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Widow(er) Petition Deadline Looms

WASHINGTON, D.C. –Ending a policy that traced back at least seventy-one years, Congress abolished the “widow penalty” on October 28, 2009, but set a two-year deadline for widows and widowers whose spouse died before the law was passed to file to immigrate. That deadline is coming up on October 28, 2011.

The New York Times explained the widow penalty as “a tragic quirk in federal law that unfairly punishes recently married immigrants whose citizen spouses die before their green-card paperwork is processed.” Under the old law, only widow(er)s who were married at least two years at the time of death were allowed to immigrate if this occurred. Those married less than two years when widowed were denied and often deported, even if they had children with their late spouse. With the change in law, widow(er)s married any length of time now have a chance to immigrate, but in most cases must file a petition within two years of the spouse’s death, and must not have remarried.

For those widow(er)s married less than two years whose spouses died before October 28, 2009, the law made a special exception to the rule that a petition must be filed within two years of the death. Until October 28, 2011, any widow(er) married less than two years can file a self-petition to immigrate, even if the death occurred many years ago. So, for example, a widow who was married in 1990 and widowed in 1991 has until October 28, 2011 to file a petition. It is not necessary for a petition to ever have been filed by the deceased spouse, but the widow(er) must not have remarried prior to receiving the green card based on the widow provisions.

Widow(er)s who are abroad may file an I-360 petition with the U.S. Embassy or Consulate, and those residing here in the U.S. may submit the I-360 petition here in the U.S. Many widow(er)s will also be eligible for adjustment of status processing despite overstaying a visa, and the law even provides for a waiver of grounds of inadmissibility if the citizen spouse filed a petition previously. Widow(er)s of U.S. citizens are exempt from the affidavit of support requirements, and thus are not required to have a relative sponsor them. Widow(er)s may also include on the I-360 petition any children who are under 21.

If a petition was filed by the citizen spouse before death, certain provisions may allow this petition to automatically convert to a widow(er) petition without the necessity of filing a new petition, but competent legal advice is required to determine whether the October 28, 2011 applies or not. Missing the deadline could have serious legal consequences, including the lack of ability to immigrate. There is no requirement, however, to immigrate to the United States by a certain date, as the October 28, 2011 deadline applies only to the petition to start the process: the filing of the I-360 petition. Depending on the particular case, it may still take many months or even years to obtain permanent resident status based on a widow self-petition.

The new law does not impact the status of permanent residents, granted green card status on a conditional basis, who experience the death of a spouse after the green card is issued. Such cases have been covered under separate rules for many years, and a different process is involved in removing the condition despite the death.

Congress also passed a number of provisions dealing with surviving relatives other than spouses of U.S. citizens – Section 204(l) of the INA – but those provisions are not affected by the October 28, 2011 deadline.

Further information on the widow penalty, including the effect of the new legislation can be found at the non-profit website for Surviving Spouses Against Deportation: www.ssad.org. Forms including the I-360 self-petition can be found at the USCIS website: www.uscis.gov.