

## **“Widow Penalty” Killed**

By J. Marcel Hernandez

On October 28, 2009, President Obama signed a law, overturning a 71-year-old rule that required self-petitioning widow(er) immigrants to have been married at least two years prior to the U.S. citizen’s death. Before *Public Law 111-83*, widows(ers) of U.S. citizens were ordered removed, even if an I-130 was previously approved, and an I-485 was pending (the “widow penalty”). *Public Law 111-83* allows immigrants to self-petition when their U.S. citizen spouse is deceased.

The Department of Homeland Security often took the position the qualifying “spouse” relationship ceased to exist upon the death of the petitioning U.S. citizen, unless that relationship had existed for at least two years before the death. However, cases in the Ninth and Sixth Circuits challenged the statute, paving the way for this recent change in the law.

In *Freeman v. Gonzales*, Carla Freeman filed an I-485 concurrently with her husband’s I-130 application. Shortly before their one-year anniversary, Mr. Freeman died in a car accident, while their petitions were still pending. USCIS subsequently denied Mrs. Freeman’s I-485 application, citing the loss of the qualifying “immediate relative” relationship upon Mr. Freeman’s death. USCIS ordered her removed from the U.S. However, during court proceedings, the government conceded it had the ability to grant the petition in question prior to Mr. Freeman’s death. Although the government defensively raised the statute, the Ninth Circuit opined Congress’ intent for immigration purposes, was to sustain the “immediate relative” relationship beyond the death of the petitioning spouse.

Similarly, the Sixth Circuit ruled. in *Lockhart v. Napolitano*, that rather than a limitation on the “immediate relative” definition, the language of the statute allowed for a self-petition, in the event the petitioner died.

More recently, the Ninth Circuit, in *Hootkins v. Napolitano Class Action*, the government argued a previous ruling held that the ability for a widow(er) spouse to self-petition after meeting certain conditions specifically addressed the would-be ambiguity. However, the court took the position the previous ruling was based on a separate issue, not the “immediate relative” issue. Several other issues arose in the case, including the timing and requirement of the filing of an additional I-864 and whether or not the I-864 was a contingency for I-130 and/or I-485 approval. While the government argued the I-864 was an inherent part of the entire process, the court held the I-864 was related specifically to admissibility and not the “immediate relative” relationship in question. Ultimately, the court ruled in favor of the plaintiffs, and allowed for self-petitioning in the event of a petitioner’s death.

With *Public Law 111-83*, these issues have been addressed at the federal level. In a marital relationship between a U.S. citizen and a foreign national, the U.S. citizen’s

death does not preclude the immigrant from applying for permanent residence. Even if a petition was not previously filed, the immigrant may file for permanent residence as long as they meet the requirements prior to the death of the U.S. citizen. Children (unmarried and under 21 years of age) and some waiver applicants may also qualify for this benefit. Thus, in the event of a tragedy, a recourse now exists for immigrants to self-petition.