



# POTENTIAL REMEDIES FOR IMMIGRANT FAMILIES AFTER LOSING A FAMILY MEMBER TO THE PANDEMIC

## *Widow(er)s of U.S. Citizens, 204(I) and Humanitarian Reinstatement*

By Peggy Gleason

### Introduction

While many people have suffered the loss of a loved one due to COVID-19, immigrants in the United States have been especially hard hit by the pandemic.<sup>1</sup> Mortality from COVID-19 meant that many immigrant families grieved over lost family members, and simultaneously were faced with the loss of an immigration benefit that may have depended on the deceased relative. This practice advisory will explore the options that may remain for a surviving relative who has lost someone to COVID-19 where an immigration benefit was also involved. The law described here pre-dates the pandemic and is not COVID-19-specific but is especially urgent now when thousands of immigrants have suffered the loss of a close family member and may face losing an immigration benefit, as well.

Immigration law impacts surviving relatives in a variety of ways. In general, for people who are immigrating through the family-based process, the regulations provide that the petition is automatically revoked if the person who submitted the family petition dies before the beneficiary's application for adjustment of status is final or before they have traveled to the United States with their approved immigrant visa.<sup>2</sup> Thus immigrant families who suffered the loss of a loved one often find themselves doubly visited by tragedy because surviving family members may also have lost the ability to immigrate through the deceased's petition. Even before the pandemic, it was not uncommon for a petitioner to die before the relative could immigrate because the waiting periods in the family preference categories are many years long, and a petitioner's health could worsen during that protracted waiting period.<sup>3</sup> With the pandemic, the possibility that this may happen to immigrant families has vastly increased.

However, this practice advisory will cover three possible remedies that allow certain beneficiaries and family members to continue to seek an immigration benefit, even after a petitioner or certain other relative has died.

The three possible remedies are:

- 1) Survivor benefits for widow(er)s of U.S. citizens (USCs) under INA § 201(b)(2)(A)(i);
- 2) Other benefits for certain surviving relatives under INA § 204(l); and
- 3) Humanitarian reinstatement of an approved I-130 petition.

These provisions can help certain family members who would otherwise lose the opportunity to apply for permanent residence because the petitioner died, or because the applicant is a derivative and the principal beneficiary died.

Each provision has distinct eligibility criteria and legal authorities. Widow(er)s of USCs are included in the statutory definition of immediate relative, and have the broadest survivor relief.<sup>4</sup> Other persons may fall under the protections at § 204(l), a separate statutory section with mandatory language about relief for eligible surviving family members, although U.S. Citizenship and Immigration Services (USCIS) may still exercise discretion in deciding whether the public interest is served in such approvals.<sup>5</sup> INA § 204(l) goes beyond coverage for principal beneficiaries of family petitions to also cover derivatives in those categories. In addition, it can cover derivatives of an I-140 employment-based petition, beneficiaries of an I-730 refugee/asylee relative petition, and derivatives in the T and U nonimmigrant categories. It also extends to derivative asylees and a derivative child of a VAWA self-petitioner.<sup>6</sup> Finally, humanitarian reinstatement is authorized only by a regulation, and is entirely discretionary.<sup>7</sup> Each of these forms of relief for surviving relatives is described below in greater detail.

## I. Widow(er)s of U.S. Citizens

### A. Who is Covered: Legal Marriage to U.S. Citizen, Not Remarried

Widow(er)s of USCs have the broadest avenue of relief should their USC spouse die. The statute allows them to remain classified as immediate relatives and to continue to be eligible to immigrate if they file an I-360 self-petition *within two years of the death of the USC*, or already have an I-130 petition that can be converted into an I-360.<sup>8</sup> They must also show a good faith marriage and demonstrate that they have not remarried; the widow(er) must remain unmarried until they receive their permanent resident status. Note that if the applicant does remarry, however, they may still be able to pursue other relief, under INA § 204(l) instead (see next section).<sup>9</sup> Although previously the law required that the marriage have lasted a minimum of two years before the USC's death in order to seek relief as the widow(er) of a USC, that requirement was removed in 2009 so now there is no set amount of time the immigrant must have been married to their USC spouse prior to the spouse's death in order to benefit from these widow(er) protections.<sup>10</sup>

In order to continue with the immigration process after a USC spouse's death under the widow(er) provisions, applicants must meet the following requirements:

- Have been legally married to a USC at the time the USC passed away (i.e., no legal separation or divorce at time of death);
- Have a pending or approved I-130 or file an I-360 within 2 years of the USC spouse's passing;
- Have not remarried;
- Establish the marriage was bona fide; and
- Be admissible (or eligible for and granted a waiver).

Depending on where they were in the immigration process when the USC spouse passed away, the noncitizen widow(er) may submit an I-360 self-petition or, if the deceased spouse had already submitted an I-130 petition on their behalf, then the widow(er) may proceed with their permanent resident application notwithstanding the spouse's death. In this situation the I-130 is converted automatically into an I-360 widow(er) self-petition, upon notification to USCIS of the USC petitioner's death and request for conversion to an I-360.<sup>11</sup> Widow(er)s apply as immediate relatives, and unlike other immediate relatives, they can include unmarried children under 21 in the application, as long as the child was under 21 when the visa petition (I-130 or I-360) was filed.<sup>12</sup>

**Example:** Orlando is a USC married to Sonia, a citizen of Mexico. Orlando and Sonia married in 2019 and Orlando filed an I-130 spouse petition on Sonia's behalf a few months later. Sonia was planning to consular process after the I-130 was approved because she entered unlawfully years ago and isn't eligible to adjust. The couple lives in Arizona where they work together in Orlando's restaurant. Orlando had to close his restaurant when the pandemic hit because his business evaporated. Arizona's stay-at-home order ended in May 2020, and a month later the couple was invited to the wedding party of some close friends. After attending the wedding party, Orlando came down with symptoms that he thought were a cold. He didn't want to go to the hospital until it became much worse. He was diagnosed with COVID when he went to the hospital, and he died there five days later.

Sonia is devastated by the loss of her spouse. She talks to the lawyer who helped the couple to file an I-130 and finds out that she can continue with her application despite her husband's death because the I-130 will be automatically converted to

an I-360 for the widow of a USC. She will submit the death certificate to USCIS and ask for the conversion.

## B. Widow(er)s of USCs and Grounds of Inadmissibility

At time of submitting the application for permanent residence, whether via adjustment of status or consular processing, widow(er)s of USCs must still prove they are admissible under all grounds of inadmissibility. However, certain relaxed requirements may apply in terms of the affidavit of support and I-212s for prior removal orders. Further, special considerations may apply in the unlawful presence waiver context.

**Affidavit of support and public charge.** USCIS does not require a Form I-864 affidavit of support for either the widow(er) or any accompanying children in order to establish they will not become a public charge under INA § 212(a)(4).<sup>13</sup> Instead, the widow(er) of the USC files Form I-864W to establish that an exemption to the affidavit of support requirement applies to them.<sup>14</sup> No substitute sponsor is needed.

**Unlawful presence.** Widow(ers) are not exempt from the bars for unlawful presence (or any other grounds of inadmissibility) and thus will be subject to the three- and ten-year bars if they accumulate sufficient time and must consular process or otherwise make a departure that triggers the unlawful presence inadmissibility grounds. This is important to be aware of, since an unlawful presence waiver requires a USC or permanent resident spouse or parent, which many widow(ers) will lack now that their USC spouse is deceased. However, sometimes the widow(er) of the USC also can qualify under INA 204(I), described below, because they were residing in the United States at the time of the spouse's death and continue to reside here. In that circumstance, the widow(er) may be able to continue with a waiver application and USCIS will consider the death of the spouse as the "functional equivalent" of the hardship to a qualifying relative that is needed for the waiver (see next section).

**Example:** Sonia in the example above needs to consular process because she entered without inspection and she is not eligible to adjust under INA § 245(i). She will need a waiver for unlawful presence as she has accrued more than one year of unlawful presence and will be triggering the inadmissibility ground at INA § 212(a)(9)(B)(i)(I)&(II) when she departs the United States to attend her consular interview. She can file an I-601A provisional unlawful presence waiver and have it granted before she leaves the United States to consular process as long as she is not otherwise inadmissible. This will help her to avoid a long wait abroad for an I-601 waiver adjudication by USCIS. She is able to file the waiver despite the fact that her only qualifying relative is no longer alive because she can also establish

coverage under INA § 204(I). Her qualifying relative for the waiver was the petitioner and extreme hardship will be presumed. (see below).

**Prior removal orders.** USCIS “should generally exercise discretion favorably” if an applicant has a prior removal order and files an I-212 for permission to reapply in advance of actually executing the order by leaving for the interview. USCIS should generally exercise discretion favorably if there are no significant adverse factors and the underlying Form I-130 has been approved as a Form I-360.<sup>15</sup>

Widow(er) benefits have the broadest coverage for surviving spouses compared to other paths covered here in that no affidavit of support or substitute sponsor is needed, no U.S. residence is required, and special considerations are given for certain grounds of inadmissibility.

### C. How to Apply for U.S. Citizen Widow(er) Benefits

Upon notification of the death of a USC petitioning spouse, USCIS will automatically convert a pending or approved Form I-130 to a Form I-360 self-petition;<sup>16</sup> the applicant does not need to re-file the petition. The date of filing is deemed to be the date that the initial I-130, if any, was filed. Otherwise, the filing of the I-360 initiates the process. Children who are unmarried and under age 21 at time of filing the I-130 or I-360 can be included.

If there was no I-130 pending at the time of death, the widow(er) can file an I-360 self-petition as an immediate relative. In this circumstance, the I-360 must be filed within two years of the USC’s death.<sup>17</sup>

Applicants cannot remarry before they adjust or receive an immigrant visa based on being the widow(er) of a USC, must show that there was a legal marriage, and that there was no divorce or legal separation at the time of the USC’s death. For widow(er)s who are eligible to adjust and did not already have a pending or approved I-130, they can file the I-360 simultaneously with an I-485 adjustment application. For widow(er)s who are outside the United States, USCIS will forward the approved I-360, or I-130 that has converted to an I-360, to the NVC so that the individual can pursue permanent residence through immigrant visa consular processing.<sup>18</sup>

If the widow(er) is adjusting, supporting documents for the widow(er)’s I-485 include:

- Two passport-style photos;
- Copy of birth certificate(s) for applicant and any accompanying children;
- Copy of passport page with admission stamp or other proof of admission or parole;

- Form I-693 Medical Exam, valid for one year, which can be presented at time of interview to avoid expiration;
- Form I-864W Request for Exemption for Intending Immigrant's Affidavit of Support;
- Copy of I-130 receipt and approval, if applicable; or Form I-360 receipt and approval; or Form I-360 with required documents, which include the death certificate and documentation to evidence a bona fide marriage, if filing concurrently with I-485.

## II. INA § 204(I)

In 2009, Congress created a broad protection for surviving relatives with the enactment of INA § 204(I).<sup>19</sup> There are no regulations on this provision, but there is a Policy Memo as well as administrative guidance in the USCIS public website and policy manual.<sup>20</sup>

### A. Who is Covered: Certain Relatives Residing in United States at Time of Death

Unlike the widow(er) protections described in the previous section that are limited to surviving spouses of USCIs, and unlike humanitarian reinstatement discussed in the next section that is limited to principal beneficiaries of approved I-130 petitions, INA § 204(I) is more expansive in terms of types of petitions covered and those who might benefit from these protections. Section 204(I) provides that the persons listed below can seek relief if they can show residence in the United States at the time of the death, and they continue to reside in the United States. Note that 204(I) provides protections not only when the petitioner dies, but also, in some cases, when the principal *beneficiary* or other principal applicant dies.

204(I) covers:

- Principal or derivative beneficiary of a pending or approved I-130 petition when petitioner died;
- Derivative beneficiary of a pending or approved I-130 petition when the principal beneficiary died;
- Derivative beneficiary of a pending or approved I-140 employment-based petition when the principal beneficiary died;
- Beneficiary of a pending or approved I-730 refugee/asylee relative petition when the petitioner died;



- Derivative of a T or U nonimmigrant visa holder, admitted as a derivative when the principal has died;
- Derivative asylee, where the principal asylee died.<sup>21</sup>
- Derivative children of a VAWA self-petitioner.<sup>22</sup>

**Example:** Julio is from Guatemala. He came to the United States with his six-year-old son Tomas in 2017. Julio was never married to Tomas' mother. Julio is undocumented and is working a poultry plant in Delaware. He married Janina, a lawful permanent resident (LPR), in 2019. Janina has several siblings also living in Delaware. Janina filed an I-130 for Julio in 2019 and it was approved. Julio's poultry plant continued to operate during the pandemic as it was deemed an essential industry by an executive order. One thousand workers are present for each of three daily shifts in the plant, and they work shoulder-to-shoulder. Most workers are immigrants, and they live in group settings with other workers. In April and May 2020, large numbers of workers began to test positive for COVID-19, including Julio. He stayed away from work for two weeks (although the company doesn't provide sick pay, he had some savings) and resumed working when he tested negative. But then Janina fell ill, and she had a much worse case of COVID-19. She went to the emergency room and died in the hospital a week later. The family was not allowed to see her in person, and they are shattered.

When he can think again about his legal situation, Julio will find that he can continue his process towards permanent residence under INA § 204(l). His son Tomas can also use 204(l) and continue to apply for permanent residence because it applies to both the principal and the derivative beneficiaries where the petitioner dies. Julio and Tomas will only be able to adjust if they were otherwise eligible under INA § 245(i) because they are applying in a preference category and have overstayed. If they aren't eligible to adjust they can consular process based on Janina's petition.

If the facts were different, and it was Julio who died, and Janina had survived, Tomas could still continue to apply for permanent residence once the priority date is current. 204(l) also applies to a derivative beneficiary where a principal beneficiary has died.

## **B. Residence Requirement for 204(l)**

The statute requires that the applicant be residing in the United States at the time of the qualifying relative's death and continue to reside in the United States.<sup>23</sup> Residence is the

applicant's "principal, actual dwelling place in fact, without regard to intent."<sup>24</sup> Residence is not the equivalent of physical presence, and it is possible to qualify while abroad if the applicant can show that they were actually residing in the United States even if briefly abroad.<sup>25</sup> While many persons seeking 204(I) may be doing so through adjustment in the United States, it is possible to use 204(I) for a surviving relative who is consular processing if that individual maintains U.S. residence while making a temporary trip abroad.

The residence requirement has been interpreted by USCIS to mean that at least one beneficiary, if there are several derivative beneficiaries, must meet the requirement of living in the United States at the time of the death, and be continuing to live in the United States when seeking relief. If one beneficiary meets the requirement, all beneficiaries may be found to meet the requirement.<sup>26</sup>

### C. 204(I) and Grounds of Inadmissibility

204(I) applicants are still subject to the grounds of inadmissibility when they submit their application for permanent residence. If they are in a category that is required to submit an affidavit of support (either Form I-864 or I-864W), as with a person applying through the family-based process, they still will need to do so despite the death of the original petitioner but can instead submit an affidavit of support by a substitute sponsor. A substitute sponsor must be a USC or LPR, at least 18 years old, and the spouse, parent, mother-in-law, father-in-law, sibling, child (at least 18 years old), son, daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent, grandchild, or legal guardian of the applicant.<sup>27</sup>

For waivers of grounds of inadmissibility where the statute requires a showing of extreme hardship to a qualifying relative, USCIS will deem the death of a qualifying relative as the "functional equivalent" of a finding of extreme hardship.<sup>28</sup> In other words, USCIS will assume that the death of the qualifying relative constitutes extreme hardship for purposes of the waiver, although the waiver applicant will still need to establish they warrant the favorable exercise of discretion. In addition, the waiver applicant must have a qualifying relative that was already a citizen or permanent resident at the time of the death to be eligible.

**Example:** Angela, an LPR, filed a petition for her wife Stephanie, who needs a waiver for unlawful presence. Angela is also Stephanie's qualifying relative for the waiver. Unfortunately, while the petition was still pending Angela passed away. Under 204(I), however, Stephanie will still be able to immigrate through the petition filed by Angela, notwithstanding Angela's death. She also will be able to submit an unlawful presence waiver even though her qualifying relative (LPR spouse Angela) is deceased because 204(I) applies to "related applications" and USCIS



will deem extreme hardship to exist as the ‘functional equivalent’ of death of the qualifying relative.<sup>29</sup>

If the person who died was the qualifying relative for the waiver (in other words, the applicant’s USC or LPR spouse or parent) but was *not* a “qualifying relative” according to 204(l), i.e. immediately before death they were the petitioner of an immediate relative petition, petitioner or principal beneficiary of a family-based petition, principal beneficiary of a widow(er)’s self-petition, etc.<sup>30</sup> then unfortunately USCIS will likely take the position that 204(l) does not apply this other person’s death to be the “functional equivalent” of a finding of extreme hardship.

**Example:** Fernando, a 21-year-old USC, filed a petition for his father Jorge. Jorge will be consular processing and needs a provisional waiver for unlawful presence. Jorge’s LPR mother (Fernando’s grandmother) Rosalia was his qualifying relative for the extreme hardship waiver. Sadly, Rosalia just passed away from COVID-19. Since Rosalia was neither the petitioner nor the principal beneficiary on Jorge’s petition, USCIS will most likely not extend 204(l) protections to the hardship waiver in this case so Jorge may now be without a qualifying relative for the waiver.

#### D. Public Interest Discretionary Standard

INA § 204(l) states that the Secretary of Homeland Security can deny a petition if the approval would not be in the “public interest.”<sup>31</sup> Given the mandatory language in the statute and this fairly generous standard, most cases should be approved. According to USCIS guidance, “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.”<sup>32</sup>

#### E. Retroactivity

INA §204(l) became law on October 28, 2009. Relief under204(l) is also available, however, for cases where the qualifying relative died prior to the date of enactment.<sup>33</sup> USCIS will allow untimely motions to reopen a petition, adjustment application, or waiver application that was denied prior to October 28, 2009 if 204(l) would now allow approval. The motion to reopen fee, or a fee waiver, must accompany such a motion, as well as supporting documentation for 204(l) eligibility.<sup>34</sup> If USCIS denies a case on or after October 28, 2009 without considering the effect of 204(l) for an eligible applicant, the agency must reopen on its own motion.<sup>35</sup>

#### F. How to Apply for 204(l)

There is no specific application form to use to apply for 204(l) relief.<sup>36</sup> Instead, to request 204(l) coverage, applicants should submit a cover letter explaining their eligibility and providing supporting documents.

The applicant should clearly distinguish a request for 204(I) relief from a request for humanitarian reinstatement (discussed in the next section), as the former has statutory authority and mandatory language, while the latter is entirely a creature of USCIS regulation and is highly discretionary. Sometimes 204(I) applications are confused with humanitarian reinstatement requests, which have very different eligibility criteria.<sup>37</sup>

Applicants and their representatives should highlight INA § 204(I) in the request, and if a petition is pending, the applicant should specifically ask that it be approved under 204(I) despite the death. If the petition was approved prior to the death, the request should specify that the petition now be approved under 204(I).

USCIS instructs applicants to include the following with a 204(I) request:

- Full name of applicant, the deceased relative, and names of any other beneficiaries;
- Any A-numbers of applicant, the deceased relative, or derivatives;
- The receipt number for the underlying petition or application and a copy of the receipt and approval notice, if any (a copy of the petition is also helpful);
- The relative's death certificate;
- Proof of residence in the United States at the time of the death by at least one beneficiary (rental leases, proof of house ownership, utility bills, school records, or pay stubs are all possible documentation);
- Form I-864 Affidavit of Support by a substitute sponsor, or an I-864W, Intending Immigrant's Affidavit of Support Exemption, if applicable.

Since 204(I) can be invoked at several different stages of the permanent residence or immigrant visa process, and it applies to several different types of applications, it can be confusing to determine where and when to file. USCIS's website has a chart which delineates several different scenarios of where to file based on the type of application underlying the 204(I) request.<sup>38</sup> Practitioners often find it preferable to present such a request with a USCIS field or district office, where delivery of documents and correspondence may sometimes be reliably accomplished in person. However, there are many scenarios where the pending application may not have arrived yet to the local USCIS field office, and in those cases, correspondence on 204(I) should be directed to the appropriate USCIS Service Center.

USCIS instructs applicants where to send the request depending on what type of application or petition it is based on and where it was processed. If an I-130, I-140, or I-730 was pending when

the relative died, the request goes to the USCIS office that was processing the case. If those petitions were already approved, but no adjustment application (I-485) has yet been filed, the request should go to the USCIS office that approved the petition. The request can also be sent in simultaneously with an I-485 if a visa is available and the applicant is ready to adjust. If the I-485 was already filed when the relative died, the request should be sent to the office handling that I-485. T and U derivatives send 204(I) requests to the appropriate Service Center. An asylee seeking adjustment who needs 204(I) coverage should send the request together with the adjustment application.<sup>39</sup>

204(I) requests are sometimes delayed or misrouted by USCIS because the agency has not devised a standardized form on which to make the request. At large volume mail rooms of USCIS Service Centers, the normal receipting and processing is for standardized forms with fees, and ordinary mail without a form and fee is difficult to route properly.<sup>40</sup> There is also no acknowledgement of receipt by USCIS as there is when a standard form is filed, making it difficult for applicants to track progress. As stated by USCIS in a liaison meeting, “Because there is no form or procedure for making a 204(I) request other than in a letter, there is no means to acknowledge receipt at the time it is submitted.”<sup>41</sup>

Applicants and their representatives should highlight “INA 204(I)” on the envelope and cover letter accompanying it and follow up through whatever customer service channels are possible if delays occur.

### III. Humanitarian Reinstatement

#### A. Who is Covered: I-130 Petitioner Dies, Beneficiary Already Has an Approved Petition

For many years, the only relief available for beneficiaries in cases where the petitioner died was a discretionary mechanism under a USCIS regulation which gives the agency discretion to decide not to revoke an approved petition upon the petitioner’s death for “humanitarian reasons.”<sup>42</sup> This limited relief can only be requested by the *principal beneficiary* of an *approved petition*, thus it is not a possible remedy for someone whose long pending petition had not yet been approved, nor can it provide a remedy for derivatives, unless USCIS approves a principal beneficiary’s request for humanitarian reinstatement, in which case eligible derivatives may also benefit. It also only applies to I-130 family petitions. USCIS treats this as an entirely discretionary request, and denials cannot be challenged by appeal.<sup>43</sup>

**Example:** William is a LPR who filed a petition for his spouse, Miriam, who lives in El Salvador with their ten-year-old son. The petition was filed and approved in 2019. William works in a meatpacking plant in Nebraska. He contracted COVID-19 in the

first months of the pandemic and died from it in August 2020. Miriam can seek discretionary humanitarian reinstatement of the petition her husband filed if it was approved by the time he died. She would need to document as many of the humanitarian factors as apply from the list below. The request is entirely within USCIS's discretion, and if it is denied there is no appeal. The derivative son would not be able to request reinstatement on his own because it does not apply to derivatives, but he can benefit if his mother's petition is reinstated. Note humanitarian reinstatement is Miriam's only option because she is ineligible for the other forms of relief for surviving relatives discussed in this advisory as she is not the widow of a USC and was residing abroad when her husband died so she cannot benefit from 204(I).

## B. How to Request Humanitarian Reinstatement

As with 204(I), there is no form or fee to request humanitarian reinstatement. USCIS directs applicants to ask for humanitarian reinstatement by submitting a written request to the office that approved the petition.<sup>44</sup> Because some USCIS offices will not entertain repeated requests for humanitarian reinstatement, it is particularly important to file the initial request with all the supporting evidence that USCIS requests. After the petitioner's death, it is a good idea to wait to file the request until the substitute sponsor's affidavit of support and the humanitarian documentation is ready, as well as the identifying information about the underlying petition and the petitioner's death certificate. The specific documents to include are described below.

Persons requesting humanitarian reinstatement are subject to the affidavit of support requirement and should include a Form I-864, Affidavit of Support from a substitute sponsor<sup>45</sup> (or an I-864W, Affidavit of Support Exemption, if applicable), since the petitioning relative has died and can no longer provide an affidavit of support. In addition, applicants should include documentation showing that they warrant a favorable exercise of discretion.<sup>46</sup>

Humanitarian reinstatement requests should also include a copy of or identifying information about the underlying petition, the receipt and approval notice, the name of applicant and the deceased petitioner, any A-numbers for applicant and the petitioner's, if any, as well as the petitioner's death certificate. According to USCIS guidance, an individual requesting humanitarian reinstatement should provide evidence of the following to support a favorable exercise of discretion:

- Impact on family living in the United States, especially those with immigration status or who are otherwise lawfully present;
- Advanced age or health concerns;

- Long residence in the United States;
- Ties or lack thereof to the applicant's home country;
- Other factors such as unusually lengthy government processing delays; and
- Any other factors that weigh in favor of reinstatement.<sup>47</sup>

In practice, the factors different USCIS offices weigh in adjudicating reinstatement can vary because the requests are solely within USCIS's discretion.<sup>48</sup>

Humanitarian reinstatement processing can be unpredictable and take a long time, due to problems arising from the lack of a standardized form and confusion on the part of both USCIS and applicants over which USCIS office has jurisdiction over a particular humanitarian request.<sup>49</sup>

Unrepresented applicants sometimes have difficulty submitting requests that USCIS deems complete and approvable, and a partially documented request may be denied, rather than receive a request for further evidence. After a denial, some USCIS offices will not permit subsequent requests for reinstatement without the filing of a motion to reopen, I-290B, with the required fee, submitted within 30 days of the USCIS decision.<sup>50</sup> Since it may take months for an applicant to gather necessary documentation of humanitarian grounds and the I-864 Affidavit of Support by a substitute sponsor, and there is no appeal from denial of humanitarian reinstatement, this means some potential applicants lose the opportunity to request reinstatement.

## IV. Conclusion

Individuals seeking to immigrate even after the death of a family member who was an integral part of their immigration case face many challenges, including navigating the various immigration laws that might apply to them after a family member's death. This has become even more important during the pandemic, when so many in the immigrant community have lost loved ones who were also central to their immigration applications. Depending on their situation, the inclusion of USC spouses and their children as "immediate relatives" after the death of the USC spouse, protections under 204(I), or humanitarian reinstatement might enable them to proceed with their case notwithstanding the relative's death. The strongest relief is the remedy for widow(er)s of USCs, but 204(I) also provides broad coverage for many surviving relatives. Humanitarian reinstatement is a limited discretionary relief but may sometimes be the only avenue that surviving relatives can pursue if they had an approved I-130 but lacked the residence requirement needed by 204(I) and/or the petitioner was not a USC spouse.

Surviving Relative Benefit	Applicable Law or Regulation	Who It Applies To	Requirements	Form
Widow(er)s of USC's	INA § 201(b)(2)(A)(i)	Spouses and children of deceased U.S. citizens	<ul style="list-style-type: none"> <li>• Bona fide marriage</li> <li>• Not re-married</li> <li>• If no petition filed yet, must file within 2 years of USC's death</li> <li>• File I-864W Exemption</li> </ul>	<ul style="list-style-type: none"> <li>• If I-130 already filed, none</li> <li>• If no petition yet, file I-360</li> </ul>
204(l)	INA § 204(l)	<ul style="list-style-type: none"> <li>• Beneficiary and derivatives of a pending or approved I-130 petition if petitioner or principal beneficiary died;</li> <li>• Derivative beneficiary of a pending or approved I-140 beneficiary if principal beneficiary died;</li> <li>• Beneficiary of a pending or approved I-730 if petitioner died;</li> <li>• Individual admitted as a derivative U or T grantee if principal died</li> <li>• Derivative asylee where principal has died</li> <li>• Child of a VAWA self-petitioner</li> </ul>	<ul style="list-style-type: none"> <li>• Must be residing in U.S. at time of death</li> <li>• Continue residing in U.S.</li> <li>• If subject to affidavit of support requirement, need substitute sponsor</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
Humanitarian reinstatement	8 CFR § 205.1(a)(3)(i)(C)(2)		<ul style="list-style-type: none"> <li>• I-130 must already be approved</li> <li>• Only principal beneficiary can request although if granted, can include derivatives</li> <li>• If subject to affidavit of support requirement, need substitute sponsor</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>



## End Notes

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<sup>1</sup> See, e.g., University of California San Francisco, *Excess Mortality among Latino People in California during the COVID-19 Pandemic* (July 2, 2021) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8283318/>. This study of death certificates in California from March 2020–October 2020 found a 31% increase in deaths in the Latino population during the pandemic. The excess death rates were greatest for persons born in Mexico or Central America who were working in agriculture or manufacturing. Rates were magnified among working-age Latinos in essential occupations. One study found that because foreign-born immigrants are so heavily represented in frontline essential industries they face a 50 percent greater risk of contracting COVID-19 than U.S-born persons. Fwd.us, *Immigrant Essential Workers are Crucial to America’s COVID-19 Recovery* (Dec. 16, 2020), <https://www.fwd.us/wp-content/uploads/2020/12/FWD-essential-worker-report-FINAL-WEB.pdf>.

<sup>2</sup> 8 CFR § 205.1(a)(3)(i)(B) (automatic revocation and termination of immediate relative and family-based petitions upon death of the petitioner or beneficiary).

<sup>3</sup> See U.S. Department of State, *Visa Bulletin* (Aug. 2021). In some family preference categories people wait decades after submitting an I-130 family petition before they are allowed to apply for permanent residence, based on the low numbers of visas available in their category. Thus, single adult sons and daughters of lawful permanent residents from Mexico currently wait more than 20 years before they can complete the process, and siblings of U.S. citizens from any country must wait at least 14 years.

<sup>4</sup> See INA § 201(b)(2)(A)(i); 8 U.S.C. § 1151(b)(2)(A)(i).

<sup>5</sup> See INA § 204(l) (“[a noncitizen] described in paragraph (2) who resided in the United States at the time of the death of the qualifying relative and who continues to reside in the United States **shall** have such petition described in paragraph (2), or an application for adjustment of status to that of a person admitted for lawful permanent residence based upon the family relationship describe in paragraph (2), and any related applications, adjudicated notwithstanding the death of the qualifying relative, unless the Secretary of Homeland Security determines, in the unreviewable discretion of the Secretary, that approval would not be in the public interest.”) (emphasis added).

<sup>6</sup> INA § 204(l)(2).

<sup>7</sup> 8 CFR § 205.1(a)(3)(i)(C)(2).

<sup>8</sup> See INA § 201(b)(2)(A)(i) (“In the case of [a noncitizen] who was the spouse of a citizen of the United States and was not legally separated from the citizen at the time of the citizen’s death, the [noncitizen] (and each child of the [noncitizen]) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen’s death but only if the spouse files a petition under [section 204(a)(1)(A)(ii) of the INA] within 2 years after such date and only until the date the spouse remarries.”).

<sup>9</sup> If the surviving spouse resided in the United States at the time of the citizen’s death, and still resides in the United States, the spouse can pursue INA § 204(l) relief despite the remarriage. See USCIS, *Policy Memorandum: Approval of a Spousal Immediate Relative Visa Petition under Section 204(l) of the Immigration and Nationality Act after the Death of a U.S. Citizen Petitioner, Revision to Adjudicator’s Field Manual Chapter 10.21(a), (b), (c)(2) and the last paragraph of (c)(5) (AFM Update AD-15-02) to implement Williams v. DHS Secretary, 741 F.3d 1228 (11<sup>th</sup> Cir. 2014) (Nov. 18, 2015)*, [https://www.uscis.gov/sites/default/files/document/memos/2015-1118\\_Approval\\_of\\_a\\_Spousal\\_Immediate\\_Relative\\_Visa\\_Petition.pdf](https://www.uscis.gov/sites/default/files/document/memos/2015-1118_Approval_of_a_Spousal_Immediate_Relative_Visa_Petition.pdf).

<sup>10</sup> Section 568 (c)(1), Department of Homeland Security Appropriations Act, 2010, Pub.L. No.111-83, 123 Stat.2142 (2009). After years of litigation against the 2-year marriage requirement, often called the “widow penalty,” Congress acted to remove the requirement on October 28, 2009. For widow(er)s who were in the transition period and had a U.S. citizen spouse who died before October 28, 2009, the deadline to file a petition was October 28, 2011.

<sup>11</sup> See 8 CFR § 205.1(a)(3)(i)(C)(2). For persons who are consular processing, this means that no petition needs to be returned to USCIS to complete the conversion. See 9 FAM § 502.1-2(D)(a)(2).

<sup>12</sup> 8 CFR § 204.2(b)(4).

<sup>13</sup> INA § 212(a)(4)(C)(i)(I) provides an exemption from the I-864 requirement for persons who obtain status under the widow(er) clause of INA §201(a)(1)(A)(ii). These applicants are still subject to the totality of the circumstances factors test for public charge listed under INA § 212(a)(4)(B).

<sup>14</sup> See USCIS, *Policy Memorandum: Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children (REVISED)*, 10 (Dec. 2, 2009),

<https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2009/Widower120209.pdf> [hereinafter “USCIS, *Surviving Spouses of USC’s*”]; see also USCIS, “Widow(er),” <https://www.uscis.gov/green-card/green-card-eligibility/widower>.

<sup>15</sup> USCIS, *Surviving Spouses of USC’s*, at 8.

<sup>16</sup> See 8 CFR § 204.2(i)(1)(iv).

<sup>17</sup> If the widow(er) has a USC spouse who died at any time prior to October 28, 2009, they must have filed the I-360 by October 28, 2011.

<sup>18</sup> USCIS, “Widow(er),” <https://www.uscis.gov/green-card/green-card-eligibility/widower>.

<sup>19</sup> INA § 204(l), as amended by FY 2010 Department of Homeland Security Appropriations Act, Pub.L.No. 111-83 Stat.2142, §568(c)(1), (October 28, 2009).

<sup>20</sup> 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* (Dec. 16, 2010),

<https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/January/Death-of-Qualifying-Relative.pdf> [hereinafter “USCIS, 204(l) Memo”]; USCIS, “*Basic Eligibility for Section 204(l) Relief for Surviving Relatives*,” <https://www.uscis.gov/greencard/section-204l-relief-surviving-relatives>; 7 U.S.

Citizenship and Immigration Services Policy Manual (USCIS-PM) A.9.

<sup>21</sup> INA § 204(l)(2).

<sup>22</sup> INA § 204(l)(2)(F), 7 USCIS-PM A.9.

<sup>23</sup> INA § 204(l)(1).

<sup>24</sup> INA § 101(a)(33).

<sup>25</sup> USCIS, *204(l) Memo*, at 5.

<sup>26</sup> *Id.*

<sup>27</sup> See INA § 213A(f)(5)(B).

<sup>28</sup> USCIS, *204(l) Memo*, at 11; 7 USCIS-PM A.9. (“Since 204(l) affects not only the visa petition and adjustment application but also any related application, USCIS has determined that INA 204(l) provides the discretion to grant a waiver or other form of relief from inadmissibility to a qualifying applicant, even if the qualifying relationship that would have supported the waiver has ended through death. It is not necessary for the waiver or other relief application to have been pending when the qualifying relative died.”). Note that 204(l) refers to those whose deaths confer protection on certain surviving family members under 204(l) as “qualifying relatives,” but that in the waiver context the statutory family member to whom the applicant must establish extreme hardship is also referred to as a “qualifying relative.” These two uses of “qualifying relative” are distinct.

<sup>29</sup> *Id.*

<sup>30</sup> See 7 USCIS-PM A.9.A.1 for the particular categories of persons USCIS deems to be qualifying relatives for a waiver under 204(l).

<sup>31</sup> See INA § 204(l) and 7 USCIS-PM A.9.B.3

<sup>32</sup> USCIS, *204(l) Memo*, at 12 and fn.5 for the “shall” mandatory language.

<sup>33</sup> 7 USCIS-PM A.9.C.

<sup>34</sup> USCIS, *204(l) Memo*, at 13.

<sup>35</sup> USCIS, *204(l) Memo*, at 5.

<sup>36</sup> Department of Homeland Security, Citizenship and Immigration Services Ombudsman, *Improving the Adjudication of Applications and Petitions under Section 204(l) of the Immigration and Nationality Act* (Nov. 26, 2012) (reported difficulties applicants have when filing for 204(l) relief, urges development of a standardized form for the process), <https://www.dhs.gov/sites/default/files/publications/cisomb-improving-adjudication-under-ina-204l-11262012.pdf> [hereinafter “Ombudsman Recommendation 204(l)”].

<sup>37</sup> See DHS Citizenship and Immigration Services Ombudsman, *Annual Report 2013*, at p. 6, fn.30 (June 27, 2013) [hereinafter “Ombudsman Annual Report 2013”],

reporting that some USCIS adjudicators confused discretionary humanitarian reinstatement standards with 204(l) eligibility, denying cases in error,

[https://www.dhs.gov/sites/default/files/publications/cisomb/cisomb\\_2013-annual-report-to-congress.pdf](https://www.dhs.gov/sites/default/files/publications/cisomb/cisomb_2013-annual-report-to-congress.pdf).

<sup>38</sup> USCIS, *Basic Eligibility for Section 204(l) Relief for Surviving Relatives*,

<https://www.uscis.gov/greencard/section-204l-relief-surviving-relatives>.

<sup>39</sup> *Id.*

<sup>40</sup> Ombudsman Recommendation 204(l) at p. 6.

<sup>41</sup> AILA, USCIS Nebraska Service Center, *Liaison Q and As from Business Product Line Teleconference*, (Nov. 14, 2013), AILA Infonet Doc. No. 13112245.

<sup>42</sup> See 8 CFR § 205.1(a)(3)(i)(C)(2).

<sup>43</sup> USCIS, *Humanitarian Reinstatement*, <https://www.uscis.gov/green-card/green-card-eligibility/humanitarian-reinstatement>; USCIS Adjudicator’s Field Manual (AFM), Chapter 21.2(h)(2)(C).

Denial rates are high according to the few statistics that are available: for the period November 2012-May 2013, USCIS received 3,104 such requests, denied 1,101 and approved 142. 2,644 of those requests were adjudicated by USCIS California Service Center (CSC), which denied 1,101, and approved 135 requests. Ombudsman Annual Report 2013, p. 18 (June 27, 2013).

<sup>44</sup> USCIS, *Humanitarian Reinstatement*, <https://www.uscis.gov/green-card/green-card-eligibility/humanitarian-reinstatement> USCIS, AFM, Chapter 21.2(h)(2)(C).

<sup>45</sup> See 8 CFR § 213a.1 for the list of family members who may be a substitute sponsor.

<sup>46</sup> USCIS, AFM, Chapter 21.2(h)(2)(C).

<sup>47</sup> USCIS, *Humanitarian Reinstatement*, <https://www.uscis.gov/greencard/humanitarian-reinstatement>.

<sup>48</sup> Some USCIS offices will not state particular criteria for reinstatement, finding it difficult to articulate a standard because the requests are discretionary and fact specific. See Ombudsman Annual Report 2013, p.20, fn.80.

<sup>49</sup> DHS Citizenship and Immigration Services Ombudsman, *Annual Report 2014*, p. 45, (June 27, 2014) [hereinafter Ombudsman Annual Report 2014],

[https://www.dhs.gov/sites/default/files/publications/cisomb/cisomb\\_2014-annual-report-to-congress.pdf](https://www.dhs.gov/sites/default/files/publications/cisomb/cisomb_2014-annual-report-to-congress.pdf).

<sup>50</sup> *Id.* at p.45 (the USCIS California Service Center (CSC) denied humanitarian reinstatement requests deemed insufficient and would refuse to consider re-filings unless a timely motion to reopen with fee was presented).



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**About the Immigrant Legal Resource Center**

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.