

## End of the Widow Penalty

Immigration through a family member who is a US citizen or legal permanent resident is the most common way of gaining US residency. All that is required is the qualifying family relationship. Qualifying relationships are grouped into two main categories – immediate relatives and other close family members. Immediate relatives of US citizens are given special preferential treatment, which allows them to immigrate to the US in unlimited numbers. Other close family members are divided into four preference categories, with a limited number of visas granted each year within that category.

Under US immigration law, a U.S. citizen or LPR may petition for green card status for his or her foreign national spouse. A US citizen spouse is considered an immediate relative. An LPR spouse is considered to be a close family member that falls under the second preference category of family-based immigrant visas.

Unfortunately, there are times when a family-based green card application may be affected by the death of the petitioning spouse. If the US citizen died before the petition was filed, the foreign-born widow(er) can file a self-petition as an immediate relative widow of a USC as long as the couple had been married for at least two years. However, in cases where the couple had not been married for two years, the foreign-born spouse would face what is known as the widow penalty.

Under the widow penalty, the government ‘penalized’ the foreign-born spouse for not having been married to a US citizen for at least two years and ordered him or her to be deported from the United States since the marriage was no longer in existence. This government policy was widely criticized for punishing widows and widowers who have just lost their spouse and was the subject of numerous court cases, many of which were decided in favor of the foreign-born spouse.

However, the widow penalty has now ended with the passage of Public Law 111-83, which was signed into law by President Obama on October 28, 2009. The bill grants green-card petitioning rights to widows of *both* US citizens and legal permanent residents.

### *Surviving Spouses of US Citizens*

Under the new law, all widows and widowers of US citizens may file self-petitions on Form I-360, regardless of whether or not they were married for at least two years and regardless of whether the spouse filed an I-130 petition prior to his or her death. Applicants must show that the marriage was entered into in good faith, and not for the purpose of immigrating to the United States. The applicant’s children may also be included in the green card petition. However, applications filed under the new law by surviving spouse who were married for less than two years must be filed within two years of the law’s passage, by October 28, 2011.

Applicants who are already present in the United States may concurrently file a Form I-485 with the I-360 form. Applicants who are not present in the United States must wait for the I-360 to be approved before they can file their I-485 petitions.

Applicants who have remarried do not qualify under the self-petition right of the law, but may still have other petitioning rights. If the I-130 application was filed before the US citizen's death, the surviving spouse may still file an I-485 petition as long as the I-130 petition was filed immediately before the US citizen's death. Under immigration law, even if the surviving spouse remarried, he or she will still qualify as an immediate relative spouse as long as the marriage to the US citizen existed when the I-130 was filed and it was filed before the US citizen died.

#### *Other Surviving Family Members*

Under the new law, if an I-130 Relative Petition was filed prior to the death of the US citizen or legal permanent resident (LPR) petitioner, it will be adjudicated. This applies to the following family members:

- The parent or minor child of a US citizen petitioner;
- The married and unmarried children of a US citizen petitioner;
- The brother or sister of a US citizen petitioner; and
- The spouse or child of a legal permanent resident.

The law also covers some other survivors, such as asylees, nonimmigrants in T status, nonimmigrants in U status, and the derivative family member beneficiaries of employment-based green card applications.

To qualify under the law, the surviving family member must have resided in the United States at the time of the petitioner's death. However, under certain humanitarian provisions in immigration law, if the beneficiary resided abroad and the I-130 petition was approved prior to the petitioner's death, the petition may still be found to be valid so the beneficiary can receive an immigrant visa at a US consulate.

To see if and how you may qualify for family benefits under Public Law 111-83, contact Margaret W. Wong and Associates for advice.