



U.S. Citizenship  
and Immigration  
Services

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AFM Update AD09-11

## Interoffice Memorandum

TO: Field Leadership

FROM: Donald Neufeld   
Acting Associate Director

SUBJECT: Field Guidance for Adjudicating Form I-817 (Application for Family Unity Benefits) under *Hernandez v. Reno*, 91 F.3d 776 (5<sup>th</sup> Cir. 1996)

Revisions to *Adjudicator's Field Manual (AFM)* Chapter 24.4(d)(1)  
(AFM Update AD09-11)

### 1. Purpose

This memorandum provides guidance to U.S. Citizenship and Immigration Services (USCIS) Field Offices, Service Centers, and the National Benefits Center regarding adjudication of Form I-817 (Application for Family Unity Benefits) under the Immigration Act of 1990 (IMMACT 90), Northwest Immigrant Rights Project (NWIRP), and Catholic Social Services, Inc. and League of United Latin American Citizens Settlement Agreements (commonly referred to as CSS Newman). This guidance does not alter the standards used to adjudicate Form I-817 filed pursuant to the section 1104 of the Life Act.

### 2. Background

Section 301 of IMMACT 90 reads in pertinent part:

The Attorney General shall provide that in the case of an alien who is an eligible immigrant (as defined in subsection (b)(1)) as of May 5, 1988, who has entered the United States before such date, who resided in the United States on such date, and who is not lawfully admitted for permanent residence, the alien –

- (1) may not be deported or otherwise required to depart from the United States...
- (2) shall be granted authorization to engage in employment in the United States...

Section 301(b)(1) defines “eligible immigrant” as a qualified immigrant who is the spouse or unmarried child of a legalized alien. Regulations implementing this section of law were first codified at 8 CFR 242 but later moved to 8 CFR 236.

In 1996, the Fifth Circuit Court of Appeals ruled that 8 CFR 242.6(c)(1)(ii), currently codified at 8 CFR 236.12(a)(2), which required the qualifying relationship to continue in order for the individual to be eligible or remain eligible for Family Unity status, exceeded the authority of the statute. *Hernandez v. Reno*, 91 F.3d 776 (1996). The Court stated that IMMACT 90 “requires that Hernandez be the spouse or unmarried child of a legalized alien on May 5, 1988. It requires no more. The INS regulation adding a requirement that the alien continuously maintain that same relationship is in conflict with the plain language of the statute.” *Hernandez*, 91 F.3d at 781. Thus, the Court found that the only relevant inquiry for adjudication of applications for Family Unity benefits was whether the applicant was an eligible alien on May 5, 1988. The fact that the relationship has ended after that date, whether by death or divorce, is irrelevant.

In addition, 8 C.F.R. § 236.15(e), precludes approval of a Family Unity extension unless the applicant is the beneficiary of an I-130 petition filed by the legalized alien. Although not at issue in *Hernandez*, this regulation, like 8 C.F.R. 236.12(a)(2), effectively requires a continuing relationship with the legalized alien. To enforce this regulation where the qualifying relationship no longer exists would undermine the *Hernandez* court’s reading of the statutory language.

### **3. Field Guidance**

Historically, USCIS interpreted IMMACT 90 as requiring the applicant to have established that a qualifying relationship existed on May 5, 1988 and that it continued to exist from that point forward. However, after the ruling in *Hernandez v. Reno*, that interpretation could no longer be used in the Fifth Circuit.

In order to ensure consistency, USCIS will apply *Hernandez* nationwide for I-817 applications filed under the provisions of IMMACT 90, NWIRP or CSS Newman. Thus, if an applicant met the eligibility requirement as the spouse or unmarried child of a legalized alien on May 5, 1988, the applicant does not have to continuously maintain that same relationship to remain eligible for the Family Unity benefit. For example, if an applicant was married to a legalized alien on May 5, 1988, and the relationship ended, whether voluntarily or not, after that date, the applicant remains eligible for Family Unity benefits. Additionally, if the qualifying legalized alien parent or spouse is now deceased, it does not affect the applicant’s eligibility for Family Unity benefits.

In addition, if an applicant for extension of Family Unity benefits demonstrates that he or she no longer has a petitionable relationship with a legalized alien, his or her application may be approved notwithstanding 8 C.F.R. § 236.15(e). However, applicants who still have a petitionable relationship with the legalized alien must still comply with the I-130 requirements of this regulation.

The applicant must meet all other eligibility requirements (see 8 CFR 236.12) and be otherwise eligible for the benefit. Note: This guidance does not apply to Legal Immigration Family Equity (LIFE Act) applications.

I-817 applications that are filed or are pending on or after [INSERT DATE OF MEMO] will be adjudicated under the policy guidance provided in this memorandum. USCIS adjudicators may not accept requests for the reopening of previously denied or revoked applications if the motions to reopen or reconsider are untimely filed. If timely filed motions are received that establish prima facie eligibility under the new interpretation, they should be granted. Petitioners may file new Form I-817s for applications that were denied or revoked

based on the USCIS's interpretation of the topics presented in this memorandum prior to **[INSERT DATE OF MEMO]**.

#### **4. Contact Information**

Questions regarding the guidance in this memorandum should be directed to Vicente F. Lopez, Office of Field Operations, Heather Evelyn, Office of Service Center Operations, or Dawn Sage, National Benefits Center, through appropriate supervisory channels.

#### **5. Adjudicator's Field Manual (AFM) Update, Chapter 24.4 (d)(1) and 244.4(k)**

**Chapter 24.4(d)(1) is revised as follows:**

**(d) Basic Requirements for Family Unity.** The following requirements apply to all petitions filed for Family Unity under IMMACT 90:

- (1) The applicant must have been the spouse or unmarried child of a legalized alien on May 5, 1988 (or December 1, 1988 in the case of a legalized alien under the SAW program). If on May 5, 1988 (or where applicable, December 1, 1988) an applicant had the requisite relationship to the legalized alien, the applicant should not be found ineligible for Family Unity benefits based on the occurrence of any of the following:
  - (a) the unmarried applicant subsequently marries; or
  - (b) the relationship between the applicant and the qualifying legalized alien spouse, though in existence on the above specified date ends after that date (whether voluntarily or involuntarily); or
  - (c) the qualifying legalized alien parent is now deceased; or
  - (d) the qualifying legalized alien spouse is now deceased.

The applicant must meet all other eligibility requirements (see 8 CFR 236.12) and be otherwise eligible for the benefit.

**Chapter 24.4(k) is revised as follows:**

**(k) Extension of Family Unity benefits.** An application for an extension of Family Unity benefits must be filed by the alien on Form I-817. An extension may be granted if the alien's eligibility for benefits under the Family Unity program continues. In addition, notwithstanding 8 C.F.R. § 236.15(e), if an applicant for extension of Family Unity benefits demonstrates that he or she no longer has a petitionable relationship with a legalized alien, his or her application may be approved even though the applicant is not the beneficiary of an I-130 petition. However, applicants who still have a petitionable relationship with the legalized alien must still comply with the I-130 requirements of 8 C.F.R. § 236.15(e).

Field Guidance for Adjudicating Form I-817 (Application for Family Unity Benefits)  
Under *Hernandez v. Reno*, 91 F.3d 776 (5<sup>th</sup> Cir. 1996)  
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*The AFM Transmittal Memoranda button is revised by adding a new entry, in numerical order, to read:*

AD09-11 [Insert date]	Chapter 24.4(d)(1)	This revision to Chapter 24.4(d)(1) to the Adjudicator's Field Manual (AFM) provides field guidance for adjudication I-817 (Application for Family Unity Benefits) in light of the decision in <i>Hernandez v. Reno</i> , 91 F.3d 776 (5 <sup>th</sup> Cir. 1996).
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