DEATH OF THE PETITIONER

Death of the petitioner automatically revokes the I-130, but there is possible relief for widows/widowers of U.S. citizens who have not re-married and who file a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, within two years of the citizen's death.[1] The widow/widower adjusts or immigrates as an immediate relative, and unmarried children under 21 are classified as derivatives. The process for self-petitioning as a widow(er) is covered in more detail in chapter 5.

In addition to the spouses of U.S. citizens, other surviving family members may continue to receive immigration benefits from a pending or approved I-130 after the petitioner has died.[2] If section 204(l) applies, it acts to nullify the petitioner's or the principal beneficiary's death. The main requirement is that the beneficiary must have been residing in the United States at the time of the petitioner's death and continue to be residing here. The other requirement is obtaining a substitute sponsor who can file an affidavit of support.

According to the USCIS, there are two ways to request 204(l) relief. If the petitioner died while the petition or application was pending, the beneficiary will simply notify the USCIS and request that the agency proceed with adjudication of the petition or application. This presumes that the petition or application was filed on or after October 28, 2009 or was pending on that date. If it was filed and adjudicated before that date, 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).[3] The second manner of requesting relief applies to beneficiaries whose petitioner died after the petition or application was approved. Assuming the beneficiary satisfies the residency requirements, he or she can request reinstatement of the approved petition or application.

Reinstatement under 204(l) should not be confused with humanitarian reinstatement. Those beneficiaries who do not satisfy the residency requirement of 204(l) but whose petitioner died after the I-130 was approved may file to reinstate the revoked I-130 based on humanitarian factors.[4] This procedure is described in chapter 2. A sample motion to reinstate an I-130 petition based on humanitarian factors, with a list of supporting documents, is attached as appendix 2. A sample request to reinstate an I-130 petition based on 204(l), with a list of supporting documents, is attached as appendix 5.

Beneficiaries who can benefit from this 2009 statutory amendment include immediate relative children and parents of a U.S. citizen and all preference category principal and derivative beneficiaries in the family-based categories. In cases where the principal beneficiary meets the residence requirements, but the derivatives do not, they may 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…"[5] So this interpretation helps in

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[1] INA §204.2(b)(2)(A)(i), as amended by FY2010 Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, 123 Stat. 2142, §568(c)(1), Oct. 28, 2009.

[2] INA §204(l), as amended by FY2010 Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, 123 Stat. 2142, §568(d)(1), Oct. 28, 2009.

[3] 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).

[4] 8 CFR §205.1(a)(3)(i)(C).

[5] *Id.*

cases where the principal beneficiary satisfies the residence requirements but the spouse and/or children have been residing abroad.

Section 204(l) 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 now allows these derivatives "of the qualifying relative" in all the family-based preference categories to proceed unaffected by the principal beneficiary's death.

The DHS retains the power to deny relief under section 204(l) when it 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.[6]

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. This statutory amendment does not waive or excuse the grounds of inadmissibility or deportability; it simply allows the petition or application to be adjudicated notwithstanding the death of the petitioner or principal beneficiary. But the agency interprets the statute 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 – if the beneficiary meets the residence requirements of section 204(l). 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.[7]

The affidavit of support requirements are not waived for family-based cases involving a deceased petitioner – other than a widow or widower – 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 residing in the United States whose 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. Those who are residing abroad and will be moving to reinstate the petition will need to include a substitute affidavit of support with the motion. Beneficiaries residing inside the United States who cannot secure a substitute sponsor will be unable to proceed with their application to reinstate.

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[6] *Id.*

[7] *Id.*

Death of the spouse/parent usually terminates the stepparent-stepchild petition, except when the parties establish an ongoing relationship.