



***U.S. v. Windsor* and the Death of DOMA:**

A New Day in U.S. Immigration for Same-Gender Couples

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July 9, 2013



What is DOMA?

- What did DOMA do?
- U.S. Immigration laws and regulations operate at the Federal level
- The interplay between state law protections and Federal benefits
- “First-class” citizenship at the state level, but “Second-class” citizenship at the Federal level



What is DOMA?

- What did *Windsor* do to DOMA?
- How will DOMA affect eligibility for U.S. immigration benefits?



What had DOMA meant for same gender couples?

- Need for independent existence in U.S. on own visa
- Fraudulent marriages
- Deportations and family separation
- Living in exile

How will *Windsor* change all this?



- Dependent status (A through U)
- New “derivative” status for same-gender spouses of work visa holders (H-1B, L-1, TN, etc.)
- “Derivative” status for spouses of students and exchange visitors (F-1, M-1 and J-1)
- Work permits under E, L, and J status
- Green card options:
 - (1) Lawfully married same-gender bi-national couple can enjoy right of family-based immigration sponsorship
 - (2) Same-gender spouses can count as “immediate family”

Marriage Logistics: Where can we get married?



- “Marriage Equality” states
- “Marriage Equality” countries = foreign jurisdictions where same-gender marriage is recognized
- What about a state that doesn’t fully recognize same-sex marriage or doesn’t actually call it “marriage” (such as civil union or domestic partnership)?
- www.immigrationequality.org
See section on “Couples and Families”

Marriage Logistics, continued:



- What if we are married in a “Marriage Equality” foreign country or a “Marriage Equality” state but we reside in a state that does not recognize same-sex marriage?
(EX: married in MA, but living in FL)
- USCIS and DOS looks to the law of the state where the couple was married (exception for proxy marriages)
- Some Marriage Equality states do require that a divorce be subject to the laws of that state

Marriage Logistics, continued:



What if the non-citizen member of the couple doesn't live in a "Marriage Equality" country or state, and can't easily get to one?

- Petition USCIS on Form I-129F for K-1; then apply through filing nonimmigrant visa application, Form DS-160
- May apply for K-1 Fiancé/Fiancée visa - must marry within 90 days of entry
- May also apply on I-129 F for K-3 nonimmigrant visa if already married, and also file I-130 petition
- Show extensive evidence regarding the history and *bona fides* of the relationship



One- or Two-Stage Green Card Process

- CPR (Conditional Permanent Resident) and/or LPR (Lawful Permanent Resident)
- If marriage in effect for less than 2 years → CPR
- Condition must be “removed” through filing of Form I-751
- Same scrutiny as to *bona fides* of marriage: shown by couple’s intent to “make a life together”



Same-Gender Nonimmigrant Visas

- New “derivative” visa status for same-gender spouses of work-visa holders (H-1B, L-1, O-1, I, TN, E-1, E-2, E-3, and others)
- If outside the U.S.: apply through filing DS-160 and schedule consular interview
- Include marriage certificate
- What do I check on the form - - “single” or “married”?
- What if I was married but previously checked “single”?



If your Fiancé/Fiancée is outside the U.S. and entering on a visa other than a Fiancé/Fiancée visa

- Immigrant intent issues
- The 30/60/90-day rule: timing is crucial
- Visa Waiver traps
- The “intent-irrelevant” exception for H-1Bs, Ls and Os, and “dual intent” rule for other visa categories



Expanded “derivative” visa status for same-gender spouses of Students or Exchange Visitors

- Applies to F-1, M-1, and J-1 categories
- If outside the U.S., apply through Form DS-160
- Be aware of “end of summer” queues
- If within the U.S., apply through filing Form I-539 for change or extension of nonimmigrant status (no Premium Processing and no appeal available)



Work permits for same-gender spouses of nonimmigrants in E, J, or L status

- Eligible if the spouse of a J-1, E-1, E-2, E-3, or L-1 (both L-1A and L-1B)
- Apply for Employment Authorization Document (EAD) card on Form I-765
- Approximately 3 month process
- Result: “open market” work permission



Green cards for bi-national couples: U.S. citizen sponsoring a non-citizen spouse

- Within the U.S.: Apply through I-130 and I-485
- Benefits issued in approx. 3 months (EAD & AP)
- In-person interview of the couple, under oath
- Couple is separated at many District Offices of USCIS
- Marriages less than 2 years' duration → CPR
- Remove condition through I-751 → LPR



Green cards for bi-national couples: U.S. citizen sponsoring a non-citizen spouse

- Outside of the U.S.: Apply to USCIS through Form I-130
- File U.S. Department of State Form DS-230 and send original documents to National Visa Center
- Foreign spouse has consular interview, receives immigrant visa and is admitted by U.S. Customs & Border Protection at Port of Entry in green card status
- Marriages less than 2 years' duration → CPR
- Remove condition through I-751 → LPR



New options for same-gender spouses of non-citizens being sponsored for employment-based green cards

- Example: One spouse is sponsored by his/her employer through a Labor Certification or I-140 exempt from Labor Certification
- Form I-485 filed as part of the employment based green card process for EB-1, EB-2, EB-3, (Skilled Worker), and EB-5 (“Investor”) may now include same-gender spouse
- Also works with a “self-sponsored” I-140 (NIW or AEA)
→ no Labor Certification needed
- If the I-485 of the primary beneficiary (employee) has already been filed, the spouse’s I-485 must be filed ASAP and receipted before the employee’s I-485 is approved



Late-breaking news of USCIS processing same-gender cases already in the filing “pipeline”

- USCIS Director Ali Mayorkas’ announcement on June 26th, and first couple approval on July 1st
- Cases in pipeline may not need to be re-filed, saving time and money for the couple



The dark (and bright) side of violations: marriage fraud, domestic violence, and the “U “ visa

- Immigration Marriage Fraud Act (IMFA) affects all couples
- What are the penalties under IMFA?
How is fraud usually detected?
- What if there are issues of domestic violence, criminal convictions, or other grounds of inadmissibility?
- The “U” visa for victims of domestic violence



Stateside waivers for non-citizen spouses who have triggered “unlawful presence” in the U.S.

- What is unlawful presence?
- What are its consequences?
- What are the grounds for a waiver?
- What is a “stateside” waiver?



Don't Try This Alone

“[U.S. immigration statutes] yield up meaning only grudgingly [to reveal] morsels of comprehension [which] must be pried from mollusks of jargon.”

- *Kwon v. INS*, 646 F.2nd 909 (5th Cir. 1981)

"Immigration law is a mystery and a mastery of obfuscation, and the lawyers who can figure it out are worth their weight in gold."

- INS Spokeswoman Karen Kraushaar (quoted in *The Washington Post*, April 24, 2001)



QUESTIONS?

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