. Where the indicia of a respondent's mental incompetency are manifest, the DHS should serve the notice to appear on:

   a person with whom the respondent resides, who, when the respondent is detained in a penal or mental institution, will be someone in a position of demonstrated authority in the institution or his or her delegate and, when the respondent is not detained, will be a responsible party in the household, if available;
   whenever applicable or possible, a relative, guardian, or person similarly close to the respondent; and
   in most cases, the respondent.

2. If the DHS did not properly serve the respondent where indicia of incompetency were either manifest or arose during a master calendar hearing conducted shortly after service of the notice to appear, the Immigration Judge should grant a continuance to afford the DHS time to effect proper service.

3. If indicia of incompetency become manifest at a later point in the proceedings and the Immigration Judge determines that safeguards are necessary, he or she should evaluate the benefit of re-serving the notice to appear in accordance with 8 C.F.R. §§ 103.8(c)((2)(i) and (ii).

4. If the respondent is represented at the time the DHS serves the notice to appear, notice must be served on counsel. However, while

notice to counsel ordinarily constitutes notice to the alien, 8 C.F.R. § 103.8(c)(2)(ii) requires service on a responsible party with whom the respondent resides. Thus, in these cases service on counsel does not obviate the need to also serve a responsible person with whom the respondent resides.

In *Matter of V-X-*, 26 I&N Dec. 147 (BIA 2013), the Board determined that a grant of asylum is not an admission under section 101(a)(13)(A) of the Act. Further, when termination of asylum status occurs in conjunction with removal proceedings, the Immigration Judge should make a threshold determination regarding the termination before resolving the issues of removability and relief therefrom. Additionally, the Board decided that an adjudication of "youthful trainee" status under section 762.11 of the Michigan Compiled Laws is a "conviction" under section 101(a)(48)(A) of the Act because such an adjudication does not correspond to a determination of juvenile delinquency under the Federal Juvenile Delinquency Act ("FJDA").

In *Matter of Zeleniak*, 26 I&N Dec. 158 (BIA 2013), which involved an appeal from the denial of an I-130 Petition for Alien Relative, the Board held that following the Supreme Court's ruling in *United States v. Windsor*, 133 S. Ct. 2675 (2013), section 3 of Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) ("DOMA"), is no longer an impediment to the recognition of lawful same-sex marriages and spouses under the Act if the marriage is valid in the State where it was celebrated. An alien spouse of a United States citizen may acquire lawful permanent resident status pursuant to section 201(b)(2)(A)(i) of the Act upon proof that the marriage is legally valid and is bona fide, thus enabling the beneficiary to qualify as a spouse under the Act pursuant to 8 C.F.R. § 204.2(a). Since the National Benefits Center Director adjudicating the visa petition had previously found that the same-sex marriage between the petitioner and the beneficiary was valid under State law, the Board remanded the case for the Director to determine whether the marriage was bona fide.

In *Matter of J-G-*, 26 I&N Dec. 161 (BIA 2013), the Board held that an alien need not first rescind an in absentia removal order before seeking reopening of the proceedings to apply for asylum and withholding of removal based on changed country conditions arising in the country of nationality or to which removal has been ordered. Additionally, the Board determined that the numerical limitations on filing a motion to reopen are not applicable when the alien is seeking reopening to apply for asylum and withholding of removal based on changed country conditions.

The respondent, who had been ordered removed in absentia, filed a second motion to reopen to apply for asylum and withholding pursuant to section 240(c)(7)(C)(ii) based on changed country conditions in China. The Immigration Judge denied the motion, determining that the respondent was first required to rescind his in absentia removal order under section 240(b)(5)(C) of the Act. In addition, the Immigration Judge concluded that even if the respondent could seek reopening based on changed country conditions without rescinding the removal order, the motion would still be denied as time and number barred.

Reviewing section 240(b)(5)(C) and 8 C.F.R. § 1003.23(b)(4)(ii), the governing statute and regulation, the Board observed that nothing prohibits an alien from seeking to reopen proceedings for the limited purpose of applying for asylum and withholding of removal based on changed country conditions without first rescinding the in absentia removal order. Further, the Board noted that the textural structure of the Act supported a conclusion that rescinding the in absentia removal order is not a prerequisite, since the filing deadlines for reopening differ depending the reason reopening is requested.

The Board pointed out that its holding is consistent with *Matter of M-S-*, 22 I&N Dec. 349 (BIA 1998) (en banc), where it concluded that in certain circumstances, an alien subject to an in absentia order could seek to reopen deportation or exclusion proceedings without rescinding the in absentia order. Finding a similarity to former section 242B discussed there, the Board noted that section 240(b)(7) explicitly bars an alien with an in absentia removal order from reopening his or her case to apply for certain forms of discretionary relief within 10 years from the date of the removal order. The Board concluded that reading section 240(b)(5)(C) to require rescission of the in absentia order as a prerequisite to reopening removal proceedings would render section 240(b)(7) as surplusage because rescinding the removal order means that the alien no longer is barred from discretionary relief. Finally, the Board noted that

requiring an alien to rescind an in absentia removal order before applying for asylum or withholding would bar an alien who satisfied the requirements for reopening based on change country conditions pursuant to section 240(c)(7)(C)(ii) from having his or her claim adjudicated.

Next, the Board addressed the effect of numerical limitations on motions to reopen. Observing that section 240(c)(7)(A) waives the time limitation on motions to reopen to apply for asylum and withholding of removal based on changed country conditions but is silent as to any numerical limitation, the Board pointed out that 8 C.F.R. §§ 1003.2(c)(3)(ii) and 1003.23(b)(4)(i) waive both the time and numerical limitations for such motions. Reviewing the legislative history, the Board found no indication that Congress did not intend to also waive the numerical limitation in accordance with earlier regulations. The Board therefore determined that a second motion to reopen to apply for asylum and withholding of removal based on changed country conditions under 8 C.F.R. § 1003.23(b)(4)(i) is not subject to the number limitation in 8 C.F.R. § 1003.23(b)(1). Concluding that the respondent was not required to rescind his in absentia removal order prior to seeking reopening based on changed country conditions and that his motion was not numerically barred, the Board remanded the record for further proceedings.

Understanding Marriage-Based K Nonimmigrant Visas *continued*

because the alien fiancé(e) entered into a timely marriage with the petitioning fiancé(e), he or she remains eligible for adjustment under section 245(a) regardless of any subsequent changes in the marital relationship. *See id.* at 440 (explaining that a "fiancé(e) visa holder is *not* precluded from adjusting by the terms of section 245(a) or the applicable regulations—*even if a marriage that was timely and bona fide no longer exists*—if he or she is not otherwise inadmissible under section 212(a) . . . and merits a grant of adjustment in the exercise of discretion" (emphasis added)); *see also Choin v. Mukasey*, 537 F.3d 1116, 1121 (9th Cir. 2008) (explaining that the K-1 statutory scheme for adjustment "focuses on the good faith of the marriage, not the marriage's [ultimate] success or failure"). This applies equally to a derivative K-2 nonimmigrant because his or her visa eligibility is also "fixed" upon the occurrence of the K-1 parent's marriage to the petitioning U.S. citizen. *See Matter of Le*, 25 I&N Dec. at 545-46.

Some may question the legitimacy of this rule, especially considering what appears to be an open invitation to engage in a "quickie marriage" simply for the purpose of becoming a permanent resident. It was, after all, the Immigration Marriage Fraud Amendments Act that abolished the streamlined recordation procedure under former section 214(d) in favor of section 245(a)'s adjustment provisions.

This concern has been answered, to some degree. While the marriage itself is sufficient to establish visa eligibility and availability, "[t]he fiancé(e) must still demonstrate the underlying bona fides of the qualifying marriage" in order to obtain adjustment. *Matter of Sesay*, 25 I&N Dec. at 440. A subsequent "divorce and its timing may raise questions about the bona fides of that marriage." *Id.* at 444; *see also Bark v. INS*, 511 F.2d 1200, 1202 (9th Cir. 1975) ("Conduct of the parties after marriage is relevant . . . to the extent that it bears upon their subjective state of mind at the time they were married."). Similarly, other circumstances surrounding the relationship and the underlying marriage—such as evidence of abuse or deception and failure to meet family or parental obligations—may be grounds to deny adjustment as a matter of discretion. *Matter of Sesay*, 25 I&N Dec. at 444. Furthermore, the fiancé(e) must fulfill the other regulatory requirements for adjustment of status, including the requirement to file an affidavit of support executed by the person who filed the fiancé(e) petition that forms the basis of the application for adjustment (the ex-spouse). 8 C.F.R. § 213.12(a), (b)(1).

K-3 nonimmigrants are not as fortunate as K-1s. As outlined above, the statute requires nonimmigrants under this category to satisfy the literal requirements of visa eligibility and availability through an I-130 filed by the citizen spouse. *See* section 101(a)(15)(K)(ii) of the Act; *see also Matter of Akram*, 25 I&N Dec. at 877-78; 8 C.F.R. § 214.2(k)(7). However, by operation of law, an I-130 is automatically terminated upon a subsequent divorce. *See* 8 C.F.R. § 205.1(a)(3)(i)(D). Moreover, because K nonimmigrants are only permitted to adjust status "as a result of the marriage . . . to the citizen who filed the [K nonimmigrant] petition," there is no other way for a K-3 nonimmigrant to satisfy the requirements of visa eligibility and availability. Section 245(d) of the Act.

The same logic applies to a K-4 nonimmigrant as well, unless a "family relationship . . . continue[s] to exist as a matter of fact [with his or her] stepparent." *Matter of*

Mowrer, 17 I&N Dec. 613, 615 (BIA 1981) (explaining that a visa petition filed on behalf of a child by his or her stepparent will not be terminated upon a divorce between the visa petitioner and the child's biological parent so long as a stepparent-stepchild relationship continues following the divorce).

Issue #2: Death of K Visa Petitioner

The death of the K visa petitioner poses a unique problem for K-1 nonimmigrants. As discussed above, visa eligibility for an alien fiancé(e) reverts back to the date on which he or she was admitted to the United States on the K-1 visa. *Matter of Sesay*, 25 I&N Dec. at 440. However, this principle is subject to a condition precedent—that is, a timely and legally valid marriage to the fiancé(e) petitioner—the occurrence of which is determinative of a K-1 nonimmigrant's eligibility for adjustment of status. *See id*.

Similar to the effect of a divorce prior to adjustment, an alien fiancé(e) who enters into a timely marriage with the fiancé(e) petitioner will remain eligible for adjustment of status in the event that the fiancé(e) petitioner were to die prior to the adjudication of the I-485. *See* USCIS Policy Memorandum, Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act, at 3 (Dec. 16, 2010) *reprinted in* 88 Interpreter Releases 109, No. 2, app. II (Jan. 10, 2011) ("In the case of a K-1 nonimmigrant who marries the petitioner within 90 days of admission, the K-1 nonimmigrant . . . may obtain adjustment of status" even if the petitioner dies before the adjustment application is filed or adjudicated) ["USCIS Policy Memo"]. It follows that by satisfying the condition precedent, the alien fiancé(e)'s eligibility for an immigrant visa is deemed to be fixed as of "the time [he or she was] . . . admitted to the United States on the K-1 visa." *Matter of Sesay*, 25 I&N Dec. at 440. Similarly, because K-1 and K-2 nonimmigrants are regarded as being the "functional equivalents" of immediate relatives and thus are not required to satisfy the formal requirements of visa eligibility and availability, they need not even follow the normal self-petitioning procedures for widow(er)s. *See* USCIS Policy Memo, *supra*, at 3 ("[A] K-1 nonimmigrant . . . (and any K-2 children who are otherwise eligible) may obtain adjustment of status without the need for Form I-360, just as they would have been eligible for adjustment without Form I-130, if the petitioner had not died.").

This analysis would most likely be different in the event that the fiancé(e) petitioner dies *prior to* marrying the K-1 nonimmigrant. In the absence of a timely and legally valid marriage, K-1 and K-2 nonimmigrants would not benefit from being treated as the "functional equivalents of immediate relatives." *Cf. Matter of Sesay*, 25 I&N Dec. at 438. Accordingly, K-1 and K-2 nonimmigrants would not be able to satisfy section 245(a)'s requirements of visa eligibility and availability under such circumstances. Moreover, because K nonimmigrants are only permitted to adjust status "as a result of the marriage . . . to the citizen who filed the [nonimmigrant] petition," K-1 and K-2 nonimmigrants could not apply for adjustment on any other basis. Section 245(d) of the Act; *see also* section 214(d)(1) of the Act ("In the event the marriage with the petitioner does not occur within three months after the admission of the said alien and minor children, they shall be required to depart from the United States and upon failure to do so shall be removed in accordance with sections 240 and 241.").

K-3 nonimmigrants are not affected to the same degree. Unlike K-1 nonimmigrants, an alien spouse entering the United States on a K-3 nonimmigrant visa does so *after* marrying the K visa petitioner and *after* the K visa petitioner files an I-130 on his or her behalf. Section 101(a)(15)(K)(ii) of the Act. Accordingly, if the petitioning spouse dies before adjustment is granted, the I-130 will be automatically converted to a Form I-360 (Petition for Amerasian, Widow(er), or Special Immigrant) and the K-3 nonimmigrant can proceed with his or her adjustment application accordingly. *See* 8 C.F.R. § 204.2(i)(1)(iv); USCIS Policy Memo, *supra*, at 3. Likewise, a K-4 nonimmigrant will qualify for an immigrant visa as a derivative on the K-3's widow(er) petition. *See* 8 C.F.R. § 204.2(b)(4); USCIS Policy Memo, *supra*, at 3.

Issue #3: Obtaining "Child" Status

Perhaps the most dramatic effect of *Matter of Sesay* and its progeny is with respect to the ability of K-2 and K-4 nonimmigrants to qualify for adjustment of status.

The easiest way to appreciate the present quandary is by first discussing the rules regarding of K-4 nonimmigrants. As noted above, a K-4 nonimmigrant must be the beneficiary of an I-130 visa petition to satisfy the "traditional" adjustment rules of visa eligibility and

availability. *See Matter of Akram*, 25 I&N Dec. at 883. Moreover, because K nonimmigrants cannot obtain adjustment on any basis other than the marriage between the principal K nonimmigrant and the petitioning U.S. citizen, a visa petition *must* be filed on behalf of the K-4 nonimmigrant by the K visa petitioner. *See* section 245(d) of the Act; *Matter of Akram*, 25 I&N Dec. at 883. This creates two problems that are unique to K-4 nonimmigrants.

The first problem stems from the fact that a K-4 nonimmigrant must qualify as the K visa petitioner's "child" in order to qualify for an immigrant visa. *See Matter of Akram*, 25 I&N Dec. at 883; *see also Matter of Le*, 25 I&N Dec. at 548 (holding that section 101(a)(15)(K)(iii)'s use of the term "minor child" is synonymous with the definition of the term "child" under section 101(b)(1)). Among other things, this requires that the K-4 nonimmigrant have a qualifying parent-child relationship with the petitioning U.S. citizen. *See* sections 101(b)(1)(A)-(G) of the Act. As relevant to this discussion, a qualifying parent-child relationship will be found between a stepchild and stepparent "provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred." Section 101(b)(1)(B) of the Act. In other words, if a K-4 beneficiary is over the age of 18 at the time of the marriage between the alien parent and the K visa petitioner, he or she will not qualify as a "stepchild" for purposes of the Act. *See id*.; *Matter of Akram*, 25 I&N Dec. at 883.

Albeit a small segment of the entire class of K-4 nonimmigrants, this is highly problematic for those nonimmigrants between the ages of 18 and 21 at the time of the K-1's marriage to the K visa petitioner. Consider, for instance, that an alien parent marries a United States citizen just months after his or her biological child's 18th birthday. Assuming all other requirements were satisfied, the alien parent could subsequently enter the United States on a K-3 nonimmigrant visa, while awaiting approval of an immediate relative visa petition, and could also bring his or her biological child to the United States on a K-4 visa. *See* section 101(a)(15)(K)(iii) of the Act. Being under the age of 21 and the biological child of the K-3 parent, there would be absolutely no problem attaining a K-4 visa for the child (provided that he or she was otherwise unmarried). *See* section 101(b)(1) of the Act.

However, under such circumstances, the child would be admitted to the United States with *no* possibility of obtaining permanent residence in the future, at least not without first leaving the country. Despite qualifying for a K-4 visa as the "child" of his or her biological parent, the K-4 nonimmigrant would not qualify as the K visa petitioner's "stepchild" because the marriage did not occur until *after* his or her 18th birthday. *See* section 101(b)(1)(B) of the Act. Thus, "the K-4 [nonimmigrant] is ineligible to adjust status in the United States and must pursue an alternative means to obtain an immigrant visa from abroad."[3] *Matter of Akram*, 25 I&N Dec. at 883; *see also* 8 C.F.R. § 214.2(k)(8) (providing for the termination of a K-4 visa on the alien's 21st birthday).

Conversely, K-2 nonimmigrants will *never* face this issue. As previously discussed, K-1 and K-2 nonimmigrants benefit being treated as the "functional equivalents" of immediate relatives for purposes of visa eligibility and availability. *See Matter of Sesay*, 25 I&N Dec. at 438. They are not required to pursue actual visa petitions, because their adjustment applications are "predicated [solely] on the nonimmigrant I-129F visa petition." *Id*. at 439. As such, "a [K-2] derivative child need not qualify as the 'stepchild' of the fiancé(e) petitioner but, rather, must only show that he or she is the 'child' of the alien fiancé(e) parent" to qualify for adjustment of status. *Matter of Le*, 25 I&N Dec. at 550; *see also* Memorandum from Michael L. Aytes, Assoc. Dir., Domestic Operations, to DHS officials, at 1 (Mar. 15, 2007), *reprinted in* 84 Interpreter Releases 769, No. 14, app. V (Apr. 2, 2007) ("The purpose of this memorandum is to remind officers that K-2 aliens seeking to adjust status are NOT required to demonstrate a step-parent/step-child relationship with the [fiancé(e)] petitioner.").

The unique treatment of K-1 and K-2 nonimmigrants could be a useful planning tool for U.S. citizens intending to marry abroad. For example, if a U.S. citizen wishes to marry an alien who has one or more children over the age of 18, the only way of securing the child(ren)'s ability to immigrate to the United States immediately would be to postpone the marriage until arriving stateside, because otherwise the child(ren) would not have a qualifying stepparent-stepchild relationship with the U.S. citizen in order to obtain an immigrant visa (which would be needed if coming to the United States on a K-4 visa). *See Matter of Akram*, 25 I&N Dec. at 883. However, as discussed above, such relationship is *irrelevant* with respect to the ability of K-2 nonimmigrants to qualify for adjustment, since their eligibility for an immigrant visa is "predicated [solely] on the nonimmigrant I-129F visa

petition." *Matter of Sesay*, 25 I&N Dec. at 439. Thus, while this may pose a hardship for those who truly desire to marry abroad, at least the child(ren) could *permanently* reside in the United States following the marriage. *Cf.* 8 C.F.R. § 214.2(k)(8) (providing for the termination of a K-4 visa on the alien's 21st birthday or after 2 years, whichever is earlier).

The Seventh Circuit's Approach

According to the Seventh Circuit, the fact that a K-4 nonimmigrant could be admitted to the United States with no prospect of acquiring permanent residence is far too "strange," *Akram*, 2013 WL 3455692, at *3, to be gleaned from the statutory text. *See id.* at *6 ("Nothing in the statute suggests that Congress intended for K-4 nonimmigrants . . . to come to the United States as mere temporary visitors."). Instead, because the K visa category was created "to allow fiancé(e)s, spouses, and [their] children . . . to enter the United States temporarily while awaiting permanent visas . . . , [t]he most natural reading of [the statute] is that the K-4 will join his or her parent *permanently*." *Id.*

Interestingly, the Seventh Circuit did not even pay homage to the rationale underlying the Board's holding in *Matter of Akram*—that is, that the statutory provision creating K-3 and K-4 nonimmigrants *explicitly* requires the actual filing of an I-130 petition to qualify for adjustment (thus removing the necessity of applying the legal fiction from *Matter of Sesay*)—but rather interpreted section 245(d) of the Act, a provision of law establishing *limitations* on what K nonimmigrants can do to adjust status,[4] to *require* that K-4 nonimmigrants be allowed to acquire permanent residence from within the United States. *See id.* at *9 ("[Section 245(d)] provides, in essence, that . . . a person who is let into the country to join her parents *must* actually join her parents." (emphasis added)).

Regardless of how the decision is interpreted, one issue remains unanswered: *how* K-4 nonimmigrants will satisfy the requirements of visa eligibility and availability moving forward. *See id.* at *12 ("[W]e leave it to the Attorney General to decide whether, and how, [a K-4 nonimmigrant under such circumstances] . . . will be able to adjust status.").

The Seventh Circuit endorsed (at least) two potential solutions to this problem. First, K-4 nonimmigrants could "adjust status immediately like K-2s" following the marriage of the K-3 parent and K visa petitioner. *Akram*, 2013 WL 3455692, at *11; *see also id.* at *9 ("Congress intended to allow K-4s to adjust status as a result of their parent's marriage and not merely based on a relationship to [the visa petitioner]."). Such a procedure would clearly run afoul the Board's premise that K-3 and K-4 nonimmigrants were created under a different statutory scheme, requiring literal satisfaction of the visa eligibility and availability requirements through a properly filed and approved I-130. *See Matter of Akram*, 25 I&N Dec. at 877-78, 81. To the Seventh Circuit, this is nothing more than a statutory illusion because, "[a]fter all, K-2 and K-4 visas arise from the exact same statutory language [i.e., section 101(a)(15)(K)(iii) of the Act.]" *Akram*, 2013 WL 3455692, at *10 ("[W]e see no *statutory* reason for treating K-2s and K-4s so differently.").

Second, a K-4 nonimmigrant could seek an immigrant visa through his or her K-3 parent. *See id.* at *11 ("[Akram] might seek an immigrant visa through her mother."); *see also id.* at *8 ("Congress's choice of words suggests that a K-4 may be defined by a relationship to their *alien parent . . . .*"). Practically speaking, however, this solution may not be much better than that which already results—that is, the K visa could expire prior to a K-4's immigrant visa petition becoming "current," especially if he or she ages into the 2B preference category while awaiting the K-3 parent to acquire permanent residence.[5] *See* 8 C.F.R. § 214.2(k)(8) (providing for the termination of a K-4 visa on the alien's 21st birthday or after 2 years, whichever is earlier); *see also Akram*, 2013 WL 3455692, at *8 n.3 (explaining the numerical cap). But rather than requiring a K-4 to "pursue an alternative means to obtain an immigrant visa from abroad" upon expiration of the nonimmigrant visa, *Matter of Akram*, 25 I&N Dec. at 883, the Seventh Circuit proposes that "the government could allow [the K-4] to remain in the United States . . . until [he or] she reaches the front of the line and an immigrant visa becomes 'immediately available' . . . by way of [the K-3 parent]."[6] *Akram*, 2013 WL 3455692, at *8 n.3.

Again, whatever approach is adopted on remand, one thing is required by the Seventh Circuit: K-4 nonimmigrants must be afforded "the opportunity" to adjust status and join their parents (permanently) in the United States. *Id.* at *11; *see also id.* at *9 (stating that the essence of section 245(d) is that "a person who is let into the country to join her parents *must* actually join her parents" (emphasis added)).

Issue #4: Maintaining "Child" Status

The final problem pertains to a K-4 nonimmigrant's ability to maintain "child" status. Even assuming that a K-4 nonimmigrant was admitted to the United States prior to attaining the age of 21 and otherwise qualifies as the K visa petitioner's "stepchild," this is no way secures his or her visa eligibility.

For instance, consider that an alien's parent marries a United States citizen abroad when the alien is only 17 years of age. Further consider that the family continues to reside abroad for the next 3 years before deciding to come to the United States, at which time the U.S. citizen files an I-130 on behalf of the alien spouse, along with an I-129F requesting a K nonimmigrant visa to allow the alien spouse to travel to the United States while the immigrant visa is being processed. The child is included as a derivative on the I-129F, but the citizen spouse—relying on the fact that a derivative child can accompany his or her alien parent as a K-4 nonimmigrant without an independent immigrant visa petition—neglects to file an I-130 on behalf of the child. *See* Dep't of State cable (No. 01-State-17318), para. 11 (Jan. 30, 2011), *reprinted in* 78 Interpreter Releases 339, No. 6 (Feb. 5, 2001) (explaining that a K-4 nonimmigrant need not be the beneficiary of an I-130 to enter the United States on a K-4 visa); *cf.* section 101(a)(15)(K)(ii) of the Act (requiring an alien spouse to be the beneficiary of an immediate relative visa petition filed by the K visa petitioner in order to enter on a K-3 nonimmigrant visa).

If the K-4 beneficiary reached the age of 21 after entering the United States and before the citizen spouse ever filed an I-130 on his or her behalf, the K-4 beneficiary would no longer qualify as a "child" for purposes of immigrant visa eligibility. *See* section 101(b)(1) of the Act. As such, he or she would be "ineligible to adjust status in the United States and must pursue an alternative means to obtain an immigrant visa from abroad." *Matter of Akram*, 25 I&N Dec. at 883; *see also* 8 C.F.R. § 214.2(k)(8) (providing for the termination of a K-4 visa on the alien's 21st birthday). Of course, if the citizen spouse were to file an I-130 on behalf of the K-4 nonimmigrant prior to his or her 21st birthday, the Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (2002) ("CSPA"), would protect the K-4 nonimmigrant from "aging out." *See* Memorandum from Johnny N. Williams, Exec. Assoc. Comm'r, to DHS officials, at 1 (Feb. 14, 2003), *reprinted in* 80 Interpreter Releases 414, No. 11, app. IV (Mar. 17, 2003); USCIS, *K Nonimmigrants*, http://www.uscis.gov (follow "Green Card Through Family" hyperlink under "Green Card"; then follow "K Nonimmigrant" hyperlink under "A Member of a Special Category") (last visited May 10, 2013) ("[s]ince the K-4 child's age 'freezes' on the date the Form I-130 is filed, a K-4 benefits from the CSPA as long as the Form I-130 petition is filed before the K-4's 21st birthday").

K-2 nonimmigrants are also immune from this problem. Again, as noted above, subject to a timely and legally valid marriage between the K-1 parent and fiancé(e) petitioner, the visa eligibility and availability requirements of section 245(a) are deemed to have been satisfied "at the time of admission to the United States with the K-2 nonimmigrant visa." *Matter of Le*, 25 I&N Dec. at 546. Thus, regardless of the K-2 beneficiary's age at the time of filing the I-485, it is his or her age at the time of admission that ultimately controls. *See id.* (finding that a K-2 applicant is eligible for adjustment despite having turned 21 after being admitted on the K-2 nonimmigrant visa); *cf. Carpio v. Holder*, 592 F.3d 1091, 1102 (10th Cir. 2010) (finding that it is the age at which the K-2 nonimmigrant "seeks to enter" the United States that controls for purposes of adjustment).

Not only are K-2 nonimmigrants immune from the aging out phenomenon, but they also are protected from "marrying out" of their child status. *Cf.* 8 C.F.R. § 205.1(a)(3)(i)(G) (providing that where beneficiary of visa petition is classified as the "child" of a United States citizen, such petition is automatically revoked "upon the marriage of the [beneficiary]" and converted to the third-preference category under section 203(a)). Again, because visa eligibility and availability revert back to the date of admission on the nonimmigrant visa, the fact that a K-2 nonimmigrant gets married after admission would have no effect on his or her ability to qualify for adjustment, conditioned on the occurrence of a timely marriage between the K-1 parent and fiancé(e) petitioner. *See Matter of Le*, 25 I&N Dec. at 546 (explaining that it is the status of being a "child at the date of admission [that] is controlling").

Conversely, if a K-4 nonimmigrant married prior to obtaining adjustment, the visa petition filed on his or her behalf would be converted to a petition for classification under the family-based third-preference category. *See* 8 C.F.R. § 205.1(a)(3)(i)(G). Under such circumstances, the K-4 nonimmigrant would most likely

not be able to satisfy the requirement of visa availability prior to the expiration of his or her nonimmigrant visa. *See* 8 C.F.R. § 214.2(k)(8) ("Aliens entering the United States as a K-4 shall be admitted for a period of 2 years or until that alien's 21st birthday, whichever is shorter."); Bureau of Consular Affairs, Dep't of State, Visa Bulletin, Vol. IX, No. 57 (June 2013), *available at* http://www.travel.state.gov/visa/bulletin/bulletin_5953.html (reflecting that petitions under the third-preference category are only current through September 2002, at the earliest). Thus, being ineligible to adjust status, the K-4 nonimmigrant would be required to "pursue an alternative means to obtain an immigrant visa from abroad." *Matter of Akram*, 25 I&N Dec. at 883; *see also supra* note 3.

Other Considerations

In addition to the visa eligibility conundrum, there are two other issues that should be considered when adjudicating a K nonimmigrant's adjustment application.

First, as mentioned above, the marriage between the principal K nonimmigrant and K visa petitioner is the *only* basis that can be used by any K nonimmigrant to obtain adjustment of status. Section 245(d) of the Act; *see also Matter of Valenzuela*, 25 I&N Dec. 867, 869 (BIA 2012) ("[S]ection 245(d) applies to any K visa holder, whether a principal beneficiary or a derivative."). For instance, a K-1 nonimmigrant who fails to marry the petitioning U.S. citizen cannot adjust through a subsequent marriage to another U.S. citizen. *See Matter of Sesay*, 25 I&N Dec. at 433 (stating that an alien fiancé(e) admitted on K-1 visa is not eligible to adjust through an I-130 filed by a second spouse). Four circuits have found that this bar prevents a K nonimmigrant from adjusting under section 245(i) as well. *See, e.g.*, *Birdsong v. Holder*, 641 F.3d 957, 959-60 (8th Cir. 2011); *Zhang v. Holder*, 375 F. App'x 879, 884-86 (10th Cir. 2010); *Markovski v. Gonzales*, 486 F.3d 108, 110 (4th Cir. 2007); *Kalal v. Gonzales*, 402 F.3d 948, 951-52 (9th Cir. 2005).

Although the statute only requires a K nonimmigrant to adjust "as a result of the marriage," section 245(d) of the Act, the regulations have interpreted this bar as establishing that adjustment is not permitted "in any way other than as a spouse or child of the U.S. citizen who originally filed the petition for that alien's [K nonimmigrant] status." 8 C.F.R. § 245.1(i). This effectively prevents a K-4 nonimmigrant who does not qualify as a "stepchild" of the K visa petitioner from adjusting through other means, including as a relative of his or her K-3 parent. *See Matter of Valenzuela*, 25 I&N Dec. at 869-71. As discussed above, the Seventh Circuit declared this interpretation unreasonable because the statute only requires that the adjustment be "a result of the marriage," which would be the case for K-4 beneficiaries seeking to acquire an immigrant visa through the K-3 parent following the marriage to the K visa petitioner. *See Akram*, 2013 WL 3455692, at *10-11. However, even if the Seventh Circuit's view was accepted (and assuming that the Board's approach to K-3/K-4 adjustment in *Matter of Akram* was otherwise followed), this would amount to little practical difference because a K-4 would likely age out of the 2A preference category and thus fall into the more backlogged 2B category while awaiting approval of the petition filed on behalf of the K-3 parent (which would be required before the K-4 would qualify as a relative "of a permanent resident").[7] *See also supra* notes 3, 5.

Second, K nonimmigrants are generally admitted for permanent residence on a conditional basis pursuant to section 216 of the Act, 8 U.S.C. § 1186a. *See* Section 245(d) of the Act (providing that "[t]he Attorney General may not adjust . . . the status of a [K] nonimmigrant . . . except to that of an alien lawfully admitted to the United States on a conditional basis under section 216"). Like any other alien admitted on such basis, a K nonimmigrant must file a joint petition to remove the conditions on his or her status, or establish the existence of an applicable waiver, within the 90-day period preceding the second anniversary of the grant of status. *See generally Matter of Stowers*, 22 I&N Dec. 605, 608-10 (BIA 1999). However, K nonimmigrants are admitted as "full" permanent residents, and thus are not subject to the provisions of section 216, if the underlying marriage is more than 2 years old at the time of adjudicating the adjustment application. *Matter of Sesay*, 25 I&N Dec. at 440-41.

Conclusion

Notwithstanding the fact of being included in the *same* nonimmigrant category and subject to the *same* rules regarding adjustment of status, K nonimmigrants are treated quite differently with respect to how they satisfy the requirements of visa eligibility and availability. As discussed above, these varying approaches produce distinct legal results under nearly identical factual scenarios; scenarios that can be the difference between obtaining permanent residence—as in the case of K-1

and K-2 nonimmigrants—and having to seek alternative means of immigrating from abroad—as in the case of K-3 and K-4 nonimmigrants. Such variances have caused some to label the Immigration and Nationality Act "a beast" and accuse it of bearing a "fiendish complexity," but literalists may question whether judicially crafted solutions are justified for the sole purpose of bestowing upon the law "a human touch . . . [and] tender heart." *Akram*, 2013 WL 3455692, at *1.

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1. As discussed below, section 101(a)(15)(K)(iii)'s use of the term "minor child" (or "minor children") is coextensive with the term "child" under section 101(b)(1). *See infra* pp. 13-17.

2. The Act lists three nonimmigrant categories under section 101(a)(15)(K): (i) alien fiancé(e)s seeking to enter the United States to conclude a valid marriage with a U.S. citizen fiancé(e); (ii) aliens married to a United States citizen who are awaiting approval of a pending I-130; and (iii) minor children accompanying or following to join individuals described in clauses (i) and (ii). The regulations further break these categories down by referring to alien fiancé(e)s and their minor children as K-1 and K-2 nonimmigrants, respectively, and alien spouses and their minor children as K-3 and K-4 nonimmigrants, respectively. 8 C.F.R. §§ 214.1(a)(1)(v), (2).

3. From abroad, the K-4 nonimmigrant could apply for an immigrant visa through his or her K-3 parent, who presumably would attain permanent residence as the spouse of a United States citizen. However, depending on his or her country of nationality, the visa could take years to become "current," especially considering that the K-4 would soon thereafter "age out" of the 2A family-based preference category and be placed in the even more backlogged 2B category. *See* sections 203(a)(2)(A), (B) of the Act, 8 U.S.C. §§ 1153(a)(2)(A), (B).

4. The plain language of this statute *limits* the adjustment power of K nonimmigrants by providing that "[t]he Attorney General *may not adjust* . . . the status of a [K] nonimmigrant . . . *except* . . . *as a result of the marriage* [between the principal K nonimmigrant and K visa petitioner.]" Section 245(d) of the Act (emphasis added). It does not state that the Attorney General "must" adjust the status of a K nonimmigrant as a result of the marriage.

5. A K-4 beneficiary is not a child (or son or daughter) "of a permanent resident" unless and until the K-3 parent acquires permanent residence. *See* section 203(a)(2)(A) of the Act.

6. *See also infra* note 7.

7. Another potential solution to this problem (assuming the Seventh Circuit's approach is being followed) would be to allow the K-3 parent to file an I-130 (on behalf of the K-4) contemporaneous with that which is being filed on his or her behalf by the K visa petitioner. This would effectively cause the K-4's age to be "frozen" because the CSPA would reduce the K-4's age at the time the visa petition is approved by the amount of time the petition was pending (that is, the entire time it took from the date of filing until approval). *See* section 203(h)(1) of the Act, 8 U.S.C. § 1153(h)(1). Once a visa petition is approved on behalf of the K-3 parent, the K-4 will be eligible for an immigrant visa as the "child" of a permanent resident and a visa would (most likely) be immediately available to him or her. *See* Bureau of Consular Affairs, Dep't of State, Visa Bulletin, Vol. IX, No. 59 (Aug. 2013), *available at* http://www.travel.state.gov/visa/bulletin/bulletin_6028.html (explaining that the entire 2A category "has become 'Current' for August, and is expected to remain so for the next several months").