

## Improving the Adjudication of Applications and Petitions Under Section 204(l) of the Immigration And Nationality Act

November 26, 2012

When a petitioning family member dies before a relative completes immigration processing, a grieving family is left not only to accept the personal loss but also to address their undefined immigration status. For many years, some beneficiaries were left in immigration limbo upon the death of their qualifying relative. Families who had long planned to make the United States their home had few options and faced an uncertain future in the United States.

In 2009, Congress enacted section 204(l) of the Immigration and Nationality Act to protect and expand the rights of surviving beneficiaries and derivatives. This law was designed to make it easier for beneficiaries of certain approved or pending visa petitions to secure immigration benefits. Advocates working on behalf of surviving relatives welcomed this law with renewed hope for families across the country.

Three years after the enactment of section 204(l), however, families are not fully experiencing the protections afforded under the law. In fact, approved petitions preserved under section 204(l) are deemed “automatically revoked” by U.S. Citizenship and Immigration Services (USCIS). As a result, surviving beneficiaries are subject to a complicated process for reinstatement of benefits afforded under section 204(l). I believe that this process is inconsistent with the letter and the spirit of the law.

While USCIS has made great strides to make our immigration system accessible and easier to navigate, more can be done to meet the needs of relatives protected under section 204(l). The solutions formulated in this recommendation will afford a fair and consistent delivery of immigration services to qualifying surviving relatives and their families.

Sincerely,



Maria M. Odom  
Citizenship and Immigration Services Ombudsman

### RECOMMENDATIONS

The Ombudsman recommends that USCIS:

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

### REASONS FOR THE RECOMMENDATIONS

- USCIS guidance does not align with the purpose and plain language of INA section 204(l) by deeming previously approved petitions, filed on behalf of covered beneficiaries, automatically revoked and subject to discretionary reinstatement.
- Cases remain outside normal intake and receipting channels, and survivors have little idea when to expect agency action.
- Stakeholders report long processing delays, incorrect information provided by USCIS, and express frustration that their cases are afforded a low priority.



**Homeland  
Security**

## Citizenship and Immigration Services Ombudsman

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*The Citizenship and Immigration Services Ombudsman, established by the Homeland Security Act of 2002, provides independent analysis of problems encountered by individuals and employers interacting with U.S. Citizenship and Immigration Services, and proposes changes to mitigate those problems.*

### EXECUTIVE SUMMARY

This review by the Office of the Citizenship and Immigration Services Ombudsman (Ombudsman's Office) considers the U.S. Citizenship and Immigration Services (USCIS) implementation of section 204(l) of the Immigration and Nationality Act (INA). This legislation was designed to make it easier for certain beneficiaries (or "survivors") of approved or pending visa petitions to secure immigration benefits. Prior to the enactment of INA section 204(l) on October 28, 2009, only widows and widowers of U.S. citizens could continue to the permanent resident application process following the death of a qualifying relative.<sup>1</sup> Other eligible survivors were required to seek humanitarian reinstatement under 8 C.F.R. section 205.1(a)(3)(iii)(C)(2).<sup>2</sup>

Approximately 14 months after INA section 204(l) became law USCIS published a memorandum titled: "Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act."<sup>3</sup> This guidance does not align with the purpose and plain language of INA section 204(l) by deeming previously approved petitions, filed on behalf of covered beneficiaries, automatically revoked and subject to discretionary reinstatement under 8 C.F.R. section 205.1(a)(3)(iii)(C)(2).<sup>4</sup> Petitions still pending upon the

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<sup>1</sup> The Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, (2009), 123 Stat. 2142, included measures expanding the rights of survivors to obtain permanent resident status. Specifically, Title V, § 568(d) created INA § 204(l) to protect beneficiaries and derivatives in family, employment, asylum, T and U cases. *See also* § 568 (c)(1) "Relief for Surviving Spouses," which references amending INA 201(b)(2)(A)(i) by striking "for at least 2 years at the time of the citizen's death."

<sup>2</sup> 8 C.F.R. § 205.1(a)(3)(iii)(C)(2) enables USCIS in the case of immediate relative and family-sponsored petitions, other than Amerasian petitions, not to revoke the approval of a petition under INA § 204 "as a matter of discretion exercised for humanitarian reasons in light of the facts of a particular case...only if the principal beneficiary of the visa petition asks for reinstatement of the approval of the petition and establishes that a person related to the principal beneficiary in one of the ways described in section 213A(f)(5)(B) of the Act is willing and able to file an affidavit of support under 8 C.F.R. part 213a as a substitute sponsor."

<sup>3</sup> USCIS Memorandum, "Approval of Petitions and Applications After the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act;" Revisions to Adjudicator's Field Manual (AFM): New Chapter 10.21 and an Amendment to Chapter 21.2(h)(1)(c) (AFM Update AD-10-51) (Dec. 2010); <http://www.uscis.gov/USCIS/Laws/Memoranda/2011/January/Death-of-Qualifying-Relative.pdf> (accessed Sept. 10, 2012). The memo was first published on Jan. 7, 2011. Information provided to the Ombudsman's Office by USCIS in 2011 and 2012 indicates the agency has not conducted comprehensive training on the § 204(l) PM.

<sup>4</sup> It recognizes that 8 C.F.R. § 205.1(a)(3)(iii)(C)(2) does not permit reinstatement of the approval of employment-based petitions for humanitarian reasons, nor for immediate-relative or family-based petitions if the principal beneficiary, rather than the petitioner, has died. *See supra* note 3, at p. 12-13.

qualifying relative's death may be adjudicated and approved.<sup>5</sup> USCIS's bifurcated approach to implementing INA section 204(1) is significant. The former effectively terminates all action on the case until USCIS receives and grants a discretionary request for reinstatement that the survivor bears the burden of producing and documenting. The latter keeps the petition within normal processing protocols and timeframes without the need for further action from the foreign national or reinstatement by USCIS.

Processing survivor benefit requests should not depend on how or when USCIS discovers the qualifying relative as defined by INA section 204(1) has died. The statute's express purpose is to keep survivors in the same place they would have been but for the qualifying relative's death.<sup>6</sup> Its unambiguous language does not require or permit USCIS to revoke automatically immigration petitions preserved under section 204(1).

The Ombudsman's Office has found based on stakeholder feedback and investigation that no clear process is available for survivors to request benefits from USCIS under INA section 204(1). Because USCIS has neither created nor designated any standard form or instructions, requests for relief include hand-written letters with or without necessary identity, medical or other information. USCIS staff must therefore devote considerable time in order to find corresponding petitions, receipt and/or alien registration numbers, and A-files. Cases remain outside normal intake and receipting channels, and survivors have little idea when to expect agency action. This generates confusion, makes tracking survivor benefit requests difficult, and likely contributes to inconsistent adjudications. Stakeholders also report long processing delays, incorrect information provided by USCIS, and express frustration that their cases are afforded a low priority.

## RECOMMENDATIONS

To address difficulties associated with INA section 204(1) implementation, the Ombudsman's Office recommends that USCIS:

- 1) Conduct notice-and-comment rulemaking to create or designate a standard form, establish a receipt protocol and describe an adjudication process consistent with the plain language of INA section 204(1);**
- 2) Train USCIS staff to interpret and apply properly INA section 204(1) and stop regarding survivor benefit requests as a form of discretionary reinstatement;**

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<sup>5</sup> *Id.* Feedback received by the Ombudsman's Office from USCIS staff (Aug. 2012). Confusion exists regarding how to handle pending cases covered by INA § 204(1). One district acknowledged a practice of revoking all such petitions regardless of whether they were pending at the time USCIS discovered the qualifying relative's death. Thus the district approves only to revoke immediately the petitions, at which point the survivor is responsible for requesting reinstatement.

<sup>6</sup> The Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, (2009), Title V, § 568(d)(2), 123 Stat. 2142 (October 28, 2009) specifically provides: "(2) Construction. Nothing in the amendment made by paragraph (1) may be construed to limit or waive any ground of removal, basis for denial of petition or application, or other criteria for adjudicating petitions or applications as otherwise provided under the immigration laws of the United States other than ineligibility based solely on the lack of a qualifying family relationship as specifically provided by such amendment."

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

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

## METHODOLOGY

In conducting this review, the Ombudsman's Office met with USCIS managers and staff at headquarters, service center and district offices and also studied case assistance requests, as well as reported incidents and feedback from stakeholders around the country.<sup>7</sup>

## BACKGROUND

### Legal Framework

Section 204(l) of the Immigration and Nationality Act (INA) enables certain beneficiaries (or "survivors") of pending or approved petitions to seek relief notwithstanding the death of a qualifying relative.<sup>8</sup> The law specifically provides that a beneficiary:

(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 described 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>9</sup>

INA section 204(l) protects:

- Beneficiaries of a pending or approved immediate relative visa petition;
- Beneficiaries of a pending or approved family-based visa petition, including both the principal beneficiary and any derivative beneficiaries;
- Any derivative beneficiary of a pending or approved employment-based visa petition;
- Beneficiaries of a pending or approved refugee/asylee relative petition;
- Individuals admitted as derivative "T" or "U" nonimmigrants; and
- Derivative asylees.

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<sup>7</sup> Preparation for this recommendation included in-person and teleconference sessions in 2011 and 2012.

<sup>8</sup> See *supra* note 1.

<sup>9</sup> *Id.*

Before INA section 204(1), only widows and widowers of U.S. citizens could seek permanent resident status after the death of a qualifying relative. Other eligible survivors were required to seek humanitarian reinstatement under 8 C.F.R. section 205.1(a)(3)(iii)(C)(2).

Humanitarian reinstatement is discretionary. USCIS and the former Immigration and Naturalization Service have long considered it "the exception, and not the rule."<sup>10</sup> In evaluating reinstatement requests, the agency has traditionally examined:

- The impact of revocation on the family unit in the United States, especially on U.S. citizen or lawful permanent resident relatives or other relatives living lawfully in the United States;
- The beneficiary's advanced age or poor health;
- The beneficiary's having resided in the United States lawfully for a lengthy period;
- The beneficiary's ties to his or her home country; and
- Significant delay in processing the case after approval of the petition and after a visa number has become available, if the delay is reasonably attributable to the Government, rather than the alien.<sup>11</sup>

### USCIS Policy Guidance and Implementation Challenges

For approximately 14 months after the enactment of INA section 204(1), USCIS provided no formal guidance regarding its implementation. On December 16, 2010, USCIS published a memorandum titled: "Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(1) of the Immigration and Nationality Act," hereinafter "the 204(1) PM."<sup>12</sup> This guidance does not align with the purpose and plain language of INA section 204(1) by deeming previously approved petitions filed on behalf of covered beneficiaries automatically revoked and subject to discretionary reinstatement under 8 C.F.R. section 205.1(a)(3)(iii)(C)(2).<sup>13</sup>

The 204(1) PM at page 12 states:

(7) **Humanitarian Reinstatement.** Under DHS regulations at 8 C.F.R. § 205(1)(a)(3)(i)(C), approved immediate-relative and family-based petitions filed under section 204 are automatically revoked upon the death of the petitioner or the beneficiary. **Since approval under section 204(1) is a matter of agency discretion, enactment of section 204(1) does not supersede this long-standing regulation.** But 8 C.F.R. § 205(1)(a)(3)(i)(C)(2) also gives USCIS discretion to decide not to revoke the approval for "humanitarian reasons." (*Emphasis added*).

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<sup>10</sup> The Adjudicator's Field Manual (AFM) Chapter 21.2(h)(1)(C), updated through March 1, 2010.

<sup>11</sup> *Id.* updated through June 22, 2012.

<sup>12</sup> See *supra* note 2. Apart from the 204(1) PM, USCIS has indicated in information provided to the Ombudsman on November 4, 2011 that it does not intend to promulgate a regulation related to this provision.

<sup>13</sup> The 204(1) PM describes two types of reinstatement: one for individuals under 8 C.F.R. § 205.1(a)(3)(iii)(C)(2), and the other for survivors covered by INA § 204(1), but not the reinstatement regulation.

By adopting the position that what Congress guaranteed in statute – the preservation for mandatory adjudication of all petitions and related applications filed by or on behalf of covered survivors – USCIS may as a matter of discretion either permit or deny, the agency effectively invalidates INA section 204(l). In communication with the Ombudsman’s Office, USCIS maintains that INA section 204(l) does not offer any “right” or “guarantee” regarding “a survivor’s ability to immigrate.”<sup>14</sup> USCIS further interprets section 204(l) as giving the agency “unreviewable discretion to permit [a] case to go forward despite the death [of the qualifying relative].”<sup>15</sup>

The Ombudsman’s Office believes that while section 204(l) does not guarantee the survivor an ultimate approval of his or her case, it does allow qualified beneficiaries and derivatives to continue to pursue immigration benefits. The discretion afforded USCIS in the context of 204(l) is limited to determinations against public interest; it does not support automatic revocation of approved petitions meant to be preserved under the very same statute.

USCIS further interprets the absence of procedural language in INA section 204(l) as requiring application of 8 C.F.R. section 205(1)(a)(3)(i)(C) to all section 204(l) beneficiaries, which affords the existing humanitarian reinstatement regulation greater weight than the statute.<sup>16</sup> The agency simultaneously recognizes that, “the regulation does not provide for reinstatement of approval of an immediate-relative or family-based visa petition if it is the principal beneficiary, rather than the petitioner, who has died,” or cover derivative beneficiaries of a pending or approved employment-based visa petition.<sup>17</sup> In its formal response to the Ombudsman’s 2011 Annual Report to Congress, however, USCIS noted that, for non-spouse immediate relative and family preference cases, (which form only a subset of covered beneficiaries), 8 C.F.R. 205.1(a)(3)(i)(C) and section 204(l), “work well together.”<sup>18</sup>

For petitions still pending upon the qualifying relative’s death, USCIS permits adjudication and approval. The 204(l) PM states:

(3) **Action in Pending Petition Cases.** Provided the alien was residing in the United States when the qualifying relative died, and still resides in the United States, an officer now has authority to approve any immigrant visa petition or refugee/asylee relative petition that was pending when the qualifying relative died if the petition is covered by section 204(l) of the Act, provided the petition was approvable when filed and still is approvable, apart from the death of the qualifying relative. Therefore, assuming all other requirements for approval of

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<sup>14</sup> Information provided to the Ombudsman’s Office by USCIS (October 2012).

<sup>15</sup> *Id.*

<sup>16</sup> Information provided to the Ombudsman’s Office by USCIS (October 2012).

<sup>17</sup> *See supra* note 3, at pages 12 and 13. For this reason, USCIS encourages adjudicators to apply a hybrid humanitarian reinstatement standard to § 204(l) cases not within the scope of 8 C.F.R. section 205(1)(a)(3)(i)(C). The guidance at page 12 instructs: “In light of section 204(l), it would generally be appropriate to reinstate the approval of an immediate-relative or family-based petition if the alien was residing in the United States when the petitioner dies and if the alien continues to reside in the United States.” It further notes at page 13, “USCIS officers may act favorably on requests to reinstate approvals under section 205 of the Act and 8 C.F.R. part 205.”

<sup>18</sup> USCIS Response to Citizenship and Immigration Services Ombudsman’s (CISOMB) 2011 Annual Report to Congress (October 26, 2012), at page 6.

a petition are met, the death of the qualifying relative no longer requires denial of a petition in a case involving an alien who meets the requirements of new section 204(l).

Hence USCIS treats INA section 204(l) survivors differently depending upon how or when it discovers that the qualifying relative has died.<sup>19</sup> Where this discovery is made after a petition has been *approved*, the 204(l) PM deems the petition automatically revoked and subject to discretionary reinstatement under 8 C.F.R. section 205(1)(a)(3)(i)(C), even where the regulation does not permit reinstatement for certain protected survivors. For *pending* petitions, USCIS permits adjudication and approval notwithstanding the death of the qualifying relative.<sup>20</sup>

This bifurcated approach is significant. The former effectively terminates all action on the case until USCIS receives and grants a discretionary request for reinstatement that the survivor bears the burden of producing and supporting. The latter keeps the petition within normal processing protocols and timeframes, including assignment to an officer for adjudication. Regardless of how or when USCIS discovers a qualifying relative has died, the statute's express purpose is to keep survivors in the same place they would have been but for the qualifying relative's death.<sup>21</sup> Its unambiguous language does not require or permit USCIS to revoke automatically immigration petitions preserved under section 204(l).

The Ombudsman's Office has found based on stakeholder feedback and investigation that no clear process exists for survivors to request benefits from USCIS under INA section 204(l).<sup>22</sup> Because USCIS has neither created nor designated any standard form or instructions, requests for relief include hand-written letters with or without necessary identity, medical or other tracking information. USCIS staff must therefore devote considerable time in order to find corresponding

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<sup>19</sup> Information provided to the Ombudsman's Office by USCIS (Aug. 2012). The agency typically learns of a qualifying relative's death through the beneficiary or the Department of State, in particular the National Visa Center.

<sup>20</sup> One USCIS staffer pointed out that since 8 C.F.R. § 205.1(a)(3)(i)(C) requires automatic revocation as a matter of law, the act of USCIS notifying the affected individual/survivor in writing is "administrative" only. This perception creates confusion in the context of § 204(l) adjudications as some adjudicators believe petitions, whether pending or previously approved, must be revoked upon the qualifying petitioner's death. In several cases brought to the attention of the Ombudsman in 2011 and 2012, USCIS District or Service Center staff unfamiliar with the 204(l) PM denied in error petitions for eligible survivors. Motions to reopen these cases were initially rejected (sometimes repeatedly), but later received and approved by USCIS.

<sup>21</sup> See *supra* note 6.

<sup>22</sup> Stakeholders indicate that they do not know where to file requests for relief under INA § 204(l). Recognizing that USCIS often assigns, or reassigns, processing functions based on operational needs, stakeholders are uncertain whether filing a request with the service center or district office that originally accepted the petition will result in rejection, timely adjudication, or a lost submission. Information provided to the Ombudsman by stakeholders (May 17, 2011 and July 27, 2011); and see AILA Comment on USCIS Draft Memorandum: "Approval of Petitions and Applications after the Death of the Qualifying Relative; New INA Section 204(l) updates the AFM with New Chapter 20.6 and an Amendment to Chapter 21.2 (h)(a)(C)," June 1, 2010. For example, an individual was denied adjustment of status without reference to § 204(l) despite presenting evidence of eligibility. He filed a request to reopen *sua sponte*, as permitted in the 204(l) PM, which was rejected. He was then told by a representative of USCIS that the proper place to file his Notice of Appeal was with the Phoenix lockbox. Because his appeal did not include any form of payment (he submitted a Form I-912, Request for Fee Waiver, based on economic hardship), the lockbox rejected it. It took over one year, during which time the applicant risked "aging out" of his visa category, to resolve the applicant's case. In a second matter brought to the Ombudsman by a Member of Congress, beneficiaries whose I-730 Refugee/Asylee Relative Petitions were rejected by USCIS without reference to § 204(l) were reopened and approved.

petitions, receipt and/or alien registration numbers, and A-files.<sup>23</sup> Cases remain outside normal intake and receipting channels, and survivors have little idea when to expect agency action. This generates confusion, makes tracking survivor benefit cases difficult, and likely contributes to inconsistent adjudications. Stakeholders also report long processing delays, incorrect information provided by USCIS, and express frustration that their cases are afforded a low priority.<sup>24</sup>

The USCIS website serves as a major source of information for stakeholders, particularly those filing other than commonly utilized applications or petitions. Currently, USCIS does not offer clear, easily accessible information regarding immigration benefits or services under INA section 204(l). It is not surprising that many survivors, notably those seeking relief without the help of an attorney or accredited representative, experience difficulty securing decisions under INA section 204(l). Even with representation, stakeholders describe and some USCIS staff has acknowledged inconsistent practices related to these cases.<sup>25</sup>

## ANALYSIS AND RECOMMENDATIONS

To address difficulties associated with INA section 204(l) implementation, the Ombudsman's Office recommends that USCIS:

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

INA section 204(l) is a new law. USCIS has attempted to implement it by issuing an internal policy memorandum. In contrast to this approach, notice-and-comment rulemaking under the Administrative Procedures Act (APA) would enable USCIS to obtain valuable information, assess stakeholder impact, and tailor agency processes and adjudications to achieve Congress's clear intent in passing INA section 204(l).

The APA was written to bring regularity and predictability to the decisions made by federal agencies.<sup>26</sup> To ensure a basic level of public participation in the rulemaking process, agencies are required to provide adequate notice of a proposed rule followed by a meaningful opportunity for comment.<sup>27</sup> Agencies will always need to issue policy memoranda to ensure that their internal operational procedures comport with relevant federal regulations and statutes. However, policy memoranda are not subject to the more comprehensive notice-and-comment procedures specified in the APA, and are not given the same weight as regulations when courts review

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<sup>23</sup> Information provided to the Ombudsman by USCIS (Aug. 2012).

<sup>24</sup> Information provided to the Ombudsman (Jul. 2011). Stakeholders also report receiving mixed messages and misinformation when consular processing.

<sup>25</sup> One attorney representing a § 204(l) beneficiary reported initial rejection of a request for reinstatement filed with a service center. Following a referral to the USCIS National Customer Service Center (NCSC), the NCSC erroneously advised the attorney to file a new Form I-130, Petition for Alien Relative.

<sup>26</sup> 5 U.S.C. § 553.5. *See generally* Vanessa K. Burrows, Todd Garvey, Congressional Research Service, "A Brief Overview of Rulemaking and Judicial Review," (Jan. 4, 2011).

<sup>27</sup> 5 U.S.C. § 553 (b)-(c).

agency actions. As such, policy memoranda are generally not the preferred vehicles for implementing new legislation. The interests of both USCIS and the public would be better served if USCIS implemented INA section 204(l) through APA notice-and-comment rulemaking procedures.

In addition, while the 204(l) PM contains some helpful instructions,<sup>28</sup> it deems previously approved petitions filed on behalf of covered beneficiaries automatically revoked and subject to discretionary reinstatement under 8 C.F.R. section 205.1(a)(3)(iii)(C)(2). Clarifying the proper relationship between INA section 204(l) and the automatic revocation regulation should be part of any future APA notice-and-comment rulemaking. The Ombudsman's Office believes this would promote greater efficiency in the use of government resources, facilitate adjudication of survivor benefit requests under INA section 204(l), and relieve those already enduring the loss of a loved one from having to navigate unclear, redundant, and/or unnecessary processes.

By creating or designating a standard form, establishing a receipt protocol and describing an adjudication process consistent with the plain language of INA section 204(l), USCIS could facilitate better the processing of survivor benefit requests.<sup>29</sup> The adjudications operations of USCIS are directly tied to form types. Until USCIS introduces or designates a form for survivor benefit requests, qualified individuals will continue to experience uncertainty, and run the risk of having their cases overlooked, delayed, lost or mishandled.

Using a standardized form to accept and process INA section 204(l) survivor benefit requests would also help eliminate the perception that these requests are given a low priority by USCIS. Immigration databases are set up to record and track receipt of standardized forms. Customers filing a request for immigration relief typically receive a written acknowledgement with a receipt number. This number may be used to track progress related to the case/adjudication. The ability to obtain information on, and assistance with, a pending matter demonstrates to customers that their petition or application is being addressed in a timely, appropriate manner by USCIS.

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

The December 16, 2010 204(l) PM is 16 pages long and includes complicated legal concepts and analyses that should ideally be conveyed through in-depth training by subject matter experts.

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<sup>28</sup> The guidance establishes a policy for cases denied before October 28, 2009, that permits individuals to file, with the proper fee, an untimely motion to reopen a petition, adjustment application, or waiver application, "if new section 204(l) would allow approval of a still pending petition or application." It further requires that, "If a petition or application was denied on or after October 28, 2009, without considering the effect of section 204(l), and section 204(l) could have permitted approval, USCIS must, on its own motion, reopen the case for a new decision..." USCIS Memorandum, "Approval of Petitions and Applications After the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act; Revisions to Adjudicator's Field Manual (AFM): New Chapter 10.21 and an Amendment to Chapter 21.2(h)(1)(c) (AFM Update AD-10-51) (Dec. 2010), p. 3-5.

<sup>29</sup> Use of the Forms I-907, Request for Premium Processing Service, I-824, Application for Action on an Approved Application or Petition, and I-797C, Notice of Action, should be considered to identify and process § 204(l) cases. With regard to the I-797C, it was recommended that USCIS include a final paragraph on the notice advising recipients in the event of the qualifying relative's death to copy and return the form with proof of § 204(l) eligibility.

While USCIS did conduct some initial training related to release of this guidance,<sup>30</sup> many adjudicators remain unaware of its existence or unsure as to its meaning and practical effect. The experience of stakeholders further corroborates gaps in training by USCIS related to the 204(l) PM.

Targeted training should encompass criteria for determining whether someone qualifies for survivor benefits and relevant evidentiary information and standards. It should also make clear that survivor benefit requests are not subject to automatic revocation and humanitarian reinstatement under 8 C.F.R. section 205.1(a)(3)(iii)(C). Rather, INA section 204(l) provides a statutorily defined right to preservation of a petition and full and fair adjudication of related applications notwithstanding the death of the qualifying relative.

### **3. Publish instructions for applicants and petitioners explaining the nature and extent of INA section 204(l) coverage and related immigration processes.**

The only written guidance that has been published by USCIS for survivors is the 204(l) PM, which includes revisions to certain sections of the AFM. The memorandum uses complicated language not easily understood by the general public. It essentially offers the following limited instruction for individuals seeking relief under INA section 204(l):<sup>31</sup>

- Where a petition is pending, USCIS will assume the applicant wishes to continue to adjudication and that the agency has discretionary authority to approve the petition despite the death of the qualifying relative.
- Where a petition has been approved, the applicant should submit in writing to the USCIS office or service center that adjudicated the petition a request for reinstatement including a death certificate, proof of U.S. residency and documentation to support discretionary approval. In the amended AFM, USCIS also indicates the applicant must provide a copy of the original approval notice.
- T or U surviving relatives seeking adjustment should submit to USCIS proof of their continuous physical presence in the United States, their immigration status as well as that of the principal, and a death certificate for the qualifying relative. Where the principal dies prior to the survivor accruing sufficient physical presence, the survivor is instructed to file an I-539, Application to Extend/Change Nonimmigrant Status.
- For any other pending adjustment case, the applicant should submit to the USCIS office with jurisdiction over the application evidence that INA section 204(l) applies, a death certificate, evidence of the applicant's residence in the United States and admissibility. Family-based survivors must also include a properly executed Affidavit of Support.

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<sup>30</sup> Cases brought to the attention of the Ombudsman's Office indicate that some USCIS offices are applying INA § 204(l) correctly.

<sup>31</sup> See *supra*, note 23.

USCIS could help applicants and petitioners and increase its own efficiency by publishing more specific information, perhaps in the form of Frequently Asked Questions, explaining the nature and extent of INA section 204(l) coverage and related immigration processes. In posting easily accessible, clear and detailed information, USCIS would help customers avoid problems and delays associated with affirmative requests for relief.

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

USCIS has not implemented a reliable system to track survivor benefit requests.<sup>32</sup> In meetings with the Ombudsman, agency staff acknowledged, “People don’t seem to know about this provision. Where [applicants] are lucky enough to find out about it, [USCIS] works to process relief requests.”<sup>33</sup> Doing so is not easy since, “there are years and years of approved visas in the cue.”<sup>34</sup>

By tracking and monitoring the adjudication of survivor requests separately, USCIS would better understand the number and nature of such requests and training issues associated with addressing them. USCIS would also demonstrate to stakeholders that the agency was in control of the requests, able to estimate and share anticipated processing times, and affording the cases the same level of attention or priority as other immigration requests for relief.

## **CONCLUSION**

INA section 204(l) was designed to allow certain surviving beneficiaries and derivatives in family, employment, asylum, T and U cases to continue immigration benefits processing. To date, USCIS’s implementation of this important legislation has been inconsistent and guided by a memorandum at odds with the plain language of the statute. Instead of treating survivor benefit requests under INA section 204(l) as a form of discretionary reinstatement, USCIS should handle the cases in the same manner as other common immigration applications. Doing so will require new regulations, appropriate outreach, education and training, the creation or designation of a standard form and proper tracking and monitoring of these cases.

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<sup>32</sup> Information provided to the Ombudsman’s Office by USCIS (June 16, 2011). Particularly with regard to reinstatement, USCIS considers the Computer-Linked Application Information Management System (CLAIMS) unable to capture cases, and regards earlier attempts to manually track petitions for which humanitarian reinstatement was requested as “inefficient, time consuming and incomplete.”

<sup>33</sup> Information provided to the Ombudsman’s Office by USCIS (Aug. 2012).

<sup>34</sup> *Id.*