USCIS Implements Law Relating to Surviving Family Members

By Charles Wheeler

The USCIS issued a memo dated December 16, 2010 that finally implemented INA §204(l).[1] This law was enacted on October 28, 2009 and provided relief to the surviving family members when the petitioner or principal beneficiary has died.[2] That same statute also provided relief to widow(er)s of U.S. citizens by eliminating the requirement that they had to have been married for at least two years before the citizen spouse died. The portion of the statute relating to other surviving family members proved difficult for the agency to interpret, and thus delayed its implementation for over a year. Some of the issues causing controversy included the following: (1) whether the new law applied to petitions filed before October 28, 2009; (2) whether it applied to petitions pending on that date; (3) whether it only applied to petitions pending on the date the petitioner died; (4) whether it provided relief to surviving family members who needed a waiver of inadmissibility; and (5) how it was going to affect the preexisting regulation governing humanitarian reinstatement.

This article will explain how the USCIS resolved these issues. It will summarize the new memo and describe in some detail who is eligible for coverage and what that relief provides. It also will review eligibility for humanitarian reinstatement in light of the memo. And it will point out vulnerabilities in the government's interpretation and suggest areas that are open to potential challenge.

Who is Covered. Existing regulation**s** state that a pending petition must be denied if the petitioner dies; approved petitions must be revoked upon his or her death if the beneficiary has not already obtained LPR status.[3] But INA §204(l) provides relief to certain principal and derivative beneficiaries when the petitioner has died. It also provides similar relief to certain derivative beneficiaries when the principal beneficiary has died. It covers beneficiaries in the family-based categories as well as in the employment-based context. It also helps derivative asylees and refugees. This section does not affect the surviving spouses of U.S. citizens; they are covered by a separate section of the law.[4] Section 204(l) addresses the following persons who die while their petition is pending:

- U.S. citizens who filed I-130 petitions on behalf of their unmarried children under 21 or their parents (immediate relatives)
- U.S. citizens who filed I-130 petitions on behalf of their unmarried children over 21 and any derivatives (first preference)
- LPRs who filed I-130 petitions on behalf of their spouses or unmarried children and any derivatives (second preference)
- U.S. citizens who filed I-130 petitions on behalf of their married children and any derivatives (third preference)

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[1] USCIS Memo, "Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act" (Dec. 16, 2010).

[2] DHS Appropriations Act, 2010, P. L. No. 111-83, 123 Stat. 2142, 2187-88 (2009), §568(e), codified in INA §204(l).

[3] 8 CFR §205.1(a)(3)(i)(C).

[4] INA §201(b)(2)(A)(i).

- U.S. citizens who filed I-130 petitions on behalf of their siblings and any derivatives (fourth preference)
- Asylees and refugees who filed I-730 petitions on behalf of their derivative spouses and children
- Principal beneficiaries in employment-based cases on whose behalf an I-140 petition has been filed, and
- T or U nonimmigrant status holders whose family members have been granted T or U derivative status. the derivatives of a principal T and U status holder under 21 include his or her spouse, children, parents, and unmarried siblings under 18 years of age. The derivatives of a principal T and U status holder over 21 include his or her spouse and children.

In addition, section 204(l) provides protection for the following persons who had pending applications for adjustment of status:

- All of the above family-based beneficiaries who had filed for adjustment of status based on an approved I-130 petition and whose petitioner or principal beneficiary died while the adjustment of status application was pending
- All of the derivative family members in an employment-based case based on an approved I-140 petition whose principal beneficiary died while the adjustment of status application was pending
- Derivative asylees whose principal asylee died while the adjustment of status application was pending.

As indicated above, the USCIS has chosen to limit eligibility to beneficiaries whose petitioner or principal beneficiary died while the petition was pending or after petition approval while the application for adjustment of status was pending. This seems to violate the plain reading of the statute, which provides eligibility to those whose petitioner died *after* the petition was approved but *before* an application for adjustment could be filed. The statute provides for the adjudication of an "application for adjustment of status… and any related applications, adjudicated notwithstanding the death of the qualifying relative…" In fact, the agency allows for the adjudication of these related applications (e.g., waiver applications) that were filed after the qualifying relative died.

Example. Maria, an LPR, filed an I-130 petition for her husband in June 2010. She died last month while the petition was pending. The petition would otherwise have been denied based on her death. Her husband satisfies the residence requirements of 204(l). He can proceed to have the petition adjudicated as if she were still alive. If it is approved, he can either adjust status (if otherwise eligible) or consular process when his priority date becomes current.

Example. Maria, an LPR, filed an I-130 petition for her husband in June 2008. It was approved one year later. In December 2010, the priority date became current and her husband entered on a nonimmigrant visa and filed for adjustment of status. Maria died last week while the adjustment application was pending. Her husband satisfies the residence requirements of 204(l). The adjustment application would otherwise have been denied based on her death. He can proceed to have the application adjudicated as if she were still alive.

Example. Yossin filed a 4th preference petition for his brother Kassai in 2002. It was approved one year later. Yossin died in 2010. The petition was automatically revoked upon his death. The priority date is just now current and Kassai wants to file for adjustment of status. The agency's interpretation is that Kassai is unable to take advantage of section 204(l) because the citizen brother did not die while either the petition or the adjustment of status application was pending. Kassai would, however, be able to file a request/motion to reinstate the petition based on humanitarian grounds, which will be discussed later. But this relief is subject to agency approval. If Kassai's motion to reinstate is denied, he should consider challenging the agency's restrictive interpretation of 204(l) relief, since the statute arguably allows for it.

Effective Date. The government has elected not to give retroactive effect to this section of the law. According to the USCIS, the provision applies only to petitions and applications adjudicated on or after October 28, 2009. It does apply in cases where the petitioner/qualifying relative died before October 28, 2009, providing the petition or application was pending on that date and adjudicated after October 28, 2009. The USCIS's restrictive interpretation is also open to a legal challenge since it does not appear to be supported by the statutory language or congressional intent. As a consolation, the agency has stated that if a petition or application was adjudicated or denied before October 28, 2009, the Service will allow the affected beneficiary to file an untimely motion to reopen if he or she would otherwise be protected by the provisions of 204(l). In those cases the Service would likely reinstate the petition or application pending on the petitioner/qualifying relative's death but later denied or revoked based on his or her death because it preceded the law's effective date. This form of "reinstatement" due to 204(l) should not be confused with humanitarian reinstatement, which will be discussed later.

Example. John, an LPR, filed an I-130 petition for his wife on December 1, 2010. He died a month later while the petition was pending. Section 204(l) would apply in this case and the surviving spouse might be eligible for relief, assuming she meets all the eligibility requirements.

Example. Same facts, but John filed the petition on December 1, 2008. John died a month later while it was still pending. The petition was denied when it was revealed that the petitioner had died. While section 204(l) would technically not apply in this case, the agency will allow the surviving spouse to file a motion to reopen the denied petition if she satisfies the law's residence requirements. She would need to pay the $620 filing fee, but she is not affected by the 90-day filing window. If the Service grants the motion, it will adjudicate the petition as if the petitioner had not died.

Residence Requirements. The principal or derivative beneficiaries enumerated above would be entitled to have the petition or application for adjustment of status adjudicated after the petitioner/qualifying relative has died, provided the beneficiary: (1) was residing in the United States at the time the petitioner/qualifying relative died, and (2) continues to reside here until the date of the decision on the pending petition or application.

Example: Juan filed an I-130 petition for his brother, Mario, in early 2001. It was approved one year later. The priority date in the fourth preference became current in August 2010. Mario has lived illegally in El Paso with his spouse and three children since June 2000. Therefore, Mario

and his family all filed for adjustment of status based on INA §245(i). Juan died on December 15, 2010, while the applications were pending. Since Mario and his family satisfy the residence and other eligibility requirements under 204(l), they can have the adjustment of status applications adjudicated notwithstanding Juan's death.

Residence is not the same as physical presence. Residence is defined as where the alien has his or her "principal, actual dwelling place in fact, without regard to intent." Therefore, in some cases the beneficiary might have been outside the United States on the date the petitioner/qualifying relative died pursuant to some brief or casual departure, but still claim residence in the United States. Similarly, there is no requirement that the beneficiary be residing in the United States lawfully. In fact, it is presumed that many if not most of the affected beneficiaries will have been residing here unlawfully.

In cases where the principal beneficiary meets the residence requirements, but the derivatives do not, they may all still qualify for relief. It is not necessary that all of the derivative beneficiaries meet the residence requirements. According to the USCIS, 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…" So this interpretation helps in cases where the principal beneficiary satisfies the residence requirements but the spouse and/or children have been residing abroad.

Example. In the hypothetical above, assume that Mario satisfies the residence requirements, but his wife and children have been living in Mexico. After Mario adjusts status, the derivatives are entitled to consular process as accompanying or following-to-join him.

As indicated above, the statute also provides relief in situations where the principal beneficiary – not the petitioner – has died. In the past, when the principal beneficiary had died, either the derivatives were left without a basis for immigrating (e.g., derivative children in first preference cases or derivative spouses and children in third or fourth preference cases), or the petitioner had to file a new petition for the child (second preference cases). The statute allows these derivatives "of the qualifying relative" in all the family- and employment-based preference categories to proceed unaffected by the principal beneficiary's death.

Example. In the above example, assume that Mario, not Juan, died on December 15, 2010 while the application for adjustment of status was pending. His spouse and two minor children, who were residing in El Paso at the time and continue to reside there, can have their adjustment of status applications adjudicated notwithstanding Mario's death.

The statute also allows derivative asylees to adjust status after the principal asylee has died. This avoids the derivative's having to apply for nunc-pro-tunc asylee status before being eligible to adjust. Derivative refugees do not face this hurdle if the principal refugee dies.

Discretionary Denial. An important exception to 204(l) protection when the beneficiary meets the eligibility requirements would be in cases where DHS determines that approval of the petition or application "would not be in the public interest." The exercise of this discretion is non-reviewable. According to the USCIS, "only truly compelling discretionary factors should be cited as a basis to deny the visa petition under section 204(l)." And before making such a

determination, the officer must first consult with Headquarters. The agency has stated: "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 it is unclear after enactment of 204(l) that the agency can exercise this discretionary authority to revoke based solely on the petitioner's death absent a separate finding that it is not in the public interest.

Inadmissibility and Waivers. Section 204(l) does not allow a surviving family member to apply for adjustment of status if not otherwise eligible. Nor does it require approval of a petition or application if the officer believes the beneficiary/applicant is ineligible. For example the officer might determine that there was no good faith marriage in a marriage-based case. Also, in the case where the principal beneficiary dies in a family-based case, the petitioner has the right to withdraw the petition if he or she does not wish that the derivatives immigrate under the provisions of 204(l). This is because the petitioner would be financially responsible for these derivatives based on the submission of an affidavit of support.

Similarly, section 204(l) does not waive or excuse the grounds of inadmissibility or removability; it simply allows the petition or application to be adjudicated notwithstanding the death of the petitioner, principal asylee/refugee, or principal T or U nonimmigrant. This means that those who must consular process after the petition is approved and the priority date becomes current may trigger the three- or ten-year bar for unlawful presence when they leave the United States. Others may be inadmissible for fraud, smuggling, crimes, or health-related grounds.

The USCIS has interpreted the phrase "any related application," as allowing the granting of a waiver of inadmissibility, even though the qualifying relative has died and even though there is obviously no extreme hardship to be suffered by the decedent. Furthermore, it is not necessary for the waiver application to have been pending at the time the petitioner/qualifying relative died. If the beneficiary meets the residence requirements of section 204(l), he or she is entitled to file a waiver of inadmissibility and have it adjudicated notwithstanding the death of the qualifying relative. Some waivers – such as for unlawful presence, fraud, or criminal conduct – require the establishment of extreme hardship to a qualifying relative (e.g., spouse or parent in the case of fraud or unlawful presence; spouse, parent, or child in the case of criminal conduct). The Service will note the fact that the qualifying relative has died and the death will be "deemed to be the functional equivalent of a finding of extreme hardship." This does not mean that the waiver will necessarily be approved. The Service retains the right to exercise its discretion in adjudicating waivers, even if extreme hardship is established.

Example. Carlos, an LPR, filed an I-130 petition for his wife, Esperanza, on December 1, 2009. He died two months later while it was pending. Esperanza was residing in the United States at the time of his death and continues to reside here. She is entitled to have the petition adjudicated as if Carlos had not died. Assuming it is approved, Esperanza will need to consular process, since she entered the United States without inspection. When she leaves for her consular interview, she will trigger the ten-year bar for unlawful presence. She will be entitled to file a waiver of inadmissibility and the Service will presume extreme hardship to her deceased spouse.

The agency's liberal interpretation does not extend to all situations involving the death of the petitioner or principal beneficiary. It only applies to those where the death is to a qualifying

citizen or LPR relative needed for waiver eligibility. So, for example, if the petitioner in a fourth preference petition dies, and the alien brother or sister will trigger the unlawful presence bar upon leaving the country, he or she will still need to establish extreme hardship to a citizen/LPR spouse or parent. Similarly, if the principal beneficiary dies while the petition or application is pending, the derivative family members eligible under 204(l) will not be able to use that death to qualify to file a waiver of inadmissibility if they otherwise did not qualify.

The agency's waiver policy applies to those who meet 204(l)'s residency requirements and had a petition or application for adjustment of status pending at the time the petitioner/qualifying relative died. It also applies to those who had an approved petition or application when the petitioner/qualifying relative died. This is a significant expansion. This waiver policy could apply, therefore, in situations where the petitioner died after the petition was approved and before the beneficiary was eligible to apply for adjustment of status or an immigrant visa. It is helpful, therefore, to those who have to reinstate the petition through humanitarian reinstatement, as discussed below, and travel abroad to consular process.

Example. Alberto, an LPR, filed an I-130 for his spouse, Pilar, in 2007. It was approved one year later. Alberto died last month. The second preference is now current. Pilar was residing in the United States when Alberto died and continues to reside here. She will be consular processing, after she reinstates the petition, but she will trigger the unlawful presence bar. She will qualify for the waiver policy allowing her to claim Alberto as a qualifying relative and the USCIS will presume extreme hardship.

While section 204(l) does not apply directly to widow(er)s of U.S. citizens, the Service apparently does not want to give an advantage to the other surviving family members with respect to waiver eligibility. Therefore, if a widow(er) needs to file a waiver and qualifies under the residency requirements of 204(l), and the citizen spouse died while the petition was pending or even after it was approved, the alien spouse will be able to file the waiver notwithstanding the death of the citizen spouse/qualifying relative. Similarly, the agency will presume extreme hardship. This represents a broad expansion of its earlier interpretation, which simply excused any unlawful presence if the citizen spouse died while the I-130 was pending on October 28, 2009. However, it would still not benefit widow(er)s who filed an I-360 after their citizen spouse died, since there would have been no petition pending or approved at the time of their death.

Affidavit of Support. The affidavit of support requirements are not waived for family-based cases involving a deceased petitioner, though the beneficiary may submit one from a substitute sponsor. Substitute sponsors may include a close relative of the beneficiary (spouse, parent, mother-in-law, father-in-law, sibling, child at least 18 years of age, son, daughter, daughter-in-law, son-in-law, sister-in-law, brother-in-law, grandparent, or grandchild) or a legal guardian. They must be either a U.S. citizen or LPR and be domiciled in the United States. If they have insufficient income to satisfy the 125 percent of poverty requirement for their household size, they may obtain a joint sponsor who does meet it. Beneficiaries taking advantage of 204(l) because their petitioning family member has died will need to file a substitute affidavit of support as part of the adjustment of status or consular processing procedure. Beneficiaries who cannot secure a substitute sponsor will be unable to proceed with their application for

adjustment of status or an immigrant visa. Beneficiaries taking advantage of 204(l) because their principal beneficiary has died will not need to obtain a substitute sponsor; those beneficiaries will proceed with an affidavit from the underlying petitioner.

Conditional Residents. Spouses and children who obtain LPR status based on a marriage that was less than two years old at the time of immigrating become conditional residents. This triggers the obligation to remove the conditions two years after obtaining conditional LPR status. But for those whose citizen/LPR spouse dies within that two-year conditional residency period, they may waive the condition based on the spouse's death. For that reason, the USCIS will not impose conditional residency for those whose I-130 petition or adjustment application was approved pursuant to 204(l) based on the death of the spouse while the petition/application was pending. Those beneficiaries will be granted LPR status without conditions.

Widows Who Re-Marry. While the spouse of a deceased U.S. citizen cannot self-petition as a widow(er) if he or she has re-married, there is no statutory prohibition against this spouse marrying and using section 204(l) relief as a surviving relative. In other words, if he or she were residing in the United States on the date of the citizen spouse's death and continued to reside here, and the citizen spouse had filed an I-130 petition, the surviving spouse should be able to proceed with a pending or approved I-130 petition, even if he or she re-marries in the interim. The USCIS did not address this issue directly in its memo, although it did state that section 204(l) will not apply to an I-130 petition filed by the widow(er) of a U.S. citizen. It also stated: "A widow(er)'s eligibility for adjustment ends if the widow(er) remarries before obtaining LPR status." But it is not clear if that surviving spouse is precluded from seeking benefits under 204(l). We need to await further guidance from the USCIS on this issue.

Erroneously Denied or Approved Petitions. If the USCIS denied a petition or application erroneously on or after October 28, 2009, without properly considering section 204(l), the agency must, on its own motion, reopen the case for a new decision in light of the new law. Similarly, where a qualifying relative died, and a petition was nevertheless approved, before October 28, 2009, the agency will let the approval stand rather than seeking to rescind the approval or grant of adjustment.

Humanitarian Reinstatement. Regulations pre-existing the passage of 204(l) allowed for the reinstatement of an approved family-based petition that was subsequently denied after the death of the petitioner if the beneficiary could establish humanitarian factors.[5] The Service has left intact the prior procedures for applying for humanitarian reinstatement. In fact, in all cases where the petitioner has died *after* the petition has been approved (assuming he or she did not die while an application for adjustment of status was pending), humanitarian reinstatement is the only form of relief. The agency has stated, however, that if the beneficiary qualifies under the residency requirements of 204(l), it "would generally be appropriate to reinstate" the approved petition. This is true even if the death occurred before October 28, 2009. The Service will even entertain a new request/motion to reinstate if it had denied an earlier one filed prior to October 28, 2009. While officers still retain the discretion to deny these motions to reinstate, the officer would need to consult with Headquarters if he or she believes the grant "would not be in the public interest."

[5] 8 CFR §205.1(a)(3)(i)(C).

Note that this regulatory provision does not help the derivative beneficiaries when the principal beneficiary has died. Nevertheless, the Service will extend the same benefits if the derivative beneficiaries satisfy the residency requirements of 204(l).

In order to request humanitarian reinstatement, send a written request/motion to the USCIS service center or district office that approved the petition.[6] Surviving family members who had already applied for adjustment of status may file the request/motion with that office. Include with the request/motion the following documents: proof of the deceased's citizenship or LPR status; the death certificate; the petition approval notice (indicating that the approval preceded the death); and an affidavit of support from a substitute sponsor and proof of relationship to the beneficiary. There is no filing fee for this request/motion. It is appears at this time that beneficiaries who meet the residency requirements of 204(l) but need to reinstate the petition may file the request concurrently with their application for adjustment of status. Such a procedure, if applied nationwide, would save time and improve efficiency.

Since there is no need to establish humanitarian factors, the request does not need to include a list of compelling factors. Those would only be required in cases where the moving party has not satisfied the residency requirements of 204(l). In those situations, the beneficiary would include a declaration and documentation showing any of the following: the impact of the revocation on the family unit in the United States; the beneficiary's advanced age; the beneficiary's long residence in the United States; the beneficiary's ties to his/her home country; and any delay by the government in processing the adjustment or immigrant visa application after the petition was approved. The persons needing to include such documentation consist of beneficiaries residing abroad at the time the petitioner's death and those who resided here on that date but who subsequently left the United States. Unfortunately, those persons may face the hardest challenge in establishing humanitarian factors.

Persons who are using humanitarian reinstatement and do not satisfy the residency requirements of 204(l) are not eligible for the generous waiver policy available to those who do meet them.

Conclusion. The USCIS has finally interpreted and implemented the 2009 law protecting surviving family members whose petitioners have died during various stages of the immigration process. The agency's narrow interpretation in some areas may necessitate further advocacy and possible litigation. At the same time, the Service has liberally interpreted other provisions, which will allow many family members to seek benefits under this law. Practitioners are advised to read the agency's interpretation closely to see if their clients qualify for relief, either prospectively or through a motion to reinstate a previously denied petition.

[6] The following addresses should be used if filing the motion/request to reinstate with the Nebraska, Texas, or California Service Centers: USCIS, Nebraska Service Center, P.O. Box 82521, Lincoln, NE 68501-2521; USCIS Texas Service Center, P.O. Box 850919, Mesquite, TX 75185-0919; USCIS, California Service Center, Attn: Humanitarian Reinstatement, P.O. Box 30111, Laguna Niguel, CA 92607-0111.