



November 18, 2015

PM-602-0126

## Policy Memorandum

SUBJECT: 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)

### Purpose

The Policy Memorandum (PM) revises chapter 10.21(a), (b), (c)(2) and the last paragraph of (c)(5) of the *Adjudicator's Field Manual* (AFM) to implement the decision in *Williams v. DHS Secretary*, 741 F.3d 1228 (11<sup>th</sup> Cir. 2014) for all spousal immediate relative visa petitions under section 204(l) of the Immigration and Nationality Act (INA) after the death of a U.S. citizen petitioner, including petitions filed outside the jurisdiction of the U.S. Court of Appeals for the Eleventh Circuit (11<sup>th</sup> Circuit court). This PM partially supersedes PM-602-0017, Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act.

### Scope

Unless specifically exempted herein, this PM applies to and is binding on all U.S. Citizenship and Immigration Services (USCIS) employees.

### Authority

INA 204(l)

*Williams v. DHS Secretary*, 741 F.3d 1228 (11<sup>th</sup> Cir. 2014)

### Background

INA 204(l) gives USCIS discretion to approve, or reinstate the approval of, an immigrant visa petition despite the petitioner's death if the beneficiary resides in the United States when the petitioner dies and continues to reside here. This discretion also extends to cases in which the principal beneficiary dies, and in other cases specified in INA 204(l).

Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act, PM-602-0017, dated December 21, 2010, amended the AFM to implement INA 204(l). One provision, AFM 10.21(b), provided that INA

204(l) did not apply to a Form I-130, Petition for Alien Relative, filed by a U.S. citizen for the U.S. citizen's spouse. The basis for this conclusion was that a separate amendment to INA 201(b)(2)(A)(i) applied to the case of a spousal immediate relative petition. Under that amendment, it is no longer necessary for the U.S. citizen spouse and the foreign national spouse to have been married for at least 2 years in order for the foreign national spouse to qualify as a "widow(er)" after the death of the U.S. citizen spouse. Under Title 8, Code of Federal Regulations (8 CFR) § 204.2(i)(1)(iv), a Form I-130 in this case is automatically converted to a widow(er)'s Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant. However, the particular fact scenario presented in *Williams v. DHS Secretary*, 741 F.3d 1228 (11<sup>th</sup> Cir. 2014), was not contemplated when this 2010 policy was drafted and implemented. In *Williams*, the foreign national spouse could no longer rely on the "widow(er)" provision because she had remarried after her U.S. citizen spouse died.

In *Williams*, the plaintiff's husband filed a Form I-130 for her in 2002 but he unexpectedly died in 2003 before they had been married for 2 years and while the Form I-130 was still pending. Because she no longer qualified as an "immediate relative" of a U.S. citizen under INA 201(b)(2)(A)(i), as in effect when he died<sup>1</sup>, USCIS denied his Form I-130 and her Form I-485, Application to Register Permanent Residence or Adjust Status. However, USCIS invited her to file a Form I-360 as a widow(er) and then subsequently denied that petition since she had not been married to the U.S. citizen for 2 years before he died. *Id.* at 1230. Early in 2009, before Congress enacted the 2009 amendments, the plaintiff remarried and therefore could no longer benefit from the amendment to INA 201(b)(2)(A)(i).<sup>2</sup> Though the amendment removed the requirement that the U.S. citizen petitioner and the alien spouse must be married for 2 years, the requirement that the surviving alien spouse must not have remarried remained. See INA 201(b)(2)(A)(i).

In October 2009, after Congress enacted INA 204(l) and after the plaintiff's divorce from her second husband, she filed a motion to reopen the original Form I-130, which her deceased husband had submitted before his death, and asked USCIS to approve the petition under the new INA 204(l).<sup>3</sup> USCIS denied her motion because she had remarried after the death of her first husband, the petitioner. The district court affirmed the USCIS decision. *Williams v. DHS Secretary*, 925 F.Supp.2d 1296 (M.D. Fla. 2013). However, the 11<sup>th</sup> Circuit court reversed the district court's decision. *Williams*, 741 F.3d at 1236.

The 11<sup>th</sup> Circuit court concluded in *Williams* that USCIS could not interpret the automatic conversion provision at 8 CFR 204.2(i)(1)(iv) in such a way as to limit the plaintiff's ability to rely instead on INA 204(l). Because a U.S. citizen's Form I-130 for his or her spouse is, in fact, an immigrant relative visa petition, INA 204(l) can apply to a Form I-130 filed by a now-

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<sup>1</sup> At the time of the U.S. citizen's death, the second sentence of the "immediate relatives" definition required the foreign spouse to have been married to the U.S. citizen "for at least 2 years at the time of the U.S. citizen's death."

<sup>2</sup> The amendment to INA 201(b)(2)(A)(i) dropped the 2 year marriage requirement but retained the requirement that the surviving spouse must not have remarried.

<sup>3</sup> INA 204(l) allows for the reopening of an earlier filed I-130 beneficiary-petition denied by USCIS because of the death of the qualifying U.S. citizen relative.

deceased U.S. citizen for his or her spouse, just as it can apply to an immediate relative petition that a now-deceased U.S. citizen filed for a child or parent. According to the court, INA 204(l)(2)A is not ambiguous and “the plain meaning of the statute is clear and supports [the plaintiff’s] position.” 741 F.3d at 1234. After much analysis of the relationship between the first and second sentences of the “immediate relatives” definition in INA 201(b)(2)(A)(i), the court concluded that Congress intended with INA 204(l) that I-130 beneficiary petitions be “adjudicated notwithstanding the death of the qualifying relative” so that the surviving spouse would be in the same position she would have been but for the untimely death of her husband. The fact that the surviving spouse eventually remarries does not invalidate the first marriage or the original I-130 petition. INA 204(l).

*Williams* is binding precedent only for cases arising in the 11<sup>th</sup> Circuit Court of Appeals. However, since the court emphasized that a U.S. citizen’s Form I-130 for his or her spouse is an “immediate relative” petition, USCIS has decided to follow *Williams* in all cases in which a U.S. citizen’s surviving spouse has remarried, and not just in those cases within the jurisdiction of the 11<sup>th</sup> Circuit.

### **Policy**

USCIS officers will follow the *Williams*<sup>4</sup> decision in all cases, including those arising outside the 11<sup>th</sup> Circuit. USCIS officers will adjudicate widow(er) cases as follows:

If a U.S. citizen filed a Form I-130 for his or her spouse before the U.S. citizen died and the surviving spouse:

- *has not* remarried, the automatic conversion provision in 8 CFR 204.2(i)(1)(iv) applies and the Form I-130 is deemed to be a Form I-360. The surviving spouse can seek to immigrate as a “widow(er)” under INA 201(b)(2)(A)(i); or
- *has* remarried, the automatic conversion provision in 8 CFR 204.2(i)(1)(iv) no longer applies, and Form I-130, which was automatically converted to a Form I-360, reverts back to a Form I-130. The surviving spouse can, instead, seek relief under INA 204(l) if the surviving spouse was residing and still resides in the United States when the petitioner died.

It does not matter whether USCIS had approved the Form I-130 before the U.S. citizen died. As noted in AFM 10.21(c)(3), a pending petition may still be denied on the merits, if it would have been subject to denial if the petitioner had not died.

### **Implementation**

The AFM is updated as follows (AFM Update AD15-02):

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<sup>4</sup> *Williams v. DHS Secretary*, 741 F.3d 1228 (11<sup>th</sup> Cir. 2014).

☞ 1. AFM chapter 10.21(a), (b), (c)(2) and the last paragraph of (c)(5) are revised to read as follows:

**10.21 Approval of pending immigrant visa petitions, T or U extension applications, asylee/refugee relative petitions, or applications after death of the qualifying relative.**

(a) General. For many decades, USCIS policy interpreted the INA to mean that if the approval of an immigrant visa petition, refugee/asylee relative petition, or application for immigration benefits requires the existence of a family relationship between the alien and another individual, the death of the individual, while the case is pending, generally meant that the alien was no longer eligible for the benefit. By regulation, 8 CFR 205.1(a)(3)(iii), USCIS had discretion to allow the approval of an immediate relative and family-based petition to remain in effect, even if the petitioner died after USCIS approved the petition. INA 204(l) gives USCIS much broader discretion to permit an alien's case to be approved, even if the petitioner or principal beneficiary has died. This chapter provides guidance for exercising that discretion.

(b) Widow(er)s of U.S. Citizens. If a U.S. citizen filed a Form I-130 and this Form I-130 was approved before his or her death, then this Form I-130 is automatically converted to a widow(er)'s Form [I-360](#). See 8 CFR 204.2(i)(1)(iv). In light of the amendment to INA [201\(b\)\(2\)\(A\)\(i\)](#) by section 568(c) of Public Law [111-83](#), this conversion takes place even if the U.S. citizen and alien were married for less than 2 years when the U.S. citizen died.

There are two significant advantages available if the widow(er) of a U.S. citizen immigrates on the basis of a Form I-130 that has been converted to a Form I-360.

- First, the widow(er)'s child(ren) may accompany or follow to join the widow(er), even if the deceased petitioner never filed a petition for the child(ren). See INA 204(a)(1)(A)(ii).
- Second, while a widow(er) and his or her child(ren), when immigrating on the basis of a Form I-360, must show that they are not likely to become public charges, they are not required to submit a Form I-864, Affidavit of Support. See INA 212(a)(4)(C)(i)(I).

Note: As specified in INA 101(b), a child is an unmarried person under 21 years of age (as determined under the Child Status Protection Act, if necessary).

Widow(er)s of U.S. Citizens with K-visas. In the case of a K-1 nonimmigrant who marries the petitioner within 90 days of admission, the K-1 nonimmigrant (and any K-2 child(ren) who may be otherwise eligible) may obtain adjustment of status without the need for Form I-360, just as they would have been eligible for adjustment without Form

I-130 if the petitioner had not died. Termination of the marriage does not end the adjustment eligibility. *Matter of Sesay* 25 I&N Dec. 431 (BIA 2011). As a widow(er) and child, the K-1 and K-2 would no longer need to submit a Form I-864.

If an alien was admitted as a K-3 or K-4 nonimmigrant, the Form I-130 filed for the K-3 is converted to a Form I-360 upon the U.S. citizen petitioner's death. The K-4 can then "accompany or follow to join" the K-3 based on that Form I-360.

Remarried Widow(er)s of U.S. Citizens. A widow(er)'s eligibility for adjustment as a *widow(er)* ends if the widow(er) remarries before obtaining lawful permanent resident (LPR) status. The U.S. Court of Appeals for the Eleventh Circuit (11th Circuit court) has held, however, that 8 CFR 204.2(i)(iv) cannot properly be applied to prevent the alien from seeking relief under INA 204(l). *Williams v. DHS Secretary*, 741 F.3d 1228 (11<sup>th</sup> Cir. 2014). USCIS has decided to follow *Williams* even for cases arising outside the 11<sup>th</sup> Circuit.

For this reason, if the widow(er) of a U.S. citizen no longer qualifies as an immediate relative *under the second sentence in INA 201(b)(2)(A)(i)*, the widow(er) can still seek relief under INA 204(l). For example, the widow(er)'s remarriage would prevent the widow(er) from qualifying under the second sentence of 201(b)(2)(A)(i), but USCIS would still have discretion to approve the Form I-130 (or to reinstate a prior approval) under INA 204(l), notwithstanding the widow(er)'s remarriage.

The two specific advantages to the widow(er) of filing a Form I-360 are not available to him or her if the alien widow(er) no longer qualifies under the second sentence of INA 201(b)(2)(A)(i) and instead seeks relief under INA 204(l). If the U.S. citizen spouse had not filed petitions for the alien spouse's child(ren), the child(ren) cannot "accompany or follow to join" the alien parent. Also, the widow(er) will need to submit a Form I-864 from a substitute sponsor, unless 8 CFR 213a.2 exempts the widow(er) from this requirement. See INA 213A(f)(5)(B); *cf.* Chapter 10.21(c)(4)(i) of this AFM.

*Williams* applies *only* to the widow(er) of a U.S. citizen (and any eligible child(ren)). The surviving spouse (widow or widower) of an LPR may seek relief only under INA 204(l) or 8 CFR 205.1(a)(3)(iii)(C).

An Approved Petition Prior to October 28, 2009. A USCIS officer may encounter a case in which a petition or application was approved before October 28, 2009, despite the death of the U.S. citizen spouse who filed the petition. The approval may have occurred because USCIS was unaware of the death. In some circuits, but not all, there were precedents from the relevant courts of appeals supporting approval of an immediate relative spousal Form I-130 after the petitioner's death. In light of those precedents, and given the intent of section 568(c) of Public Law [111-83](#), USCIS will consider the approved petition and the grant of adjustment proper, and will not seek to rescind a grant of adjustment, if the sole basis for doing so is the death of the U.S. citizen spouse and the resulting invalidity of the Form I-864 filed by the U.S. citizen spouse.

(c) Effect of INA 204(l).

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(2) Widow(er)s of U.S. Citizens. See (b) of this chapter concerning the effect of INA [204\(l\)](#) in the case of Form I-130 filed by a now-deceased U.S. citizen on behalf of his or her spouse. Please refer to Chapter [10.21\(c\)\(5\)](#) concerning the effect of section 204(l) on the widow(er)'s ability to seek a waiver of inadmissibility after the death of the U.S. citizen spouse.

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(5) Waivers and Other Related Applications.

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As noted in paragraph (b) of this chapter, a Form I-130 filed by a U.S. citizen for the U.S. citizen's spouse becomes a Form I-360 if the U.S. citizen has died. The widow(er) becomes the visa petitioner, and generally does not need to rely on INA 204(l). USCIS has determined, however, that if the widow(er) was the beneficiary of a pending or approved Form I-130 when the original petitioner died and the widow(er) meets the residence requirements in INA 204(l), then INA 204(l) preserves the widow(er)'s ability to have a waiver application approved as if the now deceased U.S. citizen had not died. If the widow(er) remarries and then requests and obtains relief under section 204(l) and *Williams v. DHS Secretary*, 741 F.3d 1228 (11<sup>th</sup> Cir. 2014), the remarried widow(er) may also rely on INA 204(l) in seeking a waiver of inadmissibility. As with any other waiver application that is covered by INA 204(l), the fact that the U.S. citizen petitioner has died will be noted in the decision and deemed to be the functional equivalent of a finding of extreme hardship. But the finding of extreme hardship merely *permits*, and never *compels*, a favorable exercise of discretion. See *Matter of Mendez-Moralez, supra*. The widow(er) must still establish that he or she merits a favorable exercise of discretion.

☞ 2. The AFM **Transmittal Memoranda** button is revised by adding a new entry, in numerical order, to read:

AD15-02 X/X/XXXX	<b>Chapter 10.21(a), (b), (c)(2) and the last paragraph of (c)(5)</b>	This Policy Memorandum (PM) revises chapter 10.21(a), (b), (c)(2) and the last paragraph of (c)(5) of the <i>Adjudicator's Field Manual</i> (AFM) to implement the decision in <i>Williams v. DHS Secretary</i> , 741 F.3d 1228 (11 <sup>th</sup> Cir. 2014) for all spousal immediate relative visa petition cases under section 204(l) of the
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	Immigration and Nationality Act (INA) after the death of a U.S. citizen petitioner.
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**Official Duties**

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

**Contact Information**

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Office of Chief Counsel and the Office of Policy and Strategy.