9 FAM 41.81 NOTES

(CT:VISA-756; 07-27-2005)
(Office of Origin: CA/VO/L/R)

9 FAM 41.81 N1 CLASSIFICATION UNDER INA 101(A)(15)(K)

9 FAM 41.81 N1.1 Classification Under INA 101(a)(15)(K)(i)

(TL:VISA-756; 07-27-2005)

An alien may be classified as a K-1 if he or she is the beneficiary of an approved Form I-129-F, Petition for Alien Fiancé*(e)*, for issuance of a nonimmigrant visa *(NIV)*. If the consular officer is satisfied that the alien is qualified to receive such a visa, the alien may be admitted to the United States for the purpose of concluding a marriage to the petitioner within a 90-day period.

9 FAM 41.81 N1.2 Classification Under INA 101(a)(15)(K)(ii)

(TL:VISA-756; 07-27-2005)

Public Law 106-553 established a new category of nonimmigrant visa *(NIV)* for the spouses of U.S. citizens who await approval of a Form I-130, Petition for Alien Relative, to enter the United States as nonimmigrants. The Department and the Department of Homeland Security (DHS) have used the symbol K-2 for the children of K-1s since the inception of that category. The symbol for the beneficiaries of this new category will, therefore, be K-3.

9 FAM 41.81 N1.3 Classification Under INA 101(a)(15)(K)(iii)

(TL:VISA-377; 03-29-2002)

This provision is for the children of either a K-1 or a K-3. An accompanying or following to join child (as defined in INA 101(b)(1) of a K-1 is entitled to K-2 derivative status, as noted in 9 FAM 41.81 N1.2. The child of a K-3 who is accompanying or following to join a K-3 principal alien is entitled to K-4 derivative status.

9 FAM 41.81 N2 FILING OF FORM I-129F, PETITION FOR ALIEN FIANCÉ(E)

(TL:VISA-756; 07-27-2005)

Because INA 214(d) uses the language "petition filed in the United States," a K visa petition Form I-129-F, Petition for Alien Fiance(e) may not be filed with, or approved or denied by, a consular officer or an immigration officer stationed abroad. All K visa petitions must be filed with the Department of Homeland Security (DHS) district office having DHS jurisdiction over the petitioner's current or intended residence in the United States. If the citizen fiance(e) is abroad at the time the K visa petition is filed the consular officer should advise the petitioner to send the completed petition, supporting documents and appropriate fee to the Department of Homeland Security (DHS) Service Center with jurisdiction over his or her state of intended residence after marriage. The DHS Internet website (Service Centers) has complete information on Service Center jurisdiction. After the petition is approved, DHS will transmit it to the appropriate post.

9 FAM 41.81 N3 ACCEPTANCE OF K VISA APPLICATIONS

(TL:VISA-756; 07-27-2005)

a. K-1 and K-2 visas must be processed and issued only at immigrant visa *(IV)* issuing posts. If a nonimmigrant visa *(NIV)* issuing post receives a K-1 visa petition, it should forward the petition to the *IV* issuing post which covers the consular district, unless the post has been specifically authorized to process K visas.

b. Subject to (c) below, applicants for K-3 or K-4 visas should also be processed at *IV* posts, as K-1s are, but, in some cases they may have to be processed at a consular post that normally issues only *NIV*, because there is no *IV* post in the country.

c. The statute requires that a K-3 visa for an applicant who married a U.S. citizen outside the United States be issued a visa by a consular officer in the foreign state in which the marriage was concluded. However, if no visa-issuing post is located in that country, the K-3 applicant should apply at the consular post designated to handle "homeless" *IV* cases for that country. A K-4 visa applicant may be issued a visa at any *IV* issuing post, or, in the circumstances noted above, at a nonimmigrant post if there is no *IV* issuing post in the country.

9 FAM 41.81 N4 DOCUMENTARY REQUIREMENTS

(CT:VISA-756; 07-27-2005)

a. The following are documentary requirements for a K-1 or K-3 visa:

(1) The applicant must undergo the standard immigrant visa (IV) medical examination by a panel physician;

(2) *A* national crime information center (NCIC) namecheck must be done by the national visa center (NVC) for each applicant;

(3) The applicant must present police certificates, if required; and

(4) The applicant must present proof of relationship to the petitioner at the time of the interview.

b. K-1 and K-3 applicants are subject to INA 212(a)(4) and must demonstrate to the consular officer's satisfaction that they will not become a public charge. The Form I-864, Affidavit of Support Under Section 213 A of the Act cannot be required. Applicants may submit a letter from the petitioner's employer or evidence that they will be self-supporting. The Form I-134, Affidavit of Support, may be required when the consular officer deems it useful.

9 FAM 41.81 N5 FILING PETITION FOR CLASSIFICATION UNDER INA 101(A)(15)(K)

9 FAM 41.81 N5.1 Petition for Classification Under 101(a)(15)(K)(i)

(TL:VISA-377; 03-29-2002)

See 9 FAM 41.81 N2 for filing requirements.

9 FAM 41.81 N5.2 Petition for Classification Under INA 101(a)(15)(K)(ii)

(CT:VISA-756; 07-27-2005)

An alien seeking admission under INA 101(a)(15)(K)(ii) must be the beneficiary of a K-3 petition filed by a U.S. citizen in the United States. For the present, the Department of Homeland Security (DHS) is using the usual Form I-129-F, Petition for Alien Fiancé*(e)*, for this purpose. As noted in 9 FAM 41.81 N3, if the couple married outside the United States, the visa must be issued by a consular officer in the foreign state in which the marriage was

effected.

9 FAM 41.81 N5.3 K-4 Child of K-1 or K-3

(TL:VISA-756; 07-27-2005)

The unmarried child of a K-1 or K-3 applicant does not require a petition. The applicant needs only to demonstrate that he or she is the "child" (as defined in INA 101(b)(1)) of an alien classified K-1 or K-3. K-2 or K-4 applicants are required to sign a form apprising them that entering into a marriage prior to obtaining adjustment of status will render them ineligible for adjustment as IR-2 or CR-2 immigrant visa *(IV)* applicants.

9 FAM 41.81 N6 ALIENS CLASSIFIED K-1 OR K-2

9 FAM 41.81 N6.1 Action When Petition Received

(TL:VISA-2; 08-30-1987)

Upon the receipt of an approved K-1 visa petition, the post should send a letter to the beneficiary outlining the steps to be taken to apply for a visa. If the initial four-month validity of a petition has expired without a response to the post's letter, the consular officer should send a follow-up letter to the beneficiary, with a copy to the petitioner, and request a reply within 60 days. If the 60-day period passes without a response from either party, or, if the response indicates that the couple no longer plans marriage, the case is to be considered abandoned; the petition is to be retained at the post for a period of one year and then destroyed.

9 FAM 41.81 N6.2 Validity of a K-1 Petition

(TL:VISA-581; 09-03-2003)

An approved K-1 visa petition is valid for a period of four months from the date of Department of Homeland Security (DHS) action and may be revalidated by the consular officer any number of times for additional periods of four months from the date of revalidation, provided the officer concludes that the petitioner and the beneficiary remain legally free to marry and continue to intend to marry each other within 90 days after the beneficiary's admission into the United States. However, the longer the period of time since the filing of the petition, the more the consular officer must be concerned about the intentions of the couple, particularly the intentions of the petitioner in the United States. If the officer is not convinced that the U.S. citizen petitioner continues to intend to marry the

beneficiary, the petition should be returned to the approving office of DHS with an explanatory memorandum. (See 9 FAM 41.81 PN7 for revalidation procedure.)

9 FAM 41.81 N6.3 Reissuance of K-1 Visa

(TL:VISA-2; 08-30-1987)

If a K-1 visa, valid for a single entry and a six-month period, has already been used for admission into the United States and the alien fiancé(e) has returned abroad prior to the marriage, the consular officer may issue a new K visa, provided that the period of validity does not exceed the 90th day after the date of initial admission of the alien on the original K visa and provided also that the petitioner and beneficiary still intend and are free to marry. The alien's return to the United States and marriage to the petitioner must take place within 90 days from the date of the original admission into the United States in K status.

9 FAM 41.81 N6.4 Petitioner and Beneficiary Must Have Met

(TL:VISA-581; 09-03-2003)

DHS regulations (8 CFR 214.2(k)(2)) require that the petitioner and the K-1 beneficiary have met in person within two years immediately preceding the filing of the petition. At the director's discretion, this requirement can be waived if it is established that compliance would result in extreme hardship to the petitioner or that compliance would violate strict and long-established customs of the beneficiary's foreign culture.

9 FAM 41.81 N6.5 Marriage Bona Fides

(CT:VISA-756; 07-27-2005)

a. If a consular officer finds that the fiance(e) or marital relationship is not bona fide but is a sham entered into solely for immigration benefits, post should return the K-1 or K-3 petition *with a recommendation for revocation to the national visa center (NVC)* under cover of a memorandum detailing the specific, objective facts giving rise to the posts conclusion.

b. All Immigrant and K-1/K-3 Visa revocation cases are to be returned to the following address:

National Visa Center
32 Rochester Ave.
Portsmouth, NH 03801
Attn: Fraud Prevention Manager

9 FAM 41.81 N6.6 Petitioner and Beneficiary Must be Legally Free to Marry

(CT:VISA-756; 07-27-2005)

a. For a K-1 petition to remain valid, the petitioner and the beneficiary must:

(1) Have been legally free to marry at the time the petition was filed;

(2) Have remained so therafter; and

(3) Continue to have the intent to marry within 90 days after the beneficiary's admission into the United States.

b. A K-1 petition filed when the petitioner and/or the applicant was still legally married shall not serve as the basis for visa issuance, even though that marriage was terminated and applicant/petitioner became free to marry within 90 days of arrival in the United States. If a consular officer finds that the petitioner and/or applicant is/was not legally free to marry, post mush return the K-1 petition to the national visa center (NVC) under cover of memorandum detailing the specific, objective facts giving rise to the officer's determination.

9 FAM 41.81 N6.7 Additional Factors That May Raise Questions in K-1 Cases

(CT:VISA-756; 07-27-2005)

a. There are several possible discrepancies between the facts stated on the petition and the actual circumstances of the K-1 beneficiary which might lead the consular officer to question whether the relationship is bona fide or which might cause the petitioner to choose not to go forward with the marriage. These include having one or more children not named in the petition, or a prior undisclosed marriage (even if it has been annulled or ended by divorce or death), or, in the case of a fiancée, a current pregnancy.

b. Discovery of a ground of ineligibility of the K-1 applicant raises another issue of the petitioners awareness of all of the factors associated with the fiance(e).

c. Consular officers should use their discretion in determining whether to return the K-1 petition to the DHS in such cases. They should, however, first solicit from the petitioner information as to whether he or she was aware of the particular circumstance(s) and whether, in light thereof, he or she still wishes to proceed with the proposed marriage. If satisfied in this regard, consular officers need not return the petition.

d. Consular officers should return the K-1 petition to DHS for reconsideration

if not satisfied with respect to the bona fides of the relationship or if the petitioner indicates that he or she no longer intends to go forward with the marriage.

9 FAM 41.81 N6.8 Multiple Petitions Approved for Same K-1 Beneficiary

(CT:VISA-756; 07-27-2005)

In instances where more than one U.S. citizen fiancé(e) has filed visa petitions on behalf of the same alien and more than one K-1 visa petition has been approved for the same beneficiary, the consular officer must suspend action and return all petitions with a covering memorandum to the DHS district director who approved the last petition so that the petition approvals may be reviewed.

9 FAM 41.81 N7 TERMINATION OF K VISA PETITION APPROVAL

(TL:VISA-581; 09-03-2003)

Department of Homeland Security (DHS) regulations, (8 CFR 214.2(k)) provide that the death of a petitioner or written withdrawal of the petition prior to the arrival of the beneficiary in the United States automatically terminates the approval of the petition. The consular officer should return the petition to the approving DHS office with an appropriate memorandum.

9 FAM 41.81 N8 FORMER EXCHANGE VISITOR

(TL:VISA-2; 08-30-1987)

Before a K visa may be issued to an applicant who is a former exchange visitor and subject to the provisions of INA 212(e) the applicant must establish that the requirements of INA 212(e) have been fulfilled or that a waiver has been obtained. (See 22 CFR 40.202(b) and 9 FAM 40.202 Notes.)

9 FAM 41.81 N9 MARRIAGE FOR PURPOSE OF EVADING IMMIGRATION LAWS-INA 204(C)

(CT:VISA-756; 07-27-2005)

See 9 FAM 42.42 N12.3-2.

9 FAM 41.81 N9.1 Waiver Availability for Applicants Ineligible Under INA 212(a)

(CT:VISA-756; 07-27-2005)

A K visa is a nonimmigrant visa *(NIV)*, and, therefore, K nonimmigrants are generally eligible for INA 212(d)(3)(A) waivers. However, processing an INA 212(d)(3)(A) waiver would not be appropriate unless an immigrant waiver is also available when the K visa holder applies to adjust status to legal permanent resident. To determine whether a waiver is available for a K applicant, the consular officer must, therefore, first examine whether the particular INA 212(a) ineligibility is waivable for immigrant spouses of U.S. citizens, under either INA 212(g), (h), (i), 212(a)(9)(B)(v), 212(d)(11) or (12) or similar provisions. (For a more complete list, see the abridged list of ineligibilities and immigrant waivers at 9 FAM 40.6.)

9 FAM 41.81 N9.2 Visa Refusal--No Waiver Possible

(TL:VISA-581; 09-03-2003)

If the K visa applicant is ineligible for a visa on an INA 212(a) ground for which no immigrant waiver is or would be possible after marriage to the petitioner, then the case should not be recommended for an INA 212(d)(3)(A) waiver and no waiver request should be submitted to Department of Homeland Security (DHS). (See 22 CFR 40.301.)

9 FAM 41.81 N9.3 INA 212(d)(3)(A) Waiver for K-1 Fiance(e) Who Would Qualify for Waiver if Married, or for K-3 Spouse

(TL:VISA-581; 09-03-2003)

a. If it is determined that the K visa applicant is ineligible to receive a visa under INA 212(a) but that the ineligibility could be waived after (or as a result of the) marriage to the petitioner, the consular officer should assist the applicant in completing Form I-601, Application for Waiver of Grounds of Excludability, and submit simultaneously both the Form I-601(with the required fee) and Form OF-221, Two-way Visa Action and Response to the appropriate DHS office abroad with the recommendation concerning the granting of an INA 212(d)(3)(A) waiver. (If the case involves a K-1 fiance(e), before beginning that waiver process the consular officer should first satisfy him or herself that the petitioner was or is aware of the ineligibility and still wishes to pursue the marriage. If not, the petition should be returned to DHS and no waiver process commenced.) Consular officers should follow this same general procedure whether the ineligibility

is on medical or non-medical bases, while taking into account any variant procedure required in certain medical cases as set forth in 9 FAM 40.11 PN2.

b. When an alien fiance(e) of a person in the U.S. military has been found ineligible and it appears that the benefits of INA 212(h) or (i) might be available once the marriage has taken place, the consular officer should discuss the ineligibility and the waiver possibility with the military officer responsible for granting permission to marry, and point out that DHS cannot make advance determinations regarding a waiver.

9 FAM 41.81 N10 VACCINATION REQUIREMENTS FOR K VISA APPLICANTS

(TL:VISA-277; 05-10-2001)

See 9 FAM 41.108 Notes.

9 FAM 41.81 N11 ALTERNATIVE CLASSIFICATION

(CT:VISA-756; 07-27-2005)

The inclusion of INA 101(a)(15)(K) in the nonimmigrant classifications is not intended to prohibit an alien fiancé(e) of a U.S. citizen from applying for and obtaining an immigrant visa *(IV)* or a nonimmigrant visa *(NIV)* under another classification, if the alien can qualify for an alternative classification. For example, an alien proceeding to the United States to marry a U.S. citizen may be classified B-2, if it is established that following the marriage the alien will depart from the United States. (See 9 FAM 41.31 N11.1.)

9 FAM 41.81 N12 CHILD OF ALIEN K-1 FIANCÉ(E)

(CT:VISA-756; 07-27-2005)

Department of Homeland Security (DHS) and the Department have agreed that the child of a K-1 principal alien may be accorded K-2 status if following to join the principal alien in the United States even after the principal alien has married the U.S. citizen fiancé(e), and acquired lawful permanent resident *(LPR)* status. However, the cutoff date for issuance of a K-2 visa is one year from the date of the issuance of the K-1 visa to the principal alien. After one year, and provided that the alien qualifies, the filing of an immediate relative or second preference petition would be required.