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A child is defined under the immigration law as an unmarried person under the age of 21.

The definition of a child includes:

* A step-child if the parent's marriage took place before the child reached the age of 18
* A child born out of wedlock if the child has a "bona-fide" relationship with the parent who is filing the petition
* An adopted child if the child was adopted before the age of 16 and has lived with the adoptive parent(s) for at least two years
* A child who is considered an orphan under the immigration law
* An adopted child under the age of 18 who is the natural sibling of an orphan or adopted child under the age of 16, if adopted with or after the sibling

9 FAM 40.1 N2 Child Defined

The term "child" refers to an unmarried person under 21 years of age. This note addresses the many categories of the term "child" under the provisions of INA 101(b)(1) with the exception of 101(b)(1)(F). [See 9 FAM 42.21 N13].

9 FAM 40.1 N2.1 Legitimate Child

A child may qualify as a legitimate child under the provisions of INA 101(b)(1)(A) if the law of the child's country of birth or the law of the parent's place of residence has deemed such child to be a "legitimate" child. For instance, the Board of Immigration Appeals has held that under Chinese law, acknowledgment by the natural father of the child of a Chinese concubine may confer legitimation upon such child, provided the child has resided in the same household with the father. Thus, the child of a concubine may be considered to be the legitimate child of the father pursuant to the provisions of INA 101(b)(1)(A).

9 FAM 40.1 N2.2 Stepchild Relationship Under INA 101(b)(1)(B)

The provisions of INA 101(b)(1)(B) provide for the creation of a step-relationship between the natural offspring (whether or not born out of wedlock) of a parent and that parent's spouse. Such step relationship is created upon the marriage of the offspring's natural parent to a spouse and must be based on a marriage which is or was valid for all purposes, including immigration purposes. The offspring:

(1) Must be or have been under the age of 18 at the time the marriage takes place in order to acquire the benefits as a child under INA 101(b)(1)(B). No previous meeting of the offspring and the new parent is required, nor is there any requirement that an emotional relationship exist; and

(2) Continues to be entitled to immigration benefits from such marriage, even though the relationship between the natural parent and the stepparent was terminated at a later date, provided the marriage was a valid marriage and the family relationship continued to exist as a matter of fact between the stepparent and stepchild.

9 FAM 40.1 N2.3 Legitimation of Child

9 FAM 40.1 N2.3-1 Qualification of Child Under INA 101(b)(1)(C)

In order for a child to qualify under the provisions of INA 101(b)(1)(C) the child must meet the following criteria:

(1) Legitimation by the natural father must occur in accordance with the law of the child's residence or domicile or in accordance with the law of the father's residence or domicile, whether in or outside of the United States;

(2) The father must establish that he is the child's natural father;

(3) The child must be under the age of 18; and

(4) The child must have been in the legal custody of the legitimating parent at the time the legitimation takes place. For adoption purposes legal custody may be granted prior to the issuance of a decree. [See 9 FAM 40.1 N2.4 below.].

9 FAM 40.1 N2.3-2 Qualification of Child Under INA 101(b)(1)(D) Through Mother

A child born out of wedlock, by virtue of his or her relationship to the natural mother, is deemed to be the legitimated "child" of the natural mother under INA 101(b)(1)(D). The natural mother's name on the child's birth certificate may be taken as proof of such relationship.

9 FAM 40.1 N2.3-3 Qualification of Child Under INA 101(b)(1)(D) Through Father

a. An illegitimate offspring of the natural father is deemed to be a "child" within the meaning of INA 101(b)(1)(D), provided the father has or has had a *bona-fide* parent-child relationship with his offspring. While an ongoing father-child relationship is not required to establish a *bona fide* parent-child" relationship, the consular officer must ascertain whether a genuine parent-child relationship, not merely a tie by blood, exists or has existed at some point prior to the offspring's twenty-first birthday.

b. While each case must be determined based on the facts presented, the consular officer must be satisfied that the facts demonstrate the existence of a past or present parent-child relationship. For instance, although not necessary, the moral or emotional behavior of the father and/or child toward each other which reflects the existence of such a relationship may constitute favorable evidence of the relationship, just as cohabitation may be another element of evidence of such relationship.

c. Proof of present or former familial relationship may include the:

(1) Father's acknowledgment within the community that the child is his own;

(2) Father's support for the child's needs;

(3) Father's genuine concern for and interest in the child; and

(4) Parent-child relationship was established while the child was unmarried and under the age of 21.

9 FAM 40.1 N2.4 Adoption

9 FAM 40.1 N2.4-1 Qualification of Adopted Child Under INA 101(b)(1)(E)

a. In order to qualify as an adopted child under INA *101*(b)(1)(E) a child must have been:

(1) Legall*y* adopted while under the age of 16; and

(2) In legal custody of, and have resided with, the adoptive parents for at least two years.

b. The legal custody requirement may be fulfilled either prior to or after the child's adoption. Legal custody is deemed official at the time the adopting parents are awarded custody of the child rather than on the date the adoption becomes final. If custody did not exist prior to adoption, a certified copy of the adoption decree constitutes proof of the custody requirement at least from the date on which it was issued.

c. The period of residence for which the adoptive parents and child have lived together must be at least *two* years, prior to or after the adoption. Furthermore, the time frame in which the two years are accrued need not be continuous. In addition, the petitioning adoptive parents must establish that they have exercised primary parental control during the period in which they seek to establish compliance with the statutory two-year residence requirement. Evidence of such control, especially in cases where the adopted child resided or continues to reside in the same household with the natural parents, may include competent objective evidence that the adoptive parents have provided or are providing financial support and day-to-day care, and have assumed the responsibility for important decisions in the child's life.

d. A child adopted under the provisions of INA 101(b)(1)(E) is precluded from bestowing any benefit or privilege or status to the natural parents because of such parentage. [See 9 FAM 40.1 N4 below.]

9 FAM 40.1 N2.4-2 Adopted Child of Single Person

A child legally adopted by a single person may be considered a "child" within the meaning of INA 101(b)(1)(E), provided the adoptive parent is over the age of twenty-five and custody and residence requirements of that section have been met. [See 9 FAM 40.1 N6 below.]

9 FAM 40.1 N2.4-3 Illegitimate Child of Natural Father Pursuant to INA 101(b)(1)(F)

a. Sec. 315 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-603, amended the INA 101(b)(1)(D) by providing for an offspring born out of wedlock to be considered a "child" of the natural father for immigration purposes. The amendment produced results which had not been intended or anticipated by Congress. Prior to the IRCA amendment, the existence of a father who had not legitimated his child was irrelevant to a determination as to whether a mother could release her child for adoption. However, the language in INA 101(b)(1)(D), as amended, precluded a child from being released by the mother if the natural father had established at any time a parent-child relationship with the child.

b. Section 210(a) of Pub. L. 100-459 removed the constraint created by passage of the previous law by adding new language to the term "parent" in INA 101(b)(2). In order to provide relief under the provisions of INA 101(b)(1)(F), for the purposes of that section only, the language excludes from the term "parent" the natural father of an illegitimate child, as described in INA 101(b)(1)(D), if the natural father has abandoned or deserted the child, or irrevocably released the child. The exception in INA 101(b)(2) was made permanent by section 611 of Pub. L. 101-162. [See 9 FAM 40.1 N6 below.]

9 FAM 40.1 N3 Parent Defined

The term "parent," "father," or "mother" means a parent, father, or mother only where the relationship exists by reason of any of the circumstances listed in INA 101(b)(1), except as noted in 9 FAM 40.1 N2.4-3 above.

9 FAM 40.1 N4 Immigration Benefits

9 FAM 40.1 N4.1 Natural Parents/Siblings of Adopted Child

(TL:VISA-41; 1-15-91)

A decision of the Board of Immigration Appeals holds that an adopted child who has received no immigration rights, benefits, or status under the law by virtue of the relationship to the adoptive parents, and who is not now in a position to receive those benefits due to the death of the adoptive parents, may confer immediate relative status upon a natural parent. Conversely, the natural parent of such a child may confer on his or her natural child immigration benefits through the child-parent relationship provided the child's adoptive parents are deceased and the child has received no immigration benefits through the adoptive parents. Similarly, the Department , with INS concurrence, has held that where the adoptive relationship has been legally terminated, there having been no immigration benefit obtained by the adoptive parent(s), the natural parents may receive from or bestow immigration benefits upon the natural child.

9 FAM 40.1 N4.2 Immigration Benefit Conferred from Child to Father

(TL:VISA-128; 10-20-95)

The Immigration and Naturalization Service has determined that a petitioner may confer immigration benefits as an illegitimate child although the child is over the age of 21, provided a *bona fide* parent-child relationship has been in existence prior to the child's 18th birthday. [See 9 FAM 40.1 N2.3-3 above.]

9 FAM 40.1 N5 Son or Daughter Defined

(TL:VISA-128; 10-20-95)

The INA defines "son" or "daughter" as someone who has at any time met the definition of child in INA 101(b)(1).

9 FAM 40.1 N5.1 Illegitimate Child of Mother

(TL:VISA-128; 10-20-95)

An alien who was born out of wedlock who is the son or daughter of a U.S. citizen or lawful permanent resident mother is deemed to be a "son" or "daughter" within the meaning of INA 203(a)(1), (2) or (*3*), provided the son or daughter has met the definition of INA 101(b)(1)(D).

9 FAM 40.1 N5.2 Illegitimate Child of Father

(TL:VISA-41; 1-15-91)

An alien who was born out of wedlock and is the son or daughter of a U.S. citizen or lawful permanent resident father is a “son” or “daughter” within the meaning of INA 203(a)(1). The amended provisions of INA 101(b)(1)(D) which entered into effect on November 6, 1986, are retroactive to the extent that a parent-child relationship established prior to the effective date can be used as the basis for a petition filed after that date.

9 FAM 40.1 N5.3 Stepson or Stepdaughter

(TL:VISA-128; 10-20-95)

A stepson or stepdaughter is not a “son” or “daughter” within the meaning of INA 203(a)(1), (2), or (3) and is not eligible for preference status unless, at the time the relationship was established, the stepchild *had* not reached the age of 18 as required by INA 101(b)(1)(B).

9 FAM 40.1 N6 Brother and Sister Defined

(TL:VISA-128; 8-20-95)

Brothers and sisters of the same mother and father, although born out of wedlock and legitimated, are “brothers” or “sisters” within the meaning of INA 203(a)(4) and are eligible for preference under these provisions.

9 FAM 40.1 N6.1 Brothers or Sisters of Half Blood With Same Mother

(TL:VISA-128; 10-20-95)

Brothers or sisters who have the same mother but different fathers, including those born out of wedlock and not legitimated, are “brothers” or “sisters” within the meaning of INA 203(a)(4) and are eligible for preference status under this provision.

9 FAM 40.1 N6.2 Brothers or Sisters of Half Blood With Same Father

(TL:VISA-162; 2-24-97)

Brothers or sisters of half blood who have the same father but different mothers are eligible for preference under INA 203(a)(4) if *both* the petitioner and beneficiary sibling qualified as a child under INA 101(b)(1).

9 FAM 40.1 N6.3 Stepbrother or Stepsister

(TL:VISA-128; 10-20-95)

A stepbrother or stepsister is not a " brother" or " sister" within the meaning of INA 203(a)(4) unless, at the time the relationship was established, the stepchild, or children if both became stepchildren, were under the age of 18 according to the of INA 101(b)(1)(B). If a consular officer at a post authorized to approve petitions receives a petition involving a stepbrother-stepsister relationship where one child was under the age of 18 at the time the marriage creating the stepchild relationship occurred, but the stepbrother or stepsister was above the age of 18, the petition should be referred to INS for consideration as one which is not clearly approvable. [See 9 FAM 42.41 N3.2.]

9 FAM 40.1 N6.4 Adoptive Sister or Brother

(TL:VISA-128; 10-20-95)

Pursuant to a Board of Immigration Appeals decision, the INS has held, that an adoptive brother or sister of a U.S. citizen who is at least 21 years of age is eligible for preference status under INA 203(a)(4*)* if the adoptive sibling qualifies under INA 101(b)(1)(E).

9 FAM 40.1 N7 Basis for "Following to Join"

9 FAM 40.1 N7.1 General

(TL:VISA-162; 2-24-97)

The term "following to join" permits an alien to obtain the (NIV or IV) status of the principal alien as long as the alien following to join possesses the required spouse or child relationship with the principal alien. There is no statutory time period during which the following-to-join alien must apply for a visa and seek admission into the United States. The only time sensitive factor to qualify as a spouse or child following to join is the alien's continued relationship with the principal alien. As an example, a person would no longer qualify as a child "following to join" upon reaching the age of 21 years or by entering into a marriage. Furthermore, there is no requirement that the following-to-join alien must take up residence with the principal alien in order to qualify for the visa, as the child or spouse is merely following the principal alien to the United States. [See also 9 FAM 42.42 N8.]

9 FAM 40.1 N7.2 Beneficiaries

(TL:VISA-128; 8-20-95)

The term "following to join", as used in INA 101(a)(27)(C) and INA 203(d), applies to a spouse or child who derives immigration status and a priority date from a principal applicant spouse or parent under those provisions. In addition, the "following-to-join" provisions relating to immigrant spouses or children, are also applicable to the spouse or child of a principal alien acquired after the principal alien's admission as a nonimmigrant under INA 101(a)(15)(F), (H), (I), (J), (L), (M), (N), (O), (P), (Q), (R) or (S) who, subsequent to his or her admission, adjusted status in the United States.

9 FAM 40.1 N7.2-1 Spouse or Child Acquired Prior to Admission of Principal Alien

(TL:VISA-41; 1-15-91)

A spouse or child acquired prior to a principal alien's admission to the United States is entitled to the priority date of the principal alien, regardless of the period of time which may elapse between the issuance of a visa to or admission into the United States of the principal alien and the

issuance of a visa to the spouse or child of such alien and regardless of whether the spouse or child had been named in the immigrant visa application of the principal alien.

9 FAM 40.1 N7.2-2 Child Born After Admission of Principal Alien

(TL:VISA-128; 10-20-95)

A child born of a marriage which existed at the time of the principal alien's admission to the United States is considered to have been acquired prior to the principal alien's admission under the provisions of 22 CFR 42.53(d) and, thus, entitled to the principal alien's priority date.

9 FAM 40.1 N7.2-3 Spouse or Child Acquired Subsequent to Admission of Principal Alien

(TL:VISA-128; 10-20-95)

A spouse or child acquired through a marriage which occurs after the admission of the principal alien under INA 101(a)(27)(C) or INA 203(a) through (c) is not derivatively entitled to the status accorded by those provisions.

9 FAM 40.1 N7.2-4 Adopted Child

(TL:VISA-41; 1-15-91)

A child who qualified as a "child" under the provisions of INA 101(b)(1)(E) subsequent to the principal alien's admission, but was adopted and was a member of the principal alien's household prior to the adoptive parent's admission to the United States, is considered to have been acquired prior to the principal alien's admission.

9 FAM 42.21 N11 Effect of Foreign Laws and Customs on Petitions for Adopted Children

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

a. Some foreign states have no statutory provisions governing adoption and in some of these states the concept of adoption is not legally recognized. Legal adoption for the purpose of immigration does not exist in foreign states which apply Islamic law in matters involving family status.

b. Accordingly, INS and the Department hold that relationships through claimed adoptions in such countries cannot be established for visa petition purposes. INS and the Department also hold that an adoptive relationship claimed to have been effected in a country which has no statutory provisions governing adoption cannot be recognized for visa classification purposes unless the relationship is sanctioned by local custom or religious practice, judicially recognized in the country, and the relationship embraces all the usual attributes of adoption, including the same irrevocable rights accorded a natural born child.

c. If the consular officer finds that any of the facts in the case are not as stated in the petition or if the adoption occurred abroad and is not valid under the laws of the country in which it took place, the consular officer shall suspend action and submit a report. [See 9 FAM 42.43(a) Related Statutory Provisions.]

d. Form I-604, Request For and Report On Overseas Orphan Investigation [see 9 FAM 42.21 Exhibit I] is sent by the NVC with the approved petition.