U.S. Citizenship and Immigration Services

Draft Memorandum for Comment

USCIS seeks your input on the draft memoranda listed below. These memoranda are drafts of proposed or revised guidance to USCIS Field Offices and Service Centers. They are not intended as guidance for the general public, nor are they intended to create binding legal requirements on the public. Until issued in final form, the draft memoranda do not constitute agency policy in any way or for any purpose.

- 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) (**Final date for comments: June 1, 2010**.)
- Extension of U Nonimmigrant Status for Derivative Family Members Using the Application to Extend/Change Nonimmigrant Status (Form I-539) Revisions to Adjudicator's Field Manual (AFM), New Chapter 39.1(g)(2)(i) (AFM Update AD10-08) **(Final date for comments: June 1, 2010.)**
- William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008: Changes to T and U Nonimmigrant Status and Adjustment of Status Provisions; Revisions to Adjudicator's Field Manual (AFM) Chapters 23.5 and 39 (AFM Update AD10-38) (**Final date for comments: June 1, 2010**.)
- Clarifying Guidance on "O" petition Validity Period Revisions to the Adjudicator's Field Manual (AFM) Chapter 33.4(e)(2) AFM Update AD10-36 (**Final date for comments: May 24, 2010**.)

Each memorandum is available for comment for ten business days after posting. The final date for comments is after each link.

Comment Process: Please email all comments to opefeedback@uscis.dhs.gov. Please put the title of the relevant memorandum in the subject line of your message. The most helpful comments will refer to a specific portion of the memorandum, explain the reason for any recommended change, and include data, information, or authority that support the recommendation. USCIS may distribute any comments received (including any personal information and contact information) on its public website or to those who request copies. By providing comments, you consent to their use and consideration by USCIS, and you acknowledge that your comments may become public. USCIS cannot guarantee that it will acknowledge or respond to any comments submitted.

Background and Additional Legal Information: Final field guidance documents have previously

been available for public review on USCIS's website (www.uscis.gov) as part of the Adjudicator's Field Manual (AFM). In a new effort to promote transparency and consistency in USCIS operations, the Agency will now periodically post drafts of new or revised draft memoranda for public comment to assist USCIS in improving immigration services. Some memoranda will not be posted, e.g., those containing information that is law enforcement sensitive, confidential, or otherwise protected from disclosure under the Freedom of Information Act. USCIS is not required to solicit public comment on the draft memoranda under the Administrative Procedure Act, nor does this informal comment process replace any statutory or other legal requirement for public comment on agency action.

Last updated: 05/17/2010

DRAFT FOR COMMENT ONLY
Posted: 05-17-2010
Comment Period Ends: 06-01-2010
This draft does not constitute agency policy in any way or for any purpose.

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

PM-602-XXXX

Policy Memorandum

SUBJECT: 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)

Purpose
This Policy Memorandum (PM) ensures that USCIS uniformly and consistently adjudicates petitions and applications in light of section 204(l) and 213A(f)(5) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. §§ 1154(l) and 1183a(f)(5).

Scope
Unless specifically exempted herein, this PM applies to and is binding on all USCIS employees.

Authority
Sections 204(l) and 213A(f)(5) of the Act, 8 U.S.C. §§ 1154(l) and 1183a(f)(5), as amended by § 568(d) and (e) of the DHS Appropriations Act, 2010, Public Law 111-83 ("Public Law 111-83"), 123 Stat. 2142, 2187-88 (2009).

Background
For many years, U.S. immigration policy has been that the *beneficiary* of a visa petition could not obtain approval if the *petitioner* died while the petition remained pending. *See Matter of Sano*, 19 I&N Dec. 299 (BIA 1985); *Matter of Varela*, 13 I&N Dec. 453 (BIA 1970).

New section 204(l) changes this governing law with respect to an alien who is seeking an immigration benefit through a deceased "qualifying relative." Section 204(l) permits the approval of a visa petition or refugee/asylee relative petition, as well as any adjustment application and related application, if the alien seeking the benefit:

- Resided in the United States when the qualifying relative died;
- Continues to reside in the United States on the date of the decision on the pending petition or application; and;

- Is at least one of the following:
  - The beneficiary of a pending or approved immediate relative visa petition;
  - The beneficiary of a pending or approved family-based visa petition, including both the principal beneficiary and any derivative beneficiaries;
  - Any derivative beneficiary of a pending or approved employment-based visa petition;
  - The beneficiary of a pending or approved Form I-730, Refugee/Asylee Relative Petition;
  - An alien admitted as a "T" or "U" nonimmigrant; or
  - A derivative asylee under section 208(b)(3) of the Act.

New section 204(l) does not expressly define the "qualifying relative." From the list of aliens to whom new section 204(l) applies, however, USCIS infers that "qualifying relative" means an individual who, immediately before death was:

- The petitioner in a family-based immigrant visa petition under section 201(b)(2)(A)(i) or 203(a) of the Act;
- The *principal* beneficiary in a family-based visa petition case under section 201(b)(2)(A)(i) or 203(a) of the Act;
- The *principal* beneficiary in an employment-based visa petition case under section 203(b) of the Act;
- The petitioner in a refugee/asylee relative petition under section 208 of the Act;
- The principal alien admitted as a T or U nonimmigrant; or
- The principal asylee, who was granted asylum under 208 of the Act.

Section 568(e) of Public Law 111-83 provides a conforming amendment to INA section 213A(f)(5)(B) relating to affidavits of support. INA section 212(a)(4)(C) provides that, to avoid public charge inadmissibility, most immediate relatives and family-based immigrants, and some employment-based immigrants, must have filed an affidavit of support on their behalf that meets the requirements of INA section 213A. If, after the death of a qualifying relative, a visa petition is approved or not revoked under new INA section 204(l), then another individual who qualifies as a "substitute sponsor" must submit a Form I-864, Affidavit of Support Under Section 213A of the Act, if a legally binding affidavit of support is required pursuant to INA section 212(a)(4)(C) and section 213A.

Policy

USCIS officers will adjudicate any petition or application that is adjudicated on or after October 29, 2009, in accordance with section 204(l) and section 213A(f)(5), as amended by sections 568(d) and (e) of Public Law 111-83, and in light of the amendments to the Adjudicator's Field Manual (*AFM*) made by this PM.

Section 568(d) and (e) of Public Law 111-83 became effective on October 28, 2009 when the President signed Public Law 111-83. This PM applies, therefore, to any case adjudicated on or after October 28, 2009, even if the case was filed before October 28, 2009.

For a case adjudicated before October 28, 2009, USCIS policy is that an alien may file, with the proper filing fee, 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. See *AFM* chapter 20.5(c)(7), as added by this PM, for complete guidance on this issue.

Implementation

The *AFM* is amended as follows.

1. New Chapter 20.6 is added to the *AFM*, to read as follows.

20.6 Approval of pending petitions or applications after death of the qualifying relative.

(a) General. Except as specified in this chapter, if the approval of a petition or application for immigration benefits requires the existence of a family relationship between the alien and another individual, the death of the other individual while the case is pending requires the denial of the petition or application.

(b) Widow(er)s of Citizens. 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.

(c) Effect of Section 204(l) of the Act. Paragraph (a) of this chapter does not apply, and a petition or application may be approved despite the death of the qualifying relative, if section 204(l) of the Act, as amended by section 568(d) of the FY2010 DHS Appropriations Act, Public Law 111-83, applies to the case. See paragraph (c)(5) of this chapter concerning the authority to deny these cases on discretionary grounds.

(1) When Section 204(l) Applies. 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. Section 204(l) allows the approval of a pending petition or application, despite the death of the qualifying relative, if the alien seeking the benefit of section 204(l):

- Resided in the United States when the qualifying relative died;

- Continues to reside in the United States on the date of the decision on the pending petition or application; and;
- Is at least one of the following:
  - The beneficiary of a pending or approved immediate relative visa petition;
  - The beneficiary of a pending or approved family-based visa petition, including both the principal beneficiary and any derivative beneficiaries;
  - Any derivative beneficiary of a pending or approved employment-based visa petition;
  - The beneficiary of a pending or approved Form I-730, Refugee/Asylee Relative Petition;
  - An alien admitted as a "T" or "U" nonimmigrant; or
  - A derivative asylee under section 208(b)(3) of the Act.

New section 204(l) does not expressly define the "qualifying relative." From the list of aliens to whom new section 204(l) applies, however, USCIS infers that "qualifying relative" means an individual who, immediately before death was:

- The petitioner in a family-based immigrant visa petition under section 201(b)(2)(A)(i) or 203(a) of the Act;
- The principal beneficiary in a family-based visa petition case under section 201(b)(2)(A)(i) or 203(a) of the Act;
- The principal beneficiary in an employment-based visa petition case under section 203(b) of the Act;
- The petitioner in a refugee/asylee relative petition under section 207 or 208 of the Act;
- The principal alien admitted as a T or U nonimmigrant;
- The principal asylee, who was granted asylum under 208 of the Act.

(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 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.

(3) Action in Pending Petition or Adjustment Cases. An officer now has authority to approve any petition or application covered by section 204(l) of the Act, *provided* the petition or application was approvable when filed and still is approvable, apart from the death of the qualifying relative. Therefore, assuming all other requirements for approval of a petition are met, the death of the qualifying relative no longer requires

denial of a petition in a case involving an alien who meets the requirements of new INA section 204(l).

An officer also has authority, now, to approve the related adjustment of status application, or other benefit application, if approvable apart from the death of the qualifying relative. In the adjustment of status context, the alien must have been eligible to apply for adjustment of status at the time that application is filed. See Chapter 20.6(c)(4) for the impact of section 204(l) on waiver applications.

Note that a petition or application to which section 204(l) applies may still be subject to denial under section 204(c) of the Act (relating to prior marriage fraud), section 208(d)(6) (relating to prior frivolous asylum claims), or any other statutory bar to approval. Note also that paragraph (c)(5) of this chapter provides guidance concerning the authority to deny a case under section 204(l) as a matter of discretion.

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.[1]

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.

[1] A substitute sponsor's Form I-864 is not needed if the alien is not required to have a Form I-864 at all. For example, an alien may already have, or be entitled to be credited with, sufficient quarters of coverage under the Social Security Act to be exempt from the Form I-864 requirement. *See* 8 CFR 213a.2(a)(2)(ii)(C). Also, as with any Form I-864, the substitute sponsor may rely on the financial resources of the sponsored alien to meet the Form I-864 requirements. *See id.* § 213a.1 (including sponsored alien's lawful income in the United States in "household income") and § 213a.2(a)(iii)(B) (including sponsored alien's assets).

[2] The alien must have been continuing to reside in the United States in order for the petition to have been approved. Once it has been approved, however, 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.

(4) Waivers. The text of new section 204(l) provides that the new approval authority applies not only to the visa petition, but to an adjustment application and "any related applications." Section 568(d)(2) of the FY2010 DHS Appropriations Act specifies that section 568(d)(1) does not waive grounds of inadmissibility. But the provision does remove "ineligibility based solely on the lack of a qualifying family relationship" as a basis for denying relief. USCIS has determined, therefore, that section 204(l) *does* give USCIS the discretion to grant a waiver of inadmissibility to an alien described in section 204(l), even if the qualifying relationship that would have supported the waiver has ended through death.

Some waivers require a showing of extreme hardship to a qualifying relative, who must be either a citizen or a permanent resident. Since the legislation intends to have the new section 204(l) of the Act extend not only to the approval of the petition, but also to any related applications, 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. But the finding of extreme hardship merely *permits,* and never *compels* a favorable exercise of discretion. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296 (BIA 1996). That is, as with any other waiver case, a waiver application decided in light of section 204(l) requires the weighing of all favorable factors against any adverse discretionary factors. Extreme hardship is just one positive factor to be weighed. *See id.* The inadmissibility ground sought to be waived is, itself, an adverse factor. *See INS v. Yang,* 519 U.S. 26 (1996). For example, inadmissibility based on a conviction for a violent or dangerous crime requires proof of exceptional or extremely unusual hardship, or some other extraordinary circumstance, in order for a waiver application to be approved. 8 CFR 212.7(d).

The preceding paragraph assumes that the qualifying relative was already a citizen or permanent resident at the time of death. If the qualifying relative was not already a citizen or permanent resident, then the qualifying relative's death does not make the alien eligible for a waiver that would not have been available if the qualifying relative had not died. If the qualifying relative was not a citizen or permanent resident, then the alien may not be able to obtain a waiver of inadmissibility unless there is yet another individual who has the requisite status and family relationship to meet the requirements of the waiver provision.

As noted in Chapter 20.6(c)(2), the widow(er) of a citizen does not need to rely on section 204(l) of the Act to obtain the approval of the citizen's Form I-130 after the citizen has died. 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. As with any other waiver application that is covered by section 204(l), the fact that the citizen petitioner has died will be noted in the decision and

deemed to be the functional equivalent of a finding of extreme hardship. But the finding of extreme hardship merely *permits,* and never *compels* a favorable exercise of discretion. *See Matter of Mendez-Moralez, supra*. The widow(er) must still establish that he or she merits a favorable exercise of discretion.

(5) Discretionary Denial under Section 204(l). Section 204(l) gives USCIS discretion to deny a petition or application that may now be approved despite the qualifying relative's death, if USCIS finds, as a matter of discretion, "that approval would not be in the public interest." Section 204(l)(1) of the Act, 123 Stat. at 2187. This exercise of discretion, moreover, is "unreviewable." *Id*.

USCIS officers will not, routinely, use this discretionary authority to deny a visa petition that may now be approved, despite the death of the qualifying relative. In a visa petition proceeding that is not subject to section 204(c) of the Act or some other approval bar, the overriding issue is simply whether the beneficiary qualifies for the visa classification sought. Inadmissibility, for example, does not warrant denial of a visa petition. *See Matter of O-*, 8 I&N Dec. 295 (BIA 1959). Section 204(l) now provides that an alien described in section 204(l) can still qualify for the benefit sought, despite the qualifying relative's death. Thus, only truly compelling discretionary factors should be cited as a basis to deny visa petition under section 204(l), on the ground "that approval would not be in the public interest." Section 204(l)(1) of the Act, 123 Stat. at 2187. Before denying a visa petition on this basis, the USCIS officer must consult with the appropriate Headquarters Directorate, through appropriate channels.

This consultation requirement also applies to all cases, other than visa petition cases, that may now be approved under section 204(l) despite the qualifying relative's death. The USCIS officer must consult the appropriate Headquarters Directorate before denying a case on the ground "that approval would not be in the public interest." Section 204(l)(1) of the Act, 123 Stat. at 2187. Consultation is *not* required if the USCIS officer will deny the case based *solely* on the traditional discretionary factors that would have applied to the particular type of case, even if the qualifying relative were still alive. Rather, consultation is required only if the USCIS officer intends to deny the case as a matter of discretion on the "not . . . in the public interest" ground.

(6) Humanitarian Reinstatement. 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. If an immediate-relative or family-based visa petitioner dies after approval, the DHS regulation at 8 CFR 205.1(a)(3)(iii)(C)(2) gives USCIS discretion to decide not to revoke the approval for "humanitarian reasons." 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. But given section 204(l), 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. In those circumstances, reinstating the approval of an immediate-relative or family-based petition is appropriate even if the revocation occurred before October 28, 2009. See Chapter 21.2(h)(1)(C) of this *AFM* for further guidance on reinstating approval of immediate relative and family-based visa petitions.

Under DHS regulations at 8 CFR 205.1(3)(iii)(B), approved employment-based petitions filed under INA section 203(b) are automatically revoked upon the death of the petitioner or the beneficiary. There is no comparable regulatory provision that allows for the reinstatement of the approval of employment-based petitions based upon "humanitarian reasons." Similarly, the DHS regulation at 8 CFR 205.1(a)(3)(C)(2) does not provide for reinstatement of approval of an immediate-relative or family-based visa petition if it is the principal beneficiary, rather than the petitioner, who has died. Any requests based on new section 204(l) for humanitarian reinstatement in those circumstances, but not covered under existing regulations, should be held in abeyance and brought to the attention of the appropriate regional or service center counsel and of the Business Employment Services Team (BEST) or Family and Status Team (FAST) within the office of Service Center Operations (SCOPS) through established channels, pending the issuance of policy guidance on this topic.

(7) Application of New Section 204(l) to Cases Adjudicated before October 28, 2009. New section 204(l) does not, by its terms, require USCIS to reopen or reconsider any decision that had already become final before October 28, 2009. Given the ameliorative purpose of section 204(l), however, 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. A motion to reopen, rather than a motion to reconsider, would be the proper type of motion, since the alien would need to present new evidence: proof of the relative's death and proof both that the alien was residing in the United States when the relative died and that the alien continues to reside in the United States. The alien must pay the standard filing fee for each motion. If the alien establishes that he or she was residing in the United States when the qualifying relative died, and that he or she continues to reside in the United States, it would be appropriate for USCIS to exercise favorably the discretion to reopen the petition and applications, and to make new decisions in light of new section 204(l).

2. Chapter 21.2(h)(1)(C) of the *AFM* is amended by removing the final paragraph and replacing it with 2 additional paragraphs at the end, to read as follows:

21.2 Factors Common to the Adjudication of All Relative Petitions

* * * * *

(h) Revocation of Approval. * * *

(1) Automatic Revocation. * * *

* * * * *

(C) Discretionary Authority to Not Automatically Revoke Approval. * * * * *

While there are no other rules or precedents on how to apply this discretionary authority, reinstatement may be appropriate when revocation is not consistent with "the furtherance of justice," especially in light of the goal of family unity that is the underlying premise of our nation's immigration system. In particular, reinstatement is generally appropriate, as a matter of discretion, if the alien was residing in the United States when the qualifying relative died, if the alien continues to reside in the United States, and if section 204(l) of the Act and Chapter 20.6 of this *AFM* would support approval of the petition were it still pending. For cases that are not covered by section 204(l) of the Act, the reinstatement request will be addressed in light of the factors that USCIS has traditionally considered in acting on reinstatement requests, which include:

- The impact of revocation on the family unit in the United States, especially on U.S. citizen or LPR relatives or other relatives living lawfully in the United States;
- The beneficiary's advanced age or poor health;
- The beneficiary's having resided in the United States lawfully for a lengthy period;
- The beneficiary's ties to his or her home country; and
- Significant delay in processing the case after approval of the petition and after a visa number has become available, if the delay is reasonably attributable to the Government, rather than the alien.

Although family ties in the United States are a major consideration, there is no strict requirement for the alien beneficiary to show extreme hardship to the alien, or to relatives already living lawfully in the United States, in order for the approval to be reinstated. If the alien is required to have a Form I-864 affidavit of support,

however, there must be a Form I-864 from a substitute sponsor. 8 CFR 205.1(a)(3)(i)(C).

3. The *AFM* **Transmittal Memorandum** button is revised by adding a new entry, in numerical order, to read:

PM-602-XXXX [Date]	**Chapter 20.6 and 21.2(h)(1)(c)**	This memorandum adds new Chapter 20.6 and revises Chapter 21.2(h)(1)(c) to reflect enactment of INA section 204(l), allowing some petitions and applications to be approved despite the death of the qualifying relative.

Use
This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information
Questions regarding this memorandum should be directed to the Field Operations Directorate or the Service Center Operations Directorate, through appropriate channels. For cases adjudicated overseas, questions should be directed to the International Operations Division, Programs Branch.