

## WINNING THE DV LOTTERY: FROM HASSLE TO HAPPINESS (HOPEFULLY)

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### INTRODUCTION

Who hasn't dreamed of winning the lottery? Buy a ticket, and if your number comes up, you're on easy street! Simple and virtually risk free, right? Not necessarily so, if the lottery in question is the Diversity Lottery.

While the Diversity Immigrant Visa Program (DV lottery) represents one of the most generous immigrant visa categories—with up to 55,000 visas allocated annually<sup>1</sup>—it is neither simple nor risk free. Being selected for, or “winning,” the DV lottery is only the first step in a long process.<sup>2</sup> Luck is certainly important, but other more controllable variables, such as timing, cross-chargeability strategies, and adherence to program rules and regulations, can significantly improve an applicant's chances of success.

This article explores the DV lottery, its statutory requirements and regulations. It also outlines strategies designed to enhance an applicant's prospects for success and avoid common pitfalls.

### BRIEF HISTORY OF THE DIVERSITY LOTTERY STATUTE

The Immigration and Nationality Act (INA) provides four primary ways by which an individual may immigrate to the United States—family, employment, asylum, and the Diversity Visa Program.<sup>3</sup> The current diversity program, enacted as part of the Immigration Act of 1990 (IMMACT90),<sup>4</sup> was designed to “further enhance and promote diversity” among immigrants. IMMACT90 included permanent diversity provisions that guaranteed immigrant visas to nationals of “underrepresented countries” that have been less represented in employment- and family-based preference categories. Nationals of “high admission” countries were

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<sup>1</sup> See Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq.*) INA §203 provides only 10,000 visas annually for skilled workers and 40,000 visas for individuals of extraordinary ability, whereas §201 sets aside 55,000 visas for the diversity visa lottery. See 8 USC §1153(b)(1), (b)(3), and (c).

<sup>2</sup> In fact, it should be called a “lottery-within-a-lottery,” since the Department of State (DOS) customarily notifies twice as many more “winners” than visas that are available. For the DV-2007 lottery, for example, 82,000 people were notified for 50,000 winning slots.

<sup>3</sup> See INA §210(c)(3).

<sup>4</sup> See Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990) (codified at 8 USC §§1151 *et seq.*).

thereby precluded from participating.<sup>5</sup> The permanent provisions also instituted minimal educational requirements for applicants (a high school diploma or two years work experience in an occupation that requires two years of training or experience).<sup>6</sup>

The DV lottery currently fixes the annual worldwide level of diversity “green cards” at 55,000.<sup>7</sup> U.S. Citizenship and Immigration Services (USCIS) further breaks this number down by geographic region according to a complicated formula specified in section 203(c) of the Act.<sup>8</sup>

### **Program Eligibility Requirements**

The Department of State (DOS) is primarily responsible for administering the annual DV lottery. DOS regulations define the eligibility criteria, the limitations, and the procedure by which a participant files an application for consideration.<sup>9</sup> To qualify for DV visas, applicants must be natives of “low-admission foreign states” and meet minimum education or work experience requirements to qualify for DV visas. A DV applicant may only submit one DV registration per year,<sup>10</sup> yet each family member who meets the eligibility requirements may submit a separate registration each year. There is no provision restricting the age of qualified applicants. Nonetheless, only applicants old enough to meet the education or work experience criteria will qualify.<sup>11</sup>

### **Foreign State Chargeability**

A DV lottery applicant must be born in or be chargeable to a low-admission foreign state, as determined by the attorney general.<sup>12</sup> Low-admission foreign states currently include all countries except 19 designated high-admission foreign states.<sup>13</sup>

Generally, the country of birth determines the state of chargeability. The foreign state, as it exists at the time of visa application, is the state of chargeability, not the state that existed at the time of the applicant’s birth. For example, a Pakistani national who was born in what is now Bangladesh may be eligible even though Pakistanis are ineligible. If the applicant’s birth state no longer exists, has different boundaries, or was a colonial territory, the secretary of State will specify an alternate country for chargeability purposes.<sup>14</sup>

Cross-chargeability provisions established to promote family unity and help prevent separation of family members born in ineligible countries also apply to qualified DV lottery applicants. Therefore, a DV applicant may utilize his or her spouse’ country of birth as the qualifying low-admission country. To take advantage of

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<sup>5</sup> INA §203(c)(1)(E)(i).

<sup>6</sup> See *id.* at INA §203. For a more detailed discussion of the legislative history of IMMACT90 and the precursors of INA’s diversity provisions, see B. P. Wolfsdorf and N. Rahman, “The Diversity Lottery - Asians and Latinos Need Not Apply!” 00-9 *Immigration Briefings* (Sept. 2000) .

<sup>7</sup> INA §203(e); however, sec. 203(d) of the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160 (NACARA) passed by Congress in Nov. 1997 stipulated that up to 5,000 of the 55,000 annually-allocated diversity visas be made available for use under the NACARA program. The reduction of the limit of available visas to 50,000 for other countries began with DV-2000.

<sup>8</sup> INA §203(c)(1)(B). For an in-depth study of the apportionment of visas, see K. Grzegorek and B. Wolfsdorf in 1 *Immigration and National Law Handbook* at 245–57 (AILA 1994–95 Ed.).

<sup>9</sup> See generally 9 U.S. Dep’t of State, *Foreign Affairs Manual* (FAM), Notes to 22 CFR §42.33.

<sup>10</sup> See 22 Code of Federal Regulations (CFR) §42.33(a)(4).

<sup>11</sup> See generally, INA §203(c) and 22 CFR §42.33(a)(1).

<sup>12</sup> See INA §203(c)(1)(E)(i).

<sup>13</sup> DOS, “Instructions for the 2011 Diversity Immigrant Visa Program (DV-2011)” at [www.travel.state.gov/pdf/DV-2011instructions.pdf](http://www.travel.state.gov/pdf/DV-2011instructions.pdf). For the 2011 DV lottery, high-admission (*i.e.*, ineligible) countries included: Brazil, Canada, China (mainland-born), Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, India, Jamaica, Mexico, Pakistan, Philippines, Peru, Poland, South Korea, United Kingdom (except Northern Ireland), and Vietnam. However, natives of Northern Ireland, Hong Kong SAR, and Taiwan are eligible.

<sup>14</sup> See INA §202(d).

these provisions, the family relationship must exist at the time the application is initially filed and the spouse must obtain permanent residence at the same time as the principal beneficiary.<sup>15</sup>

**Practice Pointer:** Carefully review chargeability provisions. A client who initially appears to be ineligible, based on birth in a high-admission state, may in fact be eligible through a parent's or spouse's birth state. However, be aware that family members using cross-chargeability or alternate-preference status provisions may be subject to additional eligibility and visa issuance requirements.

### **Education or Work Experience**

The DV lottery applicant must also have at least a high school education or its equivalent or, within the five years preceding application for a diversity visa, two years of work experience in an occupation requiring at least two years of training or experience.<sup>16</sup> Only the winner—not derivative beneficiaries, such as a spouse—must satisfy this requirement.

For DV lottery purposes, DOS defines high school education or its equivalent as “successful completion of a 12-year course of elementary and secondary education in the United States or successful completion in another country of a formal course of elementary and secondary education comparable to completion of 12 years’ elementary and secondary education in the United States.”<sup>17</sup>

Applicants without a high school diploma may qualify if they have two years’ work experience in an occupation which requires at least two years training or experience. To determine whether a particular occupation requires at least two years of training or experience, DOS utilizes the Department of Labor’s (DOL) O\*NET Online Database.<sup>18</sup> According to the DOS, qualifying occupations will be designated under the DOL O\*NET Online Database as Job Zone 4 or Job Zone 5, classified in a Specific Vocational Preparation (SVP) range of 7.0 or higher.<sup>19</sup>

**Practice Pointer:** The DV applicant should submit documentation explaining why the job requires two years of training or experience when reference to the O\*NET system does not on its own resolve the matter.<sup>20</sup>

### **The Starting Line for Lucky Winners**

The first step for DV lottery applicants is to file an application (Form DS-5501) with DOS during the open registration period (typically beginning of October through end of November).<sup>21</sup> Applications are made online, and only one per applicant is allowed.<sup>22</sup> Winners, who are randomly selected, receive a notification letter by mail between May and July of the fiscal year by the Kentucky Consular Center (KCC).<sup>23</sup> The notification letter includes a case number (showing the beneficiary’s geographic region and rank order number related to immigrant visa availability),<sup>24</sup> foreign state chargeability, consular post designation and detailed visa application instructions.

<sup>15</sup> See 9 FAM 42.33 N4.2.

<sup>16</sup> See INA §203(c)(2).

<sup>17</sup> 22 CFR §42.33(a)(2).

<sup>18</sup> See 68 Fed. Reg. 49353 (Aug. 18, 2003). See also 74 Fed. Reg. 51354 (Oct. 6, 2009) and 9 FAM 42.33 PN5.1 – 5.2. The database is available online at: [www.onetcenter.org](http://www.onetcenter.org).

<sup>19</sup> *Id.*

<sup>20</sup> Previously, DOS required jobs with Specific Vocational Preparation (SVP) ratings of at least a “7” (two to four years of experience). Jobs with an SVP of “6” (which required as much as two years of experience and thereby met DV experience criteria) were not acceptable. Under the O\*NET system, which DOS now uses, standard vocational training for particular occupations are divided into zones. Zone 3 includes occupations for which “medium preparation is needed,” usually one or two years of training and/or completion of three or four years of apprenticeship or several years of vocational training. Zone 3 occupations are assigned an SVP range of 6 to 7. The ambiguity of this standard poses difficulties in determining whether a DV lottery “winner” meets the statutory eligibility criteria.

<sup>21</sup> Form DS-5501 is available online at: [http://travel.state.gov/visa/immigrants/types/types\\_1318.html](http://travel.state.gov/visa/immigrants/types/types_1318.html).

<sup>22</sup> See 22 CFR 42.33(a)(4).

<sup>23</sup> See 74 Fed. Reg. 51354 (Oct. 6, 2009).

<sup>24</sup> See 22 CFR §42.33(c).

The principal beneficiary must complete and return to the KCC Forms DSP-122 Supplemental Registration for the Diversity Immigrant Visa Program and DS-230 Part I and II Application for Immigrant Visa and Alien Registration for the principal beneficiary and accompanying derivative family members to proceed with consular processing. Upon receipt of the immigrant visa application, the KCC initiates security checks.<sup>25</sup> Once the DOS *Visa Bulletin* indicates a visa is available for the individual's regional rank order case number, the KCC will set an appointment for the DV applicant(s) at the designated consulate and will provide instructions to obtain the medical(s).<sup>26</sup> The DV registration fees and immigrant visa fees are paid at the time of the interview at the consulate.<sup>27</sup>

The KCC notes deficiencies or potential ineligibility when reviewing the DV supplemental registration and immigrant visa application and forwards the notes to the consulate. The NVC does not, however, notify the applicant of these problems.<sup>28</sup>

DV beneficiaries in the United States who wish to apply to USCIS for permanent residence may not submit their adjustment applications until the DOS Visa Bulletin indicates their priority date is current. The DOS publishes DV visa availability for the current month and the following month. *Visa Bulletins* are released 15 days before each new calendar month. Based on USCIS policy, DV beneficiaries and the accompanying family members may submit applications to the USCIS National Benefits Center (NBC) for adjustment of status only after the *Visa Bulletin* indicates the beneficiary's priority date, which is 75 days prior to the date a visa will be available.<sup>29</sup>

After the adjustment application is submitted, security checks are initiated. The NBC sends a biometrics appointment notice, then immediately forwards the adjustment application and supporting documentation to the local USCIS district office for further processing.<sup>30</sup> The adjustment of status application package must include the USCIS filing fee. The applicant must also provide proof of paying the diversity visa registration fee (sent to the DOS in St. Louis, MO) before USCIS will grant the adjustment application.

### **Obstacles to Obtaining Permanent Residence**

As mentioned above, winning the lottery does not guarantee issuance of a visa or adjustment of status. Many potential obstacles can keep winners and derivative beneficiaries from obtaining permanent residence, including: inaccuracies in the initial application, inadmissibility issues, adjustment problems, poor timing, and age-outs.

#### ***Inaccuracies in Initial DV Registration***

DV entry and registration requirements are published each year in the *Federal Register*.<sup>31</sup> An application must contain the full name, date of birth, place of birth, and gender of the applicant. It must also list the applicant's spouse and all children, unmarried and under the age of 21 years of age, as of the date of initial application (including legally adopted and step-children). The only exception is if a spouse or child is a U.S. citizen or legal permanent resident at the time of DV entry submission.<sup>32</sup> Moreover, the application must include

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<sup>25</sup> See 9 FAM 42.33 PN6.3.

<sup>26</sup> See 9 FAM 42.33 PN6.2.

<sup>27</sup> See 9 FAM 42.33 N10.

<sup>28</sup> See 9 FAM 42.33 PN5.2.

<sup>29</sup> See Memo, Yates, Exec. Assoc. Commissioner, Ofc. Field Operations, HQ 70.23.1 (Jan. 19, 1999); and U.S. Citizenship and Immigration Services (USCIS) HQ Minutes, AILA Liaison Comm. (Apr. 2, 2008), published on AILA InfoNet at Doc. No. 08040235 (posted Apr. 2, 2008).

<sup>30</sup> See National Benefits Center (NBC) Liaison Committee, "How NBC Handles Diversity Visa Form I-485 for Adjustment of Status to Permanent Resident", published on AILA InfoNet at Doc. No. 09052264 (posted May 22, 2009).

<sup>31</sup> See 22 CFR §42.33(b); See also, Bureau of Consular Affairs; Registration for the Diversity Immigrant (DV-2011) Visa Program, 74 Fed. Reg. 51353 (Oct. 6, 2009), published on AILA InfoNet at Doc. No. 09100660 (posted Oct. 6, 2009).

<sup>32</sup> See 22 CFR §42.33(b), 9 FAM 42.33 N6.6.

the applicant's photograph. DV lottery applications lacking the required information or photos will be rejected by the registration website or disqualified at a later stage.<sup>33</sup>

DOS instructs consular officers to deny the visa applications of the principal beneficiary and all derivatives when the DV registrant's visa application lists a spouse or child who existed at the time of the initial DV entry and was not included in the initial DV entry petition.<sup>34</sup> The DOS instruction also indicates that a consular post may request an advisory opinion from the DOS Advisory Opinion Division if the officer believes the case merits issuance despite failure to comply with this instruction.<sup>35</sup>

**Practice Pointer:** Pay particular attention to entry requirements related to family members and chargeability. Failure to provide accurate and complete information will likely result in denial of the DV registration or subsequent immigrant applications.

### ***Inadmissibility Issues***

In addition to meeting the criteria for diversity immigrant visa issuance, DV applicants (including family members) are also subject to general grounds of inadmissibility under INA §212(a), with the exception of the labor certification restriction, since that provision applies only to employment-based applicants.<sup>36</sup>

While DV applicants are subject to the public charge ground of inadmissibility, they are not authorized to submit an I-864 Affidavit of Support.<sup>37</sup> They may, however, submit an I-134 Affidavit of Support with the sponsor's supporting documentation of relationship to the applicant and resources. Additionally, DV applicants may provide an offer of employment from a U.S. employer.<sup>38</sup>

DV applicants must obtain all necessary waivers of inadmissibility when applicable. Standard waivers of §212(a) grounds of inadmissibility are available to DV applicants; there are no special DV waivers. The main challenge for most DV applicants requiring a waiver is establishing eligibility, since many of the waivers require a qualifying legal permanent resident or U.S. citizen relative. DV applicants may also find it difficult to obtain approval of a waiver prior to the exhaustion of the fiscal year DV visa allotment or the expiration of the DV petition at the end of the fiscal year.

### ***Adjustment Problems***

While the vast majority of DV immigrant visa applicants apply overseas,<sup>39</sup> DV winners and their dependent family members who are physically present in the United States may apply for permanent residence with USCIS if they meet DV program requirements and are eligible for adjustment of status under INA §245.

As a general rule, only applicants who entered the United States legally and who have maintained lawful status since their entry are eligible for adjustment of status.<sup>40</sup> Persons ineligible for adjustment of status under INA §245(c) include those who: entered without inspection; overstayed, worked without authorization, or otherwise violated their status (except immediate relatives); entered as crewmen; entered on a visa waiver (except immediate relatives);<sup>41</sup> are deportable; or were admitted in transit without a visa.<sup>42</sup>

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<sup>33</sup> See 22 CFR §42.33(c); and 9 FAM 42.33 N5.1.

<sup>34</sup> See 9 FAM 42.33 N6.6.

<sup>35</sup> See 9 FAM 42.33 N6.6.

<sup>36</sup> See INA §212(a)(5)(D).

<sup>37</sup> See INA §212(a)(4).

<sup>38</sup> See 9 FAM 40.41 N4.7-2 (a) (requiring offers to be "submitted on a notarized letter, in duplicate, on letterhead stationery.")

<sup>39</sup> In the Fiscal Year 2008 DV lottery, 1,440 applicants adjusted status through the USCIS and 41,761 applicants obtained immigrant visas through consular processing. See USCIS National Stakeholder Meeting Q&A, June 30, 2009, published on AILA InfoNet at Doc. No. 09063090 (posted June 30, 2009).

<sup>40</sup> See INA §245(c), 8 USC §1255(c) (2006).

<sup>41</sup> Persons entering under the visa waiver program are not eligible to adjust status in the United States unless they are immediate relatives. See 8 CFR §245.1(b)(8) (2006).

<sup>42</sup> See INA §245(c)(1)-(8), 8 USC §1255(c)(1)-(8) (2006).

Although persons unlawfully present in the United States may submit DV applications, they and their qualifying dependents will likely be barred from adjusting their status under INA §245(c) unless they meet the requirements of INA §245(i).<sup>43</sup> To qualify under §245(i), DV winners must: be physically present in the United States; have an employment– or family-based immigrant petition (or labor certification application) filed on their behalf, directly or as a derivative, within the designated dates; and pay a \$1000 fee.<sup>44</sup>

A DV lottery winner who is present in the United States in nonimmigrant status should exercise particular caution when applying for adjustment of status. Most nonimmigrant categories, such as F-1 students, have strict nonimmigrant intent requirements,<sup>45</sup> so submission of an application for permanent residence may be considered evidence of immigrant intent.

The BIA has said that filing an application for adjustment of status does not in itself constitute a failure to maintain F-1 nonimmigrant status.<sup>46</sup> However, filing one could make it difficult for an F-1 student to maintain all requirements for that nonimmigrant status. Moreover, any immigration agency evaluating an applicant's nonimmigrant intent in the future may consider the fact that an adjustment of status application was previously filed when determining eligibility for continued or renewed nonimmigrant status.

**Practice Pointer:** Since there is no guarantee that a client in nonimmigrant status (such as F-1) will be able to continue in nonimmigrant status if a DV-based adjustment application is denied, the attorney should clearly advise the client of this risk before filing the adjustment application.

While adjustment of status is generally unavailable to applicants who have failed to maintain their lawful status since arriving in the United States, an exception is made when the failure is through “no fault of [the applicant’s] or for technical reasons.”<sup>47</sup> This exception applies to cases where an applicant “properly filed a timely request to maintain status and the Service has not yet acted on that request.”<sup>48</sup> The BIA has found that the “technical reasons” exception applies only to inaction on the part of DHS.<sup>49</sup> Thus, it held that when USCIS acts other than favorably on a pending asylum application, filed when the applicant was in valid B-1 nonimmigrant status (and B-1 status subsequently ends), the “technical reasons” also end.<sup>50</sup>

Persons seeking a DV-based immigrant visa at a U.S. consulate are not subject to requirements of INA §245; however, if they depart the United States after remaining unlawfully in the United States for a period of more than 180 days or one year, they may be subject to the unlawful presence grounds of inadmissibility and barred from re-entering the United States for either three– or ten-years, respectively.<sup>51</sup> Waiving these grounds of inadmissibility requires the applicant to have a qualifying U.S. citizen or legal permanent resident spouse or parent who would suffer extreme hardship if the immigrant visa were not granted.<sup>52</sup> As discussed below, it may be difficult to obtain approval of a waiver within the restricted DV time-frame, particularly when consular processing.

**Practice Pointer:** When helping a DV applicant decide whether to adjust status in the United States or consular process, keep in mind that adjustment is discretionary.<sup>53</sup> An applicant may be statutorily eligible, yet

<sup>43</sup> See 8 USC §1255(i) (2006).

<sup>44</sup> See INA §245(i)(1), 8 USC §1255(i)(1) (2006); 8 CFR §245.10(h).

<sup>45</sup> Nonimmigrant categories that allow dual intent (nonimmigrant and immigrant) by regulation include H-1B, H-1C, L-1 and O-1. See 8 CFR §214.2(h)(16), (l)(16), and (o)(13).

<sup>46</sup> See *Matter of Hosseinpour*, 15 I&N Dec. 191 (BIA 1975).

<sup>47</sup> INA §245(c).

<sup>48</sup> 8 CFR §1245.1(d)(2).

<sup>49</sup> See *Matter of L-K-*, 23 I&N Dec. 677 (BIA 2004) (involving alien in B-1 visa status who applies for asylum before B-1 status expires, then files adjustment application after USCIS refers asylum application to the immigration court).

<sup>50</sup> See *id.* at 680 (thereby finding alien ineligible for DV-based adjustment of status). What the BIA did not say, however, was whether the “technical reasons” exception would have applied if the applicant filed for adjustment *before* referral of the asylum application to the immigration court, leaving the matter ripe for future litigation.

<sup>51</sup> See INA §212(a)(9)(B).

<sup>52</sup> See INA §212(a)(9)(B)(v).

<sup>53</sup> See INA §245(a), 8 USC §1255(a) (2006).

the USCIS may deny the adjustment application they determine that discretion should not be favorably exercised. In contrast, consular officers must make a determination of immigrant visa eligibility based strictly on whether the applicant is statutorily eligible.

### **Timing Issues—The Clock Is Running!**

All DV-based applicants, including the principal beneficiary and each family member, whether accompanying or following-to-join, must obtain approval of the immigrant visa application or application to adjust status prior to the exhaustion of DV fiscal year allotment of immigrant visas or prior to midnight September 30th of the fiscal year, whichever comes first.<sup>54</sup> This deadline is strictly interpreted by the courts, even in cases where the government failed to process applications in a timely manner.<sup>55</sup>

Security check delays often prevent an applicant from adjusting status or obtaining an immigrant visa; however, DV applicants adjusting status in the United States are eligible for expedited Federal Bureau of Investigation name checks.<sup>56</sup> When consular processing, applicants or their attorneys may send an e-mail inquiry to the DOS Visa Office if a security advisory opinion has been pending more than 45 days.<sup>57</sup>

Also expect significant delays for applicants with medical complications, grounds of inadmissibility requiring waivers and family members who are following-to-join a principal beneficiary adjusting status in the United States. Prior to attending their consular interview, such applicants should independently confirm they meet and can document all vaccination requirements,<sup>58</sup> identify any medical conditions that may require treatment over a period of time (such as tuberculosis)<sup>59</sup> and obtain additional financial support documentation to overcome a public charge ground of inadmissibility where conditions require costly treatment.<sup>60</sup>

Consular officers are also required to refer immigrant visa applicants to panel physicians for medical re-examination if an applicant has a single drunk driving arrest or conviction within the last three calendar years or two or more drunken driving arrests or convictions at any time.<sup>61</sup> Re-examination is required to determine whether the applicant is inadmissible under the provision excluding persons with a mental disorder or behavior associated with a disorder that may pose, or has posed a threat to property, safety, or welfare of the alien or others.<sup>62</sup>

For persons adjusting status in the United States, the USCIS may also send applicants for medical re-examination if the initial medical did not take into consideration a significant criminal record of alcohol-impaired driving incidents including, among other criteria, three or more alcohol-related arrests/convictions where one arrest/conviction is within the prior two years; and two or more arrests/convictions within the prior two years.<sup>63</sup>

DV applicants may not file inadmissibility waiver applications until the U.S. consular officer has made a finding of inadmissibility at the visa interview. After the waiver application is submitted, the consular officer

<sup>54</sup> See 8 CFR §42.33(a)(1), (3)(d), (3)(f).

<sup>55</sup> See e.g., *Mohamed v. Gonzales*, 436 F.3d 79 (2d Cir. 2006) (dismissing DV lawsuit as moot because DV deadline had passed).

<sup>56</sup> See USCIS Update, “USCIS Clarifies Criteria to Expedite FBI Name Check”, Feb. 20, 2007, [www.uscis.gov/files/pressrelease/ExpediteNameChk022007.pdf](http://www.uscis.gov/files/pressrelease/ExpediteNameChk022007.pdf) (last visited Feb. 8, 2010).

<sup>57</sup> The e-mail address for the DOS Visa Office is: at [legalnet@state.gov](mailto:legalnet@state.gov).

<sup>58</sup> See INA §212(a)(1)(A)(ii), 8 USC §1182(a)(1)(A)(ii) (2006) (listing vaccine-preventable diseases).

<sup>59</sup> Untreated Infectious tuberculosis has been added as a Class A communicable disease. See *Medical Examination of Aliens—Removal of Human Immunodeficiency Virus (HIV) from Definition of Communicable Diseases of Public Health Significance*, 74 Fed. Reg. 56547 (Nov. 2, 2009) (to be codified at 42 CFR §34). The CDC provides current vaccine and communicable disease information at [www.cdc.gov](http://www.cdc.gov).

<sup>60</sup> See INA §212(a)(4); 9 FAM 40.41 N4.7-2.

<sup>61</sup> See Sec’y of St. Guidance on Processing Visa Applicants with Drunk Driving Hits, Dep’t St. Cable No. R 072132Z (June 2007), [http://travel.state.gov/visa/laws/telegrams/telegrams\\_3267.html](http://travel.state.gov/visa/laws/telegrams/telegrams_3267.html).

<sup>62</sup> See INA §212(a)(1)(A)(iii)(I), 8 USC §1182(a)(1)(A)(iii)(I) (2006).

<sup>63</sup> See Memo, Yates, Assoc. Dir. Ops., USCIS, “Requesting Medical Re-examination: Aliens Involved in Significant Alcohol-Related Driving Incidents and Similar Scenarios” Jan. 16, 2004.

forwards it to the USCIS for adjudication.<sup>64</sup> Therefore, preparation and documentation of a waiver application in advance of the consulate interview is recommended to eliminate a lapse of time between the interview and submission of the waiver application.

Derivative family members following-to-join the principal DV beneficiary after he or she has obtained approval of the adjustment of status may not “join” unless their immigrant visas are approved prior to the expiration of the DV fiscal year and before the exhaustion of the DV immigrant visa allotment. Derivative family members following-to-join may not initiate immigrant visa consular processing until after the USCIS has issued a Form I-824, Application for Action on an Approved Application or Petition, verifying the adjustment, and the KCC has issued the Instruction Packages for Immigrant Visa Applicants.<sup>65</sup>

If the DV allotment of immigrant visas are exhausted or the expiration date (September 30th of the fiscal year) is reached prior to the approval of immigrant visa applications, the family members’ immigrant visa applications will be denied and they will no longer be eligible to obtain permanent residence under the principal applicant’s DV petition.

### ***Age-Out Children***

Children of a DV principal beneficiary are entitled to obtain immigrant status if unmarried and under 21 years of age on the date a diversity-based immigrant visa becomes available.<sup>66</sup> The Child Status Protection Act provision that extends the period an alien qualifies as a child by the number of days a qualifying petition was pending with the USCIS does apply to diversity visa petitions.<sup>67</sup> Instead, the relevant period for DV lottery applicants is “between the first day of the DV mail-in application period for the program year in which the principal alien has qualified and the date on the letter notifying the principal alien that his or her application has been selected (the congratulatory letter).”<sup>68</sup> That period should be subtracted from the derivative alien’s age on the date the visa became available to the principal beneficiary.<sup>69</sup>

## **CONCLUSION**

Although the path from “winning” the diversity lottery to obtaining permanent residence can be long and perilous, the benefits to applicants who succeed are life-changing. Attorneys who carefully analyze their clients’ immigration history, work in a timely manner, and keep the considerations outlined in this article in mind stand a much greater chance seeing this dream come true.

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<sup>64</sup> See 9 FAM 40.21(a) PN2.1, Making Waiver Requests Directly to Department of Homeland Security (DHS).

<sup>65</sup> See 9 FAM 42.33 PN6.4.

<sup>66</sup> See INA §§101(b)(1)(A)–(E), 203(h).

<sup>67</sup> See Memo, Neufeld, Acting Assoc. Dir., Domestic Ops., USCIS, HQ DOMO 70.6.1, AFM Update AD07-04; *Adjudicators Field Manual*, Ch. 21.29(e)(1)(ii)(C).

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*