The Life of a Petition or Application after the Death of the Petitioner or Principal Beneficiary[1]

BACKGROUND.

USCIS (and Legacy INS) long held that an I-130 petition died with the death of the petitioner.[2] The regulations at 8 CFR §205.1(1)(3)(i)(B) provide that when a petitioner dies, an approved I-130 is automatically revoked. Reinstatement of that revoked petition was possible for humanitarian reasons only. See 8 CFR §205.1(a)(3)(i)(C). Widow(er)s of US citizen petitioners were previously allowed to self-petition for permanent residence within two years of the petitioner's death, but only if the marriage to the US citizen was at least two years in duration at the time of the death.

The Department of Homeland Security Appropriations Act, 2010[3] significantly changed the ability of a widow(er) to continue the permanent residence process after the death of the US citizen spouse and in addition allows for relief for other surviving relatives of deceased petitioners and principal beneficiaries. The changes impact family-based, employment-based and other petitions and applications. Specifically, the law amended INA §201((b)(2)(A)(i) relating to widow(er)s of US citizens, created INA §204(l) relating to other surviving relatives of petitioners and principal beneficiaries and amended INA §213A(f)(5) relating to affidavits of support. The law applies to petitions and applications adjudicated on or after October 28, 2009, regardless of whether the US citizen or qualifying relative died prior to that date.

USCIS issued two guidance memos for processing qualified petitions and applications under PL 111-83 §568:

1. Interoffice Memorandum, *Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children (REVISED)*, Donald Neufeld, December 2, 2009[4]; and

2. Policy Memorandum, Approval of Petitions and Applications After the Death of the Qualifying Relative Under New Section 204(l) of the Immigration and Nationality Act, December 16, 2010.[5]

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[1] *Article by* **Laura F. Bachman**, *Immigration Program Manager, YWCA of Tulsa.*
[2] *USCIS, relying on* Matter of Sano*, 19 I&N Dec. 299 (BIA 1985) and* Matter of Varela*, 13 I&N Dec. 453 (BIA 1970), long held that a petition could not be approved if the petitioner died while the petition remained pending.*
[3] *Pub. L. 111-83, 123 Stat. 2186, §§568 (c)(d) and (e).*
[4] *AILA InfoNet Doc. No. 09121430 (Posted 12/14/09).*
[5] *AILA InfoNet Doc. No. 11011061 (Posted 01/10/11).*

The primary change to the widow(er) provision at INA§201(b)(2)(A)(i) involved only the removal of the two-year marriage requirement, and included a transition period for filing an I-360 petition where the marriage was less than two years, but where the death was pre-enactment. The transition period has passed and all I-360 widow(er) self-petitions must now be filed within 2 years of the Petitioner's death regardless of the length of the marriage. Conversely, the addition of INA §204(*l*) involved a key change to policy and procedures on the handling of immigration benefits for the survivors of qualified relatives.

This Practice Pointer is intended to enable you to analyze a claim under the widow(er) and/or §204(*l*) provisions, and guide you through filing a case.

WIDOWS AND WIDOWERS.

Widow(er)s of U.S. citizens are eligible to self-petition regardless of the length of time of the marriage.[6] As with self-petitioning requirements in effect before the enactment of PL 111-83, it is necessary to demonstrate that the marriage was entered into in good faith, that the deceased was a US citizen, that the widow(er) and US citizen were not divorced or legally separated at the time of the US citizen's death and that the marriage was terminated by the death of the U.S. citizen. The self-petitioner must not be remarried in order to receive permanent residence as a self-petitioning widow(er). Note that a widow(er) married less than two years to the deceased US citizen will not be subjected to conditions on residence status under INA §216.

Conversion of I-130 Petition

I-130 petitions that are already approved when the U.S. citizen spouse dies will automatically convert to an approved I-360 petition. For petitions that were approved *prior* to October 28, 2009, but were subsequently automatically revoked pursuant to USCIS regulation[7], those approvals were automatically reinstated as of October 28, 2009. Just like current petitions, reinstated approved I-130 petitions are treated as I-360 approvals.[8]

In the case of a widow(er) whose spouse dies while an I-130 is pending, USCIS will continue adjudication of the I-130 petition. However, USCIS will treat the I-130 as an automatically converted I-360 self-petition. There is no need to substitute/file an I-360 or to request conversion as it occurs automatically for both pending and approved I-130 petitions. However, the widow(er) must inform USCIS of the petitioner's death and provide a death certificate.

[6] *See INA §201(b)(2)(A)(i), as amended.*
[7] *8 CFR §205.1(a)(3)(i)(C).*
[8] *8 CFR §204.2(i)(l)(iv).*

If the US citizen dies and no I-130 petition has been filed, the widow(er) can file an I-360 self-petition within two years of the US citizen's death.

In all widow(er) petitions (whether converted or filed as self-petitions in the first instance), be prepared to present evidence that:

1. The deceased spouse was a US citizen;
2. The marriage was bona fide;
3. The widow(er) and US citizen were not legally separated at the time of death; and
4. The widow(er) has not remarried.

Where the I-485 is pending based on initial I-129 petition by a US citizen who subsequently died, the beneficiary will be deemed a beneficiary of an approved I-360 and the I-485 will continue to be adjudicated.[9] The beneficiary should notify USCIS of the U.S. citizen spouse's death (with the requisite evidence) and request that the Form I-485 application continue to be adjudicated under the widow(er) provision.

Remarriage of the Widow(er)

Widow(er)s do not qualify for self-petitioning benefits if they remarry at any time prior to obtaining permanent residence status.[10] While §568(c) of PL 111-83 seemingly bars remarriage in the case of "transition cases" only (those where a widow(er) is filing a petition for the first time after the enactment of the law and where the spouse died prior to the law)[11], it does not amend INA§204(b)(2)(A)(i) with regard to the bar for self-petitioning upon remarriage. Therefore, USCIS is treating remarriage as a bar to self-petitioning as a "widow(er)." This is the case even if the widow(er) divorces the subsequent spouse.

Remarriage is *not* a bar for surviving relatives under §204(l), which includes immediate relatives. Therefore, a widow(er) of a US citizen is eligible for relief upon remarriage under §568(d).

Children of Widow(er)s

Despite the general prohibition of derivative beneficiaries for immediate relatives, the child of a widow(er) is included as a derivative beneficiary on the widow(er)'s converted or original I-360

[9] *Policy Memorandum,* Approval of Petitions and Applications After the Death of the Qualifying Relative Under New Section 204(l) of the Immigration and Nationality Act*, December 16, 2011, AILA InfoNet Doc. No. 11011061 (Posted 01/10/11).*
[10] Id*. at page 3.*
[11] *§568(c)(2)(B)(ii).*

petition.[12] The definition of "child" found in INA §§101(b)(1) and 201(f) is applied to children of widow(er)s. There is no requirement that the deceased petitioner have filed a separate I-130 for his child in order for the child to benefit from §568(c) of PL 111-83. In addition, even if the child is a beneficiary of a pending I-130 filed previously filed by the deceased U.S. citizen, the I-360 pending for the widow(er) will supersede that I-130 petition and USCIS will not act on the separate I-130 petition filed by the deceased US citizen for his/her child. The self-petitioner need only present evidence of the parent-child relationship to the self-petitioner in order for the child to be eligible for derivative classification.

Consular Processing and Unlawful Presence

"In cases where the widow(er) departed the U.S. after the death of the U.S. citizen spouse and while the adjustment of status application was pending, the application will be deemed abandoned."[13] However, USCIS will automatically convert the approved I-130 to an I- 360, thus enabling the widow(er) to submit an immigrant visa application and consular process. The same consular processing procedure would apply to a widow(er) with a pending Form I-130 at the time of the death of the US citizen who is ineligible for adjustment of status under INA §245(a) because s/he entered the U.S. without inspection or parole. Widow(er)s who were the beneficiary of a petition pending on October 28, 2009, will not be deemed to have accrued unlawful presence.[14] If a widow(er) has accrue unlawful presence and are subject to the 3/10 year bar, they are eligible to file an I-601A provisional waiver, depart the U.S. after its approval and file an immigrant visa application at a U.S. consulate.[15]

USCIS has determined that Congress' intent in applying the widow(er)s provisions to "**all** applications and petitions relating to immediate relative status under section 201(b)(2)(A)(i)" was for widow(er)s cases to be resolved fully – up to the adjudication of adjustment of status or through issuance of an immigrant visa, not only through the self-petitioning process. It is because of this that USCIS will not apply the unlawful presence bar at 212(a)(9)(B)(i) to widow(er)s who had petitions pending on the date of enactment.[16] Therefore, widow(er)s who are not eligible for adjustment under INA §245(a) may consular process and not be subject to the reentry bar for unlawful presence.

One point of caution is that the Foreign Affairs Manual has not yet been updated with regard to

[12] *INA §201(b)(2)(A)(i).*
[13] *Interoffice Memorandum,* Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children (REVISED)*, Donald Neufeld (December 2, 2009), AILA InfoNet Doc. No. 09121430.*
[14] *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).*
[15] *USCIS Policy Manual, Volume 9: Waivers, Part B, Extreme Hardship, Chapter 4, C [9 USCIS-PM B, Ch 4,C].*
[16] *PL 111-83 §568 (c)(2)(A),* emphasis added.

the requirements to establish relief as a widow(er). Specifically, 9 FAM 502.2-2(B), which defines Immediate Relative, still includes the pre-October 28, 2009 standard that the widow(er) was married to the US citizen two years prior to the petitioner's death.[17] Additionally, AILA national has been working with DOS on widow(er) issues at consular posts and recently posted a *DOS Call for Examples* for erroneous I-130 revocations where they should have been automatically converted after the death of the USC petitioner.[18]

Affidavit of Support

A form I-864 is not required in the case of a widow(er) of a US citizen or his/her children.[19] However, while an affidavit of support is not required, inadmissibility based on the public charge ground in INA §212(a)(4)(A) is still applicable and not automatically waived for widows. If a review of the factors in INA §212(a)(4)(B) demonstrates a likelihood that the widow(er) will become a public charge, the widow(er) can be found inadmissible. However, even in this situation, an I-864 is not required. Instead, the widow(er) may overcome the public charge ground with an I-134 sponsor.[20] This is an important difference not only because the I-864 is a binding contract between the sponsor and the US government while the I-134 is not, but also because the I-134 does not require the qualifying relationships between the sponsor and the intending immigrant as required by INA §213A(f).

Permission to Reapply for Admission

In its discretion, USCIS can consent to the reapplication for admission after a removal (Form I-212) for a widow(er) who was removed or who departed the U.S. while an order was pending. Such consent would rely upon whether the pending Form I-130 is approved and if there are no other adverse issues (such as a criminal record or immigration violations other than the removal), that would otherwise make the widow(er) inadmissible.

USCIS will exercise discretion favorably and grant an I-212 under 212(a)(9)(A)(iii) "if:

1. TheFormI-130 that had been filed by the widow(er)'s spouse has now been approved as an I-360 under the new §568(c) of PL 111-83;
2. The widow(er) is otherwise admissible; and
3. The widow(er)'s case does not present significant adverse factors beyond the removal

[17] *9 FAM 502.2-2(B)(e).*
[18] *AILA Doc.No.16081100 (10/7/2016).*
[19] *INA §204(a)(4)(C)(i)(I).*
[20] *Interoffice Memorandum,* Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children (REVISED)*, Donald Neufeld (December 2, 2009), AILA InfoNet Doc. No. 09121430, page 10.*

itself."[21]

OTHER SURVIVING RELATIVES.

The second section of PL 111-83 that relates to relatives of deceased petitioners is §568(d). Prior to the enactment of this section, with very limited exceptions, if a petitioning family member died, the immigrant's permanent residence processing died as well. Similarly, if the primary beneficiary in an employment-based case died before approval of permanent residence, the derivative beneficiaries has no basis for continuing their permanent residence processing pursuant to the employment petition. Surviving relatives of certain petitioners and principal beneficiaries are now covered by the provisions of INA §204(l) as created by PL 111-83 §568(d). The changes in the law provide for permanent residence processing to continue for immediate-relative cases and preference category family and employment-based cases. In addition, surviving derivative beneficiaries in refugee/asylee cases and T and U nonimmigrant cases also benefit under this statute.

Surviving Relatives Covered Under §§568(d) and (e)

PL 111-83 §568(d) protects the following surviving relatives pursuant to the creation of INA §204(l):

1. Beneficiary of a pending or approved immediate relative visa petition;
2. Beneficiary of a pending or approved family-based visa petition, included both the principal beneficiary and any derivative beneficiaries;
3. Any derivative beneficiary of a pending or approved employment-based visa petition;
4. The beneficiary of a pending or approved I-730,Refugee/AsyleeRelativePetition;
5. Derivative U or T nonimmigrant; or
6. DerivativeasyleeunderINA§208(b)(3)(spouse or child of principal asylee).

Based on these classifications, a "qualifying relative", which is not specifically defined in INA §204(l), is presumed to be an individual who was:

1. The petitioner in an immediate relative or family-based immigrant visa petition;
2. The principal beneficiary in a widow(er)'s immediate relative or a family based visa petition;

[21] *Interoffice Memorandum,* Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children (REVISED)*, Donald Neufeld (December 2, 2009), AILA InfoNet Doc. No. 09121430, page 8.*

3. The principal beneficiary in an employment-based visa petition case;
4. The petitioner in a refugee or asylee relative petition(I-730);
5. The principal beneficiary admitted as a T or U nonimmigrant; or
6. The principal asylee who was granted asylum under INA §208.

Because the guidance memo relating to INA §204(l) was issued over a year after the enactment of the law, USCIS will reopen on its own motion, any application or petition that was denied by USCIS on or after October 28, 2009 without consideration to the application of INA §204(l).

U.S. Residence Requirement for Surviving Relative

A significant limitation of relief to other surviving relatives is that it applies only where the surviving relative resided in the United States at the time of the qualifying relative's death. Additionally, the surviving relative must continue to reside in the U.S. at the time of adjudication of the petition or application for benefits under §204(l).[22] USCIS guidance clarifies that the residence requirement does require physical presence by the surviving relative in the U.S. "Residence" for surviving relative benefits is defined in INA§ 101(a) (33): "The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent."

USCIS will allow the surviving relative to provide documentation establishing such residence in the event that they are, at the time of filing, physically present outside of the U.S. The absence of a proper immigration status, however, ultimately could prevent one from obtaining immigration benefits due to other requirements in the law.) The memo notes that, in cases involving multiple beneficiaries, it is sufficient for only one of the beneficiaries to meet the residence requirements.

Pending Petitions and Applications

Notwithstanding INA §205 and the corresponding regulations, USCIS now has the 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 INA §204(l) and the petition is approvable but for the death of the qualifying relative.

Affidavit of Support Requirements in the case of Surviving Relatives

Cases that require the filing of an affidavit of support (I-864), require an execution of a new affidavit of support filed by a substitute sponsor. As the USCIS explains, this is because an

[22] *Policy Memorandum,* Approval of Petitions and Applications After the Death of the Qualifying Relative Under New Section 204(l) of the Immigration and Nationality Act*, December 16, 2011, AILA InfoNet Doc. No. 11011061 (Posted 01/10/11), page 4.*

affidavit of support is a legally binding contract between the sponsor and the sponsored individual. Because the death of a party to the contract ends the obligations under the contract, the contact is void and a new binding contract (I-864) will be required.

No Waiver of Other Requirements

Notwithstanding the broad application of the law providing for relief to surviving beneficiaries, it is important to note that beneficiaries would still have to demonstrate that they meet all other eligibility requirements under the law. For example, individuals seeking to adjust status through a deceased qualifying relative must still establish that they are otherwise admissible to the United States. In some cases, a waiver of inadmissibility must be filed before the surviving relative may adjust her/his status. Those waivers typically require a showing of extreme hardship to a qualifying U.S. citizen or lawful permanent resident (LPR) qualifying relative. In those cases, "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."[23] However, the applicant still must establish that s/he is deserving of USCIS's favorable discretion in its review of the waiver application.

With regard to employment-based cases where the derivative beneficiaries of the qualifying relatives still seek to adjust status based, the withdrawal by the employer of an approved employment based petition *prior* to the qualifying relative's death, would make the derivative beneficiaries ineligible for adjustment despite INA §204(l).[24] Note also that the death of principal beneficiary in a family based preference category case covered by 204(l), does not preclude the petitioner from withdrawing the petition and leaving the derivative beneficiaries without relief. "USCIS will honor [the petitioner's decision to withdraw the petition], and refrain from adjudicating the petition."[25]

One requirement that is no longer applicable to spouses of deceased US citizen and LPR petitioners in family based cases is the condition on residence under INA §216. A surviving spouse who acquires LPR status pursuant to INA §204(l) is not subject to the conditions of §216 even where a marriage may have existed for less than two years when the petitioner died.

[23] *Policy Memorandum,* Approval of Petitions and Applications After the Death of the Qualifying Relative Under New Section 204(l) of the Immigration and Nationality Act*, December 16, 2011, AILA InfoNet Doc. No. 11011061 (Posted 01/10/11), page 11.*
[24] *Policy Memorandum,* Approval of Petitions and Applications After the Death of the Qualifying Relative Under New Section 204(l) of the Immigration and Nationality Act*, December 16, 2011, AILA InfoNet Doc. No. 11011061 (Posted 01/10/11), page 6.*
[25] *Policy Memorandum,* Approval of Petitions and Applications After the Death of the Qualifying Relative Under New Section 204(l) of the Immigration and Nationality Act*, December 16, 2011, AILA InfoNet Doc. No. 11011061 (Posted 01/10/11), page 7.*

Moreover, unlike the provisions for widow(er)s in §568(c) of the DHS Appropriations Act, remarriage of a qualifying relative does not bar approval of the petition.

U and T Nonimmigrants

U and T nonimmigrants who were admitted as derivative beneficiaries in U and/or T visa status will not have their status revoked upon the death of the U or T principal beneficiary. However, if the principal's U or T visa petition was still pending at the time of their death, USCIS may not approve the visa petition for the derivative beneficiaries. INA §204(l) requires that the derivative have already been admitted in U or T status for the benefits to apply. While §204(l) does not address U and T visa status adjustment requirements, USCIS guidance indicates that the surviving relative may file for an extension of U or T status until the surviving relative has accrued the sufficient physical presence to apply for adjustment (presumably notwithstanding the inability of the surviving family member to meet the requirements of the U principal at adjustment).[26]

[26] Id.