

Reinstatement of a revoked I-130 petition

Tales from the Arena



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UNDER 8 CFR 205.1(a)(3)(i)(C), an approved Form I-130 petition for an alien relative is automatically revoked upon the death of the petitioner if the beneficiary has not obtained lawful permanent residence prior to the petitioner's death. In *Matter of Varela*, 13 I&N Dec. 453 (BIA 1970), the Board of Immigration Appeals (BIA) held that an I-130 petition could not be approved if the petitioner died while the petition was pending. We will discuss two ways of solving these problems arising from a petitioner's death.

The first remedy is to request for a humanitarian reinstatement of a revoked petition. Under 8 CFR 205.1(a)(3)(i)(C)(2), a beneficiary of an approved I-130 that has been revoked due to the death of the petitioner may make a request for reinstatement by submitting, among other things, a copy of the approval notice of the revoked I-130, the death certificate of the petitioner, and a Form I-864 affidavit of support signed by a substitute sponsor. Without an affidavit of support, the beneficiary would be inadmissible under INA 212(a)(4) as an alien likely to become a public charge. INA 213A(f)(5)(B) requires that a substitute sponsor in a request for humanitarian reinstatement must be related to the beneficiary as a: (1) spouse, (2) parent, (3) mother-in-law, (4) father-in-law, (5) sibling, (6) child, who is at least 18 years of age, (7) son, (8) daughter, (9) son-in-law, (10) daughter-in-law, (11) sister-in-law, (12) brother-in-law, (13) grandparent, or (14) grandchild. Without this relationship to the beneficiary, the substitute sponsor would not qualify even if he meets the other requirements for a sponsor.

A request for reinstatement may be granted in the discretion of USCIS. In the exercise of this

discretion, AFM 21.2(h)(1)(C) identifies factors that USCIS traditionally considers: (1) the impact of revocation on the family unit in the US, especially on US citizen (USC) or lawful permanent resident (LPR) relatives or other relatives living lawfully in the US; (2) the beneficiary's advanced age or poor health; (3) the beneficiary's having resided in the US lawfully for a lengthy period; (4) the beneficiary's ties to his or her home country; and (5) 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. However, unlike in certain applications for waiver of inadmissibility, a request for reinstatement does not strictly require the beneficiary to show extreme hardship on US relatives.

A second remedy for a revoked petition is described under INA 204(l), which covers beneficiaries of immediate relative or family-based preference petitions, among others. INA 204(l) states that these covered beneficiaries, who resided in the US at the time of the death of their qualifying relatives and who continue to reside in the US, shall have their petitions, adjustment of status applications and other related applications adjudicated notwithstanding the death of their qualifying relatives, unless USCIS determines that approval would not be in the public interest. INA 204(l) is broader than humanitarian reinstatement under 8 CFR 205.1(a)(3)(i)(C)(2) because INA 204(l) applies to approved petitions that have been revoked and to pending petitions that were denied upon the death of the petitioner while humanitarian reinstatement applies only to approved petitions. However, like humanitarian reinstatement, a request for INA 204(l) relief requires an affidavit of support from a substitute sponsor described under INA 213A(f)(5)(B).

Like a request for humanitarian reinstatement,

there is no particular form or filing fee for applying for INA 204(l) relief. However, if the petition or application was denied before the effective date of INA 204(l) on October 28, 2009, AFM 10.21(c)(8)(i) allows a beneficiary to file an untimely motion to reopen the petition, adjustment application, or waiver application that was denied. This motion to reopen requires a standard form and filing fee.

AFM 10.21(c)(6) explains that when USCIS exercises its discretion under INA 204(l), the overriding issue is simply whether the beneficiary qualifies for the requested visa classification. Inadmissibility is not a basis for denial of a visa petition. Thus, an INA 204(l) request may be denied on the ground that it is not in the public interest only on the basis of truly compelling discretionary factors.

Lastly, INA 204(l) also authorizes the adjudication of an application for waiver of inadmissibility that may be necessary in the course of adjudicating an adjustment application. Some waivers require an applicant to show extreme hardship on qualifying relatives. If the qualifying relative is also the deceased petitioner, then this would present an insurmountable problem for the beneficiary. Thus, INA 204(l), as implemented under AFM 10.21(c)(5), treats the death of the qualifying relative as the equivalent of a finding of extreme hardship if the hardship asserted by the beneficiary would have been suffered by the qualifying relative were he or she still alive. Extreme hardship though is just one of several factors weighed when deciding a waiver. It is the task of the beneficiary to show more positive factors to merit the approval of the waiver.

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