



# Telecon Recap: Survivor Benefits under INA §204(l): A Conversation with USCIS

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## Overview

On October 28, 2010, Congress enacted two measures designed to provide:

1. broader self-petitioning rights for all widow(er)s of American citizens and their children; and
2. expanded survivors' rights for other immigrants, set forth in Immigration and Nationality Act (INA) §204(l).

USCIS issued guidance on [INA §204\(l\)](#) in December 2010, but very little additional public information is available.

On July 27, 2011, the Citizenship and Immigration Services Ombudsman's Office (Ombudsman's Office) hosted a public teleconference regarding Survivor Benefits under INA §204(l). Senior Advisor Margaret (Peggy) Gleason interviewed two USCIS officials, Office of Policy and Strategy, Family and Immigrant Victims Protection Division, Adjudications Officer Erica Simpson, and Michael Sheridan from the Office of Chief Counsel. This teleconference focused specifically on INA §204(l). The elimination of the two-year widow penalty was not covered in this teleconference.

Ms. Gleason provided a brief overview of section 204(l), as summarized below.

In the past, only widows and widowers of U.S. citizens could continue to seek immigration status despite the death of their petitioning spouse. INA §204(l) expands eligibility for immigration survivor benefits to other categories of relatives, as well as to T and U non-immigrants, I-730 asylum derivatives, and derivative beneficiaries in employment and family-based preferences.

Individuals seeking immigration survivor benefits under section 204(l) must have resided in the U.S. at the time of the qualifying relative's death; continue to reside in the United States at the time the immigration survivor benefits application is filed; and comply with all other residence and physical presence requirements applicable to those requesting Lawful Permanent Resident status. In certain circumstances, a survivor who would otherwise qualify under section 240(l), but for residing outside of the U.S. at the time of the qualifying relative's death, might be allowed to request "humanitarian reinstatement" under 8 C.F.R. § 205.1(a)(3)(i)(C)(2) if he/she was the beneficiary of a petition approved prior to the death of the qualifying relative. While those seeking immigration survivor benefits under section 204(l) are still required to provide an Affidavit of Support (I-864), one may be obtained from a substitute sponsor.

## Questions and Answers

### **How does an individual apply for reinstatement under section 204(l) if their petition was already approved prior to the death of their qualifying relative?**

Ms. Simpson recommended that individuals with an approved petition should seek reinstatement by writing a letter to the USCIS office that adjudicated the petition, *not* where the petition was filed. The letter should specify the applicant is seeking 204(l) reinstatement. If an applicant already filed for adjustment of status, a request for reinstatement should be sent to the same office. Ms. Simpson suggested that the applicant should also provide documentary evidence as proof of eligibility. No specific documents are required, but decisions will be based on preponderance of evidence standard.

### **What are the differences between reinstatement under INA §204(l) and humanitarian reinstatement?**

Ms. Simpson noted that humanitarian reinstatement and reinstatement under 204(l) are two different applications. Reinstatement under 204(l) is statutorily provided for qualifying applicants through a written request accompanied by documentary evidence such as a death certificate, evidence of continuous residence in the U.S., and evidence of a relationship with the qualifying relative. Humanitarian reinstatement is discretionary and available to applicants with an approved petition seeking to reinstate the petition on humanitarian grounds, regardless of proof of U.S. residence. In addition to a written request, an application for humanitarian reinstatement requires evidence supporting the humanitarian reasons for the request, and supporting discretionary factors.

**When a survivor's petition is reinstated, does it retain the priority date of the original I-130 petition?**

An applicant's reinstated petition will retain the original priority date. INA §204(l) requires USCIS to proceed with the applications as if relative hasn't died. Additionally, Mr. Sheridan shared that an applicant may file their I-485, petition to adjust status and a request for reinstatement under INA §204(l) for the underlying petition at the same time, so long as the priority date is current. There are variations in approval notices since there is no standard form for reinstatement under section 204(l). However, Ms. Simpson said that petition type will be stated on the notice as will the approval date.

**May an applicant seek section 204(l) reinstatement and simultaneously file Form I-485, Application to Register Permanent Residence or Adjust Status?**

Ms. Simpson shared that an applicant may simultaneously file [Form I-485, Application to Register Permanent Residence or Adjust Status](#) and a request for reinstatement under section 204(l), so long as the priority date is current.

**Does the Child Status Protection Act (CSPA) impact those eligible for reinstatement under section 204(l)? Specifically, does the one year in which applicants need to apply for permanent residence run from the date when the visa first became available, or from the date that the petition was reinstated?**

Ms. Sheridan explained that an individual covered by CSPA before their qualifying relative's death will still be eligible for protection. An applicant who was unable to file for permanent residence because of the death of a qualifying relative will have one year from the date of petition reinstatement to satisfy the one year requirement during which they must seek to acquire permanent residence.

**Must applicants seeking survivor benefits file an I-864, Affidavit of Support?**

A [Form I-864, Affidavit of Support](#) is required for certain applicants for permanent residence under 8 C.F.R. § 213a., and anyone who is subject to those requirements must provide an Affidavit of Support from a substitute sponsor if the qualifying relative dies. This is true even if the relative dies after submitting an Affidavit of Support. Ms. Simpson explained that individuals with 40 quarters of qualifying employment are exempt from the Affidavit of Support requirement and thus do not need to file an Affidavit of Support from a substitute sponsor. No new requirements are created by 204(l) in this regard.

Callers also had the opportunity to ask Ms. Simpson and Mr. Sheridan questions, many of which are included below.

**May an applicant file section 204(l) reinstatement and humanitarian reinstatement together? What if humanitarian reinstatement was already denied, may an applicant still seek reinstatement under section 204(l)?**

Mr. Sheridan stated that USCIS may consider both types of reinstatement simultaneously. Mr. Sheridan explained that denials of requests for reinstatements are not appealable. However, an applicant may seek reinstatement under section 204(l) after humanitarian reinstatement was denied, if the applicant is now eligible to do so based upon the expanded eligibility criteria in section 204(l).

**If an application for adjustment is pending, and the applicant is in removal proceedings, does an Immigration Judge have jurisdiction to reinstate a petition based upon section 204(l)?**

Immigration Judges do not have jurisdiction over visa petitions or their reinstatement. However, Immigration Judges are free to grant adjustment when a visa petition is approved and visa number is available.

**Is there a difference between seeking reinstatement for a pending petition versus an approved petition?**

Mr. Sheridan explained that pending and approved petitions are treated differently because USCIS has regulations that provide for revocation of an approved petition upon death of a petitioner. Approved petitions must apply for section 204(l) reinstatement to continue seeking permanent residence.

**Does death of the petitioning relative constitute "extreme hardship" for waivers of inadmissibility for survivor applicants?**

Mr. Sheridan explained that a survivor applicant may seek a waiver for any grounds of inadmissibility. USCIS provides guidance on [page 11 of their memo \(PDF, 16 pages - 102 KB\)](#); "[a]s 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." While these determinations are subject to discretion, Mr. Sheridan noted that no actual hardship to the qualifying relative needs to be shown if that individual has died.

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## The Ombudsman's Public Teleconference Series

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The Ombudsman's Office hosts public teleconferences to share information on specific topics and to hear your comments and suggestions regarding your interactions with the [U.S. Citizenship and Immigration Services \(USCIS\)](#).

### Upcoming Teleconferences

#### **Immigration Survivor Benefits under INA Section 204(l): A Conversation with USCIS**

**July 27, 2011**

**2:00 – 3:00 EDT**

The Ombudsman's Office invites you to participate in a public teleconference on "Immigration Benefits for Survivors under INA Section 204(l): A Conversation with USCIS." Congress enacted this new law on October 28, 2009 and USCIS published a final policy memo implementing the law on December 16, 2010. The Ombudsman's Office will interview USCIS officials who work on implementation of this new survivor benefits provision. We will reserve time for your questions, comments, and suggestions.

To participate, please RSVP to [cisombudsman.publicaffairs@dhs.gov](mailto:cisombudsman.publicaffairs@dhs.gov).

Participation in these teleconferences is anonymous for callers.

### Recaps from Recent Teleconferences

- [Application Processing Times: A Conversation with USCIS Office of Performance and Quality](#)
- [Export Controls Requirements on Form I-129: A Conversation with the Commerce Department](#)
- [Family-based Retrogression](#)
- [Child Status Protection Act \(CSPA\): How Is It Working For You?](#)
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