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Re: AILA Comment on USCIS Draft Memorandum: “Approval of Petitions and Applications after the Death of the Qualifying Relative; New INA Section 204(l) updates the AFM with New Chapter 20.6 and an Amendment to Chapter 21.2(h)(1)(C)”

The American Immigration Lawyers Association (AILA) hereby submits the following comments to the above-named draft memorandum. AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. The organization has been in existence since 1946 and is affiliated with the American Bar Association. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. Citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the proposed rule and believe that our members’ collective expertise provides experience that makes us particularly well-qualified to offer views that we believe will benefit the public and the government.

We now provide the following comments to the above-named draft memorandum.

Introduction

AILA appreciates the opportunity to provide comment on the recently released draft policy memorandum, “Approval of Petitions and Applications after the Death of the Qualifying Relative; New INA Section 204(l) updates the AFM with New Chapter 20.6 and an Amendment to Chapter 21.2(h)(1)(C).” The memorandum clarifies a number of areas of concern to our members. We welcome the recognition that the grant of benefits under §204(l) is not prohibited in cases arising prior to the date of

enactment. This treatment comports with Supreme Court precedent on the issue of retroactivity. *See Langraf v. USI Film Prod.*, 511 U.S. 244 (1994); *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006). Additionally, we are pleased that the agency has decided, in the spirit of the new legislation, to allow untimely motions to reopen petitions, adjustment of status applications, or waiver applications denied before October 28, 2009 if §204(l) would now allow approval.

The interpretation of the meaning of “qualifying relative” is a reasonable interpretation of the statute. Also reasonable is the treatment of waivers. By noting that the qualifying relative has died and deeming the death to be the functional equivalent of a finding of extreme hardship, the agency does not interfere with the statute’s prohibition against the use of criteria for adjudicating petitions or applications based solely on the lack of a qualifying relationship. AILA agrees that waivers that call for the exercise of discretion may be decided based on a weighing of all favorable factors against adverse discretionary factors.

AILA is also encouraged by the procedure announced in the draft memorandum regarding “not in the public interest” denials. Based on the language of the statute, as well as the humanitarian nature of the legislation, it is clear that the discretionary denial power for approvals that are not in the public interest should be used extremely sparingly. The consultation requirement is a welcome safeguard against inconsistent adjudication.

Having outlined the positive aspects of the draft memorandum, AILA also wishes to provide constructive comment on some areas which could lead to confusion for applicants and adjudicators. These concerns are outlined below.

When INA §204(l) Applies

The statute requires that the alien described in §204(l)(2) had a residence in the United States at the time of the death, and continues to reside in the United States. The draft memorandum uses somewhat different language in describing this, stating that the “alien seeking the benefit” is required to meet the residence requirement. Draft Memorandum at 3. This may lead adjudicators to believe that all derivative beneficiaries are each required to meet the residence requirement. As long as the principal beneficiary meets the residence requirement and the case is approved, the derivatives should be able to immigrate together with the principal beneficiary. Likewise, if the derivative beneficiary (spouse of EB immigrant for example) meets the residence requirement, it should not be necessary for each and every derivative beneficiary to meet the residence requirement. In other words, as long as one beneficiary (whether principal beneficiary or main derivative beneficiary) meets the residence requirement, that should suffice. Otherwise, family members may end up being separated.

The draft memorandum also states that “Section 204(l) of the act applies to any petition or application adjudicated on or after October 28, 2009, even if the petition or application was filed before that date.” Draft Memorandum at 3. Because the provisions of 568(d) do not expressly include in or exclude from section 204(l)’s ambit individuals whose qualifying relative died before the effective date of the act, this also should be explicitly stated. The AFM Ch. 20.6(c)(1) should be amended as follows:

Section 204(l) of the act applies to any petition or application adjudicated on or after October 28, 2009, even if the petition or application was filed before that date and even if the death occurred before that date.

Any beneficiary or derivative beneficiary who has chosen to continue his or her residence after the effective date of the new law, thus subjecting himself or herself to the new and more generous legal regime, is qualified to seek benefits under §204(l) despite the occurrence of the death prior to the enactment. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006). The applicability of §204(l) to a case involving a pre-enactment death should be clearly stated.

Widow(er)s of Citizens

It is noted in the draft memorandum on page 3 that, “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, the Form I-130 is converted under 8 CFR 204.2(i)(1)(iv) to a widow’s Form I-360.” It is also noted on page 4 that, “As noted, 204(l) applies to immediate relative petitions, as well as several other petitions and applications. The widow of a citizen, however, does not need to rely on section 204(l) of the Act to obtain approval of a Form I-130 that the citizen filed before dying.” These statements are accurate with respect to the beneficiary of an I-130 who continues to qualify as a widow(er). For immediate relative spouses who have remarried, however, the I-130 will not automatically convert to an I-360 due to the remarriage. The language of INA §201(b)(2)(A)(i) precludes eligibility if the spouse remarries, effectively taking them out of the self-petitioning “widow(er)” category. Despite the inability to file a widow(er) I-360 or have the previously filed I-130 automatically convert, however, a remarried widow(er) still retains eligibility under the clear language of INA §204(l), provided the residence requirements are met. The draft memorandum also omits reference to K-1 widow(er)s, and clarification on their inclusion is needed.

Widow(er)s 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. Because INA §204(l) does not restrict aliens on the basis of whether or not they have remarried, some widow(er)s may be eligible only for §204(l). To clarify the applicability of §204(l) to widow(er)s who have remarried, we respectfully suggest the following amendment to the draft AFM Ch. 20.6(b) and Ch. 20.6(c)(2):

(b) Widow(er)s of Citizens. Paragraph (a) of this chapter does not apply to most Form I-130 petitions filed by a citizen on behalf of his or her spouse. Upon the death of the citizen petitioner, the Form I-130 is converted under 8 CFR 204.2(i)(1)(iv) to a widow’s Form I-360. In some

cases, however, as in the case of a widow(er) who remarries and who is therefore ineligible for the I-360 benefit, 204(l) may be considered provided all statutory criteria are met.

...

(c)(2) Widow(er)s of Citizens. As noted, section 204(l) applies to immediate relative petitions, as well as several other petitions and applications. The widow of a citizen, however, does not generally need to rely on section 204(l) of the Act to obtain approval of a Form I-130 that the citizen filed before dying. Under section 201(b)(2)(A)(i) of the Act and 8 CFR 204.2(i)(1)(iv), the Form I-130 is automatically converted to a widow(er)'s Form I-360, when the citizen spouse dies. Please refer to Chapter 20.6(c)(4) 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.

In the case of an alien who was the beneficiary of an immediate relative I-130 petition filed by the citizen petitioner, but who has remarried prior to obtaining the status of a lawful permanent resident, the alien can no longer be considered a self-petitioning "widow(er)". The second sentence of section 201(b)(2)(A)(i) allows a widow(er) to remain an immediate relative for I-360 purposes "only until the date the spouse remarries." Because the language of 204(l) does not contain such a restriction, however, a widow(er) of a U.S. citizen who has remarried, but who was the beneficiary of a pending or approved petition for immediate relative immediately prior to the death of his or her deceased spouse, may claim eligibility under section 204(l).

Under established canons of statutory interpretation, none of the words of the statute are to be deemed meaningless. Because §204(l) was passed in the same legislative act as the removal of the two year marriage requirement of the widow(er) category, legislators are deemed to have known about the other provisions. Therefore, because §204(l) includes all who were "immediate relatives" as defined in §201(b)(2)(A)(i) immediately prior to the death, any interpretation that makes their inclusion in §204(l) meaningless cannot be supported. These proposed revisions will clarify to officers the benefits under §204(l) to those widow(er)s who have remarried, and give proper meaning to their inclusion in §204(l).

K-1 Widow(er)s

As noted in the December 2, 2009 Neufeld memorandum, "Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children (FY2010 DHS Appropriations Act)," "the K-1 nonimmigrant will also be deemed the beneficiary of a Form I-360 if the K-1 nonimmigrant now qualifies as a widow(er)." Neufeld Memorandum at 6. This treatment should be extended to K-1 widow(er)s who are eligible under §204(l). This could include a K-1 widow(er) who remarried, or a K-1 widow(er) who requires a waiver of inadmissibility. A brief note in this section stating that K-1 nonimmigrants are deemed to be the beneficiary of a petition under §204(l) if the K-1 nonimmigrant now qualifies under §204(l). The I-129F petition filed by the petitioner should be "deemed" to be an approved petition for classification as an immediate relative (as described in §201(b)(2)(A)(i)), provided the marriage between the K-1 petitioner and the K-1 nonimmigrant occurred prior to the death of the petitioner.

Humanitarian Reinstatement

The section covering humanitarian reinstatement carries the potential for confusion. AILA believes that the clear language of the statute removes §204(l)-eligible beneficiaries from the rules constructed around humanitarian reinstatement for the following reasons.

The draft memorandum states that, “New section 204(l) addresses only petitions and applications that are still pending at the time of the petitioner’s death; it does not directly address revocation or reinstatement.” Draft Memorandum at 7–8. The language of §204(l), however, applies to beneficiaries of “pending *or approved* petitions,” so this portion of the draft memorandum is not accurate. Section 204(l) does address approved petitions. The draft memorandum goes on to state that “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.” Draft Memorandum at 8. There are several problems with this statement. First, standards such as “it would generally be appropriate” do not give adjudicators sufficient guidance to apply the law to this type of scenario. Second, the statement ignores other categories of §204(l) beneficiaries such as employment-based immigrants, refugees/asylees, and U and T nonimmigrants. The draft memorandum specifically mentions employment-based petitions as not coming within the humanitarian reinstatement rules, and that such cases should be held in abeyance. Nevertheless, the clear language of §204(l) applies to beneficiaries of pending or approved petitions of all the types listed.

The enactment of §204(l), as well as court decisions, call into question the applicability of humanitarian reinstatement in the context of §204(l)-eligible beneficiaries. For example, the derivative beneficiary of an employment-based petition (Form I-140) that was pending at the time of the principal beneficiary’s death, was the “derivative beneficiary of a pending ... petition,” and under the draft memorandum, would come within §204(l) and be adjudicated notwithstanding the death. In other words, the pending I-140 could be approved despite the principal beneficiary’s (the worker’s) death. Oddly, under the draft memorandum’s formulation, the derivative beneficiary of an already-approved I-140 would have the case held in abeyance pending issuance of policy guidance on this topic, because there are no rules for humanitarian reinstatement in place for employment-based cases. This is unnecessary due to the plain language of the statute.

Section 204(l) contains two main sections: the “In General” provisions of §204(l)(1), and the “Alien Described” provisions of §204(l)(2). An alien who is described in §204(l)(2) may have certain relief granted under §204(l)(1). Aliens described are beneficiaries of pending petitions, and also approved petitions. Whether the petition was pending or already approved at the time of death does not matter; the beneficiaries are aliens described in the section. Section 204(l)(1) determines what action the Secretary shall take with respect to the aliens described. If the alien described resided in the U.S. at the time of the death and continues to reside in the U.S., such alien may have the petition described in paragraph (l)(2) adjudicated notwithstanding the death of the qualifying relative. The language of §204(l)(1) provides that the adjudication shall cover “such petition ... or an application for adjustment of status...,” thus providing for an adjudication of the petition for aliens described who are beneficiaries of pending petitions, and for an adjudication of the adjustment of status for aliens described who are beneficiaries of approved petitions. Congress would not have provided for an adjustment of status to be adjudicated notwithstanding the death if the approved petition underlying the adjustment were allowed to be automatically revoked. Thus, it is clear from the statute that automatic revocation of approved visa

petitions is not contemplated by the statute, and that no humanitarian reinstatement needs to be considered in order to adjudicate the adjustment of status application of a beneficiary of an approved petition.

In establishing eligibility for both beneficiaries of pending and approved petitions, and establishing that either the petition described or an application for adjustment of status to be adjudicated, Congress clearly intended to establish the right to adjudication notwithstanding the death for two categories of aliens: 1) beneficiaries of petitions pending at the time of death, who would be eligible for adjudication of the petition and the adjustment of status notwithstanding the death; and 2) beneficiaries of petitions approved at the time of death, who would be eligible for adjudication of the adjustment of status notwithstanding the death. The draft memorandum, with respect to beneficiaries of already-approved petitions who are residing in the U.S. and meet the criteria under §204(l), has the potential for causing a violation of the statute's prohibition against adjudicating petitions or applications based solely on the lack of a qualifying family relationship.

The only plausible place for humanitarian reinstatement under the new statutory scheme created by §204(l) is where the beneficiary is not an "alien described," or who either did not reside in the U.S. at the time of the death and/or does not continue to reside in the U.S. In the case of an alien who was residing outside the U.S. at the time of death, §204(l) plainly does not apply. The alien who was residing abroad, therefore only has recourse in the humanitarian reinstatement regulations under current USCIS interpretation. The draft memorandum impermissibly imports humanitarian reinstatement rules into the new §204(l) statutory regime without statutory basis.

As stated in the draft memorandum, "Under DHS regulations at 8 CFR 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." Draft Memorandum at 7. Because §204(l) defines an "alien described" as "an alien who, *immediately prior to the death* of his or her qualifying relative, was...", a petition approved prior to the death could *not* be automatically revoked, because §204(l) sets the eligibility point at the time *immediately prior* to the death. The automatic revocation regulations purport to revoke an approved petition only "*upon the death* of the petitioner or the beneficiary," so they can be seen as having no operation, because §204(l) preserves the petition the moment *before* death. Therefore, the "*immediately prior to the death*" language of §204(l) trumps the "*upon the death*" language of the regulations on automatic revocation at 8 CFR §205.1. For the §204(l) eligible beneficiary, therefore, automatic termination has no effect on the already approved petition. This holds true for all §204(l) eligible beneficiaries, including those who cannot currently avail themselves of humanitarian reinstatement. INA §205 also gives the Secretary authority to revoke the approval of any approved petition for "good and sufficient cause..." but does not require the automatic revocation of an approved petition. Additionally, §204(l) mandates that the beneficiary of an approved petition "shall" have the petition or application for adjustment of status "adjudicated notwithstanding the death of the qualifying relative," and therefore discretionary criteria related to the occurrence of death may not be used. The automatic revocation regulation is therefore irrelevant to a §204(l) eligible beneficiary. To clarify the applicability of §204(l) to beneficiaries and derivative beneficiaries of petitions approved at the time of the death, we respectfully suggest the following amendment to the draft AFM Ch. 20.6(c)(6):

(6) Humanitarian Reinstatement. Under DHS regulations at 8 CFR 205.1(a)(3)(i)(B) and (C), approved petitions are automatically revoked “upon the death” of the petitioner or the beneficiary or self-petitioner. New section 204(l), however, fixes the eligibility of beneficiaries of pending or approved petitions at a point “immediately prior to the death,” which precedes the death, and before the “upon the death” language contained in 8 CFR 205.1. Any alien described in 204(l)(2), therefore, who resided in the United States at the time of the death of the qualifying relative and continues to reside in the United States, and who was the beneficiary or derivative beneficiary of a petition approved while the qualifying relative was alive is not subject to the automatic revocation regulation. The petition that was approved will remain valid and unrevoked notwithstanding the death of the qualifying relative. In the case of an alien who is not described in section 204(l), but on whose behalf a petition was approved before the death, humanitarian reinstatement may be considered.

Leaving the approval in place will avoid anomalous results, such as those potentially caused by the draft memorandum. This treatment will also promote efficiency in the adjudication process. A petition that has already been approved prior to the death need not be reopened and reinstated. Beneficiaries of approved petitions should not be treated less favorably than petitions pending at the time of death. An interpretation that leaves approved petitions in place will comport with the plain meaning of the statute, and will not interfere with the current USCIS interpretation of the automatic revocation regulations.¹

It should be noted that the treatment of humanitarian reinstatement requests has been harshly criticized by our membership. These requests often languish for years, and are treated as burdensome work by the service centers which have no real resources devoted to such requests. Members report that there are not sufficient tracking mechanisms for such requests, that agencies involved in the process engage in finger-pointing with respect to transfer of cases between agencies, and that once a decision is finally rendered, beneficiaries receive cursory and callous adjudications that are apparently not subject to review. AILA strongly objects to any §204(l) eligible beneficiary being the subject of humanitarian reinstatement procedures. The new §204(l) establishes substantive and procedural rights to adjudication that should not fall within the constructs of humanitarian reinstatement. USCIS must revise the draft memorandum to reflect the inapplicability of automatic revocation or humanitarian reinstatement to §204(l) eligible beneficiaries. AFM Ch. 21.2(h)(1)(C) must also be revised accordingly.

Waivers

As noted in the introduction to this comment, USCIS’ interpretation of waivers appears reasonable. By noting that the qualifying relative has died and deeming the death to be the functional equivalent of a finding of extreme hardship, the agency does not interfere with the statute’s prohibition against the use

¹ While this comment argues that §204(l) is not within the ambit of the automatic revocation regulations due to the plain language of the statute fixing eligibility “immediately prior to the death,” it is worth noting that the automatic revocation regulations at 8 CFR §205.1 have been found to be *ultra vires* and invalid. *See Pierno v. INS*, 397 F.2d 949 (2d. Cir. 1968); *Leano v. INS*, 460 F.2d 1260 (9th Cir. 1972); *Hootkins v. Napolitano*, CV-07-05696 (C.D. Cal. 2009). Nothing in INA §205 authorizes *automatic* revocation. Rather, the Secretary may only revoke the approval of a petition for “good and sufficient cause,” based on careful review of the individual facts of the case.

of criteria for adjudicating petitions or applications based solely on the lack of a qualifying relationship. Nevertheless, a few areas are in need of clarification.

With respect to widow(er)s of U.S. citizens, the draft memorandum notes, “If the citizen dies while the Form I-130 is pending, however, the widow(er) can seek approval of a waiver of inadmissibility despite the death of the citizen petitioner.” Draft Memorandum at 6. The language “pending” may lead adjudicators to believe that a widow(er) cannot seek a waiver of inadmissibility if the petition was in fact approved at the time of the death. Therefore, it is recommended that the language be changed to “pending or approved.”

With respect to paragraph 3 of the section on waivers, found on page 6 of the draft memorandum, this section may unfairly limit the application of waivers to beneficiaries of those cases involving the grant of posthumous citizenship under INA §329A. Because posthumous citizenship under §329A provides that the United States considers the person to have been a citizen of the United States at the time of the person’s death, this section should be revised to add the following:

Under section 329A of the Act, relatives of members of the military may request posthumous citizenship on behalf of the deceased family member. In such a case, the person granted posthumous citizenship is considered to have been a citizen at the time of death, and would qualify as a relative for purposes of a waiver where citizenship of the relative is required.

Adjustment of Status

The draft memorandum properly notes that, in the adjustment context, “the death of the qualifying relative does not relieve the alien of the need to qualify for adjustment of status under section 245(a) of the Act,” unless the alien qualifies under INA §§245(i) or 245(k). Draft Memorandum at 5. The draft memorandum also correctly states that “an alien whose petition has been approved 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 at a consular post abroad.” *Id.* Providing for consular processing of an alien whose petition was approved due to the residence requirements having been met prior to petition approval comports with the statutory structure of §204(l), even if the alien must physically depart to obtain a visa abroad. In the case of an alien who maintained residence in the United States throughout the relevant period, but who was physically present abroad for the purpose of consular processing at the time of death, however, this section may be viewed by adjudicators in a more restrictive light than necessary. Specifically, it should be noted that an alien’s departure to obtain a visa abroad is not the same as ceasing residence in the United States, and that a petition that remained pending at the time of the death can still be approved despite the alien’s physical presence in another country for the purpose of consular processing.

Further, the guidance on adjustment of status does not provide for situations in which an applicant for adjustment of status may be maintaining status at the time of the death. For example, take the case of an employment-based adjustment of status applicant. Section 245(c) of the Act requires maintenance of status for employment-based adjustment applicants since last entry. If a derivative beneficiary of an employment-based I-140 petition is pending adjustment of status at the time of death, but the adjustment of status application is not adjudicated until one year after the death, the derivative beneficiary should be deemed to have maintained status despite no longer qualifying for status as the nonimmigrant H-4

dependent. Any failure to maintain status *after the death* that is based solely upon death of the principal beneficiary must be deemed to be an impermissible basis for denial of a §204(l)-eligible derivative beneficiary, based on a plain reading of the statute. Section 568(d)(2) of P.L. 111-83 prohibits denial founded on “ineligibility based solely on the lack of a qualifying relationship,” and any §245(c) ground which purports to bar adjustment based on the death of the qualifying relative, including failure to maintain nonimmigrant dependent status based on the death, is inappropriate. Essentially, the legislation was intended to place beneficiaries who suffered the death of the qualifying relative back in the place he or she would have enjoyed had the death not occurred. Therefore, it is appropriate to ask the question, “would the case have been approved at a point immediately preceding the death?” If the answer is yes, the case should qualify under §204(l). Finally, a note about the realities of an unexpected death is appropriate. By regulation, H and L nonimmigrants are not required to obtain advance parole before traveling while an adjustment of status application is pending. If an H or L nonimmigrant travels after the death and re-enters in H or L status, despite the entry taking place after the death (such as for funeral related travel), during the validity of a prior grant of H or L status, such entry should not be used to deny adjustment of status.

In order to clarify the applicability of §204(l) to beneficiaries and derivative beneficiaries in the adjustment of status and consular contexts, we respectfully suggest the following amendment to paragraph five (5) of the draft AFM ch. 20.6(c)(3):

In the adjustment context, the death of the qualifying relative does not relieve the alien 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. Section 245(c) of the act may still make the alien ineligible, if section 245(i) or (k) of the Act does not apply to the alien. An alien whose petition has been approved 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 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.

Any failure to maintain status *after* the death that is based solely upon death of the principal beneficiary, however, is not a valid basis for denial of a 204(l) eligible derivative beneficiary. Section 568(d)(2) of P.L. 111-83 prohibits denial founded on “ineligibility based solely on the lack of a qualifying relationship,” and any ineligibility or inadmissibility ground based on the death of the qualifying relative, including failure to maintain nonimmigrant dependent status based on the death is inapplicable in the 204(l) context. The legislation was intended to place beneficiaries who suffered the death of the qualifying relative back in the place he or she would have enjoyed had the death not occurred. Therefore, it is appropriate to ask the question, “would the case have been approved at a point immediately preceding the death?” If the answer is yes, the case should qualify under 204(l). Further, if the alien was pending adjustment of status at the time of death, but visa numbers have retrogressed, the alien would continue to be a pending adjustment of status applicant until numbers became available, despite the death. Likewise, if a pending adjustment applicant who is an H or L nonimmigrant or alien granted an advance parole document travels after the death of the relative and re-enters in such status, the adjustment of

status application shall be adjudicated notwithstanding the fact that the travel occurred after the death (such as for a funeral or other bona fide reason).

FN 2—The alien must have been continuing to reside in the United States in order for the petition to have been approved. 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. In the case of an alien who maintained residence in the United States throughout the relevant period, but who was physically present abroad for the purpose of consular processing at the time of death, the case may proceed to approval. Please note that an alien’s departure to obtain a visa abroad is not the same as ceasing residence in the United States, as residence and physical presence have two separate legal definitions under the Act. A petition that remained pending at the time of the death can still be approved despite the alien’s physical presence in another country for the purpose of consular processing, if U.S. residence is established through documentary evidence.

Affidavit of Support

It is noted in the draft memorandum that “[t]he death of the qualifying relative 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 CFR 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.” Draft Memorandum at 5.

The draft memorandum properly notes that an affidavit of support is required of applicants under §204(l) in cases where the beneficiary would otherwise be subject to the requirement. We also assume that in cases where the petitioner *never* filed an I-864 previously, that those subject to the I-864 requirement will need a substitute sponsor under §213A(f)(5). For those relatives whose petitioning relative did in fact execute an I-864, however, no further I-864 should be required unless income issues exist. First, §212(a)(4)(C) requires the petitioner to have executed an affidavit of support, and §213A does not specify that death terminates the enforceability of an affidavit. Given the fact that the statute provides for specific bases for termination in §213A(a)(3), the omission of death as a termination ground is evidence that death was not meant by Congress to terminate enforcement. The plain meaning of the statute is met if the petitioner, now deceased, executed an I-864 prior to death.

Second, §204(l)(1) specifically states that beneficiaries shall have any related applications adjudicated notwithstanding the death. An I-864 is certainly a “related application,” and therefore the petitioner’s already executed I-864 should be adjudicated and accepted notwithstanding the death. An example of this application would be the parent of an adult U.S. citizen who was the beneficiary of an immediate relative I-130 petition filing and who concurrently filed an I-485 and I-864. Upon the death of the U.S. citizen petitioner before adjudication, §204(l) preserves the eligibility of the parent to adjust status based on the already-filed petition (I-130), adjustment application (I-485), and related applications (I-864), without the need to seek a substitute sponsor listed on the limited list of relatives at §213A(f)(5). In some cases, while the evidence shows the beneficiary is not likely to become a public charge due to financial resources, beneficiaries without a relative listed in §213A(f)(5) may be subject to an anomalous denial for public charge grounds solely based on lack of the relative. Such a result is not

required under the new §204(l), as any related application must be adjudicated notwithstanding the death.

In order to clarify the applicability of §204(l) to beneficiaries and derivative beneficiaries who require the execution of an I-864 affidavit of support, we respectfully suggest the following amendment to paragraph four (4) of the draft AFM ch. 20.6(c)(3):

The death of the qualifying relative 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 CFR 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. In the case of a 204(l)-eligible beneficiary whose petitioning relative executed a Form I-864 prior to the death, the Form I-864 shall be adjudicated notwithstanding the death. If adjudication results in a determination that the financial resources of the sponsor were insufficient at the time of the death, even taking into consideration the financial resources of the sponsored alien, however, a joint sponsor (as opposed to substitute sponsor) may submit a Form I-864. Such joint sponsor would not need to be related to the beneficiary in the manner set forth in Section 213A(f)(5).

Cases Adjudicated before October 28, 2009

As noted in the introduction to these comments, AILA is pleased that the agency has decided, in the spirit of the new legislation, to allow untimely motions to reopen petitions, adjustment of status applications, or waiver applications denied before October 28, 2009 if §204(l) would now allow approval. The draft memorandum leaves some areas of potential confusion, however, and we suggest some minor changes.

The draft memorandum states that, “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.” Draft Memorandum at 8. Because USCIS has used many different terms to describe the ending of benefits due to death of a qualifying relative, we suggest that these terms be used in this section in order to ensure that all cases subject to negative action prior to the date of enactment be covered. For example, a petition approved prior to the date of enactment, and theoretically subject to automatic revocation before enactment due to a pre-enactment death that has not been the subject of any formal notice of revocation action may be considered by some adjudicators to not have been “denied.” Therefore, we recommend that the term “denied” in this section be expanded to include a petition, adjustment application or waiver application that was “denied, terminated, or approved and then automatically revoked upon the death of the qualifying relative before October 28, 2009 by operation of the regulations,” instead of just “denial.” This will clarify the full scope of the motion to reopen authority. Otherwise, applicants with petitions approved at the time of death that have not been notified of the automatic revocation by USCIS may find it difficult to reopen such an approved petition under the draft memorandum. As discussed in the section on humanitarian reinstatement above, those regulations do not apply to a §204(l) eligible beneficiary.

Additionally, in the case of an approved petition that was subject to automatic revocation, but which has not been the subject of any post-approval action, some clarification is needed. For example, an

adjustment of status application may not have been filed at the time of death, but may be able to be filed based on the §204(l)-eligible petition now. In such a case, it should be clarified whether the alien should file an I-290B motion to reopen the previously approved I-130 petition, combined with a first-time I-485 application, or whether a new I-485 application is sufficient alone.

Cases Involving Aliens Approved for Lawful Permanent Resident Status

Although not addressed by the draft memorandum, there are occasions when USCIS or the Department of State is unaware that a death occurred, and grants permanent resident status. In such cases, it would be inefficient to reopen and readjudicate the case anew if it would qualify under §204(l). It is suggested that the draft memorandum address this issue by giving adjudicators the authority to leave a grant of lawful permanent resident status in place if the new §204(l) would provide relief.

Conclusion

AILA appreciates the opportunity to comment on this proposed draft memorandum and we look forward to a continued dialogue with USCIS on issues concerning INA Sec. 204(1).

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION