

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Deputy Director (MS 2000)
Washington, DC 20529-2000



U.S. Citizenship
and Immigration
Services

JUN 3 2013

Memorandum

TO: Maria Odom
Citizenship and Immigration Services Ombudsman

FROM: Lori Scialabba *Lori Scialabba*
Deputy Director

SUBJECT: Response to Citizenship and Immigration Services Ombudsman Formal Recommendation 55, "Improving the Adjudication of Applications and Petitions Under Section 204(l) of the Immigration and Nationality Act"

Recommendations

The Citizenship and Immigration Services Ombudsman (CISOMB) recommends that U.S. Citizenship and Immigration Services (USCIS):

1. Conduct notice-and-comment rulemaking to create or designate a standard form, establish a receipt protocol and describe an adjudication process consistent with the plain language of INA section 204(l);
2. Train USCIS staff to interpret and properly apply INA section 204(l) and stop regarding survivor benefit requests as a form of discretionary reinstatement;
3. Publish instructions for applicants and petitioners as to the nature and extent of INA section 204(l)'s coverage and related benefit request processes; and
4. Track and monitor the processing of survivor benefit requests.

USCIS Response to Recommendations

USCIS thanks CISOMB for its review and will respond to each individual recommendation below. First, USCIS would like to respond to concerns that there is a significant difference in the implementation of INA section 204(l) for cases where the petition is pending compared with cases where the petition has been approved.

As CISOMB highlighted in its report, section 204(l) specifically provides that a beneficiary whose qualifying relative has died "...shall have such petition...or an application for adjustment of status...and any related applications, adjudicated..."¹ If the petition is pending when the relative dies, there is no need for a separate process. The survivor simply informs USCIS of the death, shows that he or she was, and is, residing in the United States, and provides any other information the person wants USCIS to consider.

¹ CISOMB Formal Recommendation 55, "Improving the Adjudication of Applications and Petitions Under Section 204(l) of the Immigration and Nationality Act" (Nov. 26, 2010); p. 3.

Response to Citizenship and Immigration Services Ombudsman Formal Recommendation 55,
“Improving the Adjudication of Applications and Petitions Under Section 204(l) of the
Immigration and Nationality Act”

Page 2

However, if the petition is already approved when the relative dies, there is nothing pending on which USCIS can act. Section 204(l) does not act to preserve a petition approval, but expressly requires USCIS to make a discretionary determination whether to permit a case to proceed. The request for reinstatement of the approval is the vehicle for bringing to USCIS’s attention the fact that the relative has died.

Section 204(l) does not guarantee that a qualifying relative’s death will not alter the survivor’s ability to immigrate. At present, only the widow(er)s of citizens have a right to immigration classification despite the spouse’s death.² Section 204(l), by contrast, gives USCIS “unreviewable discretion” to permit a case to go forward despite a death. Because a negative exercise of discretion is generally limited to instances that are not in the public interest, USCIS will ordinarily allow a case to proceed. However, USCIS must still make a decision in each individual case to apply section 204(l).

Furthermore, the standard for these two types of cases is not different. The policy guidance states twice that a request for reinstatement should be granted in any case in which section 204(l) would permit approval of a pending petition.³ The policy guidance states that reinstatement under section 204(l) cannot be denied on the discretionary ground of “not in the public interest” except after vetting through headquarters.⁴

Differences in processing time generally occur when petitions are not filed concurrently with Form I-485, Application to Register Permanent Residence or Adjust Status, and must be retrieved from various storage locations in order to process the request for section 204(l) relief.

1. Conduct notice-and-comment rulemaking to create or designate a standard form, establish a receipt protocol and describe an adjudication process consistent with the plain language of INA section 204(l).

USCIS does not concur with this recommendation. First, section 204(l) is self-executing and entered into force upon enactment. As CISOMB is aware, notice-and-comment rulemaking often entails long delays. To defer implementing section 204(l) while completing the rulemaking process would not be in the interest of individuals who will benefit from this provision. Second, USCIS can address, and has addressed, many of CISOMB’s concerns through alternative means, such as providing clear instructions for requesting section 204(l) relief on the USCIS website.

Creation of a specific form would also have delayed implementation of section 204(l). USCIS cannot adopt a standardized means of information collection without complying with the Paperwork Reduction Act. Allowing individuals to seek relief under section 204(l) through existing processes is a far simpler means of implementation.

² See INA section 201(b)(2)(A)(i).

³ See USCIS 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” (Dec. 16, 2010); pp. 12 and 15.

⁴ See *id* at p. 13.

Response to Citizenship and Immigration Services Ombudsman Formal Recommendation 55,
“Improving the Adjudication of Applications and Petitions Under Section 204(l) of the
Immigration and Nationality Act”

Page 3

2. Train USCIS staff to interpret and properly apply INA section 204(l) and stop regarding survivor benefit requests as a form of discretionary reinstatement.

USCIS believes that its staff is properly trained to interpret and apply section 204(l). As noted above, section 204(l) gives USCIS “unreviewable discretion” to permit a case to proceed despite a qualifying relative’s death. Ordinarily, USCIS will exercise that discretion favorably unless an approval would not be in the public interest. In fact, the policy guidance makes clear that an officer cannot exercise this discretion adversely without headquarters’ concurrence.

USCIS, however, will send a reminder to officers in the field to ensure that they are aware of and understand how to apply section 204(l) consistent with the policy memorandum. Additionally, if any areas or issues of concern are identified related to the interpretation or application of section 204(l), USCIS will provide appropriate training or guidance as needed.

3. Publish instructions for applicants and petitioners as to the nature and extent of INA section 204(l)’s coverage and related benefit request processes.

USCIS concurs with this recommendation. USCIS has posted information to its website that discusses the nature and extent of section 204(l) coverage and explains how customers may request this discretionary form of relief. A section on humanitarian reinstatement, which includes eligibility information and instructions for submitting a request, has also been added to the USCIS website. In addition, USCIS is developing improved scripts to assist customers who contact the National Customer Service Center (NCSC).

On February 7, 2013, USCIS hosted a public engagement on section 204(l) that included more than 350 stakeholders. The engagement offered stakeholders an opportunity to ask questions and raise concerns. As an additional customer service effort, upon learning of the death of a qualifying relative, Service Centers will mail instructional letters to the petitioner or his or her estate if deceased explaining the requirements for submitting a request for section 204(l) relief.

4. Track and monitor the processing of survivor benefit requests.

USCIS concurs with this recommendation. In November 2012, USCIS added a new action code to the Computer-Linked Application Information Management System (CLAIMS). With this addition, Service Centers are now able to update CLAIMS to indicate when a petition is returned from the Department of State due to the death of a petitioner, as well as when a section 204(l) request is received from the beneficiary. Further, Service Centers are able to indicate if the request for section 204(l) relief is approved or denied. Field Offices typically make updates to CLAIMS through the Interim Case Management System (ICMS). USCIS expects to add similar action codes to ICMS by the first quarter of FY2014.