



Excluded family members (s. 117(9)(d)): Practical Guide

Regulation 117(9)(d)

Immigration and Refugee Protection Regulation 117(9)(d) states that a person is not a family member if they were not examined by a visa officer when the person sponsoring them immigrated to Canada. Since they are not considered a “family member”, they cannot be sponsored under the Family Class.

The following are some of the scenarios that can lead to excluded family members:

- A refugee family has a new baby after their interview with the visa officer and before departure for Canada. Someone gives them bad advice and encourages them to go to Canada as planned and sponsor the baby after arrival. The baby is an excluded family member.
- A man marries his fiancée just days before immigrating to Canada. He does not realize he needed to declare his new wife and have her examined. His wife is an excluded family member.
- A man learns after he becomes a permanent resident in Canada that a woman had borne him a child. The child is an excluded family member.
- A woman who immigrates to Canada is pressured by a family member not to mention a child she has had out of wedlock. Her child is an excluded family member.
- A man immigrates to Canada because he knows that Canada provides for family reunification for same-sex couples. When he applies to immigrate to Canada, the couple have not cohabited for a year so the partner cannot be included as a dependant. By the time the application is finalized and the man arrives in Canada, the couple have cohabited for a year. However, the man does not realize that he had to declare this. His partner is an excluded family member.

Exception where visa officer approved non-examination

There is an exception to the excluded family rule (at s. 117(1)(10)), if the visa officer had determined at the time of the sponsor’s own application for permanent residence that the family member did not need to be examined. This exception could apply in particular to refugees who reported a family member but they couldn’t be examined, for example, because their whereabouts were unknown.

The exception cannot apply if the visa officer did not know about the family member.

Humanitarian and compassionate (H&C) considerations

Immigration, Refugees and Citizenship Canada (IRCC) accepts that cases may arise where the excluded family member rule should not be applied. Their solution for these cases is to use humanitarian and compassionate considerations (H&C) under section 25 of the *Immigration and Refugee Protection Act*.

According to IRCC, use of H&C to overcome the excluded family member rule may be appropriate when the person presents compelling reasons for not having disclosed the existence of a family member. IRCC offers the following examples:

- a refugee presents evidence that they believed their family members were dead or that their whereabouts were unknown; or
- a client presents evidence that the existence of a child was not disclosed because it would cause extreme hardship because the child was born out of wedlock in a culture that does not condone this.¹

One Year Window applications

In the case of refugees (Protected Persons) who might normally apply under the **One Year Window** of opportunity (OYW) provision, **Regulation 141** excludes family members who were not declared. The Regulation is limited to family members “included in the applicant’s permanent resident visa application at the time that application was made”, or “added to that application before the applicant’s departure for Canada”.

Applying for H&C exemption from “excluded family member rule”

- In order to overcome the bar, the applicant must submit an application in the regular course (usually a Family Class sponsorship, or a One Year Window application, if appropriate). Complete all the relevant forms and follow the document checklist from the IRCC site for the type of application.
- The person must include with their application a request a waiver for the non-disclosure/non-examination, based on Humanitarian and Compassionate grounds (“H&C”). The request needs to be included as written submissions. **There is no special form for this.**

Preparing H&C submissions

H&C submissions should normally be prepared with the assistance of an experienced immigration lawyer, or at least with a lawyer reviewing the submissions before they are finalized.

- H&Cs are discretionary – but the officer **must consider all the circumstances of the case and the best interests of any children directly affected** by the application and **reach a reasonable decision based on the evidence.**
- It is very helpful to obtain **the immigration file through Access to Information and Privacy (ATIP)**. This allows you to look at the previous declarations made to IRCC to anticipate issues and address inconsistencies. ATIP requests take 30-90 days.

¹ IRCC, **Determining membership in the class: Spouse or common-law partners**. The old Immigration Manual OP2 is still available at www.cic.gc.ca/english/resources/manuals/op/op02-eng.pdf. See 5.12.

The contents of an H&C submission

1. **The Story – A Narrative** of the full circumstances of the case:

- Normally in Affidavit form, but a detailed statement is possible.
- Explain the history of the sponsor’s own permanent residence application
- Explain the relationship to the sponsored person(s)/applicant(s). The officer must be satisfied that it is a genuine relationship. (Note that DNA might be requested).
- Explain the situation of the sponsored person(s)/applicant(s). Are they living in a secure and stable situation?
- Was the non-disclosure a material misrepresentation? (i.e. if the family member had been disclosed, would the sponsor have been inadmissible to immigrate to Canada? If it would not have affected the admissibility of the sponsor, it strengthens the case.)
- Was the non-disclosure because of compelling circumstances (such as war, abuse, gender oppression, etc.)? Was it a mistake? Explain fully.
- Did IRCC’s own delay contribute to the non-disclosure (for example a long processing delay putting the sponsor in a difficult situation.)

2. **The arguments** why the family should be able to reunite in Canada

- Include all the ways in which the separation is causing hardship: emotionally, psychologically, economically, impacts on physical and mental health, etc. Comment on everyone affected: the person(s) to be sponsored, the sponsor, other family members, etc.
- Explain why the family cannot or should not be expected to reunite in some country other than Canada.

3. **Best interests of children** directly affected (“BIOC”)

The best interests of the child arguments (if relevant) are part of your arguments about why the family should be able to reunite in Canada. However, it is worth highlighting them under a separate heading because the *Immigration and Refugee Protection Act* specifically mentions that the best interests of the child must be considered when examining H&C factors (s. 25(1))

As per *Kanthasamy*, officers must not only be “alive, alert and sensitive” to the BIOC, but the BIOC merits “a singularly significant focus and perspective” in the H&C analysis.

Economic considerations, special needs, discrimination, separation from family, custody issues, education, health care – all of these are relevant factors to assess what is best for the child.

Note that a child need not be the person being sponsored to raise BIOC. For example, if a parent is in Canada with a child and the other parent is overseas, the best interests of the child in Canada separated from one of their parents (or a step-parent) is relevant.

4. **Evidence** to support the story.

- Photos are powerful, to support the relationship
- Evidence of discrimination (e.g. stigma of unmarried mothers; women at risk)
- Evidence of impact of family separation (narratives from all affected, psych reports, letters, emails)
- Evidence of economic factors (e.g. remittance slips, employability)
- Evidence of special needs (and include information on how the parent plans to handle them)

Further Ideas for Documentation

- Expert and medical reports
- Letters of support from family and friends, with as much detail about first-hand observations as possible. Address, date and signature required.
- Letters of support from employer and other relevant third parties (faith, community organizations etc.)
- Country condition documents - see IRB's National Documentation Packages, UNHCR's Refworld, news articles, Amnesty, HRW, USDOS, UK Home Office, etc.
- Documentation about family separation and impact

Be sure to explain why you are including a specific document, and tie it back to the facts of your case

If the application is refused

If an application for Family Class sponsorship is refused based on s. 117(9)(d), be aware that there is generally no point in making an appeal to the Immigration Appeal Division. If the person is an excluded family member according to the regulation, the Immigration Appeal Division does not have jurisdiction to consider the H&C elements in the case. (On the other hand, if the visa officer was wrong about the person having been an unexamined family member at the time of the sponsor's immigration to Canada, the IAD would have jurisdiction to hear the case).

For more information:

- (For CCR members) Webinar on Excluded Family Members ccrweb.ca/en/resources-excluded-family-members-part-1. The webinar on H&C, although not directly relevant to Excluded Family Members, can also be useful: ccrweb.ca/en/resources-applying-humanitarian-compassionate-considerations
- CCR Brief on R117(9)(d): ccrweb.ca/en/excluded-family-members-brief
- CCR infographic on Regulation R. 117(9)(d) ccrweb.ca/en/117-9-d-infographic
- Liew, Jamie and Balasundaram, Prasanna and Stone, Jennifer, Troubling Trends in Canada's Immigration System via the Excluded Family Member Regulation: A Survey of Jurisprudence and Lawyers (September 15, 2016). Ottawa Faculty of Law Working Paper No. 2016-36. Available at SSRN: <https://ssrn.com/abstract=2839415> or <http://dx.doi.org/10.2139/ssrn.2839415>

