

SURVIVING RELATIVES: NEW WAYS TO RESUSCITATE A DEAD PETITION OR APPLICATION

by Barbara L. Bower, Christie Popp, and Brent Renison*

This article concerns new solutions, under recently enacted legislation and pursuant to a class-action settlement, to some of the problems encountered by surviving relatives following the death of the person who had provided the basis for immigration benefits. On October 28, 2009, President Obama signed into law two provisions directed toward surviving relatives: (1) elimination of the two-year marriage requirement for self-petitioning widows and widowers [widow(er)s] of U.S. citizens; and (2) an entirely new INA section, Section 204(I), which allows many petitions and other immigration benefits to remain viable after the death of the qualifying relative.¹ U.S. Citizenship and Immigration Services issued a Memorandum dated December 2, 2009, by Donald Neufeld, Associate Director, Service Center Operations Directorate (Neufeld Memo), that provided guidance on the change to widow(er)s of U.S. citizens, and issued a policy memorandum dated December 16, 2010, that provided guidance on implementation of the new INA §204(I) provisions (Policy Memo).²

A few key concepts may assist practitioners in sorting through the provisions that are relevant to an individual client's case:

- **Widow(er)s of U.S. citizens** are treated differently than other surviving relatives, primarily because there is a right to self-petition in addition to having a previously filed petition remain valid. Congress eliminated the provision requiring a marriage of two years for widow(er)s of U.S. citizens to self petition, and litigation and a class action settlement established other rights for this class of immigrants;
- **Humanitarian Reinstatement**, which has for many years served as the only immigration tool for most surviving relatives, has been partially replaced by the more liberal provisions of 204(I) and the removal of the two-year marriage requirement for widow(er)s of U.S. citizens. Nevertheless, it remains an option available under the regulations for cases not covered by the widow(er) or 204(I) provisions;

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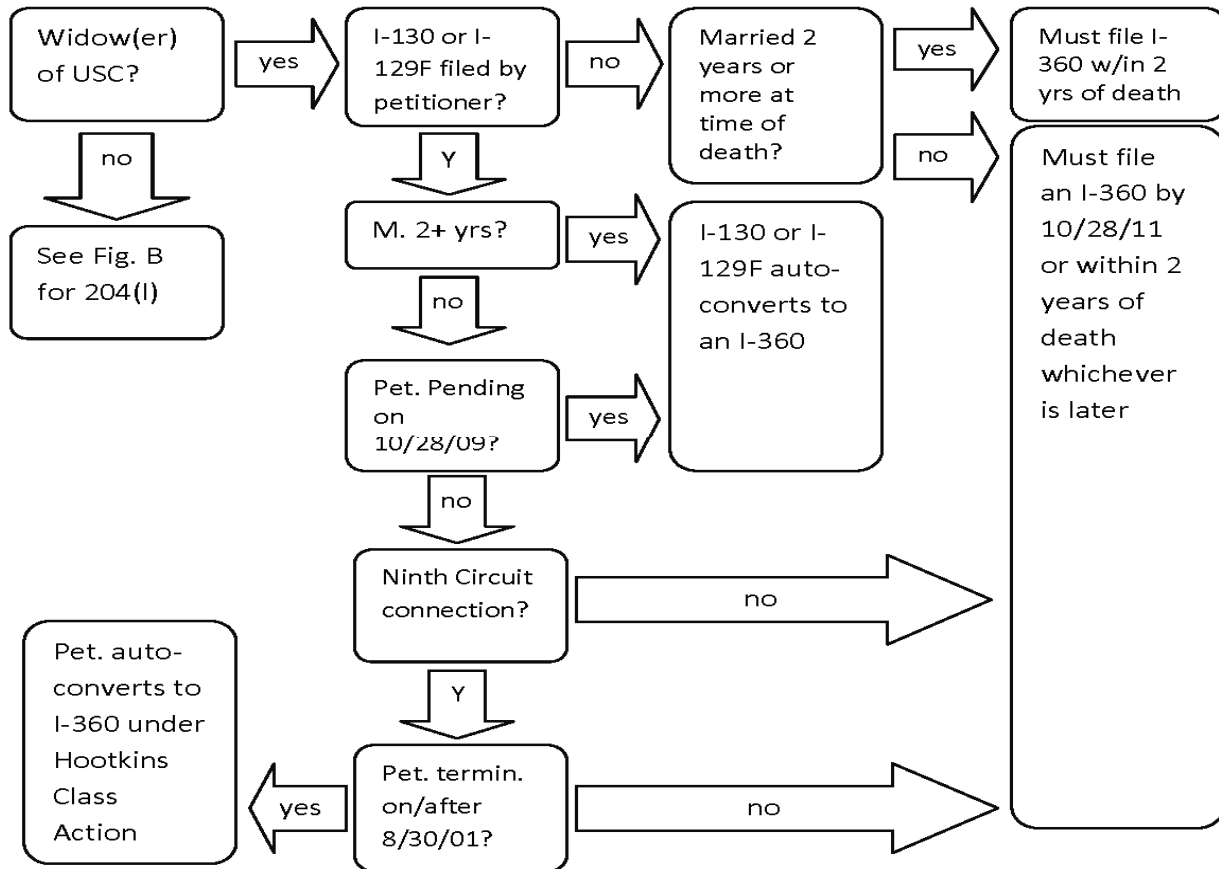
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¹ INA §201(b)(2)(A)(i) (8 U.S.C. §1151(b)(2)(A)(i)); INA §204(I) (8 U.S.C. §1154(I)), as amended by §568(c) and §568(d) of the DHS Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat. 2142, 2187-88 (2009). Note that new INA §204(I) follows §204(k) alphabetically, and the subsection is ordered by the letter "I" as in "letter" as opposed to a numeral 1 or I.

² Memorandum, Neufeld, Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children (Revised), Dec. 2, 2009, published on AILA InfoNet Doc. No. 09121430 (posted Dec. 14, 2009); Policy Memorandum, Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(I) of the Immigration and Nationality Act, PM-602-0017, Dec. 16, 2010, published on AILA InfoNet Doc. No. 11011061 (posted Jan. 10, 2011).

- **Surviving Relative Consideration Under 204(I)** represents a new form of relief for surviving relatives, some of whom could previously only rely upon humanitarian reinstatement, and many of whom simply had no relief at all. The requirements of 204(I) relief center around two main elements:
- **Residence in the United States** at the time of the death, and continuing residence in the United States; and
- **A Previously Filed Petition** such that at the time of the death the surviving relative was the beneficiary or derivative beneficiary of a petition. This is in contrast to the self-petition rights unique to widow(er)s of U.S. citizens.

Figure 1.



As shown above in Figure 1, widow(er)s are subject to special rules, including the statutory right of self-petitioning. Widow(er)s married more than two years are subject to different rules than those married less than two years, but only for pre-October 28, 2009 deaths. Additionally, because of the *Hootkins v. Napolitano* class action,³ cases involving petitions filed in the Ninth Circuit, or where the beneficiary or petitioner resided in the Ninth Circuit at the time of the death, are subject to special rules in accordance with the settlement of that lawsuit. If the case does not involve a widow(er) of a U.S. citizen, it may be covered by new INA §204(I), as shown below in Figure 2.

³ *Hootkins v. Napolitano*, 645 F. Supp. 2d 856 (C.D. Cal. 2009) (court filings and rulings, including the settlement agreement reached Apr. 5, 2010, are available at www.ssad.org/litigation/classaction.html).

Figure 2.

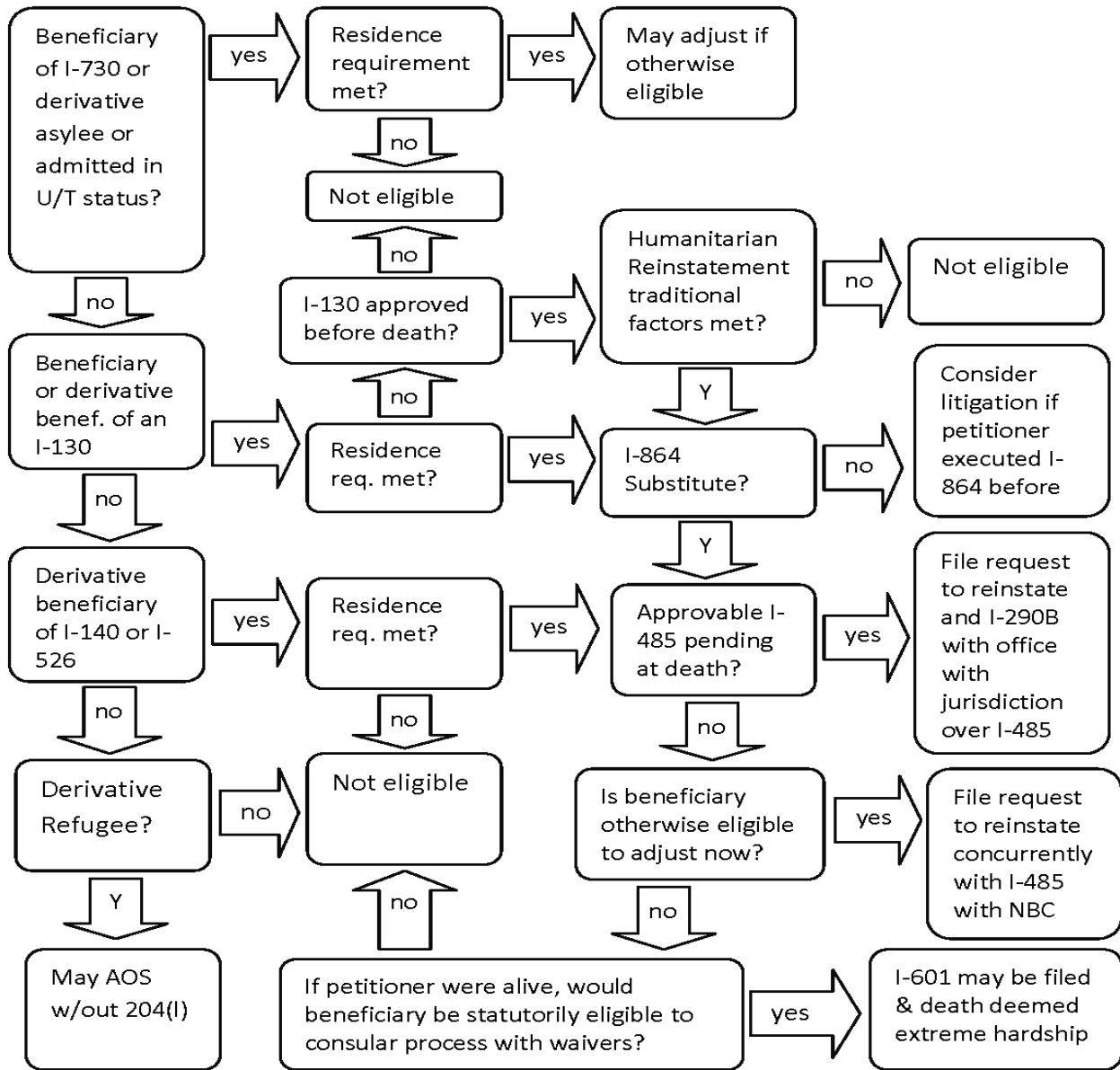


Figure 2 incorporates the statutory language of new INA §204(l) and the interpretation given to it by U.S. Citizenship and Immigration Services (USCIS) through the Policy Memo. As with any simplified construct, it is provided only as an aid to a more thorough analysis of an individual case. One should not rely on Figure 2 alone to analyze eligibility. Additionally, there are a number of areas that are either not clear as of this writing or are the subject of disagreement between the USCIS interpretation and AILA’s membership. USCIS issued a Draft Policy Memorandum on May 17, 2010⁴, and AILA responded with comments.⁵

⁴ Draft Policy Memorandum, May 17, 2010, published on AILA InfoNet Doc. No. 10051767 (posted May 17, 2010).

⁵ AILA Comment on USCIS Draft Policy Memorandum Regarding 204(l), published on AILA InfoNet Doc. No. 10060363 (posted June 3, 2010).

Remarriage

The clear statutory language of §201(b)(2)(A)(i) covering self-petitioning widow(er)s of U.S. citizens bars self-petitioning eligibility for widow(er)s who remarry. In response to the Draft Policy Memo, however, AILA responded that §204(l) nevertheless provides relief to those who remarry:

A widow(er) whose U.S. citizen spouse filed an I-130 petition before dying, and who remarries prior to being admitted to lawful permanent resident status, still qualifies as an “alien described” in INA §204(l)(2)(A) because the alien, “immediately prior to the death of his or her qualifying relative, was—(A) the beneficiary of a pending or approved petition for classification as an immediate relative (as described in section 201(b)(2)(A)(i)).” INA §204(l)(2)(A). By fixing the point of eligibility before the death, the statute clearly contemplates eligibility for those who were spouses of U.S. citizens immediately prior to the death of the qualifying relative. The statute does not require the widow(er) to continue to be the spouse of a U.S. citizen; only that he or she “was” an immediate relative at the time of death, and was the beneficiary of a petition.”⁶

This argument is further strengthened by the language of §204(l)(1), which requires that the petition be adjudicated “based upon the family relationship described in paragraph (2),” because that family relationship is described in terms fixing the relationship “immediately prior to the death.” USCIS bases its contrary position only upon the remarriage bar contained in §201(b)(2)(A)(i).⁷ This statute, however, does not pertain to widow(er)s of lawful permanent residents (LPRs) in the 2A category, and it cannot be reconciled with the clear language of §204(l). This is an area, therefore, where an appeal to the BIA or litigation may find fertile ground.

Affidavit of Support

Another area of concern is in the area of the I-864 Affidavit of Support. USCIS takes the position that the petitioner’s I-864 is no longer valid.⁸ In order to be admissible, therefore, a survivor must either show exemption from the I-864 requirement or obtain an I-864 from a “substitute sponsor” who must be related to the applicant in one of the ways described in §213A(f)(5).⁹ This may be impossible in cases where the survivor does not have one of the relatives listed. The substitute sponsor requirement is absolute, according to USCIS, and neither the alien’s own funds nor joint sponsors can cure the absence of a substitute sponsor. AILA previously commented that in cases where the petitioner (now deceased) executed an I-864 prior to the death, the affidavit of support requirement should be deemed to have been met because it was a related application.¹⁰ USCIS disagreed, stating that the I-864 is neither a petition, nor an application, nor a related application.¹¹ Because there will undoubtedly be survivors who qualify for §204(l), save for lack of a qualifying substitute sponsor, it appears that litigation may be necessary to advance survivors’ rights in this area.

Discretion

The Policy Memo lacks the necessary clarity on the issue of discretion, which could lead to erroneous denials. Specifically, §204(l) does authorize the agency to withhold approval where the secretary of the Department of Homeland Security determines that “approval would not be in the public interest.”¹² Such discretion is unreviewable.¹³ According to the Policy Memo, however, discretionary “public interest” denials

⁶ *Id.*, p. 3.

⁷ Policy Memo, p. 3.

⁸ Policy Memo, p. 9.

⁹ Relatives include, “spouse, parent, mother-in-law, father-in-law, sibling, child (if at least 18 years of age), son, daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent or grandchild of a sponsored alien or a legal guardian of a sponsored alien...” INA §213A(f)(5)

¹⁰ AILA Comment, p. 10–11.

¹¹ Policy Memo, p. 9.

¹² INA §204(l)(1).

¹³ *Id.*

should not be routinely used, and a consultation with headquarters is required prior to denying a visa petition on that basis.¹⁴

The Policy Memo notes that traditional discretionary factors may still be used to deny a case, without specifying under which situations those may be appropriate. Nevertheless, because visa petition proceedings are nondiscretionary by nature, one can make the argument that only a “public interest” denial subject to the consultation requirement would be proper. As for adjustment of status or waiver applications, those may still be denied using traditional discretionary factors. Because §204(l) does not permit a denial based solely on the lack of the qualifying family relationship,¹⁵ however, a discretionary denial that is based on the death of the qualifying relative should be reviewed for appeal.

Humanitarian Reinstatement

In cases involving a petition that had been approved prior to the death of the petitioner, USCIS takes the position that a kind of hybrid type of humanitarian reinstatement is to be applied.¹⁶ This treatment runs contrary to the plain language of the statute, and it elevates the old humanitarian reinstatement regulations above the level of the statute.¹⁷ The guidance is also confusing in that it explains that discretion should be “generally appropriate” in cases covered under §204(l).¹⁸ In light of the fact that, outside “public interest” denials, visa petition adjudications are nondiscretionary, this guidance is at odds with the statute and accepted adjudicatory standards. Additionally, it appears to make beneficiaries of approved petitions more vulnerable than those of pending petitions.

U and T Visa Considerations

There is some concern that §204(l) may not provide any greater protection to U and T nonimmigrants than was already granted by the statute, regulations, and current USCIS policy. For example, the guidance states that “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.” This was already granted by the U adjustment regulations and the policy of USCIS, which considers U derivatives to be separate from the principals when it comes time to adjust.

In addition, §204(l) leaves several significant groups out in the cold; for example, an applicant for derivative U nonimmigrant status who resided in the United States. If that applicant traveled abroad while the U application was pending (before it was approved), and the principal died before the derivative could return, the derivative would not benefit from 204(l) even though he or she resided in the United States and even though the U status had been approved. The statute requires that the U nonimmigrant be *admitted* in that status before benefiting from 204(l). If the derivative was abroad when the U status was approved, he was not admitted before the principal died.

The second large group of individuals who cannot benefit from 204(l) are family members of U principals who never hold U status. Under INA §245(m) a family member can adjust his or her status or obtain an immigrant visa if such a grant is necessary “to avoid extreme hardship.” An alien who might otherwise be the beneficiary of an adjustment of status under this section cannot obtain status if the principal dies because he or she has not held U nonimmigrant status before the principal died.

The third group of individuals who might be harmed by this section are derivatives who have aged out. USCIS is currently considering guidance on how to deal with derivative children who age out (reach the age

¹⁴ Policy Memo, p. 12.

¹⁵ DHS Appropriations Act for FY 2010, Pub. L. No. 111-83, Title V, §568(d)(2), 123 Stat. 2142 (Oct. 28, 2009), provides: “(2) Construction. Nothing in the amendment made by paragraph (1) may be construed to limit or waive any ground of removal, basis for denial of petition or application, or other criteria for adjudicating petitions or applications as otherwise provided under the immigration laws of the United States other than ineligibility based solely on the lack of a qualifying family relationship as specifically provided by such amendment.”

¹⁶ Policy Memo, pp. 12–13; p. 15.

¹⁷ The Humanitarian Reinstatement Regulations can be found at 8 CFR §205.1(a)(3)(i)(C). The *Adjudicator’s Field Manual* deals with the issue at AFM §21.2(h)(1)(C), as amended by the Policy Memo.

¹⁸ Policy Memo, pp. 12–13; p. 15.

of 21). It has previously stated that derivative children will age out and lose their status at 21. For this reason, recently issued U visas are being granted only until the day that the derivative turns 21, even if that is less time in U status than the principal will have. Thus, only those derivative children who obtain U status by age 18 will have the requisite time in U status (three years) to adjust on their own. The Vermont Service Center is holding back the older applications of derivative children who turned 21 before the principal's status was approved, rather than denying them, pending the forthcoming guidance. For those derivatives whose applications are still pending because they have already aged out, the question is open as to whether they would benefit from INA §204(*I*). If the principal dies, the language of the statute would not allow a derivative to obtain status because the derivative must have already held such status at the time that the principal died.