U.S. Department of Justice
Immigration and Naturalization Service

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Office of the Executive Associate Commissioner

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MEMORANDUM FOR REGIONAL DIRECTORS

FROM: Johnny N. Williams /S/
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Policy Change -- Public Law 107-150, the Family Sponsor Immigration Act of 2002: Use of Substitute Sponsor if Visa Petitioner Has Died

I. Introduction

On March 13, 2002, the President signed Public Law (P.L.) 107-150, the "Family Sponsor Immigration Act of 2002." P.L. 107-150 makes a significant change to the requirement for certain aliens seeking permanent residence in the United States to obtain an Affidavit of Support, (Immigration and Naturalization Service (INS) Form I-864) from their petitioner to avoid inadmissibility as a public charge under Immigration and Nationality Act (INA) § 212(a)(4)(C).

Under INA § 212(a)(4)(C), an alien who seeks permanent residence as an immediate relative or family preference immigrant is inadmissible as an alien likely to become a public charge unless the visa petitioner submits a Form I-864 that meets the requirements of § 213A. This requirement also applies to employment-based immigrants, if a relative either filed the Form I-140, Immigrant Petition for Alien Worker, or has a significant ownership interest in the firm that did file the Form I-140.

Previously, INA § 213A(f)(1)(D) required the visa petitioner to be the sponsor who signed the Form I-864 filed on the alien's behalf. INA § 213A(f)(5) allowed for a "joint sponsor," who accepted joint and several liability with the petitioning sponsor, if the petitioner could not meet the income requirements of § 213A(a)(1)(A). In these cases, however, both the petitioner and the joint sponsor had to sign and submit Form I-864 in order for the sponsored alien to avoid inadmissibility under § 212(a)(4)(C).

The affidavit of support requirements of INA § 212(a)(4) and § 213A thus eliminated, as a practical matter, the use of the INS procedure of "humanitarian reinstatement" of a visa petition revoked upon the death of the petitioner. 8 CFR § 205.1(a)(3)(i)(C) requires the revocation of an approved visa petition upon the death of the petitioner unless the Attorney General determines that, for humanitarian reasons, revocation would be inappropriate. However, since the implementation of INA § 213A, humanitarian reinstatement served no purpose because the visa

petitioner, now deceased, could not execute a Form I-864. As a result, the alien became inadmissible as a public charge, and, therefore, ineligible for permanent residence.

II. Changes to INA § 212(a)(4) and § 213A As a Result of the Family Sponsor Immigration Act of 2002

The Family Sponsor Immigration Act of 2002 remedies the situation of an alien whose petitioner has died by amending INA sections § 212(a)(4)(C)(ii) and § 213A(f)(5). The amended § 213A(f)(5) creates a way in which a person other than the visa petitioner can sponsor an alien. Section 213A(f)(5)(B) now allows certain family members to become "substitute sponsors" if a visa petitioner dies following approval of the visa petition, but before the alien obtains permanent residence.

Section 213A(f)(5)(B)(i) specifically states that the visa petition must be approved prior to the death of the petitioner in order for the beneficiary to be eligible for permanent residence. The INS has no authority to approve a visa petition following the petitioner's death. *Dodig v. INS*, 9 F.3d 1418 (9th Cir. 1993).

If, however, the visa petition was approved prior to the death of the petitioner, the Service, may, in its discretion, reinstate the petition for humanitarian reasons, [8 CFR § 205.1(a)(i)(C)]. Section 213A(f)(5)(B)(ii) explicitly places this determination of whether or not to reinstate a petition in such circumstances with the INS, through the authority vested in the Attorney General. The INS is not required in any given case to reinstate approval of a visa petition. Reinstatement continues to be a matter of discretion, to be exercised in light of the facts of each individual case, particularly those cases in which failure to reinstate would lead to a harsh result contrary to the goal of family reunification.

Should the INS reinstate a petition following the death of the visa petitioner, § 213A(f)(5)(B) and § 212(a)(4)(C)(ii) now allow the use of a "substitute" sponsor to sign INS Form I-864 and, if the sponsor meets the income requirements, allow the alien to obtain permanent residence. A substitute sponsor may only replace the visa petitioner if the visa petitioner is dead and if the INS reinstates the original petition for humanitarian reasons. Also, substitute sponsors must be related to the sponsored alien in one of the following ways: as a 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, or grandchild or legal guardian.

III. Effective Date of Changes

Public Law 107-150 was effective upon enactment. Section (2)(b) of the Family Sponsor Immigration Act of 2002 specifies, moreover, that the amendment applies to cases in which the

visa petitioner died before, on or after March 13, 2002. INS officers shall, therefore, apply the amendment to pending cases, as well as to cases filed on or after March 13, 2002. In all cases in which the death of the petitioner occurred after the date of enactment, March 13, 2002, a sponsored alien may utilize the provisions of § 213A(f)(5)(B) and submit an I-864 with a substitute sponsor if the INS reinstates the alien's visa petition.

In cases in which the death of the petitioner occurred before March 13, 2002, the date of enactment, the alien must formally request the INS to reinstate the petition and simultaneously demonstrate that they have a substitute sponsor that meets the requirements of INA § 213A. Thus, the alien seeking to rely on the amendment should submit the substitute sponsor's properly completed Form I-864 along with the request for reinstatement. If the Service reinstates the petition, that alien may be considered for an immigrant visa or adjustment of status, provided that the I-864 filed by the substitute sponsor meets the standard § 213A income requirements and the substitute sponsor is related to the alien by one of the ways listed in section II above.

The INS is aware that some INS officers held in abeyance adjustment cases in which the visa petitioner had died, while Congress had Public Law 107-150 under consideration. The INS can now complete the adjudication of those cases, once a substitute sponsor submits a properly completed Form I-864.

There may be other cases in which the INS made a final decision denying adjustment of status. In those cases, the INS should favorably consider a properly filed motion to reopen, and should consider enactment of Public Law 107-150 to be a sufficient reason for filing the motion more than 30 days after the initial decision, [*Cf.* 8 C.F.R. § 103.5(a)(1)(i)]. Any motion should include a substitute sponsor's properly completed Form I-864, as well as the filing fee established in 8 C.F.R. § 103.7(b)(1).

The Office of Field Operations requests your assistance in disseminating this policy memorandum to your respective offices and ensuring its immediate implementation.

Attachment