



Fact Sheet

Aug. 31, 2009

USCIS Provides Interim Deferred Action Relief For Surviving Spouses

Relief for Spouses of Deceased U.S. Citizens Married Less Than Two Years

Introduction

On June 9, 2009, U.S. Department of Homeland Security (DHS) Secretary Janet Napolitano announced that DHS would grant deferred action relief to surviving spouses of U.S. citizens who died before the second anniversary of their marriage. Based on the Secretary's decision, U.S. Citizenship and Immigration Services (USCIS) will temporarily suspend adjudication of visa petitions and adjustment applications filed for widow(er)s where the sole reason for an adverse decision from USCIS would be the death of a U.S. citizen spouse before the second anniversary of their marriage.

Background

Until there is a legislative solution to remedy the situation commonly referred to as the "widow penalty," USCIS is providing interim administrative relief in the form of deferred action to surviving spouses whose U.S. citizen spouses died before the second anniversary of their marriage. The "widow penalty" prevents widow(er)s of deceased U.S. citizens from becoming lawful permanent residents on a petition filed by their late spouse or from later self-petitioning to change their status if the U.S. citizen dies before the second anniversary of their marriage. Surviving spouses, whose U.S. citizen spouses died before the second anniversary of their marriage, qualifies for deferred action if they:

1. Were married to, but not legally separated or divorced from, their U.S. citizen spouse at the time of that spouse's death;
2. Did not remarry; and
3. Are currently residing in the United States, regardless of whether the U.S. citizen spouse filed a Form I-130 petition for the foreign spouse before his or her death.

Additionally, deferred action under this program is also available to the qualifying children of the surviving spouse who are:

1. Younger than age 21 (at the time the request for deferred action is submitted or a Form I-130 was filed on their behalf as an immediate relative);
2. Currently residing in the United States; and
3. Unmarried.

Deferred Action

Deferred action is an exercise of prosecutorial discretion not to pursue removal of a particular alien for a particular period. Deferred action is not intended to be a permanent remedy to the "widow penalty," rather it is a temporary discretionary solution to an issue that is subject to ongoing legislative and judicial actions. The grant of deferred action by USCIS does not confer or alter any immigration status.

Deferred action does not eliminate any periods of unlawful presence that accrued before it was granted; however, no additional unlawful presence accrues during the time that the deferred action is in effect. The

grant of deferred action does not convey or imply any waivers of inadmissibility that may exist, regardless of whether that inadmissibility is known to USCIS at the time of the request for deferred action. Likewise, deferred action cannot be used to establish eligibility for any immigration benefit that requires maintenance of lawful status.

Forms to File for Deferred Action

Applicants must file Form I-360 with fee with the Vermont Service Center. Applicants filing the Form I-360 seeking deferred action relief must check box “**m. Other, explain:**” in part 2 of the petition and cite the basis for eligibility as “**Deferred Action—Surviving spouse of a deceased U.S. citizen, married less than 2 years.**” Applicants should complete Parts 1, 2, 3, 4, 7, 9 (if applicable), 10, and 11 of the Form I-360.

You Are Not Eligible for Deferred Action if you are the:

- Surviving spouse of a deceased U.S. citizen, or qualifying child who is residing outside the United States;
- Surviving spouse or child of a lawful permanent resident alien or other non-U.S. citizen;
- Surviving spouse of a deceased U.S. citizen or qualifying child if the surviving spouse remarried at any time after the U.S. citizen’s death (regardless of whether or not the subsequent marriage has been terminated);
- Surviving spouse who was legally separated or divorced from his or her U.S. citizen spouse at the time of the citizen’s death (or the surviving spouse’s child);
- U.S. born child of either the surviving spouse or the deceased U.S. citizen spouse or such beneficiary’s children; or
- Deceased U.S. spouse’s child who previously derived U.S. citizenship.

A grant of deferred action is a discretionary action on the part of USCIS. In addition to basic eligibility criteria as described above, USCIS will consider whether any serious adverse factors exist, such as national security concerns, significant immigration fraud, commission of other crimes, or public safety reasons. In addition, applicants whose visa petition was denied or revoked for any reason other than or in addition to the death of the petitioning U.S. citizen spouse are not eligible for deferred action under this program. Denial of a deferred action request may not be appealed.

Two-Year Validity Period for Deferred Action

The validity period of deferred action granted based on this program is **two years**. Once granted deferred action, the applicant will receive a grant letter indicating the duration of validity, specifics regarding the program, and ability to request employment authorization.

Eligibility for Employment Authorization under Deferred Action Status

Surviving alien spouses of U.S. citizens who died before the second anniversary of their marriage and the children of those surviving alien spouses who have been granted deferred action relief under this program are eligible to apply for an Employment Authorization Document (EAD) by completing Form I-765 with appropriate fees.

Validity Period of Employment Authorization under Deferred Action Status

The validity period is two years, not to exceed the expiration date of the grant of deferred action. The appropriate category for Form I-765, *Application for Employment Authorization*, filed on the basis of a deferred action grant is C(14) under 8 CFR 274.a.12(c)(14). Applicants may submit a Form I-765, with

the appropriate filing fee, using this category if applicants wish to seek employment authorization under this program; however, they must demonstrate an economic necessity.

Filing Eligibility Information

If a Form I-130 was approved before the death of the U.S. citizen spouse (petitioner):

- Federal regulations require that the approval of Form I-130, *Petition for Alien Relative*, be automatically revoked upon the death of the petitioner if the beneficiary has not already adjusted status in the United States or been inspected and admitted as an immigrant. Thus, once USCIS receives notice of the death of the U.S. citizen petitioner the approved I-130 petition is automatically revoked.
- However, the beneficiary may request humanitarian reinstatement of the revoked petition. USCIS may then exercise discretion and grant the reinstatement after considering the facts and humanitarian considerations of the particular case. If the request for humanitarian reinstatement request is approved, then the beneficiary may proceed to the adjustment of status or consular processing stage. Since an avenue for permanent resident status already exists for this group, the beneficiary is not eligible to seek deferred action under this program. While each case will be considered individually on its merits, USCIS generally will give favorable consideration to requests for humanitarian reinstatement made by eligible widow(er)s. If the request for humanitarian reinstatement is denied, the beneficiary may file for deferred action status by submitting a completed Form I-360 with the Vermont Service Center

If an I-130 was pending at the time of the beneficiary's U.S. citizen spouse's death:

- If the beneficiary did not file a Form I-485 and Form I-130 concurrently, the beneficiary will need to file an I-360, *Petition for Amerasian, Widow(er), or Special Immigrant*, with the appropriate filing fee, with a copy of the I-130 receipt notice and the documents requested in the I-360 filing instructions.
- On the Form I-360, you must check box "m. Other, explain:" in Part 2 of the petition and cite the basis for eligibility as "*Deferred Action -- Surviving spouse of a deceased U.S. citizen, married for less than two years.*" If the I-130 and I-485 were filed concurrently, both applications will be held in abeyance. In the meantime, the surviving spouse will be eligible to receive all of the appropriate interim benefits.

If the I-130 was denied (before the issuance of this guidance) due to the death of the U.S. citizen spouse (petitioner):

- A beneficiary who is the surviving spouse of a U.S. citizen petitioner and whose petition was denied by USCIS due to the death of the U.S. citizen petitioner, and before the issuance of this guidance, may submit a completed Form I-360, with the appropriate filing fee.
- The beneficiary must check box "**m. Other, explain:**" in Part 2 of the petition and cite the basis for eligibility as "*Deferred Action -- Surviving spouse of a deceased U.S. citizen, married for less than two years.*" This particular instruction relates to only I-360 deferred action requests based on the applicants' claim as the surviving spouse of a U.S. citizen who died before the second anniversary of their marriage.

If a Form I-130 was never filed on behalf of the surviving spouse before the death of his or her U.S. citizen spouse:

- If the surviving spouse and the now deceased U.S. citizen were legally married at the time of the U.S. citizen spouse's death and the marriage was less than two years old at the time of the death, then the surviving spouse may submit a completed Form I-360, with the appropriate filing fee to request deferred action.
- The qualifying surviving spouse must check box "**m. Other, explain:**" in Part 2 of the petition and cite the basis for eligibility as "*Deferred Action -- Surviving spouse of a deceased U.S. citizen, married for less than two years.*"

If the surviving spouse (applicant) was not legally married to the deceased U.S. citizen at the time of the U.S. citizen's death:

- The applicant would not be eligible to request deferred action as established under this program, due to his or her failure to establish the qualifying relationship on which this program is based.

If the surviving alien spouse is detained and in removal proceedings and/or is subject to an administrative order of removal:

- In this situation, the applicant must seek deferred action from the Immigration and Customs Enforcement Agency (ICE). Additional information on requesting deferred action through ICE can be obtained from ICE.

USCIS has posted on the Web, an accompanying list of questions and answers about this program. For additional information about this program, please call the National Customer Service Center at (800) 375-5283, or visit our Web site, <http://www.uscis.gov>.