Implementation of INA §204(l)
Relating to Surviving Family Members

by Charles Wheeler

In December 2010, U.S. Citizenship and Immigration Services (USCIS) issued a memorandum¹ that implemented §204(l) of the Immigration and Nationality Act (INA).² This law, enacted on October 28, 2009, provides relief to surviving family members when the petitioner or principal beneficiary has died.³ That same statute also provided relief to widow(er)s of U.S. citizens by eliminating the requirement that they had to have been married for at least two years before the citizen spouse died. The portion of the statute relating to other surviving family members had proved difficult for the agency to interpret and this delayed its implementation for more than a year. These are some of the questions that caused controversy:

• Whether the new law applied to petitions filed before October 28, 2009;
• Whether it applied to petitions pending on that date;
• Whether it applied only to petitions that were pending on the date the petitioner died;
• Whether it provided relief to surviving family members who needed a waiver of inadmissibility; and
• How it was going to affect the pre-existing regulation governing humanitarian reinstatement.

This article will explain how USCIS resolved these issues. It will summarize the implementing memorandum and describe in some detail who is eligible for relief and what that relief provides. It also will review eligibility for humanitarian reinstatement in light of the memorandum. It will provide some guidance on how the Child Status Protection Act (CSPA) applies in these situations. And it will point out vulnerabilities in the government’s interpretation and suggest areas that are open to potential challenge.

Who Is Covered?

Existing regulations state that a pending petition must be denied if the petitioner dies; approved petitions must be revoked upon the petitioner’s death if the beneficiary has not already obtained lawful

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permanent resident (LPR) status. But INA §204(l) provides relief to certain principal and derivative beneficiaries when the petitioner has died. It also provides similar relief to certain derivative beneficiaries when the principal beneficiary has died, and it applies to beneficiaries in the family-based categories as well as in the employment-based context. It also helps derivative asylees and refugees. This section does not affect the surviving spouses of U.S. citizens; they are covered by a separate section of the law. Section 204(l) applies to the following persons who die while their petitions are pending:

- U.S. citizens who filed I-130 petitions on behalf of their unmarried children under 21 or their parents (immediate relatives);
- U.S. citizens who filed I-130 petitions on behalf of their unmarried children over 21 and any derivatives (first preference);
- LPRs who filed I-130 petitions on behalf of their spouses or unmarried children and any derivatives (second preference);
- U.S. citizens who filed I-130 petitions on behalf of their married children and any derivatives (third preference);
- U.S. citizens who filed I-130 petitions on behalf of their siblings and any derivatives (fourth preference);
- Asylees and refugees who filed I-730 petitions on behalf of their derivative spouses and children;
- Principal beneficiaries in employment-based cases on whose behalf an I-140 petition has been filed; and
- T or U nonimmigrant status holders whose family members have been granted T or U derivative status. The derivatives of a principal T or U status holder under 21 include his or her spouse, children, parents, and unmarried siblings under 18 years of age. The derivatives of a principal T or U status holder over 21 include his or her spouse and children.

In addition, §204(l) provides protection for the following persons who had pending applications for adjustment of status:

- All of the above family-based beneficiaries who had filed for adjustment of status based on an approved I-130 petition and whose petitioner or principal beneficiary died while the adjustment of status application was pending;
- All of the derivative family members in an employment-based case based on an approved I-140 petition whose principal beneficiary died while the adjustment of status application was pending; and
- Derivative asylees whose principal asylee died while the adjustment of status application was pending.

As indicated, USCIS has chosen to limit eligibility to beneficiaries whose petitioner or principal beneficiary died while the petition was pending or after petition approval while the application for adjustment of status was pending. This seems to violate the plain reading of the statute, which provides eligibility to those whose petitioner died after the petition was approved but before an application for adjustment could be filed. The statute provides for the adjudication of an “application for adjustment of status … and any related applications, adjudicated notwithstanding the death of the qualifying relative ….” In fact, the agency allows the adjudication of related applications (e.g., waiver applications) that were filed after the qualifying relative died.

5 INA §201(b)(2)(A)(i).
Example: Maria, an LPR, filed an I-130 petition for her husband in June 2010. She died last month while the petition was pending. The petition would otherwise have been denied based on her death. Her husband satisfies the residence requirements of §204(l). He can proceed to have the petition adjudicated as if she were still alive. If it is approved, he can either file for adjustment of status (if otherwise eligible) or pursue consular processing when his priority date becomes current.

Example: Maria, an LPR, filed an I-130 petition for her husband in June 2008. It was approved one year later. In December 2010, the priority date became current and her husband entered on a nonimmigrant visa and filed for adjustment of status. Maria died last week while the adjustment application was pending. Her husband satisfies the residence requirements of §204(l). The adjustment application would otherwise have been denied based on her death. He can proceed to have the application adjudicated as if she were still alive.

Example: Yossin filed a fourth-preference petition for his brother, Kassai, in 2002. It was approved one year later. Yossin died in 2010 and the petition was automatically revoked upon his death. The priority date is just now current and Kassai wants to file for adjustment of status. The agency's interpretation is that Kassai is unable to take advantage of §204(l) because the citizen brother did not die while either the petition or the adjustment of status application was pending. Kassai would, however, be able to file a request/motion to reinstate the petition based on humanitarian grounds, which will be discussed later. But this relief is subject to agency approval. If Kassai's motion to reinstate is denied, he should consider challenging the agency's restrictive interpretation of §204(l) relief, since the statute arguably allows for it.

Example: John, an LPR, filed an I-130 petition for his wife on December 1, 2010. He died a month later while the petition was pending. Section §204(l) would apply in this case and the surviving spouse might be eligible for relief, assuming that she meets all the eligibility requirements. John died a month later while it was still pending. The petition was denied when it was revealed that the petitioner had died. Although §204(l) would technically not apply in this case, the agency will allow the surviving spouse to file a motion to reopen the denied petition if she satisfies the law's residence requirements. She would have to pay the $620 filing fee, but she is not affected by the 90-day filing window. If USCIS grants the motion, it will adjudicate the petition as if the petitioner had not died.

Example: Juan filed an I-130 petition for his brother, Mario, in early 2001. It was approved one year later. The priority date in the fourth preference became current in August 2010. Mario has lived illegally in El Paso with his spouse and three children since June 2000. Therefore, Mario and his family all filed for adjustment of status based on INA §245(i). Juan died on December 15, 2010, while the applications were pending. Because Mario and his family satisfy the residence and other eligibility requirements under

What Is the Effective Date?

The government has elected not to give retroactive effect to this section of the law. According to USCIS, the provision applies only to petitions and applications adjudicated on or after October 28, 2009. It does apply in cases where the petitioner/qualifying relative died before October 28, 2009, provided that the petition or application was pending on that date and adjudicated after October 28, 2009. The agency’s restrictive interpretation is open to a legal challenge because it does not appear to be supported by the statutory language or congressional intent. In mitigation, the agency has stated that if a petition or application was adjudicated or denied before October 28, 2009, USCIS will allow the affected beneficiary to file an untimely motion to reopen if he or she would otherwise have been protected by the provisions of §204(l). In such cases, USCIS would likely reinstate a petition or application that had been pending on the date of the petitioner’s/qualifying relative’s death but was later denied or revoked based on that death because it preceded the law’s effective date. This form of “reinstatement” because of §204(l) should not be confused with humanitarian reinstatement.

What Are the Residence Requirements?

The principal or derivative beneficiaries listed above are entitled to have the petition or application for adjustment of status adjudicated after the petitioner/qualifying relative has died, provided that the beneficiary was residing in the United States when the petitioner/qualifying relative died and continues to reside here until the date of the decision on the pending petition or application.

Example: Juan filed an I-130 petition for his brother, Mario, in early 2001. It was approved one year later. The priority date in the fourth preference became current in August 2010. Mario has lived illegally in El Paso with his spouse and three children since June 2000. Therefore, Mario and his family all filed for adjustment of status based on INA §245(i). Juan died on December 15, 2010, while the applications were pending. Because Mario and his family satisfy the residence and other eligibility requirements under
§204(l), they can have the adjustment of status applications adjudicated notwithstanding Juan’s death.

Residence is not the same as physical presence. Residence is defined as where the foreign national has his or her “principal, actual dwelling place in fact, without regard to intent.” Therefore, in some cases the beneficiary might have been outside the United States when the petitioner/qualifying relative died, pursuant to some brief or casual departure, but still claim residence in the United States. Similarly, there is no requirement that the beneficiary be residing in the United States lawfully. In fact, it is presumed that many, if not most, of the affected beneficiaries will have been residing here unlawfully.

In cases where the principal beneficiary meets the residence requirements, but the derivatives do not, they may all still qualify for relief. It is not necessary that all of the derivative beneficiaries meet the residence requirements. According to USCIS, if “any one beneficiary of a covered petition meets the residence requirements of section 204(l) of the Act, then the petition may be approved . . . .” So this interpretation helps in cases where the principal beneficiary satisfies the residence requirements but the spouse and/or children have been residing abroad.

- Example: In the hypothetical above, assume that Mario satisfies the residence requirements, but his wife and children have been living in Mexico. After Mario adjusts status, the derivatives are entitled to consular process as beneficiaries who are accompanying or following to join him.

As indicated above, the statute also provides relief in situations where the principal beneficiary—not the petitioner—has died. In the past, when the principal beneficiary had died, either the derivative beneficiaries were left without a basis for immigrating (e.g., derivative children in first-preference cases or derivative spouses and children in third- or fourth-preference cases), or the petitioner had to file a new petition for the children (second-preference cases). The statute allows these derivative beneficiaries “of the qualifying relative” in all the family- and employment-based preference categories to proceed unaffected by the principal beneficiary’s death.

- Example: In the above example, assume that Mario, not Juan, died on December 15, 2010, while the application for adjustment of status was pending. His spouse and two minor children, who were residing in El Paso at the time and continue to reside there, can have their adjustment of status applications adjudicated notwithstanding Mario’s death.

The statute also allows derivative asylees to adjust status after the principal asylee has died. This avoids the derivative’s having to apply for nunc pro tunc asylee status before becoming eligible to adjust. Derivative refugees do not face this hurdle if the principal refugee dies.

**Discretionary Denial**

An important exception to §204(l) protection when the beneficiary meets the eligibility requirements appears in cases where the U.S. Department of Homeland Security (DHS) determines that approval of the petition or application “would not be in the public interest.” The exercise of this discretion is non-reviewable. According to USCIS, “only truly compelling discretionary factors should be cited as a basis to deny the visa petition under section 204(l).” Before making such a determination, the officer must consult with headquarters. The agency has stated: “Since approval under section 204(l) is a matter of agency discretion, enactment of section 204(l) does not supersede this long-standing regulation.” But it is unclear after enactment of §204(l) whether the agency can exercise this discretionary authority to revoke based solely on the petitioner’s death, absent a separate finding that approval is not in the public interest.

**Inadmissibility and Waivers**

Section 204(l) does not allow a surviving family member to apply for adjustment of status if he or she is not otherwise eligible. Nor does it require approval of a petition or application if the officer believes the beneficiary/applicant is ineligible. For example, the officer might determine that there was no good-faith marriage in a marriage-based case. Also, if the principal beneficiary dies in a family-based case, the petitioner has the right to withdraw the petition if he or she does not want the derivative beneficiaries to immigrate under the provisions of §204(l). This is because the petitioner would be financially responsible

6 INA §101(a)(33).
for these beneficiaries based on the submission of an affidavit of support. Similarly, section 204(l) does not waive or excuse the grounds of inadmissibility or removability; it simply allows the petition or application to be adjudicated notwithstanding the death of the petitioner, principal asylee or refugee, or principal T or U nonimmigrant. This means that those who must pursue consular processing after the petition is approved and the priority date becomes current may trigger the three- or ten-year bar for unlawful presence when they leave the United States. Others may be inadmissible because of fraud, smuggling, other criminal conduct, or on health-related grounds.

USCIS has interpreted the phrase “any related application” as allowing the granting of a waiver of inadmissibility, even though the qualifying relative has died and even though there is, obviously, no extreme hardship to be suffered by the decedent. Furthermore, it is not necessary for the waiver application to have been pending at the time the petitioner/qualifying relative died. If the beneficiary meets the residence requirements of §204(l), he or she is entitled to file a waiver of inadmissibility and to have it adjudicated, notwithstanding the death of the qualifying relative. Some waivers—those for unlawful presence, fraud, or criminal conduct, for example—require the establishment of extreme hardship to a qualifying relative (e.g., U.S. citizen or LPR spouse or parent in the case of fraud or unlawful presence; spouse, parent, or child in the case of criminal conduct). USCIS will note that the qualifying relative has died and the death will be “deemed to be the functional equivalent of a finding of extreme hardship.” This does not mean that the waiver will necessarily be approved. USCIS retains the right to exercise its discretion in adjudicating waivers, even if extreme hardship is established.

- **Example:** Carlos, an LPR, filed an I-130 petition for his wife, Esperanza, on December 1, 2009. He died two months later while it was pending. Esperanza was residing in the United States at the time of his death and continues to reside here. She is entitled to have the petition adjudicated as if Carlos had not died. Assuming that it is approved, Esperanza will need to pursue consular processing, since she entered the United States without inspection. When she leaves the country for her consular interview, she will trigger the ten-year bar for unlawful presence. She will be entitled to file a waiver of inadmissibility and USCIS will presume extreme hardship to her deceased spouse.

The agency’s liberal interpretation does not extend to all situations involving the death of the petitioner or principal beneficiary. It applies only to those where the death is to a qualifying citizen or an LPR relative needed for waiver eligibility. So, for example, if the petitioner in a fourth-preference petition dies, and the alien brother or sister will trigger the unlawful presence bar upon leaving the country, he or she will still need to establish extreme hardship to a spouse or parent who is a citizen or LPR. Similarly, if the principal beneficiary dies while the petition or application is pending, the derivative family members who are eligible under §204(l) will not be able to use that death to qualify to file a waiver of inadmissibility because the principal beneficiary is not a qualifying relative.

The agency’s waiver policy applies to those who meet §204(l)’s residency requirements and had a petition or application for adjustment of status pending when the petitioner/qualifying relative died. It also applies to those who had an approved petition or application when the petitioner/qualifying relative died. This is a significant expansion. This waiver policy could apply in situations where the petitioner died after the petition was approved and before the beneficiary was eligible to apply for adjustment of status or an immigrant visa. It is helpful, therefore, to those who have to reinstate the petition through humanitarian reinstatement, as discussed below, and travel abroad to pursue consular processing.

- **Example:** Alberto, an LPR, filed an I-130 for his spouse, Pilar, in 2007. It was approved one year later. Alberto died last month. The second preference is now current. Pilar was residing in the United States when Alberto died and continues to reside here. She will pursue consular processing after she reinstates the
petition and will trigger the unlawful presence bar. She will qualify for the waiver policy, allowing her to claim Alberto as a qualifying relative, and USCIS will presume extreme hardship.

Although §204(l) does not apply directly to widow(er)s of U.S. citizens, USCIS apparently does not want to give an advantage to the other surviving family members with respect to waiver eligibility. Therefore, if a widow(er) needs to file a waiver and qualifies under the residency requirements of §204(l), and the citizen spouse died while the petition was pending (or even after it was approved), the alien spouse will be able to file the waiver notwithstanding the death of the citizen spouse/qualifying relative. Similarly, USCIS will presume extreme hardship. This represents a broad expansion of its earlier interpretation, which simply excused any unlawful presence if the citizen spouse died while the I-130 was still pending on October 28, 2009. However, it would still not benefit widow(er)s who filed an I-360 after the citizen spouse died, since there would have been no petition pending or approved at the time of the death.

- **Example:** Jack, a U.S. citizen, married Juanita in 2006. He filed an I-130 petition for her and it was approved six months later. Jack died in 2007. Pursuant to section 201(b)(2)(A)(i), Juanita can proceed as a widow, since the couple no longer had to have been married for two years. Because she has to consular process, and would trigger the ten-year bar for unlawful presence upon leaving, she had not exercised this right. Based on USCIS’s implementing memo, Juanita will be able to file a waiver of inadmissibility when she consular processes and the agency will presume extreme hardship to her deceased husband.

- **Example:** Same facts, except Jack died before filing an I-130 petition. Although Juanita can file an I-360 self-petition, she will trigger the ten-year bar upon leaving to consular process. She is not eligible to file a waiver because she does not have a qualifying relative (unless she has a U.S. citizen or LPR parent).

### Affidavit of Support

The affidavit of support requirements are not waived for family-based cases involving a deceased petitioner, though the beneficiary may submit one from a substitute sponsor. Substitute sponsors may include a close relative of the beneficiary (spouse, parent, mother-in-law, father-in-law, sibling, child at least 18 years of age, son, daughter, daughter-in-law, son-in-law, sister-in-law, brother-in-law, grandparent, or grandchild) or a legal guardian.  

They must be either a U.S. citizen or an LPR and be domiciled in the United States. If they have insufficient income to satisfy the requirement that the sponsor’s income be 125 percent of the poverty level for his or her household’s size, the sponsor may obtain a joint sponsor whose income does meet it. Beneficiaries taking advantage of §204(l) because their petitioning family member has died will have to file a substitute affidavit of support as part of the adjustment of status or consular processing procedure, unless they are exempted because they satisfy the 40-qualifying-quarters exception. Beneficiaries who cannot secure a substitute sponsor will be unable to proceed with applications for adjustment of status or for an immigrant visa. Beneficiaries taking advantage of §204(l) because the principal beneficiary has died need not obtain a substitute sponsor; those beneficiaries will proceed with an affidavit from the underlying petitioner.

### Conditional Residents

Spouses and children who obtain LPR status based on a marriage that was less than two years old at the time of immigrating become conditional residents. This triggers the obligation to remove the conditions two years after obtaining conditional LPR status. But for those whose citizen or LPR spouse dies within that two-year conditional residency period, USCIS may waive the condition based on the spouse’s death. For that reason, USCIS will not impose conditional residency on those whose I-130 petition or adjustment application was approved pursuant to §204(l) based on the death of the spouse while the petition/application was pending. Those beneficiaries will be granted LPR status without conditions.

Although the spouse of a deceased U.S. citizen cannot self-petition as a widow(er)

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7 INA §213A(f)(5)(B).
8 See 8 CFR §213a.2(a)(2)(ii)(C).
if he or she has remarried, there is no statutory prohibition against this spouse remarrying and nevertheless using §204(l) relief as a surviving relative. In other words, if he or she resided in the United States on the date of the citizen spouse's death and continued to reside here, and the citizen spouse had filed an I-130 petition, the surviving spouse should be able to proceed with a pending or approved I-130 petition even if he or she remarries. USCIS did not address this issue directly in its memo, although it did state that §204(l) will not apply to an I-130 petition filed by the widow(er) of a U.S. citizen. It also stated: “A widow(er)’s eligibility for adjustment ends if the widow(er) remarries before obtaining LPR status.” But it is not clear if that surviving spouse is precluded from seeking benefits under §204(l). We await further guidance from USCIS on this issue.

Erroneously Denied or Approved Petitions

If USCIS denied a petition or application erroneously on or after October 28, 2009, without properly considering §204(l), the agency must, on its own motion, reopen the case for a new decision in light of the new law. Similarly, where a qualifying relative died and a petition was nevertheless approved before October 28, 2009, USCIS will let the approval stand rather than seeking to rescind the approval or grant of adjustment.

Humanitarian Reinstatement

Regulations pre-existing the passage of §204(l) allowed the reinstatement of an approved family-based petition that was subsequently denied after the death of the petitioner if the beneficiary could establish humanitarian factors. USCIS has left intact prior procedures for applying for humanitarian reinstatement. In fact, in all cases where the petitioner has died after the petition was approved (assuming that he or she did not die while an application for adjustment of status was pending), humanitarian reinstatement is the only form of relief available. The agency has stated, however, that if the beneficiary qualifies under the residency requirements of §204(l), it “would generally be appropriate to reinstate” the approved petition. This is true even if the death occurred before October 28, 2009. USCIS will even entertain a new request/motion to reinstate if it had denied one that had been filed prior to October 28, 2009. Although USCIS officers retain the discretion to deny these motions to reinstate, an officer who believes the grant “would not be in the public interest” must consult headquarters before making such a determination.

Note that this regulatory provision does not help derivative beneficiaries when the principal beneficiary has died. Nevertheless, USCIS will extend the same benefits if the derivative beneficiaries satisfy the residency requirements of §204(l).

To request humanitarian reinstatement, send a written request/motion to the USCIS service center or district office that approved the petition. Surviving family members who already had applied for adjustment of status may file the request/motion with the office at which they applied for adjustment. The following documents should accompany the request/motion:

- proof of the deceased’s citizenship or LPR status;
- the death certificate;
- the petition approval notice (indicating that the approval preceded the death); and
- an affidavit of support from a substitute sponsor and proof of relationship to the beneficiary.

There is no filing fee for this request/motion. It appears at this time that beneficiaries who meet the residency requirements of §204(l) but need to reinstate the petition may file the request concurrently with their application for adjustment of status. Such a procedure, if applied nationwide, would save time and improve efficiency.

Because there is no need to establish humanitarian factors, the request does not have to include a list of compelling factors. Those would only be required in cases where the moving party has not satisfied the residency requirements of §204(l). If that is the case, the beneficiary would include a declaration and

10  The following addresses should be used if filing the motion/request to reinstate with the Nebraska, Texas, or California Service Centers:
    USCIS, Nebraska Service Center, P.O. Box 82521, Lincoln, NE 68501-2521; USCIS Texas Service Center, P.O. Box 850919, Mesquite, TX 75185-0919; USCIS, California Service Center, Attn: Humanitarian Reinstatement, P.O. Box 30111, Laguna Niguel, CA 92607-0111.
documentation showing any of the following:

- the impact of the revocation on the family unit in the United States;
- the beneficiary's advanced age;
- the beneficiary's long residence in the United States;
- the beneficiary's ties to his or her home country; and
- any delay by the government in processing the adjustment or immigrant visa application after the petition was approved.

Persons who need to include such documentation are not only beneficiaries who were residing abroad at the time of the petitioner's death, but also those who resided here on that date but subsequently left the United States. Those persons may face a considerable challenge in establishing humanitarian factors.

Persons who are using humanitarian reinstatement and do not satisfy the residency requirements of §204(l) are not eligible for the generous waiver policy available to those who do meet them.

**Child Status Protection Act**

Nothing in §204(l) or the USCIS implementing memo changes the CSPA, although the law affecting surviving family members does create various situations where the CSPA might come into play. USCIS has recently provided separate guidance on how the intersection of §204(l), humanitarian reinstatement, and the CSPA should operate.¹¹ These include situations where the beneficiary was an immediate relative or in the F-2A category or a derivative at the time the petitioner or principal beneficiary died. The questions posed include the effects of aging out before being eligible for §204(l) relief or humanitarian reinstatement and how the one-year filing requirement will be interpreted. The simplest situation is when the beneficiary is an immediate relative at the time the petition is filed. If the petitioner dies and the beneficiary turns 21, can the subsequent implementation of §204(l) allow the beneficiary to recapture that status? USCIS has answered in the affirmative, given that the CSPA is to be applied retroactively. The Board of Immigration Appeals decision in *Matter of Avila-Perez*¹² can be reduced to the axiom, “if ever an immediate relative, always an immediate relative,” provided the beneficiary does not marry.

- **Example:** An I-130 petition was filed by a U.S. citizen parent on behalf of an unmarried child under 21 in 2000. The petitioner died in 2001 while the petition was pending. The beneficiary has resided here for the past 15 years and is still unmarried, but is now 29. The beneficiary would need to file a motion to reopen the revoked petition based on §204(l). Assuming that motion is granted, he could retain the status of immediate relative.

If the beneficiary is in the F-2A category at the time the petition is filed, and was under 21 (using CSPA age) on the date the visa became available and satisfied the one-year filing requirement, he should be able to use the CSPA to preserve that F-2A status if he is also eligible for §204(l) relief.

- **Example:** An LPR parent filed an I-130 petition on behalf of an unmarried child under 21 in 2000. The priority date for F-2A became current in 2005 and the beneficiary, who was still under 21 using CSPA age, filed for adjustment of status within one year. The LPR petitioner died while the application was pending. The applicant was residing in the United States on the date the petitioner died and has resided here ever since. He is now 28 and has aged out, even using the CSPA. Pursuant to §204(l), the beneficiary may file a motion to reopen the revoked petition. Assuming that motion is granted, he could retain the status in the F-2A category, since he satisfied the CSPA requirements.

USCIS applies the same reasoning with respect to derivative beneficiaries in the family- and employment-based context. In other words, if the derivative beneficiary was under 21 (using CSPA age) on the date the petitioner’s priority date became current and satisfies the one-year filing requirement, the petitioner’s subsequent death will not prevent the child from retaining derivative status. This presumes that the derivative beneficiary is eligible for relief under §204(l).

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¹¹ This instruction is included as part of the minutes of a USCIS Stakeholders meeting that took place on June 29, 2011, in Washington, D.C. Minutes from that meeting are published on AILA InfoNet at Doc. No. 11042964 (posted June 29, 2011).

Since §204(l) also provides relief for derivative beneficiaries when the principal beneficiary dies, the CSPA can be applied in this situation as well. If a derivative beneficiary was under 21 (using CSPA age) on the date the principal’s priority date became available and had satisfied the one-year filing requirement, the derivative beneficiary can use §204(l) and continue with adjustment or immigrant visa processing after the principal beneficiary’s death.

- **Example:** A U.S. citizen parent filed an I-130 petition in the third-preference category on behalf of his married son, Arturo, in 2000. Arturo has a daughter who is a derivative beneficiary, Guadalupe. The petition was approved and the priority date became current in 2008. Both Arturo and Guadalupe (who was still under 21 using her CSPA age) filed for adjustment of status within one year. Arturo died while the applications were pending. Guadalupe is still unmarried but is now over 21 (using her CSPA age). Because of the passage and implementation of §204(l), Guadalupe can now file a motion to reopen the petition, which was revoked upon the principal’s death. Assuming that the motion is granted, she could retain derivative status in the third-preference category and continue with adjustment.

In the example above, if the derivative did not file for adjustment of status with the principal, the principal’s death would have prevented her from proceeding to immigrate. But passage and implementation of §204(l) provided new relief. In this situation, the derivative would be able to apply for the relief of humanitarian reinstatement. In this and other situations where humanitarian reinstatement is now available, how will the CSPAs one-year filing requirement be enforced? Will the one-year period start on the date the visa first became available or when the motion to reinstate is granted? Fortunately, USCIS is interpreting this liberally. The agency reasons that eligibility for §204(l) and its related humanitarian reinstatement should restore the beneficiary to a status as if the petitioner or principal beneficiary had not died. So, if the death of the principal beneficiary occurred within the one-year filing window and the derivative beneficiary was under 21 (using CSPA age) on the date the visa first became available, the subsequent approval of a request or motion for humanitarian reinstatement starts a new one-year window in which the derivative may file to immigrate. This same reasoning or policy would apply in other cases involving humanitarian reinstatement.

- **Example:** An LPR parent filed an I-130 petition on behalf of an unmarried child under 21 in 2003. The petition was approved in 2004 and the petitioner died one month later. The priority date became current in 2008. At that time, the child was under 21 using his CSPA age. He filed a request/motion to reinstate the petition, which was approved in January 2011. At that time, the child had aged out, even using CSPA age. According to USCIS, he can still be considered in the F–2A category and has one year from the date of the approval of the request/motion to reinstate within which to seek LPR status.

**Conclusion**

USCIS has finally interpreted and implemented the 2009 law protecting surviving family members whose petitioners died during various stages of the immigration process. The agency’s narrow interpretation in some areas may necessitate further advocacy and possible litigation. At the same time, USCIS has liberally interpreted other provisions, which will allow many family members to seek benefits under this law. Practitioners are advised to read the agency’s interpretation closely to see if their clients qualify for relief, either prospectively or through a motion to reinstate a previously denied petition.