



U.S. Citizenship
and Immigration
Services

HQPRM 70/6.1.1P

Interoffice Memorandum

To: SERVICE CENTER DIRECTORS
REGIONAL DIRECTORS
DISTRICT DIRECTORS
OFFICERS-IN-CHARGE

From: Michael Aytes /s/
Acting Director, Domestic Operations

Date: April 3, 2006

Re: Amended Guidance pertaining to Posthumous Immigration Benefits under Section 1703 of Public Law 108-136, National Defense Authorization Act for Fiscal Year 2004 (AFM Update AD05-34)

1. Purpose

On January 24, 2004, the USCIS issued implementing instructions for posthumous immigration benefits provided by Title XVII of Public Law 108-136, 'National Defense Authorization Act for Fiscal Year 2004'." This memorandum incorporates a portion of guidance of the January 24, 2004, memorandum into the *Adjudicator's Field Manual (AFM)*, provides revised instructions on the processing of Forms I-360 and I-485 filed for the purpose of seeking posthumous immigration benefits, and provides guidance on how to interpret the statutory requirement "died as a result of injury or disease incurred in or aggravated by combat," as found in Section 1703, Title XVII of Public Law 108-136. USCIS field offices are directed to comply with this guidance.

2. Background

A. Section 1703 of Public Law 108-136

Section 1703 of Public Law 108-136 provides immigration benefits under certain conditions for a surviving spouse, child, or parent of a United States citizen or an alien granted posthumous citizenship under section 329A of the Immigration and Nationality Act (the Act) who:

- (1) served honorably in an active duty status in the military, air, or naval forces of the United States; and
- (2) died as a result of injury or disease incurred in or aggravated by combat.

USCIS may treat such surviving spouse, child, or parent as an immediate relative (IR) for purposes of sections 201(b)(2)(A)(i), 204(a)(1)(A)(ii), and 245 of the Act if he or she satisfies the other applicable requirements of section 1703 of Public Law 108-136 and is otherwise eligible for the immigration benefit(s) sought.

B. Policy Consideration

Since issuance of implementing instructions on January 24, 2004, USCIS field offices have requested clarification on how to interpret the statutory requirement “died as a result of injury or disease incurred in or aggravated by combat.” To create appropriate standards for the adjudication of this requirement, USCIS has examined the definition of “combat-related disability” in section 642 of Public Law 108-136, which amended 10 U.S.C 1413a(e). USCIS also has consulted the United States Department of Defense (DOD), the United States Department of Veterans Affairs (VA), and United States Coast Guard (USCG), which share responsibility for administering 10 U.S.C. 1413a(e) and making combat-related disability determinations.

C. Processing Issue

The January 24, 2004, memorandum directed the USCIS service center with jurisdiction over the applicant’s place of residence to accept only stand alone Form I-360 (Petition for Amerasian, Widow(er), or Special Immigrant) and the USCIS district office having jurisdiction over the alien’s place of residence for family-based adjustment of status applications to accept concurrently filed Forms I-360 and I-485 (Application to Register Permanent Residence or Adjust Status). Since issuance of the January 24, 2004, memorandum, USCIS has designated the California Service Center (CSC) as the service center with sole jurisdiction over such stand alone I-360s. Because the CSC also handles all the posthumous naturalization petitions (Form N-644), many family members and assisting military personnel incorrectly assumed that subsequent and corresponding Forms I-360 and I-485 should also be filed at the CSC. The CSC had been forwarding concurrently filed Forms I-360 and I-485 to the appropriate district offices. CSC had instructions to reject any incorrectly filed Forms I-360 and I-485.

3. Field Guidance

Effectively immediately, USCIS field offices will comply with the following instructions.

A. Processing Instructions for Forms I-360 and I-485

Both the CSC and the USCIS domestic district office that has jurisdiction over the alien's place of residence for family-based petitions and applications may accept a stand alone Form I-360 or a Form I-360 concurrently filed with Form I-485. This change in processing instructions will provide better customer service to affected aliens and should improve operational efficiency. See *AFM* Subchapter 21.11(d)(1) for filing instructions with USCIS overseas offices.

USCIS is amending the instructions to the Form I-360 to notify the public of the evidence that should be submitted in support of a request for posthumous benefits. In the interim, USCIS will continue its current practice of requesting the evidence noted in *AFM* Subchapter 21.11(c)(1) and (d)(3) from individuals in conjunction with adjudication of the Form I-360.

B. USCIS Interpretation of "Died as a result of...Combat"

Consistent with the statutory definition of "combat-related disability" as well as DOD and VA standards used to make combat-related disability determinations, USCIS adjudicators are directed to interpret "died as a result of injury or disease incurred in or aggravated by combat" to mean:

- (1) The death is attributable to an injury or disease for which the member was awarded the Purple Heart; or
- (2) The death resulted from an injury or disease that was incurred or aggravated:
 - (A) as a direct result of armed conflict;
 - (B) while engaged in hazardous service;
 - (C) in the performance of duty under conditions simulating war; or
 - (D) through an instrumentality of war.

4. Adjudicator's Field Manual (AFM) Update

The *Adjudicator's Field Manual (AFM)* is revised accordingly.

- ☞ 1. Subchapter 21.11 is added to Chapter 21, "Family-Based Petitions and Applications," of the *AFM*.

21.11 Petition for Spouse, Child, or Parent of Certain Deceased U.S. Armed Forces Members

(a) General Eligibility: Immediate Relative Benefits under Section 1703 of Public Law 108-136

Section 1703(a) of Public Law 108-136 provides that a surviving alien spouse, child, or parent of a U.S. citizen may be classified as an immediate relative if the U.S. citizen:

- served honorably in an active duty status in the military, air, or naval forces of the United States; and
- died as a result of injury or disease incurred in or aggravated by combat.

Similarly, sections 1703(c) and (d) of Public Law 108-136 provide that a surviving alien spouse, child, or parent of a lawful permanent resident (LPR) may be classified as an immediate relative if the LPR:

- served honorably in an active duty status in the military, air, or naval forces of the United States;
- died as a result of injury or disease incurred in or aggravated by combat; and
- has been granted posthumous citizenship under section 329A of the Act.

The adjudicator may treat such surviving alien spouse, child, or parent as an immediate relative (IR) for purposes of sections **201(b)(2)(A)(i)**, **204(a)(1)(A)(ii)**, and **245** of the Act if the surviving family member satisfies the other applicable requirements of section 1703 of Public Law 108-136 and is otherwise eligible for the immigration benefit(s) sought.

(1) Spouse, Child, or Parent of United States Citizen Member of the Armed Forces

Section 1703(a) provides that a surviving alien spouse, child, or parent of a United States citizen member of the Armed Forces can remain classified as an immediate relative under certain circumstances.

(A) Spouse or Child

(1) The alien spouse or child must file Form I-360. In cases where the qualifying U.S. citizen died on or after November 24, 2003, the alien spouse or child may file Form I-360 with fee within 2 years of the qualifying U.S. citizen's death. In cases where the qualifying U.S. citizen died on or after September 11, 1999, but prior to November 24, 2003, the alien spouse or child must have filed the Form I-360 on or before November 24, 2005.

(2) Special Consideration for the Spouse. The alien spouse must have been the spouse of the U.S. citizen at the time of the U.S. citizen's death and cannot have been legally separated from the U.S. citizen at that time. Unlike other provisions of the Act, there is no requirement that the marriage must have existed for a specific length of time. The spouse will cease to qualify as an immediate relative if he or she remarries prior to obtaining lawful permanent residence based on his or her relationship to the deceased U.S. citizen.

(3) Special Consideration for the Child. The alien child will remain classifiable as an immediate relative even if he or she marries or turns 21 years of age.

(B) Parent

(1) The alien parent must file Form I-360. In cases where the qualifying U.S. citizen died on or after November 24, 2003, the alien parent may file Form I-360 with fee within 2 years of the qualifying U.S. citizen's death. In cases where the qualifying U.S. citizen died on or after September 11, 1999, but prior to November 24, 2003, the alien parent must have filed the Form I-360 on or before November 24, 2005.

(2) Special Consideration for the Parent. The alien parent will remain classifiable as an immediate relative irrespective of the U.S. citizen's age at the time of the U.S. citizen's death. The standard requirement that a U.S. citizen must be over the age of 21 in order to petition for his or her parents does not apply.

(2) Spouse, Child, or Parent of Lawful Permanent Resident (LPR) Member of Armed Forces

Section 1703(c) and (d) of Public Law 108-136 provide that a surviving alien spouse, child, or parent of an LPR member of the armed forces may be classified as an immediate relative under certain circumstances.

(A) Spouse or Child

The alien spouse or child must either:

(1) be the beneficiary of an approved Form I-130 filed by the deceased LPR under section **203(a)(2)** of the Act as a spouse or child of a lawful permanent resident or

(2) self-petition by filing a Form I-360 to obtain an immediate relative classification within 2 years of the qualifying LPR's posthumous naturalization.

(B) Parent. The alien parent must file Form I-360 to obtain an immediate relative classification within 2 years of the deceased LPR's posthumous naturalization.

(C) Eligibility for Interim Relief and Benefits. If present in the United States, the alien spouse, child, or parent is eligible for deferred action, an Employment Authorization Document (EAD), and/or advance parole, as necessary. The office with jurisdiction over the Form I-360 may grant such benefits.

(b) USCIS Interpretation of "Died as a result of...Combat"

Consistent with the statutory definition of "combat-related disability" as well as United States Department of Defense (DOD), United States Veterans Affairs (VA), and United States Coast Guard (USCG) standards used to make combat-related disability determinations, the adjudicator is directed to interpret "died as a result of injury or disease incurred in or aggravated by combat" to mean:

- (1) The death is attributable to an injury or disease for which the member was awarded the Purple Heart; or
- (2) The death resulted from an injury or disease that was incurred or aggravated:
 - (A) as a direct result of armed conflict;
 - (B) while engaged in hazardous service;
 - (C) in the performance of duty under conditions simulating war; or
 - (D) through an instrumentality of war.

To determine if a death related to a particular incident is combat-related, the adjudicator should consult the guidelines that are currently used by DOD, as in the following:

(1) Purple Heart

"Death attributable to an injury or disease for which the service member was awarded the Purple Heart" means that the service member received a Purple Heart for such injury or disease and also died as a result of such injury or disease. Generally, the death is associated with an incident involving armed conflict.

(2)(A) Direct Result of Armed Conflict

"Death resulting from an injury or disease that was incurred or aggravated as a direct result of armed conflict" means that the service member's injury or disease was

sustained or further exacerbated in armed hostilities and such injury or disease resulted in the service member's death. Armed conflict includes war, expedition, occupation of an area or territory, battle, skirmish, raid, invasion, rebellion, insurrection, guerilla action, riot, or any other action in which service members are engaged with a hostile or belligerent nation, faction, force, or terrorists. Armed conflict may also include incidents involving a service member while interned as a prisoner of war, while detained against the service member's will in custody of a hostile or belligerent force, or while escaping or attempting to escape from such confinement, prisoner of war, or detained status. Evidence simply demonstrating that the service member's death occurring during a period of war, in an area of armed conflict, or while the service member participated in combat operations is insufficient to show that the service member's death directly resulted from armed conflict.

(2)(B) While Engaged in Hazardous Service

"Death resulting from an injury or disease that was incurred or aggravated while engaged in hazardous service" means that the service member died from an injury or disease that was the direct result of actions taken in the performance of such service. Hazardous service includes, but is not limited to, aerial flight, parachute duty, demolition duty, experimental stress duty, and diving duty. Hazardous service does not include travel to and from hazardous service duty or actions incidental to a normal duty status.

(2)(C) In the Performance of Duty Under Conditions Simulating War

"Death resulting from an injury or disease that was incurred or aggravated in the performance of duty under conditions simulating war" means that a service member's participation in a combat simulation activity caused or exacerbated an injury or disease, which resulted in the service member's death. The performance of duty under conditions simulating war includes participation in military training, such as war games, practice alerts, tactical exercises, airborne operations, leadership reaction courses, grenade and live fire weapons practice, bayonet training, hand-to-hand combat training, repelling, and negotiation of combat confidence and obstacle courses. Incurring or aggravating an injury or disease during military training without participation in combat simulation activity, however, is not considered combat-related. Consequently, the performance of duty under conditions simulating war does not include physical training activities, such as calisthenics and jogging or formation running and supervised sport activities.

(2)(D) Instrumentality of War

"Death resulting from an injury or disease that was incurred or aggravated through an instrumentality of war" means that the instrumentality of war caused the service

member's injury or disease, which resulted in the service member's death. Sustaining or aggravating an injury or disease during an actual period of war, however, is not required. An instrumentality of war is a vehicle, vessel, or device designated primarily for Military Service and intended for use in Military Service at the time the service member's injury or disease was incurred or aggravated. An instrumentality of war may also include an instrumentality that is not designated primarily for Military Service if use of, or occurrence involving, such instrumentality subjects the service member to a hazard or risk peculiar to Military Service. Therefore, a determination that a service member's death resulted from an instrumentality of war may include instances where the death occurred in any period of service as a result of such diverse causes as: wounds caused by a military weapon; accidents involving a military combat vehicle; or injury or sickness caused by fumes, gases, or explosion of military ordinance, vehicles, or material.

(c) Evaluation of Evidence Addressing "Died as a Result of...Combat"

It is the responsibility of the surviving alien spouse, child, or parent of the deceased service member to prove that the service member "died as a result of injury or disease incurred in or aggravated by combat." The adjudicator should make reasonable efforts to verify whether the service member died of a combat-related injury or disease by contacting the appropriate DOD, VA, or USCG office when necessary. The adjudicator should exercise normal judgment and discretion when reviewing evidence submitted to establish that the service member's death was combat-related and when determining whether the service member "died as a result of injury or disease incurred in or aggravated by combat."

(1) Evidence

Evidence should include, but is not limited to, the following:

- (A) The service member's death certificate, if such certificate indicates that the service member's death was attributable to a combat-related injury or disease;
- (B) Purple Heart certificate, other combat decoration, or DOD or USCG service records showing the award of a Purple Heart or combat decoration and, if available, accompanying citations explaining that the service member's death was attributable to an injury or disease for which the service member was awarded the Purple Heart or other combat decoration;
- (B) DOD or USCG forms, service records, service medical records, reports, or casualty notification telegrams indicating that the service member's death was the result of an injury or disease that qualified the service member or the service

member's family for a Combat-Related Special Compensation (CRSC) benefit or demonstrating a causal relationship between an injury or disease that resulted in the service member's death and a combat-related incident or activity;

(C) VA administrative, adjudicative, medical, or clinical records or reports showing that the service member's death was the result of an injury or disease that qualified the service member or the service member's family for a Combat-Related Special Compensation (CRSC) benefit or demonstrating a causal relationship between an injury or disease that resulted in the service member's death and a combat-related incident or activity; and/or

(D) Other credible documentation that is not issued or endorsed by DOD, VA, or USCG but sufficiently proves that the service member's death resulted from an injury or disease incurred in or aggravated by a combat-related incident or activity.

Evidence demonstrating that DOD, VA, or USCG has determined that the service member's death was combat-related or qualified for a CRSC benefit clearly meets the "died as a result of injury or disease incurred in or aggravated by combat" provision.

(2) Consultation with DOD, VA, and/or USCG

The adjudicator should consult with the appropriate office within DOD, VA, and/or USCG under the following conditions:

(A) The adjudicator cannot determine eligibility, because the submitted DOD, VA, and/or USCG-issued and endorsed documents are inconclusive.

(B) The evidence has not been issued and endorsed by DOD, VA, or USCG, and the evidence is inconsistent with the circumstances, conditions, and/or hardships of the service member's active duty status assignments and responsibilities or is otherwise unsatisfactory.

Appendix 21-4 contains a list of DOD, VA, and USCG offices that serve as points-of-contact. If more detailed information for DOD, VA, or USCG points-of-contact is needed, the adjudicator should contact the California Service Center, Posthumous Citizenship for Military Casualties and Derivative Citizenship Team, at the following email address: CSCN644.REF9@dhs.gov.

(d) Jurisdiction and Filing Instructions

(1) Form I-360 and Form I-485 Jurisdiction. An alien in the United States who qualifies for benefits under section 1703 as an immediate relative and who needs to file Form I-360 may file Form I-360 alone or concurrently with Form I-485. Both the California Service Center (CSC) and the USCIS district office that has jurisdiction over the alien's place of residence for family-based petitions and applications may accept a stand alone Form I-360 or Form I-360 concurrently filed with Form I-485. However, if the alien is currently residing outside of the United States, he or she needs to file only Form I-360 with the USCIS overseas office having jurisdiction over the alien's place of residence or with the appropriate Consular Section of the U.S. Embassy. If the Form I-360 is approved overseas, the alien will be issued an immigrant visa.

(2) Form I-130 and Form I-485 Jurisdiction. An alien spouse or child residing in the United States who qualifies for benefits under section 1703(c) as an immediate relative and who is the beneficiary of a qualifying approved Form I-130 may file for adjustment of status. The alien should file Form I-485 with the USCIS office that has jurisdiction over the alien's place of residence for family-based applications for adjustment of status.

(3) Filing Form I-360. The alien should check box "K" in Part 2 and write "PUBLIC LAW 108-136" in the space provided. The alien should submit the following with Form I-360:

- (A) Proof of the alien's identity, such as a passport or foreign birth certificate with English translation.
- (B) Evidence showing that the alien was the bona fide spouse, child, or parent of the deceased U.S. citizen or LPR member of the U.S. Armed Forces, such as a birth certificate or marriage certificate. A surviving spouse should submit proof of termination of any prior marriages for both the surviving spouse and the deceased service member. The surviving spouse should also submit documentation showing that the marriage was entered in good faith, such as holding joint accounts and property leases, filing joint income tax returns, and/or testimonials by credible witnesses/acquaintances regarding the spousal relationship.
- (C) A copy of the deceased service member's death certificate.
- (D) Documentation showing that the deceased member of the U.S. Armed Forces was a U.S. citizen or was granted citizenship, such as a birth certificate, naturalization certificate, certificate of citizenship, or posthumous naturalization certificate (N-645).

(E) Certified proof issued by the appropriate military department showing that the deceased member of the U.S. Armed Forces served honorably in an active duty status in the military, air, or naval forces of the United States.

(F) Evidence demonstrating that the deceased member of the U.S. Armed Forces died as a result of injury or disease incurred in or aggravated by combat. See sections (b) and (c) of this subchapter.

(4) Approved I-130. If the alien's qualifying Form I-130 has been approved and the alien has not yet established eligibility under section 1703(c) or (d) of Public Law 108-136, the alien should submit the evidence and documentation noted in (d)(3) of this subchapter when filing Form I-485 in the United States or when applying for an immigrant visa prior to entry into the United States. The adjudicator handling the approved Form I-130 should write "PUBLIC LAW 108-136" in the "Remarks" section of the form.

(5) Filing Form I-485. Refer to instructions in Subchapter 23.5(d)(2).

2. The following DOD, VA, and USCG points-of-contact list is designated as Appendix 21-4, "U.S. Department of Defense, U.S. Department of Veterans Affairs, and U.S. Coast Guard Points-of-Contact for Public Law 108-136 (National Defense Authorization Act for Fiscal Year 2004)."

Points-of-Contact for Current Conflicts

United States Air Force
Air Force Personnel Center
(210) 565-3505 or (210) 565-1600

United States Army
Casualty Operations Center
(703) 325-0474

United States Coast Guard
Office of Military Compensation
(202) 267-1648

United States Marine Corps
Casualty Assistance Section
(703) 784-9512 or (800) 847-1597

Points-of-Contact for Past Conflicts

United States Air Force
Air Force Personnel Center
(210) 565-3505 or (210) 565-1600

United States Army
Mortuary Affairs
(703) 325-7975

United States Coast Guard
Office of Military Compensation
(202) 267-1648

United States Marine Corps
Casualty Assistance Section
(703) 784-9515 or (800) 847-1597

United States Navy
Casualty Assistance Branch
(800) 368-3203

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United States Department of
Veterans Affairs
Compensation and Pension Service
(202) 273-7251

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(202) 273-7251

3. The first three paragraphs of Subchapter 23.5(d), “Relative-Based Adjustment Cases,” are re-designated as Subchapter 23.5(d)(1), “General.” The following is designated as Subchapter 23.5(d)(2), “Aliens who Benefit as Immediate Relatives under Section 1703 of Public Law 108-136.”

(A) Eligibility

An alien who qualifies for a benefit under section 1703 of Public Law 108-136 is considered an immediate relative for purposes of adjustment of status under section 245 of the Act. The adjudicator may adjust the status of such alien if the alien is:

- (1) the beneficiary of an approved Form I-360 filed in accordance with the requirements of section 1703(a) of Public Law 108-136, which classifies the beneficiary as an immediate relative of a U.S. citizen; or
- (2) the beneficiary of an approved Form I-130 filed by a qualifying LPR granted posthumous citizenship under section 329A of the Act or an approved Form I-360 self-petition filed in accordance with the requirements of section 1703(c) or (d) of Public Law 108-136 which classifies the beneficiary as an immediate relative.

(B) Adjustment of Status Applications Filed Prior to the Death of the Qualifying Alien Granted Posthumous Citizenship under section 329A of the Act

Section 1703(b) of Public Law 108-136 provides that the applications for adjustment of status filed by certain alien spouses or children prior to the death of the qualifying alien granted posthumous citizenship may be adjudicated as immediate relative applications and as if the death had not occurred.

- (1) The alien spouse, child, or parent’s Form I-485 must have been pending prior to the death of the petitioner. The adjudicator will generally not become aware of the death of the alien petitioner until the adjudication

of the application for adjustment of status. Therefore, either prior to adjudication or at the time of adjudication, the alien should demonstrate that he or she remains eligible for adjustment of status based on section 1703(b) of Public Law 108-136 and provide documentation of his or her eligibility.

(2) If the adjudicator becomes aware of any Form I-485 that has been denied because of the death of the petitioner that would have otherwise been approved under the terms of section 1703 of Public Law 108-136, the adjudicator may move to reopen such a case. Similarly, an alien who believes his or her previously denied application now qualifies under section 1703 may file a motion to reopen with the adjudicating office. If that application meets all the other statutory and procedural requirements and falls within the terms of Public Law 108-136, including the effective date provision of September 11, 2001, the adjudicator may reopen and approve the case.

(3) The adjudicator will only reopen a Form I-485 that was filed based on a qualifying family relationship to the deceased alien. In addition, given that USCIS does not have jurisdiction over a Form I-485 where the alien is in deportation or removal proceedings, such application will not be considered for reopening or determining an alien's eligibility under section 1703.

(C) Jurisdiction and Filing Instructions

(1) Refer to Subchapter **21.11(d)(1)** and **(2)** for jurisdiction pertaining to Form I-360 and Form I-485 and Form I-130 and Form I-485, respectively.

(2) An alien who benefits under section 1703 of Public Law 108-136 should check box "A" in Part 2 of Form I-485. Each alien must file his or her own Form I-485.

(D) Exemption from Section 212(a)(4) of the Act, Public Charge Ground of Inadmissibility

An alien who qualifies for a benefit under section 1703 of Public Law 108-136 is exempt from section 212(a)(4) of the Act, public charge. Therefore, the alien is not required to execute and submit Form I-864 as part of his or her application for adjustment of status.

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

AD 05-34 [April 3, 2006]	Subchapter 21.11 Appendix 21-4 Subchapter 23.5(d)	This memorandum adds Subchapter 21.11 and Appendix 21-4 and revises Subchapter 23.5(d) of the <i>Adjudicator's Field Manual (AFM)</i> .
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5. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their adjudicative 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 of by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

6. Contact Information

Policy questions regarding immediate relative, adjustment of status, and combat-related death issues discussed in this memorandum should be directed to Mark Phillips, Office of Regulations and Product Management, through appropriate supervisory channels. Operational questions regarding processing instructions provided in this memorandum should be directed to Deanna L. Garner, Office of Service Center Operations, or Leah Torino, Office of Field Operations, through appropriate supervisory channels.

cc: USCIS Headquarters Directors
U.S. Immigration and Customs Enforcement
U.S. Customs and Border Protection