

PUBLICATION

Death's Dominion is Reduced in U.S. Immigration

Authors: Robert C. Divine
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In the past, the death of the sponsor or "principal beneficiary" in an immigration process usually spelled the end of the alien's ability to immigrate based on that relationship. A new provision, slipped into the conference report of the recent DHS appropriations bill signed by President Obama on October 28, 2009, changes that. Anyone who has suffered the death of a relative through whom he or she hoped to immigrate should immediately contact competent counsel to determine if the opportunity might be salvaged.

Widow(er)s of U.S. citizens. Prior law provided two major protections for the bereaved. First, the widow(er) of a U.S. citizen could self-sponsor if the death followed at least the second anniversary of the wedding and if the widow(er) filed the papers within two years of the death. The new law eliminates the requirement of two years of marriage, so the bereaved spouse can file even if the death occurred the day after the wedding, and even if the couple had been living abroad. This is particularly useful for couples who married abroad, such as to a U.S. soldier stationed abroad, and who had not needed to file papers to immigrate to the U.S. when the U.S. citizen unexpectedly died.

Importantly, anyone who in the past had not been able to file because the death had occurred less than two years before the wedding can now step forward and self-sponsor for permanent residence, even if the death occurred twenty years ago and even if the person is living abroad, but that filing must be made by October 28, 2011 (two years after the law was passed). For deaths occurring after October 28, 2011, the filings must be made within two years of death. Children may be able to join the filings. Widow(er)s illegally present in the U.S. might still face problems. A widow(er) who has since remarried cannot use this special provision but might use the provisions discussed below.

Survival of Petitions. Prior law allowed the beneficiary of a family petition (I-130) to request highly discretionary "humanitarian reinstatement" if the sponsor died. That opportunity technically remains, especially if the beneficiary does not reside in the U.S., but the new law creates a clearer path for a wider range of beneficiaries.

Under the new law, primarily an amendment to INA section 204(l), if the sponsor dies, or even if the primary beneficiary of a petition dies, the bereaved family may continue to receive the benefits of the petition as if the death had not occurred, as long as the beneficiary resided in the U.S. at the time of death and still resides in the U.S. The protection applies to a wider range of case types than the "humanitarian reinstatement" did:

- principal and derivative beneficiaries of family based I-130 petitions when the petitioner and/or principal beneficiary dies,
- beneficiaries of I-730 petitions by refugees and asylees,
- family of T and U nonimmigrants when the principal nonimmigrant dies,
- derivative asylees when the principal asylee dies, and
- derivative beneficiaries of employment based petitions when the worker dies.

It does not seem to matter if a bereaved spouse has remarried, but marriage to a foreign national lacking U.S. status might create complications. It seems possible to seek a waiver of inadmissibility (such as for past misrepresentation or unlawful presence), but waivers depending on hardship to the now-deceased relative might be complicated.

As with "humanitarian reinstatement," if an I-130 was involved the beneficiary must have an I-864 Affidavit of Support from a 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 or legal guardian of the beneficiary, accompanied as necessary by a joint sponsor.

The provision for widow(er)s of U.S. citizens clearly applies to old, even already denied, cases as long as the widow(er) self-petitions by October 28, 2011. But the more general provision for the survival of petitions contains no language about its effective date. Bereaved beneficiaries may wish to claim retroactive benefits from this law, requesting reopening of denied cases, and we shall see what happens.

How We Can Help

Baker Donelson's Immigration Group has helped countless families achieve their ultimate goal of being together by helping them obtain family-based U.S. immigration benefits. Some of the many ways we can help include: demonstrating a qualifying relationship when primary documents are unavailable; helping couples who intend to marry decide which immigration route is best for them based on their location in or out of the U.S. and the location of the wedding ceremony; advising clients on the realities and considerations involved in international adoption and working with adoption agencies to complete the immigration process expeditiously to entry and citizenship; aiding newly married couples overcome USCIS accusations of marriage fraud by establishing that their marriage was in good faith; counseling and assisting clients on obtaining benefits such as work authorization, travel documents and permanent residency as quickly and efficiently as possible by avoiding delays due to paperwork and filing errors; docketing dates for removal of conditions on permanent residence; and helping clients continue to pursue their U.S. immigration goals after a divorce or abuse.