

chargeable if the child is accompanying or following to join the parent, in accordance with INA 202(b)(1).

(c) *Exception for spouse.* If necessary to prevent the separation of husband and wife, an immigrant spouse, including a spouse born in a dependent area, may be charged to a foreign state to which a spouse is chargeable if accompanying or following to join the spouse, in accordance with INA 202(b)(2).

(d) *Exception for alien born in the United States.* An immigrant who was born in the United States shall be charged to the foreign state of which the immigrant is a citizen or subject. If not a citizen or subject of any country, the alien shall be charged to the foreign state of last residence as determined by the consular officer, in accordance with INA 202(b)(3).

(e) *Exception for alien born in foreign state in which neither parent was born or had residence at time of alien's birth.* An alien who was born in a foreign state, as defined in §40.1, in which neither parent was born, and in which neither parent had a residence at the time of the applicant's birth, may be charged to the foreign state of either parent as provided in INA 202(b)(4). The parents of such an alien are not considered as having acquired a residence within the meaning of INA 202(b)(4), if, at the time of the alien's birth within the foreign state, the parents were visiting temporarily or were stationed there in connection with the business or profession and under orders or instructions of an employer, principal, or superior authority foreign to such foreign state.

[52 FR 42613, Nov. 5, 1987, as amended at 56 FR 49681, Oct. 1, 1991]

### Subpart C—Immigrants Not Subject to Numerical Limitations of INA 201 and 202

SOURCE: 56 FR 49676, Oct. 1, 1991, unless otherwise noted.

#### § 42.21 Immediate relatives.

(a) *Entitlement to status.* An alien who is a spouse or child of a United States citizen, or a parent of a U.S. citizen at least 21 years of age, shall be classified as an immediate relative under INA 201(b) if the consular officer has re-

ceived from INS an approved Petition to Classify Status of Alien Relative for Issuance of an Immigrant Visa, filed on the alien's behalf by the U.S. citizen and approved in accordance with INA 204, and the officer is satisfied that the alien has the relationship claimed in the petition. An immediate relative shall be documented as such unless the U.S. citizen refuses to file the required petition, or unless the immediate relative is also a special immigrant under INA 101(a)(27) (A) or (B) and not subject to any numerical limitation.

(b) *Spouse of a deceased U.S. Citizen.* The spouse of a deceased U.S. citizen, and each child of the spouse, will be entitled to immediate relative status after the date of the citizen's death provided the spouse or child meets the criteria of INA 201(b)(2)(A)(i) and the Consular Officer has received an approved petition from the INS which accords such status, or official notification of such approval, and the Consular Officer is satisfied that the alien meets those criteria.

[56 FR 49676, Oct. 1, 1991, as amended at 64 FR 55419, Oct. 13, 1999]

#### § 42.22 Returning resident aliens.

(a) *Requirements for returning resident status.* An alien shall be classifiable as a special immigrant under INA 101(a)(27)(A) if the consular officer is satisfied from the evidence presented that:

(1) The alien had the status of an alien lawfully admitted for permanent residence at the time of departure from the United States;

(2) The alien departed from the United States with the intention of returning and has not abandoned this intention; and

(3) The alien is returning to the United States from a temporary visit abroad and, if the stay abroad was protracted, this was caused by reasons beyond the alien's control and for which the alien was not responsible.

(b) *Documentation needed.* Unless the consular officer has reason to question the legality of the alien's previous admission for permanent residence or the alien's eligibility to receive an immigrant visa, only those records and documents required under INA 222(b) which relate to the period of residence

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in the United States and the period of the temporary visit abroad shall be required. If any required record or document is unobtainable, the provisions of § 42.65(d) shall apply.

(c) *Returning resident alien originally admitted under the Act of December 28, 1945.* An alien admitted into the United States under Section 1 of the Act of December 28, 1945 (“GI Brides Act”) shall not be refused an immigrant visa after a temporary absence abroad solely because of a mental or physical defect or defects that existed at the time of the original admission.

[56 FR 49676, Oct. 1, 1991, as amended at 63 FR 48578, Sept. 11, 1998]

### § 42.23 Certain former U.S. citizens.

(a) *Women expatriates.* An alien woman, regardless of marital status, shall be classifiable as a special immigrant under INA 101(a)(27)(B) if the consular officer is satisfied by appropriate evidence that she was formerly a U.S. citizen and that she meets the requirements of INA 324(a).

(b) *Military expatriates.* An alien shall be classifiable as a special immigrant under INA 101(a)(27)(B) if the consular officer is satisfied by appropriate evidence that the alien was formerly a U.S. citizen and that the alien lost citizenship under the circumstances set forth in INA 327.

## Subpart D—Immigrants Subject to Numerical Limitations

SOURCE: 56 FR 49676, Oct. 1, 1991, unless otherwise noted.

### § 42.31 Family-sponsored immigrants.

(a) *Entitlement to status.* An alien shall be classifiable as a family-sponsored immigrant under INA 203(a) (1), (2), (3) or (4) if the consular officer has received from INS a Petition to Classify Status of Alien Relative for Issuance of Immigrant Visa approved in accordance with INA 204 to accord the alien such preference status, or official notification of such an approval, and the consular officer is satisfied that the alien has the relationship to the petitioner indicated in the petition. In the case of a petition according an alien status under INA 203(a) (1) or

(3) or status as an unmarried son or daughter under INA 203(a)(2), the petitioner must be a “parent” as defined in INA 101(b)(2) and 22 CFR 40.1. In the case of a petition to accord an alien status under INA 203(a)(4) filed on or after January 1, 1977, the petitioner must be at least twenty-one years of age.

(b) *Entitlement to derivative status.* Pursuant to INA 203(d), and whether or not named in the petition, the child of a family-sponsored first, second, third or fourth preference immigrant or the spouse of a family-sponsored third or fourth preference immigrant, if not otherwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and priority date of the beneficiary of the petition.

[56 FR 49676, Oct. 1, 1991, as amended at 61 FR 1836, Jan. 24, 1996]

### § 42.32 Employment-based preference immigrants.

Aliens subject to the worldwide level specified in section 201(d) for employment-based immigrants in a fiscal year shall be allotted visas as indicated below.

(a) *First preference—Priority workers—*

(1) *Entitlement to status.* An alien shall be classifiable as an employment-based first preference immigrant under INA 203(b)(1) if the consular office has received from INS a Petition for Immigrant Worker approved in accordance with INA 204 to accord the alien such Preference status, or official notification of such an approval, and the consular officer is satisfied that the alien is within one of the classes described in INA 203(b)(1).

(2) *Entitlement to derivative status.* Pursuant to INA 203(d), and whether or not named in the petition, the child or spouse of an employment-based first preference immigrant, if not otherwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and priority date of the beneficiary of the petition.