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FREQUENTLY ASKED QUESTIONS ON THE HISTORIC PASSAGE OF THE BILL TO END THE WIDOW PENALTY

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CONGRESS ENDS THE WIDOW PENALTY

On October 20, 2009, the Senate voted to pass the Department of Homeland Security Appropriations Bill Conference Report that contained a provision to end the widow penalty. The House previously voted to pass the bill last week. The bill will become law upon President Obama's signature.

The bill contains two measures to address survivors' issues: 1) self-petitioning rights for all widow(er)s of American citizens and their children; and 2) certain survivors' rights for other immigrants.

PART ONE: WIDOW(ER)S OF AMERICAN CITIZENS AND THEIR CHILDREN

I am the widow(er) of an American citizen, how does the law affect me?

The law removes the two-year marriage requirement from the current law (Immigration and Nationality Act Section 201(b)(2)(A)(i)) that permits widows and widowers ("widow(er)s") of U.S. citizens to file a self-petition for themselves and their children, while retaining the requirement to show a good faith marriage. The law does not alter the rights of widow(er)s who were married two years or more, who have been able to self-petition since 1990.

It will allow a widow(er) who was married less than two years at the time of the citizen spouse's death to file an I-360 self-petition form within two years of the law's passage. This self-petition can be filed concurrently (together) with an Application for Adjustment of Status to Lawful Permanent Resident (Form I-485) if the widow(er) is in the United States pursuant to a lawful entry. If the widow(er) is outside the United States, he or she can apply for an immigrant visa following the I-360 approval. The law does not require that a petition have ever been filed by the U.S. citizen spouse.

In cases where the widow(er) was already the beneficiary of an I-130 Petition for Alien Relative filed prior to the citizen petitioner's death, it is anticipated that such I-130 petitions can be considered automatically converted to an I-360 self-petition. Current regulations already allow such auto-conversion for self-petitions. 8 C.F.R. 204.2(b). It is anticipated that USCIS will

apply those regulations to the new law, and allow for a previously denied I-130 petition (and accompanying I-485 application) to be reopened and approved as an I-360 petition.

Until such time as guidance is issued, however, be aware that there is a two-year window during which widow(er)s must file an I-360 following the law's passage. If you are relying on the automatic conversion of a previously-filed I-130 petition, be aware that an I-360 should be filed within the two years following the law's passage if guidance is not established by that time.

Does the law require me to obtain an Affidavit of Support Sponsor?

No. The law allows the widow(er) to self-petition, which removes the requirement that another person file an affidavit of support on behalf of the immigrant. Form I-864, Affidavit of Support, will not be required of self-petitioners. Widow(er)s must still prove they are not likely to become a public charge, based on a totality of factors listed under INA Sec. 212(a)(4)(B).

Does the law allow my children to be included?

Yes. Unmarried children of the widow(er) may be included on Form I-360 that is filed by the widow(er). Those children who are under the age of 21 years at the time the petition is filed should be eligible, as well as those children whose age determination is calculated under 201(f) of the Immigration and Nationality Act (Child Status Protection Act, or "CSPA"). CSPA allows children to qualify, even when over age 21, where the petition was filed before the child's 21st birthday. CSPA calculations can be difficult, so competent counsel should be consulted.

If an I-130 was previously filed by the U.S. citizen on behalf of the child before the child's 21st birthday, such petition may be considered automatically converted, and may be used to establish the child's age for self petitioning purposes. This will be particularly helpful in cases where children have already reached age 21 at the time of the law's passage. In cases where the child is still under 21 at the time of the law's passage, however, it is urged that widow(er)s file the I-360 self-petition for themselves and their children in case of controversy over this auto-conversion and CSPA interpretation.

Are there deadlines?

Yes. For those married *less than two years* at the time of the citizen's death, the law permits the filing of a self-petition on Form I-360 within two years of the law's enactment. The law will be enacted on the day that the President signs the bill. After this two-year period, a petition must be filed within two years of the citizen's death. In cases where an I-130 was previously filed by the U.S. citizen, it can be considered to have automatically converted to an I-360 petition. Until guidance is issued, however, the two year deadline following enactment should be carefully reviewed and docketed by everyone affected.

For those married *at least two years* at the time of the citizen's death, the law remains the same: an I-360 must be filed within two years of the citizen's death, unless automatic conversion occurs as explained above. This new law does not change that deadline.

PART TWO: OTHER SURVIVORS

What other benefits to survivors does the law provide?

The law adds a new section of law, Sec. 204(l), to the Immigration and Nationality Act. The new section allows petitions that were filed prior to the death to be adjudicated despite the death of the petitioner or the principal immigrant in cases where the beneficiary or derivative beneficiary resided in the United States at the time of the death and continues to reside in the United States. The law covers the following survivors:

- Immediate relatives (spouse, parent, minor child of a U.S. citizen)
- Family Preference relatives (unmarried son or daughter of a citizen, married son or daughter of a citizen, spouse or child of a permanent resident, brother or sister of a citizen)
- Employment-based dependents (derivative beneficiaries)
- Refugee/Asylee relative petition beneficiaries
- Nonimmigrants in "T" (victims of trafficking) or "U" (victims of crime) status
- Asylees

Does the law require an Affidavit of Support?

Yes. Unlike the self-petitioning widow(er)s (see PART ONE), 204(l) requires an Affidavit of Support, Form I-864. The law amends INA 213A(f)(5) to provide for a substitute sponsor in the case of a petition that is being adjudicated under the new INA 204(l).

I resided abroad at the time that my relative died. Am I covered under this new law?

Only self-petitioning widow(er)s and their qualifying children (see PART ONE) are covered under the new law where the survivor resided abroad at the time of the qualifying relative's death. If the petition was approved prior to the qualifying relative's death, however, current "humanitarian reinstatement" provisions found at 8 C.F.R. 205.1(a)(3)(i)(C)(2) may allow continued validity of the previously-approved petition, followed by consular processing of an immigrant visa. This would be the case even where the beneficiary was residing abroad.

Can my petition still be denied?

The law gives the Secretary of Homeland Security some discretion to deny a petition if it is determined that approval would not be in the public interest. Most cases should be approved under this standard.

Will other related applications be adjudicated on the same basis?

Yes. New INA Section 204(l) provides that the petition, any application for adjustment of status, "and any related applications" be adjudicated notwithstanding the death of the qualifying relative. It is clear from this provision that it was the intent of Congress that such cases be treated humanely, and that the death of the relative should not form the sole reason for denial.

Applications related to petitions and applications for adjustment of status include such things as waiver applications (Form I-212, Form I-601).

Under the new law, it should be possible for survivors (including spouses of American citizens, and all listed survivors) to be approved for waivers of inadmissibility notwithstanding the death of the qualifying relative, provided a petition was filed by the qualifying relative prior to the death, or in the case of a derivative, on behalf of the qualifying relative.

Can I rely on the information provided here for my individual case?

No. This information is of a general nature and cannot be substituted for advice of competent counsel in an individual case.

For further information, please visit the website: http://www.ssad.org