

HUMANITARIAN BENEFITS: IS IT MANDATORY TO HAVE AN APPROVED I-130 & WHO COULD SIGN AN AFFIDAVIT OF SUPPORT?

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Introduction

There are three different types of Humanitarian Benefits related to Form I-130, Petition for Alien Relative: Conversion of Form I-130 to Form I-360 for Surviving Spouses; Section 204(l) of the Immigration and Nationality Act (INA); and Humanitarian Reinstatement under INA Section 205 and 8 CFR 205.1(a)(3)(C)(2).

This article will focus on the Humanitarian Benefit available under Section 204(l) of the INA. Also, this article will detail who could act as a “Substitute Sponsor” when requesting Humanitarian Benefits under Section 204(l) of the INA and Humanitarian Reinstatement under INA Section 205 and 8 CFR 205.1(a)(3)(C)(2).

Humanitarian Benefit under Section 204(l) of INA

Section 568(d) of the FY 10 DFIS Appropriations Act created INA section 204(l) and was enacted on October 28, 2009. It applies to any petition adjudicated *on or after that date* - even if the case was filed before that date. While eligibility for relief under INA 204(l) is not limited to I-130 cases, this article will focus on I-130 cases.

In the context of family-based petitions, the following surviving beneficiaries are potentially eligible for benefits under INA 204(l):

- The principal beneficiary of an Immediate Relative or family-based preference visa petition; and
- The derivative beneficiary of a family-based preference visa petition.

The petition may have been pending or approved when the petitioner or principal beneficiary passed away. Further, to qualify under INA 204(l), the surviving beneficiary must:

- Have *resided*¹ in the U.S. when the qualifying relative (petitioner or principal beneficiary) died;
- Continue *residing* in the United States on the date of the decision on the pending petition or application; and
- Meet all other I-130 eligibility requirements.

If anyone derivative beneficiary meets the residence requirements, the petition can be approved/reinstated which means all of the remaining derivative beneficiaries can also benefit from approval/reinstatement under INA 204(l), even if they are not residing in the United States.

¹ Section 204(l) relief eligibility requires that someone must have “resided” in the United States; it does not require physical presence in the United States when the relative died. Residence is not interrupted by incidental travel. Events like a vacation, visiting family, or travel for work do not affect eligibility for Section 204(l) relief.

Humanitarian Reinstatement under INA Section 205 & Humanitarian Benefit under INA Section 204(l): Who Could Sign Affidavit of Support?

USCIS regulations provide that when the petitioner dies, an approved² I-130 is automatically cancelled by operation of law. *See* 8 C.F.R. § 205.1(a)(3)(i)(B). This provision was ameliorated by a regulation which allowed the I-130 petition to be reinstated for humanitarian reasons. 8 C.F.R. § 205.1(a)(3)(i)(C). However, problems began with the passage of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IRAIRA), which required a family-based petitioner to file a binding affidavit of support. INA § 212(a)(4)(C). Previously, there was no absolute requirement that the petitioner file an affidavit of support.

Thus, after IRAIRA, legacy INS took the position that the law effectively overruled the regulation allowing for humanitarian reinstatement. The government's reasoning was that a binding affidavit of support by the petitioner is required for a family-based beneficiary to receive an LPR status. A dead petitioner can't submit a binding affidavit of support. Therefore, there would be no point to granting humanitarian reinstatement of the I-130 since the beneficiary can't obtain residence due to the lack of a binding affidavit of support from the petitioner.

This problem was resolved by the enactment of Family Sponsor Immigration Act, Public Law 107-150, 116 Stat. 74 on March 13, 2002. This legislation allows for an affidavit of support by a Substitute Sponsor if original sponsor has died and the Attorney General has granted humanitarian reinstatement. A substitute sponsor must be either a citizen or national, or else an alien lawfully admitted for permanent residence. The substitute sponsor must also be at least 18 years of age, and must have a domicile in the United States. If USCIS allows the approval of the visa petition to stand, then the sponsored alien's spouse, parent, mother-in-law, father-in-law, sibling, child (if at least 18 years of age), son, daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent, grandchild, or a legal guardian may sign the affidavit of support.

Conclusion

Based on the foregoing, it is not mandatory to have an approved I-130 in order to request reinstatement of I-130s by submitting a Humanitarian Benefit application under INA Section 204(l). Even if a principal or derivative beneficiary does not have an approved I-130 that was submitted by the late petitioner, she or he could submit a Humanitarian Benefit Application provided the applicant meets all of the requirements under Section 204(l) of the INA. Additionally, before submitting a Humanitarian Reinstatement Application under INA Section 205 or Humanitarian Benefit Application under Section 204(l) it is imperative to have a Substitute Sponsor who could sign the Affidavit of Support.

² unless the principal or derivative beneficiary qualifies for the Humanitarian Benefit under INA Section 204(l).