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USCIS AND THE LACK OF PROCEDURES FOR SURVIVING RELATIVE PETITIONS UNDER INA § 204(L)

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Congress passed a noble law in 2009 to protect surviving family members who were the derivatives of employment-based and other categories of petitions and applications. Specifically, the law provides that certain categories of individuals could continue to have petitions, adjustment applications and related applications adjudicated so long as they were residing (not necessarily present, but residing) in the United States at the time the qualifying relative died and continuing to reside in the United States. The statute specifically states that the named categories of individuals "*shall have*" a "*pending or approved*" petition of the type listed in subsection 2 of the statute "and any related applications adjudicated notwithstanding the death of the qualifying relative . . . ." INA § 204(*l*)(1)(emphasis added).

This blog will focus on the problems arising in the context of surviving relatives of beneficiaries of employment-based petitions who have filed adjustment applications. Given the backlogs in the EB-3 category for India for example making people wait decades before their priority dates become current, there may be more and more surviving relatives to deal with. This blog seeks to help shed some light on surviving relative cases and highlight some of the overall problems with the lack of clear guidance from USCIS on what surviving relatives should do and how their requests will be handled.

The statute is worth reviewing in its entirety to demonstrate how odd it is that USCIS treats surviving relatives differently based on whether an I-140 has been approved or remains pending:

(l) SURVIVING RELATIVE CONSIDERATION FOR CERTAIN PETITIONS AND APPLICATIONS-

(1) IN GENERAL- An alien 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 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.

(2) ALIEN DESCRIBED- An alien described in this paragraph is an alien who, immediately prior to the death of his or her qualifying relative, was–

(A) the beneficiary of a pending or approved petition for classification as an immediate relative (as described in section 201(b)(2)(A)(i));

(B) the beneficiary of a pending or approved petition for classification under section 203 (a) or (d) ;

(C) a derivative beneficiary of a pending or approved petition for classification under section 203(b) (as described in section 203(d));

(D) the beneficiary of a pending or approved refugee/asylee relative petition under section 207 or 208 ;

(E) an alien admitted in `T' nonimmigrant status as described in section 101(a)(15)(T)(ii) or in `U' nonimmigrant status as described in section 101(a)(15)(U)(ii) ; or

(F) an asylee (as described in section 208(b)(3)).

As you can see, the law helps a host of categories of individuals, but here we will use the example of families who suffered the loss of a member who had been sponsored by an employer, with the sole difference being that in one case the I-140 had been approved and in the other the I-140 remains pending. In both cases, the families have been able to file their green card applications.

Mahjouba and Karim came to the United States from Morocco, two young children in tow, when Mahjouba was sponsored by a company on an H-1B visa. After two years, the company was so impressed with her work that they

sponsored Mahjouba for an immigrant visa. The immigrant petition on Form I-140 was filed premium processing on her behalf and quickly approved. When her priority date became current, the family submitted their adjustment of status applications, along with advance parole and work authorization applications. Karim used his EAD and started working. When the family traveled, he used his advance parole.

Henri and Helene came from France when Henri was sponsored for an H-1B, and they also brought their children. After a few years of working with the company, he was sponsored for an immigrant visa. The immigrant petition on Form I-140 was filed regular processing, and remains pending along with the adjustment applications, which were filed concurrently because Henri's priority date was current at the time of filing. Helene decided to use her EAD to work and her advance parole to travel, instead of depending on her H-4, while the immigrant petition for her husband and the families' adjustment applications were pending.

Tragedy strikes both families. Mahjouba became very ill and died from a rare form of cancer. Henri was hit by a drunk driver and killed.

The families are in similar straits – the person sponsored by an employer has been killed. Their dependents are residing in the United States, grieving and wondering what will happen to us now?

It seems quite clear from the statute that Karim and his kids and Helene and her kids should be protected in the same way. So long as they meet the requirements of the law – that is, at least one member of each family was residing in the United States at the time of death and will continue to reside in the United States, their "pending or approved" petitions and adjustment of status applications should continue to be adjudicated as if the death had not occurred, unless the Secretary of Homeland Security decides that approval would not be in the public interest. Thus, they should be able to renew their EAD and AP documents, and continue to work and travel and ultimately get their green cards.

Unfortunately, because USCIS took the position in Policy Memorandum, Approval of Petitions and Applications after the Death of the Qualifying Relative , PM-602-0017 (December 16, 2010) ("Policy Memo") (and in the Adjudicator's Field Manual sections it revised pursuant to that memorandum) issued December 16, 2010, that pursuant to 8 C.F.R. § 205.1(a)(3)(iii)(B), an *approved*

I-140 is automatically revoked when the individual sponsored dies, Karim and his family will not have the same security of knowing their petitions will proceed and may be subject to a different, more intense standard, i.e. to request "humanitarian reinstatement." I say "may" be subject to the more exacting standard because the policy memorandum is not clear on the matter, and does give an adjudicating officer an "out" by stating "reinstatement is generally appropriate as a matter of discretion, if section 204(*l*) of the Act and Chapter 10.21 of the AFM would support approval of the petition if it were still pending." Policy Memo at p. 15 (and AFM 10.21(7)).

As the Citizenship and Immigration Services Ombudsman, and many others, have noted, in taking the position that an approved I-140 is automatically revoked by the death of the beneficiary, thus requiring humanitarian reinstatement, USCIS guidance "does not align with the purpose and plain language" of the statute. The bifurcated approach is unfair, unnecessary and nonsensical. Why would a pending I-140 petition be treated more favorably than an approved I-140 petition, as the approved petition has been vetted and completed and revoking it works a hardship on derivative beneficiaries that Congress intended to prevent by enacting INA § 204(*l*)? At the very least, they should be treated the same – that is what the law in fact dictates. The American Immigration Lawyers Association (AILA) made an interesting argument in comments it submitted on USCIS's draft memorandum. Specifically, AILA demonstrated that the automatic revocation provision does not apply where INA § 204(*l*) applies.

The automatic revocation regulations purport to revoke an approved petition only "upon the death of the petitioner or the beneficiary," so they can be seen as having no operation, because §204(l) preserves the petition the moment before death. Therefore, the "immediately prior to the death" language of §204(l) trumps the "upon the death" language of the regulations on automatic revocation at 8 CFR §205.1. For the §204(l) eligible beneficiary, therefore, automatic termination has no effect on the already approved petition. This holds true for all §204(l) eligible beneficiaries, including those who cannot currently avail themselves of humanitarian reinstatement

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)(1)(C)" (June 1, 2010) at p.6.

Putting aside the unfairness (if we can bring ourselves to do that), what do Karim and Helene need to do, how can they embrace the protection Congress has provided for their families? Unfortunately, as the Ombudsman determined, "no clear process is available for survivors to request benefits from USCIS under INA section 204(*l*)." *See* Ombudsman Report at p. 2.

Reviewing the policy memorandum and AFM section 10.21 gives no hint of what Helene should do. There are no instructions for individuals whose qualifying relative's petition was still pending at the time of death. Presumably it and related application will continue to be processed and the family can use and renew their EAD and AP to work and travel, respectively, without issue. Maybe. More on that aspect below.

Karim can get some direction from AFM 10.21(7). That section, as noted above, dictates that Mahjouba's I-140 petition was automatically revoked upon her death and that Karim needs to look to AFM 21.2(h)(1)(C) for guidance on reinstating Mahjouba's petition and obtaining the protection of INA § 204(*l*). Before going on to that, note that USCIS will not give effect to Mahjouba's employer's request to withdraw the I-140 approval after her death "since the employment-based petitioner no longer has any legal interest in the immigration of the principal beneficiary's widow(er) or children." AFM 10.21(c)(3).

So, what does Karim need to do? AFM 21.2(h)(1)(C) directs someone in Karim's position to "send a written request for reinstatement to the USCIS service center or field office that approved the petition except that, if the beneficiary has properly filed an application for adjustment of status with USCIS, the written request should be submitted to the USCIS office with jurisdiction over the adjustment application." This section also directs that the request must include a copy of the approval notice for the revoked petition and the death certificate of the qualifying relative.

Although it is not stated in this section, to comply with the requirements of the statute, Karim would need to include proof of his residence in the United States at the time of his wife's death and that he continues to reside in the United States. In addition, it would be prudent for him to include a copy of each family member's I-485 receipt notice, which should include each individual's alien number, all of which could assist USCIS in matching up the request to each family member's file.

Once the request is submitted, USCIS takes the position that a request like Karim's, because it involved an I-140 that was previously approved and in USCIS's view automatically revoked, is a request for *humanitarian*reinstatement, is discretionary, and may be denied "if the director decides that humanitarian reinstatement is not warranted." AFM 21.2(h)(1)(C). The section goes on to state:

While there are no other rules or precedents on how to apply this discretionary authority, reinstatement may be appropriate when revocation is not consistent with "the furtherance of justice," especially in light of the goal of family unity that is the underlying premise of our nation's immigration system. In particular, reinstatement is generally appropriate as a matter of discretion, if section 204(l) of the Act and Chapter 10.21 of this *AFM* would support approval of the petition if it were still pending.

It is unclear what guidance, given the lack of "other rules and precedents", terms like "may be appropriate" or "generally appropriate" provide to the adjudicating officer, but one would hope that given Congress's intent to protect individuals in Karim's position, and the fact that the statute clearly states it covers those with "pending or approved" petitions, that, barring other grounds of ineligibility, the I-140 should be reinstated and the adjustment applications and related applications should continue, as if his wife had not died.Presumably, Helene could submit a similar packet to ensure the protections of §204(l) are applied to her and her family. In her case, she need not request reinstatement, but presumably she too would need to provide proof of her spouse's death, and demonstrate residence in the United States at the time of his death and her intent to continue to reside in the United States. Because her husband's I-140 is still pending, the best guess is that she needs to send the information to the Service Center processing his I-140.

As pointed out above, there is no clear system in place for how USCIS handles these requests, acknowledge these requests, process these requests, or give notice to family members about these requests. Because there are no regulations, no form, and no guidelines other than what may be "appropriate", there is little a family can do but contact USCIS or perhaps even the Ombudsman's office to try to get acknowledgement that their applications are being adjudicated.

A big question arises with regard to travel. It would appear that the ability to

travel after submission of the request by someone in Helene's position might be a bit safer than someone in Karim's position, given that Henri's pending I-140 petition remains pending. But what happens if the request is still pending or is denied while the family is out of the country, using their valid advance parole documents to travel? Clearly if the request has been denied, the family should not travel and if they are outside the country they could get stranded, as this has happened to similarly situated individuals. But if the request is still pending, should Karim and his family take the risk of traveling? One would counsel probably not, because even though the advance parole document was valid when they left the country and remains, on its face, valid and no notice of its revocation has been given, CBP might not honor the documents at the border if they see that the underlying I-140, upon which all other applications depend, has been automatically revoked and not yet reinstated by USCIS.

One last diversion: what about those individuals who have an approved or pending EB-3 I-140, are from countries with severely backlogged priority dates like India, and therefore have not yet been able to file an adjustment application? What does an individual in H-4 status do when his or her H-1B spouse dies? The statute clearly states that individuals in this category should be covered, *see* INA § 204(*l*)(2)(C), but for how long? It is unclear whether the "continuing to reside" requirement applies only to getting the revoked I-140 reinstated or reaffirmed, or whether the individual would have to remain, waiting decades for the priority date to become current. The Policy Memo provides little clear guidance:

Because section 204(l) of the Act does not waive the standard eligibility requirements for applying for adjustment, an alien who did not already have an adjustment application pending when the qualifying relative died may not be able to seek adjustment in every case in which a pending petition was approved, or an approved petition was reinstated, under section 204(l) of the Act. An alien whose petition has been approved or reinstated under new section 204(l) of the Act, but who is not eligible to adjust status, would not be precluded from applying for an immigrant visa at a consular post abroad.[2] The approval of a visa petition under section 204(l) of the Act does not give an alien who is not eligible for adjustment of status, and who is not in some other lawful immigration status, a right to remain in the United States while awaiting the availability of an immigrant visa.

Footnote 2 states:

The alien must have been continuing to reside in the United States in order for the petition to have been approved. Once it has been approved, however, the alien's departure to obtain a visa would not change the fact that the alien met the residence requirements when the officer adjudicated the petition.

One interpretation of this language from the Policy Memo is that the individual is only required to continue to reside in the United States until the I-140 has been reinstated or reaffirmed. The implication therefore is that the person can then leave the United States to wait for the priority date to become current and apply for an immigrant visa via consular processing, although note that the Foreign Affairs Manual has not been updated to take the provisions of INA § 204(*l*) into account. And after they have waited 20 or 30 years in India (one report has estimated that the EB-3 India wait is 70 years!), how will they get the National Visa Center to prompt their case into active status?

Since the H-4 spouse can no longer maintain status once his or her H-1B spouse has died, he or she may be able to remain in the United States for 180 days past the death of his or her spouse and take harbor in INA 245(k). Or he or she could arguably wait in the United States until 180 days after their valid I-94 expires and then leave to consular process. But given the backlogs, 180 days could never be enough time, and INA § 204(*l*) does not protect against grounds of ineligibility not related to the death of the spouse (so, INA 245(c) could make an overstay spouse ineligible to adjust and if such spouse leaves to consular process, they might trigger the 3 or 10 year bar and would need a waiver – a waiver they could only get if they had some qualifying relative, as their deceased spouse could not serve as that qualifying relative in this example because he or she was not yet a lawful permanent resident or citizen).

These individuals could try to change to another nonimmigrant status, but again the decades they might have to wait make this seem untenable – how long can one really remain a student? If they do not have the appropriate qualifications for an H-1B, or keep getting unlucky under the H-1B cap, what to do? One could perhaps try to request deferred action on humanitarian grounds given the humanitarian purpose behind INA § 204(*l*), from the Department of Homeland Security in order to avoid accruing unlawful presence while waiting for the priority date to become current to leave the country in order to consular process, but would DHS grant such a request? There is no

guidance as to that issue. Clearly, the backlog of priority dates is a missing link in the protection that INA § 204(*l*) was meant to provide.

USCIS should take up the Ombudsman's November 26, 2012 recommendations as soon as possible and conduct notice-and-comment rulemaking to create or designate a standard form, establish a receipt protocol, and an adjudication process that is in compliance with the actual statute. USCIS should stop regarding these requests as discretionary ("shall be adjudicated"), publish instructions for applicants and petitioners and track and monitor the processing of surviving relative requests. The loss of a family member is enough of a burden, USCIS should not double down on that burden by failing to institute clear procedures to give families comfort and clarity as to their ability to have their applications adjudicated, and feel safe to travel and work. Moreover, one would hope that the backlogs will be cleared up but in the interim, the problem posed by backlogs in the surviving spouse context should be taken up by USCIS or even by Congress.