



December 16, 2010

PM-602-0017

Policy Memorandum

SUBJECT: Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act

Revisions to *Adjudicator's Field Manual* (AFM): New Chapter 10.21 and an Amendment to Chapter 21.2(h)(1)(C) (AFM Update AD-10-51)

Purpose

This Policy Memorandum (PM) ensures that USCIS uniformly and consistently adjudicates petitions and applications in light of section 204(l) and 213A(f)(5) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. §§ 1154(l) and 1183a(f)(5).

Scope

Unless specifically exempted herein, this PM applies to and is binding on all USCIS employees.

Authority

Sections 204(l) and 213A(f)(5) of the Act, 8 U.S.C. §§ 1154(l) and 1183a(f)(5), as amended by § 568(d) and (e) of the DHS Appropriations Act, 2010, Public Law 111-83 ("Public Law 111-83"), 123 Stat. 2142, 2187-88 (2009).

Background

For many years, USCIS had taken the position that the law did not permit the beneficiary of a visa petition to obtain approval of the petition if the petitioner died while the petition remained pending. See *Matter of Sano*, 19 I&N Dec. 299 (BIA 1985); *Matter of Varela*, 13 I&N Dec. 453 (BIA 1970).

New section 204(l) of the Act changes this governing law with respect to an alien who is seeking an immigration benefit through a deceased "qualifying relative." Section 204(l) permits the approval of a visa petition or refugee/asylee relative petition, as well as any adjustment application and related application, if the alien seeking the benefit:

- Resided in the United States when the qualifying relative died;
- Continues to reside in the United States on the date of the decision on the pending petition or application; and
- Is at least one of the following:
 - The beneficiary of a pending or approved immediate relative visa petition;

- o The beneficiary of a pending or approved family-based visa petition, including both the principal beneficiary and any derivative beneficiaries;
- o Any derivative beneficiary of a pending or approved employment-based visa petition;
- o The beneficiary of a pending or approved Form I-730, Refugee/Asylee Relative Petition;
- o An alien admitted as a derivative “T” or “U” nonimmigrant; or
- o A derivative asylee under section 208(b)(3) of the Act.

Section 568(d) of Public Law 111-83 does not expressly define the “qualifying relative.” From the list of aliens to whom the new section 204(l) applies, however, USCIS infers that “qualifying relative” means an individual who, immediately before death, was:

- The petitioner in a family-based immigrant visa petition under section 201(b)(2)(A)(i) or 203(a) of the Act;
- The principal beneficiary in a family-based visa petition case under section 201(b)(2)(A)(i) or 203(a) of the Act;
- The principal beneficiary in an employment-based visa petition case under section 203(b) of the Act;
- The petitioner in a refugee/asylee relative petition under section 207 or 208 of the Act;
- The principal alien admitted as a T or U nonimmigrant; or
- The principal asylee, who was granted asylum under 208 of the Act.

Section 568(e) of Public Law 111-83 provides a conforming amendment to INA section 213A(f)(5)(B) relating to affidavits of support. INA section 212(a)(4)(C) provides that, to avoid public charge inadmissibility, most immediate relatives and family-based immigrants, and some employment-based immigrants, must have filed an affidavit of support on their behalf that meets the requirements of INA section 213A. If, after the death of a qualifying relative, a visa petition is approved or not revoked under new INA section 204(l), then another individual who qualifies as a “substitute sponsor” must submit a Form I-864, Affidavit of Support under section 213A of the Act. If the alien is not required under sections 212(a)(4)(C) and 213A of the Act and 8 C.F.R. § 213a.2(a)(2)(ii) to have a legally binding affidavit of support, then there is no need for a substitute sponsor to submit a Form I-864.

Policy

USCIS officers will follow section 204(l) and section 213A(f)(5) of the Act, as amended by sections 568(d) and (e) of Public Law 111-83, and the amendments to the Adjudicator’s Field Manual (*AFM*) made by this PM, in adjudicating on or after October 28, 2009, any petition or application to which section 204(l) and section 213A(1)(5) apply.

Section 568(d) and (e) of Public Law 111-83 became effective on October 28, 2009 when the President signed Public Law 111-83. This PM applies to any case adjudicated on or after October 28, 2009 even if the case was filed before October 28, 2009.

For a case denied before October 28, 2009 USCIS policy is that an alien may file, with the proper filing fee, an untimely motion to reopen a petition, adjustment application, or waiver application, if new section 204(1) would now allow approval of a still-pending petition or application. See *AFM* chapter 20.5(c)(8), as added by this PM, for complete guidance on this issue.

Implementation

The AFM is amended as follows.

1. New Chapter 10.21 is added to the *AFM*, to read as follows.

10.21 Approval of pending immigrant visa petitions, T or U extension applications, asylee/refugee relative petitions, or applications after death of the qualifying relative.

(a) General. Except as specified in this chapter, if the approval of an immigrant visa petition, refugee/asylee relative petition or application for immigration benefits requires the existence of a family relationship between the alien and another individual, the death of the petitioner or other individual while the case is pending requires the denial of the petition or application.

(b) Widow(er)s of Citizens. Paragraph (a) of this chapter does not apply to a Form I-130 filed by a citizen on behalf of his or her spouse. Upon the death of the citizen petitioner, Form I-130 is converted to a widow(er)'s Form I-360. In light of the amendment to section 201(b)(2)(A)(i) of the Act by section 568(c) of Public Law 111-83, this conversion takes place even if the citizen and alien were married for less than 2 years when the citizen died.

In the case of a K-1 nonimmigrant who marries the petitioner within 90 days of admission, the K-1 nonimmigrant (and any K-2 children who are otherwise eligible) may obtain adjustment of status without the need for Form I-360, just as they would have been eligible for adjustment without Form I-130, if the petitioner had not died.

If an alien was admitted as a K-3 or K-4 nonimmigrant, the Form I-130 filed for the K-3 is converted to a Form I-360 upon the citizen petitioner's death. The K-4 can then "accompany or follow to join" the K-3 based on that Form I-360.

A widow(er)'s eligibility for adjustment ends if the widow(er) remarries before obtaining LPR status.

A USCIS officer may encounter a case in which a petition or application was approved before October 28, 2009, despite the death of the citizen spouse who filed the petition. The approval may have occurred because USCIS was unaware of the death, or because the alien persuaded USCIS that the death did not end eligibility. In some circuits, but not all, there were precedents from the relevant courts of appeals supporting approval of an immediate relative spousal Form I-130 after the petitioner's death. In light of those precedents, and given the intent of section 568(c) of Public Law 111-83, USCIS will deem the approval of the petition and the grant of adjustment proper, and will not seek to rescind a grant of adjustment, if the sole basis for doing so is the death of the citizen spouse and the resulting invalidity of the Form I-864 filed by the citizen spouse.

(c) Effect of Section 204(l) of the Act. Paragraph (a) of this chapter does not apply, and a petition or application may be approved despite the death of the qualifying relative, if section 204(l) of the Act, as amended by section 568(d) of the FY2010 DHS Appropriations Act, Public Law 111-83, applies to the case. See paragraph (c)(6) of this chapter concerning the authority to deny these cases on discretionary grounds.

Section 568(d)(2) of Public Law 111-83 specifies that new section 204(l) does not “limit or waive” any eligibility requirements or bars to approval of a petition or application other than the lack of a qualifying relative due to the qualifying relative's death. Thus, no other eligibility requirements are changed by the enactment of section 204(l).

(1) When Section 204(l) Applies. Section 204(l) of the Act applies to any immigrant visa petition, refugee/asylee relative petition, or application adjudicated on or after October 28, 2009, even if the petition or application was filed before that date. Section 204(l) allows the approval of a pending petition or application, despite the death of the qualifying relative, if the alien seeking the benefit of section 204(l):

- Resided in the United States when the qualifying relative died;
- Continues to reside in the United States on the date of the decision on the pending petition or application; and;
- Is at least one of the following:
 - The beneficiary of a pending or approved immediate relative visa petition;
 - The beneficiary of a pending or approved family-based visa petition, including both the principal beneficiary and any derivative beneficiaries;
 - Any *derivative* beneficiary of a pending or approved employment-based visa petition;
 - The beneficiary of a pending or approved Form I-730, Refugee/Asylee Relative Petition;
 - An alien admitted as a derivative “T” or “U” nonimmigrant; or
 - A derivative asylee under section 208(b)(3) of the Act.

The new section 204(l) does not expressly define the “qualifying relative.” From the list of aliens to whom new section 204(l) applies, USCIS infers that “qualifying relative” means an individual who, immediately before death was:

- The petitioner in an immediate relative or family-based immigrant visa petition under section 201(b)(2)(A)(i) or 203(a) of the Act;
- The principal beneficiary in a widow(er)’s immediate relative or a family-based visa petition case under section 201(b)(2)(A)(i) or 203(a) of the Act;
- The *principal* beneficiary in an employment-based visa petition case under section 203(b) of the Act;
- The petitioner in a refugee/asylee relative petition under section 207 or 208 of the Act;
- The principal alien admitted as a T or U nonimmigrant;
- The principal asylee, who was granted asylum under 208 of the Act.

Section 204(l) applies to a petition or application adjudicated on or after October 28, 2009, even if the qualifying relative died before October 28, 2009. If a petition or application was denied on or after October 28, 2009, without considering the effect of section 204(l), and section 204(l) could have permitted approval, USCIS must, on its own motion, reopen the case for a new decision in light of section 204(l). See chapter 10.21(c)(8) of this AFM for guidance on cases denied before October 28, 2009.

Section 101(a)(33) of the Act governs the determination whether an alien “resided” in the United States when the qualifying relative died, and whether the alien continues to reside in the United States. A person’s “residence” is his or her “principal, actual dwelling place in fact, without regard to intent.” If the alien’s “residence” was in the United States at the required times, the alien “resided” here. The statute does not bar an alien who was actually abroad when the qualifying alien died from proving that the alien still resides in the United States. Also, section 204(l) of the Act does not require the alien to show that he or she was, or is, residing here lawfully. Execution of a removal order, however, terminates an alien’s residence in the United States.

Sections 203(d), 207(c)(2)(A), and 208(b)(3)(A) permit the spouse or child of a principal alien to accompany or follow to join a principal alien. If any *one* beneficiary of a covered petition meets the residence requirements of section 204(l) of the Act, then the petition may be approved, despite the death of the qualifying relative, and *all* the beneficiaries may immigrate to the same extent that would have been permitted if the qualifying relative had not died. But it is not necessary for each beneficiary to meet the residence requirements in order to have the benefit of section 204(l).

(2) Widow(er)s of Citizens. As stated in paragraph (b) of this chapter, section 204(l) does not apply to a Form I-130 filed by a now-deceased citizen on behalf of his or her spouse. Because of the automatic conversion of the Form I-130 to a Form I-360, there

is no longer any Form I-130 to which section 204(l) can apply. Please refer to Chapter 10.21(c)(5) concerning the effect of section 204(l) on the widow(er)'s ability to seek a waiver of inadmissibility, after the death of the citizen spouse.

(3) Action in Pending Petition Cases. Provided the alien was residing in the United States when the qualifying relative died, and still resides in the United States, an officer now has authority to approve any immigrant visa petition or refugee/asylee relative petition that was pending when the qualifying relative died if the petition is covered by section 204(l) of the Act, *provided* the petition was approvable when filed and still is approvable, apart from the death of the qualifying relative. Therefore, assuming all other requirements for approval of a petition are met, the death of the qualifying relative no longer requires denial of a petition in a case involving an alien who meets the requirements of new INA section 204(l).

Section 568(d)(2) of Public Law 111-83 specifies that new section 204(l) does not "limit or waive" any eligibility requirements or bars to approval of a petition or application other than the lack of a qualifying relative due to the qualifying relative's death. Thus, no other eligibility requirements are changed by the enactment of section 204(l). For example, a petition to which section 204(l) applies may still be subject to denial under section 204(c) of the Act (relating to prior marriage fraud) or any other statutory bar to approval. Note also that paragraph (c)(6) of this chapter provides guidance concerning the authority to deny a case under section 204(l) as a matter of discretion.

An immigrant visa petitioner may withdraw a pending petition at any time before the admission or adjustment of the principal beneficiary. 8 C.F.R. § 103.2(b)(6). USCIS cannot adjudicate a petition that has been withdrawn. *See Matter of Cintron*, 16 I&N Dec. 9 (BIA 1976). Pursuant to section 204(l) of the Act, whether an employment-based petitioner is able to withdraw the petition and possibly affect the ability of principal beneficiary's alien widow(e) or children to immigrate on the employment-based visa, depends on when that petitioner is attempting to withdraw the petition. If the principal beneficiary is alive when the employer petitioner requests withdrawal of the petition, then USCIS will honor that request. On the other hand, if the withdrawal is dated after the death of the principal beneficiary, then USCIS will not give effect to the request for withdrawal since the employment-based petitioner no longer has any legal interest in the immigration of the principal beneficiary's widow(er) or children.

The situation of a family-based petitioner is different. A family-based petitioner must generally assume the affidavit of support requirements for the principal beneficiary's spouse and children. Thus, unlike employment-based petitioners, the immigration of the derivatives does have an effect on the family-based petitioner. Under section 204(l) of the Act, the petitioner may certainly continue to seek approval of the petition, after the death of the principal beneficiary, if at least one derivative was residing in the United States when the principal died, and continues to do so. USCIS will presume that the

family-based petitioner wants the case to continue to adjudication. But USCIS does not interpret section 204(l) of the Act as requiring the petitioner to do so. The death of the principal beneficiary does not alter the family-based immigrant visa petitioner's right to withdraw a petition. If the petitioner chooses to withdraw the petition, USCIS will honor that decision, and refrain from adjudicating the petition. See *Matter of Cintron*.

Section 204(l) of the Act requires that a T or U nonimmigrant surviving relative must have been admitted as a T or U nonimmigrant derivative at the time of death of the qualifying relative T or U nonimmigrant principal. Therefore, USCIS may not approve derivative status for a surviving relative whose qualifying relative died prior to approval of the derivative T application (I-914A) or derivative U petition (I-918A). However, USCIS officers should thoroughly review the case to determine whether the surviving relative may qualify as a principal T or U nonimmigrant. Also, if the surviving relative already had status as a T or U nonimmigrant derivative at the time of death of the qualifying relative, the surviving relative may apply for adjustment of status, as specified in paragraph (c)(4) of this chapter, notwithstanding the death of the principal, once the surviving relative has the requisite continuous physical presence in the U.S. If the principal dies prior to accrual of the requisite physical presence, the surviving relative may file a Form I-539 to apply for an extension of his or her T or U nonimmigrant status, notwithstanding the death of the principal, if necessary, until the surviving relative has accrued sufficient physical presence to apply for adjustment of status.

(4) Action in Pending Adjustment Cases. (i) General. An officer also has authority, now, to approve an adjustment of status application that was pending when the qualifying relative died, if the related visa petition is approved under section 204(l), or if a pre-death approval is reinstated. In the adjustment of status context, the alien must have been eligible to apply for adjustment of status at the time that application was filed. See Chapter 10.21(c)(5) for the impact of section 204(l) on waiver and other related applications.

Section 568(d)(2) of Public Law 111-83 specifies that new section 204(l) does not "limit or waive" any eligibility requirements or bars to approval of a petition or application other than the lack of a qualifying relative due to the qualifying relative's death. Thus, no other adjustment eligibility requirements are changed by the enactment of section 204(l).

For example, the death of the qualifying relative does not relieve the alien who is seeking adjustment under section 245(a) of the Act of the need to qualify for adjustment of status under section 245(a) of the Act. That is, unless the alien qualifies under section 245(i) of the Act, the alien must still establish a lawful inspection and admission or parole and is otherwise eligible for adjustment. An alien may not apply for adjustment before an immigrant visa is "immediately available." Section 245(c) of the Act may make the alien ineligible, if section 245(i) or (k) of the Act does not apply to the

alien. However, if there was a properly filed adjustment application pending and the beneficiary or the derivative beneficiary was eligible to adjust, approval or reinstatement of approval of a visa petition under section 204(l) will preserve any eligibility for adjustment that existed immediately before the qualifying relative died. For example, if an immediate relative petition is approved or a pre-death approval is reinstated under section 204(l) of the Act, the beneficiary remains eligible for the immediate relative exemptions in section 245(c), assuming the beneficiary is not barred from adjustment under sections 245(d) or 245(f) of the Act.

The death of a principal *refugee* has not, historically, affected the eligibility of a derivative refugee for adjustment under section 209(a) of the Act. See Memorandum from William R. Yates to Field Offices, “Procedural Guidance on Admission and Adjustment of Status for Refugees” at p. 9 (May 15, 2000). Thus, while section 204(l) may benefit the beneficiary of a Form I-730, if the principal dies before the derivative is admitted, reliance on section 204(l) is not necessary for a derivative who has already been admitted. By contrast, section 204(l) can benefit an alien who seeks adjustment based on a derivative asylum grant, under section 209 of the Act, as a derivative T nonimmigrant under section 245(l) of the Act, or as a derivative U nonimmigrant under section 245(m) of the Act. Any one of these aliens may still be eligible for adjustment, in light of section 204(l) of the Act, despite the death of a qualifying relative. But the alien must still establish that he or she is eligible for adjustment, apart from the qualifying relative’s death, under the governing statute.¹

Similarly, the applicant must be admissible, or must obtain any available waiver of inadmissibility. Section 204(l) of the Act, by its terms, does not automatically waive any ground of inadmissibility that may apply to an adjustment applicant. See Public Law 111-83, § 568(d)(2). Thus, an adjustment applicant whose case is governed by section 204(l) of the Act may need to apply for a waiver or other relief from inadmissibility. See paragraph (c)(5) of this chapter concerning the effect of section 204(l) of the Act on applications for waivers or other relief from inadmissibility.

Because section 204(l) of the Act does not waive the standard eligibility requirements for applying for adjustment, an alien who did not already have an adjustment application pending when the qualifying relative died may not be able to seek adjustment in every case in which a pending petition was approved, or an approved petition was reinstated, under section 204(l) of the Act. An alien whose petition has been approved or reinstated under new section 204(l) of the Act, but who is not eligible to adjust status, would not be precluded from applying for an immigrant visa

¹ In the past, USCIS has been willing to grant asylum as a principal to a derivative asylee who no longer qualified as a derivative. This action would preserve the derivative’s ability to adjust even if the derivative was no longer the spouse or child of a principal. Section 204(l) of the Act makes this step unnecessary, if the reason for the loss of derivative status is the death of the principal.

at a consular post abroad.² The approval of a visa petition under section 204(l) of the Act does not give an alien who is not eligible for adjustment of status, and who is not in some other lawful immigration status, a right to remain in the United States while awaiting the availability of an immigrant visa.

The death of the qualifying relative also does not relieve the alien of the need to have a valid and enforceable Form I-864, Affidavit of Support, if required by sections 212(a)(4)(C) and 213A of the Act and 8 C.F.R. § 213a.2. If the alien is required to have a Form I-864, and the visa petition is approved under section 204(l), a substitute sponsor will need to submit a Form I-864. Pub. L. 111-83, § 568(e), 123 Stat. at 2187. A substitute sponsor is needed *even if* the deceased petitioner had filed a Form I-864. A Form I-864 is not a “petition” nor is it an application or “related application.” The Form I-864 is a contract between the sponsor and the Government, submitted as evidence in support of a visa or adjustment application. DHS regulations clearly provide, moreover, that a sponsor’s obligations under a Form I-864 do not take force until the alien actually immigrates. 8 C.F.R. § 213a.2(e)(1). It is the grant of LPR status that is the Government’s “acceptance” of the sponsor’s offer to be bound by the Form I-864. The sponsor’s obligations terminate with the sponsor’s death. 8 C.F.R. § 213a.2(e)(2)(ii).

Also, the affidavit of support has an important role, beyond establishing that the sponsored alien is not inadmissible on public charge grounds. The sponsor’s income may be deemed to the sponsored alien in determining the sponsored alien’s eligibility for means-tested public benefits. 8 U.S.C. §§ 1631 and 1632. The sponsor is also responsible for reimbursing an agency for the costs of any means-tested public benefit provided to the sponsored alien. Section 213A(b) of the Act.

Accepting as still valid a Form I-864 from someone whom USCIS knows to be dead would work against each of these vital aspects of the affidavit of support requirement. Thus, there is no longer a valid and enforceable Form I-864 if the sponsor dies while the petition, visa application, or adjustment application is pending.³

(ii) Adjustment not subject to conditions under section 216 of the Act. An alien who acquires LPR status based on a marriage entered into less than 24 months before the alien acquires LPR status obtains LPR status on a conditional basis under section

² The alien must have been continuing to reside in the United States in order for the petition to have been approved. Once it has been approved, however, the alien’s departure to obtain a visa would not change the fact that the alien met the residence requirements when the officer adjudicated the petition.

³ A substitute sponsor’s Form I-864 is not needed if the alien is not required to have a Form I-864 at all. For example, an alien may already have, or be entitled to be credited with, sufficient quarters of coverage under the Social Security Act to be exempt from the Form I-864 requirement. *See* 8 C.F.R. § 213a.2(a)(2)(ii)(C). Also, as with any Form I-864, the substitute sponsor may rely on the financial resources of the sponsored alien to meet the Form I-864 requirements. *See id.* § 213a.1 (including sponsored alien’s lawful income in the United States in “household income”) and § 213a.2(a)(iii)(B) (including sponsored alien’s assets).

216 of the Act. Generally, the alien must then petition, two years later, for removal of the conditions. If the qualifying marriage has already ended by death, however, a condition for removal of the conditions already exists. For this reason, if a Form I-130 and Form I-485 are approved under section 204(l) of the Act, the alien's LPR status will *not* be subject to the conditions under section 216 of the Act. The alien, therefore, will not need to file Form I-751.

(iii) Removal of conditions under section 216A of the Act. An alien who acquires LPR status based on a qualifying investment under section 203(b)(5) of the Act does so on a conditional basis under section 216A of the Act. If the derivative beneficiary of a Form I-526 obtains approval of the Form I-526 and Form I-485 under section 204(l) of the Act, the alien remains subject to the conditions imposed by section 216A of the Act. Unlike the death of a petitioning spouse under section 216 of the Act, the death of the Form I-526 petitioner does not, by itself, provide a basis for removing the section 216A conditions. Rather, under 8 C.F.R. § 216.6(a)(6), the derivative beneficiaries must still file, two years later, a Form I-829 and show that the requirements for removal of the conditions have been met.

(5) Waivers and Other Related Applications. The text of new section 204(l) provides that the new approval authority applies not only to the visa petition, but to an adjustment application and “any related applications.” Section 568(d)(2) of the FY2010 DHS Appropriations Act specifies that section 568(d)(1) does not waive grounds of inadmissibility. But the provision does remove “ineligibility based solely on the lack of a qualifying family relationship” as a basis for denying relief. USCIS has determined, therefore, that section 204(l) *does* give USCIS the discretion to grant a waiver or other form of relief from inadmissibility to an alien described in section 204(l), even if the qualifying relationship that would have supported the waiver has ended through death.

Note that it is *not* necessary for the waiver or other relief application to have been pending when the qualifying relative died. Section 204(l) of the Act permits the approval of a waiver or other relief application despite the death of a qualifying relative if:

- a petition or application specified in paragraph (c)(1) of this chapter was pending or approved when the qualifying relative died;
- the alien was residing in the United States when the qualifying relative died;; and
- the alien still resides in the United States.

If a pending petition or application to which section 204(l) applies is denied, despite section 204(l) of the Act, then the alien may not obtain approval of a waiver or other relief under section 204(l).

Some waivers require a showing of extreme hardship to a qualifying relative, who must be either a citizen or a permanent resident. Since the legislation intends to have

the new section 204(l) of the Act extend not only to the approval of the pending petition, but also to any related applications, the fact that the qualifying relative has died will be noted in the decision and deemed to be the functional equivalent of a finding of extreme hardship. Note that 204(l) applies in this context only when, the hardship being claimed by the surviving beneficiary, would have been on account of claimed extreme hardship that would have been suffered by the qualifying relative were he or she still alive. Additionally, it should be noted that the finding of extreme hardship merely *permits*, and never *compels* a favorable exercise of discretion. See *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996). That is, as with any other waiver case, a waiver application decided in light of section 204(l) requires the weighing of all favorable factors against any adverse discretionary factors. Extreme hardship is just one positive factor to be weighed. See *id.* The inadmissibility ground sought to be waived is, itself, an adverse factor. See *INS v. Yang*, 519 U.S. 26 (1996). For example, inadmissibility based on a conviction for a violent or dangerous crime requires proof of exceptional or extremely unusual hardship, or some other extraordinary circumstance, in order for a waiver application to be approved. 8 C.F.R. § 212.7(d).

The preceding paragraph assumes that the qualifying relative was already a citizen or permanent resident at the time of death. If the qualifying relative was not already a citizen or permanent resident, then the qualifying relative's death does not make the alien eligible for a waiver that would not have been available if the qualifying relative had not died. If the qualifying relative was not a citizen or permanent resident, then the alien may not be able to obtain a waiver of inadmissibility unless there is yet another individual who has the requisite status and family relationship to meet the requirements of the waiver provision, or the waiver provision does not require a family relationship and/or extreme hardship.

As noted in Chapter 10.21(c)(2), section 204(l) does not apply to Form I-130 that was filed by a now-deceased citizen for his or her spouse, who is now the widow(er) of a citizen. Once the citizen has died, the widow(er) becomes the visa petitioner. USCIS has determined, however, that if the widow(er) was the beneficiary of a pending or approved Form I-130 when the original petitioner died, and the widow(er) meets the residence requirements in section 204(l), then section 204(l) preserves the widow(er)'s ability to have a waiver application approved as if the now deceased citizen had not died. As with any other waiver application that is covered by section 204(l), the fact that the citizen petitioner has died will be noted in the decision and deemed to be the functional equivalent of a finding of extreme hardship. But the finding of extreme hardship merely *permits*, and never *compels* a favorable exercise of discretion. See *Matter of Mendez-Morales, supra*. The widow(er) must still establish that he or she merits a favorable exercise of discretion.

(6) Discretionary Denial under Section 204(l). Section 204(l) gives USCIS discretion to deny a petition or application that may now be approved despite the qualifying

relative's death, if USCIS finds, as a matter of discretion, "that approval would not be in the public interest." Section 204(l)(1) of the Act, 123 Stat. at 2187. This exercise of discretion, moreover, is "unreviewable." *Id.*

USCIS officers will not, routinely, use this discretionary authority to deny a visa petition that may now be approved, despite the death of the qualifying relative. In a visa petition proceeding that is not subject to section 204(c) of the Act or some other approval bar, the overriding issue is simply whether the beneficiary qualifies for the visa classification sought. Inadmissibility, for example, does not warrant denial of a visa petition. See *Matter of O-*, 8 I&N Dec. 295 (BIA 1959). Section 204(l) now provides that an alien described in section 204(l) can still qualify for the benefit sought, despite the qualifying relative's death. Thus, only truly compelling discretionary factors should be cited as a basis to deny a visa petition under section 204(l), on the ground "that approval would not be in the public interest." Section 204(l)(1) of the Act, 123 Stat. at 2187. Before denying a visa petition on this basis, the USCIS officer must consult with the appropriate Headquarters Directorate, through appropriate channels.

This consultation requirement also applies to all cases, other than visa petition cases, that may now be approved under section 204(l) despite the qualifying relative's death. The USCIS officer must consult the appropriate Headquarters Directorate before denying a case on the ground "that approval would not be in the public interest." Section 204(l)(1) of the Act, 123 Stat. at 2187. Consultation is *not* required if the USCIS officer will deny the case based *solely* on the traditional discretionary factors that would have applied to the particular type of case, even if the qualifying relative were still alive. For example, unwaived or unwaivable fraud or criminal inadmissibility, or security grounds, may warrant denial as a matter of discretion under ordinary circumstances, and consultation is not required in such a case. Rather, consultation is required only if the USCIS officer intends to deny the case as a matter of discretion on the "not . . . in the public interest" ground.

(7) Humanitarian Reinstatement. Under DHS regulations at 8 C.F.R. § 205.1(a)(3)(i)(C), approved immediate-relative and family-based petitions filed under section 204 are automatically revoked upon the death of the petitioner or the beneficiary. Since approval under section 204(l) is a matter of agency discretion, enactment of section 204(l) does not supersede this long-standing regulation. But 8 C.F.R. § 205.1(a)(3)(iii)(C)(2) also gives USCIS discretion to decide not to revoke the approval for "humanitarian reasons." In light of section 204(l), it would generally be appropriate to reinstate the approval of an immediate-relative or family-based petition if the alien was residing in the United States when the petitioner dies and if the alien continues to reside in the United States. In those circumstances, reinstating the approval of an immediate-relative or family-based petition is appropriate even if the death that resulted in the automatic revocation occurred before October 28, 2009.

The fact that USCIS already denied reinstatement before October 28, 2009, does not preclude a new request.

Under DHS regulations at 8 C.F.R. § 205.1(a)(3)(iii)(B), approved employment-based petitions filed under INA section 203(b) are automatically revoked upon the death of the petitioner or the beneficiary. There is no comparable regulatory provision that allows for the reinstatement of the approval of employment-based petitions based upon “humanitarian reasons.” Similarly, the DHS regulation at 8 C.F.R. §205.1(a)(3)(iii)(C)(2) does not provide for reinstatement of approval of an immediate-relative or family-based visa petition if it is the principal beneficiary, rather than the petitioner, who has died. In light of section 204(l), however, USCIS officers may act favorably on requests to reinstate approvals under section 205 of the Act and 8 C.F.R. part 205.

See Chapter 21.2(h)(1)(C) of this *AFM* for further guidance on reinstating approval of visa petitions. Chapter 21.2(h)(1)(C) specifies the information that the beneficiary should submit with the written request for reinstatement and also specifies that the written request should be submitted to the USCIS service center or field office that approved the petition except that, if the beneficiary has properly filed an application for adjustment of status with USCIS, the request should be submitted to the USCIS office with jurisdiction over the adjustment application.

USCIS may still deny a request to reinstate approval as a matter of discretion. As stated in chapter 10.21(c)(6) of the *AFM*, however, the USCIS officer must consult the appropriate Headquarters Directorate through appropriate channels, if the USCIS officer intends to deny reinstatement solely based on a finding under section 204(l) that granting it “would not be in the public interest.”

(8) Application of New Section 204(l) to Cases Adjudicated before October 28, 2009.

(i) Denials. New section 204(l) does not, by its terms, require USCIS to reopen or reconsider any decision denying a petition or application, if the denial had already become final before October 28, 2009. For this reason, enactment of new section 204(l) is not a reason for USCIS to reopen or reconsider, on its own motion, any decision that was made before October 28, 2009. Given the intent of section 204(l), USCIS has decided to allow an alien to file an untimely motion to reopen a petition, adjustment application, or waiver application that was denied before October 28, 2009 if new section 204(l) would now allow approval of a still-pending petition or application. A motion to reopen, rather than a motion to reconsider, would be the proper type of motion, since the alien would need to present new evidence: proof of the relative’s death and proof both that the alien was residing in the United States when the relative died and that the alien continues to reside in the United States. The alien must pay the standard filing fee for each motion, unless the alien qualifies for a fee waiver under 8

C.F.R. § 103.7(c)(5). If the alien establishes that he or she was residing in the United States when the qualifying relative died, and that he or she continues to reside in the United States, it would be appropriate for USCIS to exercise favorably the discretion to reopen the petition and/or application(s), and to make new decisions in light of new section 204(l).

Note that an alien who is present in the United States unlawfully does not accrue unlawful presence while a properly filed adjustment application is pending. AFM chapter 40.9.2(b)(3)(A). If USCIS grants, under section 204(l) of the Act, a motion to reopen a Form I-485 that was denied, the Form I-485 will, once again, be pending, and is deemed to be pending from the original date of filing. Thus, reopening a Form I-485 under section 204(l) of the Act will cure any unlawful presence that may have accrued between the original denial and the new decision. The result is that the alien will not have accrued any unlawful presence from the original filing of the Form I-485 until there is a final decision after the reopening of the Form I-485. If the alien is otherwise inadmissible because of unlawful presence accrued before applying for adjustment, a waiver may be available, as discussed in paragraph (c)(5) of this chapter.

(ii) Approvals. A USCIS officer may encounter a case in which a petition or application was approved, before October 28, 2009, despite the death of a qualifying relative. The approval may have occurred because USCIS was unaware of the death, or because the alien persuaded USCIS that the death did not end eligibility. Although some courts of appeals had held that the death of a citizen did not end the eligibility of the citizen's *spouse* for classification as an immediate relative, there was no nationwide ruling on this issue. Nor was there any binding precedent concerning relatives other than widow(er)s of citizens. The spousal immediate relative cases, however, could be seen as at least persuasive authority that USCIS could approve other types of visa petitions, despite the petitioner's death. Given the intent of section 204(l), USCIS will deem the approval of the petition and the grant of adjustment proper, and will not seek to rescind a grant of adjustment, if the sole basis for doing so is the death of the qualifying relative or the resulting invalidity of the Form I-864 filed by the visa petitioner.

2. Chapter 21.2(h)(1)(C) of the *AFM* is amended by:
 - a. Revising the first and second sentences in the third paragraph; and
 - b. Removing the final paragraph and replacing it with 2 additional paragraphs at the end.

The revisions read as follows:

21.2 Factors Common to the Adjudication of All Relative Petitions

* * * * *

(h) Revocation of Approval. * * *

(1) Automatic Revocation. * * *

* * * * *

(C) Discretionary Authority to Not Automatically Revoke Approval.

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To request humanitarian reinstatement of a revoked petition, the beneficiary should send a written request for reinstatement to the USCIS service center or field office that approved the petition except that, if the beneficiary has properly filed an application for adjustment of status with USCIS, the written request should be submitted to the USCIS office with jurisdiction over the adjustment application. The written request must include a copy of the approval notice for the revoked petition, the death certificate of the petitioner (or other qualifying relative) and, if required by section 213A of the Act and 8 CFR part 213a, a Form I-864 from a substitute sponsor and proof of the substitute sponsor's relationship to the beneficiary. * * *

While there are no other rules or precedents on how to apply this discretionary authority, reinstatement may be appropriate when revocation is not consistent with "the furtherance of justice," especially in light of the goal of family unity that is the underlying premise of our nation's immigration system. In particular, reinstatement is generally appropriate as a matter of discretion, if section 204(l) of the Act and Chapter 10.21 of this *AFM* would support approval of the petition if it were still pending. For cases that are not covered by section 204(l) of the Act, the reinstatement request will be addressed in light of the factors that USCIS has traditionally considered in acting on reinstatement requests, which include:

- The impact of revocation on the family unit in the United States, especially on U.S. citizen or LPR relatives or other relatives living lawfully in the United States;
- The beneficiary's advanced age or poor health;
- The beneficiary's having resided in the United States lawfully for a lengthy period;
- The beneficiary's ties to his or her home country; and
- Significant delay in processing the case after approval of the petition and after a visa number has become available, if the delay is reasonably attributable to the Government, rather than the alien.

Although family ties in the United States are a major consideration, there is no strict requirement for the alien beneficiary to show extreme hardship to the alien, or to

relatives already living lawfully in the United States, in order for the approval to be reinstated. If the alien is required to have a Form I-864 affidavit of support, however, there must be a Form I-864 from a substitute sponsor. 8 C.F.R. § 205.1(a)(3)(i)(C).

3. The *AFM Transmittal Memorandum* button is revised by adding a new entry, in numerical order, to read:

PM-602-0017 AFM Update 10-51 [12/16/2010]	Chapter 10.21 and 21.2(h)(1)(c)	This memorandum adds new Chapter 10.21 and revises Chapter 21.2(h)(1)(c) to reflect enactment of INA section 204(l), allowing some petitions and applications to be approved despite the death of the qualifying relative.
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Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions regarding this memorandum should be directed to the Field Operations Directorate or the Service Center Operations Directorate, through appropriate channels. For cases adjudicated overseas, questions should be directed to the International Operations Division, Programs Branch.