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Fact Sheet: USCIS To Process Applications of Widow(er)s of Deceased U.S. Citizens

Introduction

On October 28, 2009, the President signed the FY2010 DHS Appropriations Act into law, allowing eligible widows or widowers of U.S. citizens to qualify for permanent resident status regardless of how long the couple was married. The new law amends the Immigration and Nationality Act (INA) by removing the two-year marriage requirement previously necessary for a widow(er) to qualify for permanent resident status as an immediate relative of his or her late U.S. citizen spouse. Additionally, when a widow(er) qualifies as an immediate relative under the law, his or her unmarried minor children will also qualify for the same status. The law applies equally to widow(er)s living abroad, who are seeking immigrant visas and widow(er)s in the United States, who want to become permanent residents based on their marriage.

These provisions of the FY2010 DHS Appropriations Act relate only to the impact of the citizen's death on a widow(er)'s eligibility for classification as an immediate relative. All other requirements for approval of a visa petition remain in force. Specifically, the widow(er) must still establish that:

- He or she was the citizen's legal spouse.
- The marriage was bona fide and not an arrangement solely to confer immigration benefits to the beneficiary.
- He or she has not remarried.
- He or she is admissible as an immigrant.
- In an adjustment of status case, that he or she meets all other adjustment eligibility requirements and merits a favorable exercise of discretion.

Pending Form I-130, Petition for Alien Relative

As of October 28, 2009, any pending Form I-130 that was filed on a widow(er)'s behalf prior to the citizen spouse's death will automatically convert to a widow(er)'s Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, so long as, on the date of the citizen spouse's death, they qualified as an immediate relative under the INA and the FY2010 DHS Appropriations Act. Additionally, any Form I-130 that has been the subject of litigation in any Federal court on the issue of the effect of the petitioner's death is reopened for a new decision as of December 2, 2009, the date of issuance of the USCIS implementing directive. USCIS will identify those cases that are the subject of litigation that was pending on October 28, 2009. Once a case is identified, USCIS will notify the widow(er) in writing that their Form I-130 has been reopened and adjudicated as a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant. Eligibility for classification as an immediate relative ceases if the widow(er) remarries.

Petition Approved Before Death

If the Form I-130 was approved before U.S. citizen petitioner's death, it will automatically convert to an approved I-360. Unmarried minor children of the widow(er) will also be eligible to seek an immigrant visa or adjustment of status based on the approved Form I-360.

Pending Form I-485, Application to Register Permanent Residence or Adjust Status

Additionally, if USCIS has jurisdiction to act on a Form I-485, Application to Register Permanent Residence or Adjust Status, that is the subject of litigation on this issue in any Federal court, USCIS will notify applicants in writing that their Form I-485 has been reopened. If the widow(er) entered the United States as a K-1 nonimmigrant and filed an I-485 after marrying the deceased U.S. citizen, he or she will be deemed the beneficiary of a Form I-360 Widow(er) petition. If a widow(er) with an approved Form I-130 and a pending Form I-485 left the United States voluntarily after his or her petitioning U.S. citizen spouse died, and thus "abandoned" his or her adjustment application, the approved Form I-130 is converted to an approved Form I-360, so that the widow(er) may apply for an immigrant visa abroad.

Widow(er)s Without Pending Cases

Widow(er)s of citizens who died before October 28, 2009, but who did not have a Form I-130 pending on October 28, 2009, have until October 28, 2011, to file a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, for themselves and their unmarried minor children. A widow(er) whose citizen spouse died on or after October 28, 2009, will have two years from the date of the citizen spouse's death to file their Form I-360.

Children of Widow(er)s

The child of a widow(er) whose Form I-360 is approved may be included in the widow(er)'s petition as long as they meet the definition for "child" under the INA. Where the deceased citizen filed a Form I-130 for his or her spouse that was pending at the time of his or her death, and the Form I-130 can now be adjudicated as a Form I-360 widow(er)'s petition, the child(ren) of the widow(er) will be included in the Form I-360.

An individual qualifies as the "child" of a widow(er) depending on their age when the visa petition was filed. For those cases that were pending on October 28, 2009, the Form I-360 filing date is the date on which the deceased citizen filed the prior Form I-130. If a widow(er) has an unmarried son or daughter who was under 21 when the deceased citizen filed the Form I-130, that individual will still be considered under 21 for purposes of the widow(er)'s Form I-360.

Questions & Answers

Q. If my U.S. citizen spouse has passed away, and I do not have a petition pending with USCIS, how do I obtain status as a widow(er)?

A. If your U.S. citizen spouse died on or after October 28, 2009, you will have two years from the date of the citizen spouse's death to file a Form I-360 petition. If your U.S. citizen spouse died before October 28, 2009, and you did not have a Form I-130 pending on October 28, 2009, you have until October 28, 2011, to file a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant.

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Related Links

[Hootkins Case Information](#)

Immigrant for you and your unmarried minor children.

Q. Where do I file the Form I-360?

A. Currently, USCIS requires that applicants who are submitting a Form I-360 as a widow(er) must file the form with the Vermont Service Center along with the supporting evidence and fees specified in the Form I-360 instructions. The Form I-360 and filing instructions can be found at the USCIS website, under the "Forms" tab.

Q. If I have a pending I-130 and qualify as an immediate relative, how do I find out if my petition has converted to a widow(er)'s I-360?

A. Your Form I-130 will automatically convert to a widow(er)'s Form I-360. USCIS will adjudicate your converted I-360 and notify you with a decision. If your case has been the subject of litigation in any Federal court on the issue of the effect of the petitioner's death on your Form I-130, you will receive notification from USCIS that the Form I-130 has been reopened.

Q. As a widow(er) of a U.S. citizen, am I required to submit a Form I-864, Affidavit of Support?

A. No. Under the INA, a widow(er) of a citizen and his or her accompanying children are not required to submit Form I-864, Affidavit of Support.

Q. I previously filed a Form I-360 to obtain deferred action as the widow(er) of a U.S. citizen who died prior to the second anniversary of our marriage. What happens to that Form I-360?

A. If you were already granted deferred action, and received an employment authorization document on that basis, USCIS will not terminate your deferred action or your EAD. Now that Congress has enacted the ameliorative legislation, however, any Form I-360 that was filed to obtain deferred action and has not yet been adjudicated as a deferred action request will now be considered to be an I-360 widow(er)s petition. If your prior I-360 was already approved as a deferred action request, USCIS will, on its own motion, reopen your Form I-360 and adjudicate it as an I-360 widow(er) petition. It will not be necessary for you to file a formal motion or to pay a new Form I-360 filing fee.

Q. The deferred action guidance said I could obtain employment authorization only if my deferred action Form I-360 was approved. If my deferred action Form I-360 is now considered a widow(er)'s visa petition, does that mean I can apply for employment authorization even before my Form I-360 is approved?

A. If you filed a Form I-360 as a deferred action request, you are still in the United States, and your Form I-360 now qualifies as a widow(er)'s visa petition, the filing of an adjustment application (Form I-485), with the required filing fee will make it possible for you to file a Form I-765 to apply for employment authorization based on the pending Form I-485.

Q. Does it make a difference whether my children had an I-130 filed on their behalf?

A. A child who was listed on your Form I-130 can be included on your converted I-360, regardless of whether your child was the beneficiary of his or her own Form I-130.

Q. Are the children of my deceased U.S. citizen spouse covered under this new law?

A. Your spouse's children may already be U.S. citizens if they were born in the United States or were born abroad but obtained citizenship by birth or naturalization. If your spouse's children are not citizens, then whether they can be included on your converted Form I-360 depends on whether they are your children as well. Generally, your stepchildren through marriage to the U.S. citizen would be considered your children, and thus covered, as long as your marriage took place when the child was younger than age 18. If those children did not already derive U.S. citizenship through your deceased spouse at birth or on entry into the United States under the Child Citizenship Act of 2000, they may be eligible for immediate relative status under the INA.

Q. Are my children, who are not the children of my deceased U.S. citizen spouse, covered under this program?

A. Yes. Regardless of whether your children are also the children of your deceased U.S. citizen spouse, the program covers your children in the United States, as long as they meet the definition of your "child" in section 101(b) of the INA.

Q. If I become a permanent resident based on my marriage to my deceased spouse, will I have to submit Form I-751, Petition to Remove Conditions on Residence?

A. No. Those who obtain permanent residence based on being the widow(er) of a citizen are not subject to conditional permanent residence and will not have to file Form I-751.

Q. What if my U.S. citizen spouse died and I remarried, but my marriage to the new spouse has been terminated by divorce or death?

A. If you remarried after the death of your previous U.S. citizen spouse, you are ineligible for this program based on your first marriage, regardless of whether your subsequent marriage ended due to a divorce from or the death of your subsequent spouse. If your second spouse is deceased but was a U.S. citizen, you may be eligible based on your second marriage.

Q. What if I was legally separated or divorced from my U.S. citizen spouse at the time of his or her death?

A. If you were divorced or legally separated from your U.S. citizen spouse at the time of his or her death, you are ineligible for this program.

Q. What happens if I remained in the United States after my U.S. citizen spouse died, while awaiting a USCIS decision on my Form I-130?

A. Generally, if a widow(er) remained in the United States after the U.S. citizen petitioner died, while awaiting the outcome of Form I-130 that can now be approved as a Form I-360, they will be deemed not to have accrued any unlawful presence as a matter of policy. This protection applies only to widow(er)s who had a Form I-130 pending before USCIS, the Board of Immigration Appeals, or the courts on October 28, 2009, but applies even if the widow(er) was not in a lawful status while the now-converted Form I-360 was pending. If your spouse never filed a Form I-130 for you, you may file a Form I-360 within the applicable filing period, but the new filing will not affect any unlawful presence you already have accrued.

Q. I am widow(er) who had a Form I-130 pending on October 28, 2009 but I entered the United States without lawful admission or parole. Can I qualify for adjustment of status?

A. Your spouse's Form I-130 will still be converted to a Form I-360 and can be approved if you now qualify as a widow(er). But an alien who is present in the United States without having been admitted or paroled generally cannot qualify for adjustment of status. It, therefore, may be necessary for you to leave the United States and apply for an immigrant visa at a U.S. consulate overseas. Your attorney or accredited representative is in the best position to advise you about your specific case.

Q. What if I am in removal proceedings?

A. Your attorney or accredited representative is in the best position to advise you about your specific case.

Q. What if I am a widow(er) who was removed or departed from the United States while an order of removal was pending?

A. If the widow(er) is outside of the United States and had been ordered removed, USCIS has discretion under the INA to consent to the widow(er)'s reapplication for admission. USCIS will generally exercise discretion favorably and grant an application for consent to reapply when:

- The Form I-130 that had been filed by the widow(er)'s spouse has now been approved as a Form I-360,
- The widow(er) is otherwise admissible, and
- The widow(er)'s case does not present significant adverse factors beyond the removal itself, such as a criminal record, national security concerns, or immigration fraud that has not been the subject of a waiver of inadmissibility.

Q. How will USCIS know whether this new legislation applies to my specific case?

A. If you are a named plaintiff in a court case challenging the denial of your spouse's Form I-130, USCIS already knows about your case because of the lawsuit. If your spouse's Form I-130 remains pending before USCIS, USCIS may not be aware of your spouse's death. In this situation, you should write to the USCIS office where your case is pending, with a copy of your filing receipt showing the USCIS receipt number, any other notice issued in your case, and a copy of your spouse's death certificate.

Q. I am a member of the class in the Hootkins case, but I am not a named plaintiff. How do I ask USCIS to make a new decision in my case?

A. USCIS has not identified all of the individuals who may be class members in *Hootkins v. Napolitano*, No. CV-07-5696 (C.D. Cal. filed Aug. 30, 2007). You are a Hootkins class member if a USCIS office in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, or Guam denied your deceased spouse's Form I-130 on or after August 30, 2001, because of the death of your deceased spouse, or if another USCIS office denied it but you or your deceased spouse lived in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, or Guam when your spouse died.

You should write to the USCIS office that denied your petition, with a copy of your filing receipt showing the USCIS receipt number, the notice denying your spouse's Form I-130, and a copy of your spouse's death certificate, and ask for a new decision in your case under Public Law No. 111-83. You do not have to pay a motion to reopen filing fee to ask for a new decision. For information about whether you are a class member in the Hootkins case, visit the USCIS website, see the corresponding link to the right.

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