

# NEW LAW EXPANDS IMMIGRANT RIGHTS OF SURVIVORS

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A significant expansion of the right of survivors to obtain permanent resident status despite the death of a qualifying relative occurred on October 28, 2009 with the passage of the Department of Homeland Security Appropriations Act for FY2010.<sup>1</sup> The bill contains two measures to address survivors' issues: 1) self-petitioning rights for all widow(er)s of American citizens and their children contained in § 568(c) of the Act; and 2) certain survivors' rights for family based, employment based, and other immigrants contained in § 568(d).

### End of the Widow Penalty

The "widow penalty", whereby spouses of U.S. citizens and their children faced automatic denial of a visa petition if the death of the spouse occurred prior to adjudication and prior to two years of marriage, effectively ended upon the passage of § 568(c).<sup>2</sup> That section removes the two-year marriage requirement from the current law that permits widows and widowers ("widow(er)s") of U.S. citizens to file a self-petition for themselves and their children.<sup>3</sup>

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<sup>1</sup> FY2010 Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, Oct. 28, 2009, 123 Stat. 2142.

<sup>2</sup> Litigation to end the widow penalty has been ongoing. See *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006) (surviving spouse remains "spouse" for immediate relative definition); *Robinson v. Napolitano*, 554 F.3d 358 (3d Cir. 2009) (surviving spouse not a "spouse"), *cert. pending*, 78 U.S.L.W. 3059 (U.S. July 23, 2009); *Taing v. Napolitano*, 567 F.3d 19 (1st Cir. 2009) (remains spouse); *Lockhart v. Napolitano*, 573 F.3d 251 (6th Cir. 2009) (remains spouse); See also Maria Baldini-Potermin, *Working Toward a Solution to the Widows and Orphans Penalty Through the Courts, Congress, and Community*, 86 Int. Rel. 2529, October 12, 2009 (outlining extent of litigation and summarizing Courts of Appeals cases and district court rulings).

<sup>3</sup> INA § 201(b)(2)(A)(i) was amended thus, "In the case of an alien (and each child of the alien) who was the spouse of a citizen of the United States ~~for at least two years at the time of the citizen's death~~ and was not legally separated from the citizen at the time of the citizen's death the alien shall be considered, for purposes of this subsection, to remain an

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By removing the two-year precondition to a current statutory program, Congress retained the widow(er) self-petition procedure including 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.<sup>4</sup>

The deletion of the two-year marriage requirement will allow a widow(er) who was married less than two years at the time of the citizen spouse's death to file a Form I-360 self-petition within two years of the law's passage, or within two years of the spouse's death, whichever is later. This self-petition can be filed concurrently 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, nor does the law require any U.S. residence before or after the death.

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, however, 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.<sup>5</sup> USCIS has begun to 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

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immediate relative after the date of the citizen's death but only if the spouse files a petition under section 204(a)(1)(A)(ii) within two years after such date and only until the date the spouse remarries." See § 568(c)(1), Pub. L. No. 111-83, *supra*.

<sup>4</sup> § 101(c), Immigration Act of 1990, Pub. L. 101-649, Nov. 29, 1990, 104 Stat. 4978.

<sup>5</sup> 8 C.F.R. § 204.2(i)(1)(iv).

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.

### **No Substitute Affidavit of Support Sponsor Required for Widow(er)s**

§ 568(c) allows the widow(er) to self-petition, which removes the requirement that another person file an affidavit of support on behalf of the immigrant.<sup>6</sup> Widow(er)s must still file an I-864W form establishing that they are exempt from the requirement, and also prove they are not likely to become a public charge, based on a totality of factors listed under INA § 212(a)(4)(B).

### **Children Included**

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 INA § 201(f) (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 and certain conditions exist.

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

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<sup>6</sup> INA § 212(a)(4)(C)(i)(I) provides an exemption from the I-864 requirement for an alien who has obtained status as the spouse or child of a U.S. citizen under INA § 204(a)(1)(A)(ii). The latter is the statutory section authorizing a self-petition by a spouse described in the second sentence of § 201(b)(2)(A)(i) (widow(er)).

and their children in case of controversy over this auto-conversion and CSPA interpretation.

Children cannot self-petition, but are instead included on the widow(er)'s self-petition.<sup>7</sup> Widow(er)s may include children even if the widow(er) has already obtained LPR status through treatment under one of the court rulings. If a widow(er) obtained LPR status through the interpretation in *Freeman, Lockhart, or Taing*, or some other court judgment, but his or her child has not received this treatment, or an I-130 petition was never filed on behalf of the child, the widow(er) should be able to have the I-130 which was automatically converted to an I-360 extend to minor children without self-petitioning (since the widow(er) is already an LPR).

### **Remarriage Cuts Off Some But Not All Benefits**

While the self-petition provision in § 568(c) specifically requires that the widow(er) not have remarried, § 568(d) dealing with "Surviving Relative Consideration" does not. That section requires a petition to have been filed previously, so if no previous petition was ever filed before the death, remarriage prior to receiving permanent resident status may foreclose benefits. If a petition was filed by the citizen spouse, but the surviving spouse has now remarried, § 568(d) may offer relief.

### **Deadlines**

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. Because the law was enacted October 28, 2009, the deadline is October 28, 2011. 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.

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<sup>7</sup> *Matter of Minkova*, 22 I&N Dec. 1161 (BIA 1999).

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.

### Other Survivors' Benefits

§ 568(d) of the law adds a new section, § 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)<sup>8</sup>
- Family Preference relatives (unmarried son or daughter of a citizen, married son or daughter of a citizen, spouse or child of a permanent resident, unmarried son or daughter of a permanent resident, brother or sister of a citizen)<sup>9</sup>
- Employment-based dependents (derivative beneficiaries)<sup>10</sup>
- Refugee/Asylee relative petition beneficiaries<sup>11</sup>
- Nonimmigrants in "T" (victims of trafficking) or "U" (victims of crime) status<sup>12</sup>
- Asylees<sup>13</sup>

The law also allows adjustment of status applications to be adjudicated notwithstanding the death, as well as related applications.<sup>14</sup>

### Substitute Affidavit of Support Required

<sup>8</sup> INA § 204(l)(2)(A).

<sup>9</sup> INA § 204(l)(2)(B).

<sup>10</sup> INA § 204(l)(2)(C).

<sup>11</sup> INA § 204(l)(2)(D).

<sup>12</sup> INA § 204(l)(2)(E).

<sup>13</sup> INA § 204(l)(2)(F).

<sup>14</sup> INA § 204(l)(1).

Unlike the self-petitioning widow(er)s covered by § 568(c), § 204(l) requires an Affidavit of Support, Form I-864, from a substitute sponsor. 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 § 204(l). The substitute sponsor must be related in one of the ways listed in the statute, or be a legal guardian.<sup>15</sup>

### U.S. Residence Required

Only self-petitioning widow(er)s and their qualifying children under § 568(c) are covered under the new law where the survivor resided abroad at the time of the qualifying relative's death. The provisions of § 204(l) require residence in the United States at the time of the death, and also require the person to continue to reside in the United States. Residence is generally equated with domicile, and is not the same as physical presence.<sup>16</sup>

While survivors residing abroad may not benefit from § 204(l) if the petition was pending at the time of death, if the petition was approved prior to the qualifying relative's death "humanitarian reinstatement" provisions may allow continued validity of the previously-approved petition, followed by consular processing of an immigrant visa.<sup>17</sup> This would be the case even where the beneficiary was residing abroad.

### Remarriage Does Not Bar Relief

<sup>15</sup> INA § 213A(f)(5) allows a substitute affidavit of support from the sponsored alien's "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 of a sponsored alien or a legal guardian..." Sponsors must be citizens or lawful permanent residents.

<sup>16</sup> INA § 101(a)(33) defines the term "residence" as "the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." Therefore, a survivor who was merely physically present abroad at the time of death may still qualify if residence in the U.S. can be established during the relevant time period.

<sup>17</sup> 8 C.F.R. § 205.1(a)(3)(i)(C)(2).

While the self-petition provision in the new law specifically requires that the widow(er) not have remarried, the provision dealing with “Surviving Relative Consideration” does not.

Specifically, if a widow(er) resided in the United States at the time of the death of the qualifying relative and continues to reside in the United States, he or she shall have a petition or application for adjustment of status and any related applications adjudicated notwithstanding the death of the qualifying relative as long as the widow(er) “was...the beneficiary of a pending or approved petition for classification as an immediate relative...immediately prior to the death of his or her qualifying relative.” The clear language of the statute requires only that the person was an immediate relative immediately prior to the death. In the case of a widow(er) who remarries, this requirement is met despite the remarriage, provided a petition was filed prior to the death. Because such a widow(er) would be applying under § 568(d), a substitute affidavit of support may be required.

### **Discretionary Denial**

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. Adjustment of status is also a discretionary remedy.

### **Related Applications Also Adjudicated Notwithstanding Death**

New § 204(l) provides that the petition, 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. This remedial statute is intended to make survivors whole, and put them in the position they enjoyed prior to the untimely passing of the qualifying relative. Applications related to petitions and applica-

tions for adjustment of status include such things as waiver applications (Form I-212, Form I-601).<sup>18</sup>

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. While the extreme hardship waiver of the unlawful presence bar requires a showing of hardship to the qualifying relative,<sup>19</sup> § 204(l) requires such applications to be adjudicated “notwithstanding” the death. Because hardship cannot be shown to a deceased qualifying relative, the requirement of “extreme hardship” should be interpreted as having no application in the case of a deceased qualifying relative, provided eligibility under § 204(l) is established.<sup>20</sup> This means that a waiver should be granted without a showing of extreme hardship, due to the more specific “notwithstanding” language in § 204(l). Remaining, therefore, is the “sole discretion” of the Secretary to grant the waiver.<sup>21</sup>

### **Retroactivity**

The grant of lawful permanent resident (“LPR”) status, pursuant to § 204(l) on or after October 28, 2009, is not prohibited in cases arising prior to the date of enactment. Simply stated, survivors whose

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<sup>18</sup> Instructions to Form I-601 explain that, “If you are in the United States and filing Form I-601 together with Form I-485, Application to Register permanent Residence or Adjust Status, you must file the I-485/I-601 at the filing location specified on Form I-485.” Form I-601 Instructions (rev. 04/06/09)N, Page 8. Instructions to Form I-212 likewise state, “If you are in the United States and are applying for adjustment of your status under section 245 of the INA, or are seeking to be granted advance permission to reapply prior to your departure from the United States, submit the application to the USCIS District Director having jurisdiction over the place where you are residing.” Form I-212 Instructions (rev. 07/30/07)Y, p. 1. These are clearly related applications.

<sup>19</sup> See INA § 212(a)(9)(B)(iv)

<sup>20</sup> See *U.S. v. Estate of Romani*, 528 U.S. 517, 532 (1998) (later, more specific statute governs).

<sup>21</sup> *Id.*

qualifying relative died prior to the date of enactment may be given LPR status pursuant to 204(l).

The provisions of § 568(d) do not expressly include in or exclude from § 204(l)'s ambit individuals whose qualifying relative died before the effective date. In the absence of clear statutory language, a provision that *removes* barriers to rights is to be applied to cases arising before enactment as well as after enactment.<sup>22</sup> Under the framework established by the Supreme Court in *Landgraf*, a two step analysis is performed; First, it is determined whether “Congress has expressly prescribed the statute’s proper reach.”<sup>23</sup> If not, as is the case here, then the statute must be examined to determine whether its application impermissibly “impose[s] some burden on the basis of an act or event preceding the statute’s enactment.”<sup>24</sup> Because the granting of benefits un-

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<sup>22</sup> *Langraf v. USI Film Prod.*, 511 U.S. 244 (1994) (In cases where Congress has not clearly expressed whether a statute applies to cases arising prior to enactment, it will apply unless “it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” ). Also, the enactment of new INA § 204(l) is not a repeal of a statute, and therefore not governed by 1 U.S.C. § 109, which allows a repealed statute continued operation.

<sup>23</sup> *Id.*, 511 U.S. at 280.

<sup>24</sup> *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006). The Court applied INA § 241(a)(5), a provision providing for reinstatement of a prior removal order, to an individual whose order pre-dated the enactment by many years. The Court did so because the law was being applied to his current status post-enactment. Just as the Court in *Fernandez-Vargas* found that the alien’s *continued presence* in the country allowed § 241(a)(5) to operate based on a removal order and re-entry prior to the date of enactment, an alien who continues to reside in the U.S. after enactment may be considered for adjustment to lawful permanent resident status under § 204(l) despite the fact that the circumstances leading to eligibility under that section arose prior to enactment. The Court stated the application of § 241(a)(5) to *Fernandez-Vargas*’ situation thus, “it applies to *Fernandez-Vargas* today not because he reentered in 1982 or at any other particular time, but because he chose to remain after the new statute became effective...It is therefore the alien’s choice to continue his illegal presence, after illegal reentry and after the effective date of the new law, that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo...” *Id.* at . It could also be said of an alien survivor, “It is therefore the alien’s choice to continue his residence, after the effective date of the new law, that subjects him to the new and more generous legal regime, not a past act such as the death of the petitioner that he is helpless to undo.”

der § 204(l) is not a burden but the *removal of a burden*, it can permissibly be applied to cases filed before the statute’s enactment, as well as to survivors who lost a qualifying relative prior to enactment. If the statutory prerequisites of § 204(l) exist in a case involving a pre-enactment death, the case may now be approved because applying the statute would not have a “retroactive consequence in the disfavored sense.”<sup>25</sup>

## Conclusion

The new surviving relative legislation was intended by Congress to remove barriers to approval of lawful permanent resident status for immigrants experiencing the death of a qualifying relative. Now that Congress has spoken on this issue and provided a framework for adjudicating cases notwithstanding the death, the Agency must put in place humane and flexible guidelines to facilitate Congress’ wishes. Guidance and regulations that are in keeping with the spirit of the new law will be met with gratitude from families suffering the ultimate loss.

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<sup>25</sup> *Fernandez-Vargas*, *supra*.