IMMIGRATION EQUALITY

FAQs for Binational Couples

General information, such as that provided below, does not constitute individual legal advice nor is it meant to take the place of the assessment of an expert; however, we do hope to answer some of the questions we hear most often. You should always consult with a qualified immigration attorney about the individual facts of your case before making any decisions about your particular situation.

Can LGBT couples qualify for marriage-based immigration benefits?

Yes, LGBT couples have been able to obtain marriage-based immigration benefits since the U.S. Supreme Court held that the Defense

of Marriage Act ("DOMA") was unconstitutional on June 26, 2013. DOMA was a federal law that limited marriage to different-sex couples. Because immigration law is federal, DOMA prevented lawfully married lesbian and gay couples from obtaining lawful permanent residence ("green cards") through marriage. Now that DOMA has been struck down, American citizens and lawful permanent residents can submit green card applications for their same-sex spouse.

That said, immigration law is very complicated and couples should carefully review these FAQs and speak with a qualified attorney before filing anything. Options for families will vary from case to case, based upon a number of factors, including: whether the couple is together or apart; whether the couple is living together in the United States or abroad; whether the couple has already married; whether the couple can marry; and, for families together in the United States, whether the non-U.S. citizen partner arrived in the United States after having been inspected by an immigration officer or whether they entered without inspection.

Has the government issued any guidance on how it will treat immigration applications by same-sex couples?

Yes, on July 26, 2013, U.S. Citizenship and Immigration Services added a webpage entitled Same-Sex Marriages which answers many questions about how LGBT immigrant families' applications will be treated post-DOMA. Also, in July 2013 the Board of Immigration Appeals issued a decision called *In Re Zeleniak* which makes clear that with the end of DOMA, married same-sex couples are eligible for the whole range of immigration benefits. That case also clarifies that under immigration law, the agencies look to the law of the state or country where the marriage took place to determine the validity of the marriage. The Department of State also issued guidance confirming that LGBT married couples qualify for spousal visas.

Do we have to live in a marriage equality state to apply for a green card?

No. As long as the marriage was validly entered into under the laws of the state or country of celebration, it should not matter where in the U.S. you reside.

Do marriages from outside the U.S. count for U.S. immigration purposes?

Yes. As long as the marriage was validly entered into, it is sufficient for immigration purposes.

Does a civil union or domestic partnership count?

We have not seen any guidance on this issue from USCIS, but the Department of State FAQs say, "At this time, only a relationship legally considered to be a marriage in the jurisdiction where it took place establishes eligibility as a spouse for immigration purposes." Couples who have attempted to apply for marriage-based benefits on the basis of a civil union or domestic partnership have been unsuccessful. If it is possible to marry, couples may be better off doing so because they could then feel more secure that their relationship will be recognized for immigration purposes without having to wait for further guidance.

What are the different types of relationship-based immigration petitions?

For families where both partners are in the United States, the U.S. citizen can submit a marriage based spousal petition and the foreign partner can apply for a green card through a procedure known as "adjustment of status." So long as the foreign partner did not enter the U.S. without inspection (EWI) (i.e. crossing the border without interacting with border patrol agents), this option should be available regardless of whether or not the foreign spouse is in lawful status or has fallen out of lawful status.

For families who are married and the foreign spouse is located outside

the United States, the U.S. partner can submit a spousal petition and the foreign spouse can apply for an immigrant visa through the U.S. embassy or consulate, in a procedure known as "consular processing." For families who are not already married, a U.S. citizen partner can sponsor their fiancé(e) to come to the U.S. on a K visa.

Consular processing is also the option that families have to pursue if the foreign spouse entered the U.S. without inspection. However, when the foreign national spouse leaves the U.S. to apply, they may be prohibited from returning because of the three-year/ten-year bar on returning to the U.S. following the accrual of unlawful presence here. As a result, some families may be need to file for a provisional waiver of this bar from within the U.S. and wait here for the waiver to be approved before the foreign partner leaves the U.S. to consular process.

My partner is here on a visa that allows for the intention to stay in the U.S. (for example, an H1B or L1 visa). Can we marry and apply for a green card?

Yes, as long as a couple is lawfully married, and meet the other general immigration marriage requirements they can apply to adjust status to lawful permanent resident and process their paperwork from within the United States.

Can someone in the United States on a non-immigrant visa (for example a tourist or student visa) that does not allow for immigrant intent file a marriage-based green card application?

Maybe. As with many areas of immigration law, this is an area that will involve a fact-intensive inquiry by USCIS. Many nonimmigrant visas are subject to Section 214(b) of the Immigration and Nationality Act (INA), which creates a legal presumption that the foreign national is an "intending immigrant", that is that they intend to remain in the U.S. permanently. To overcome the presumption of immigrant intent, a foreign

national must show that they have such strong ties to their home country (such as family, a good job, real estate, school enrollment) that it is not likely they would want to remain in the U.S. beyond the period of time the U.S. gives them. However, it is considered acceptable to enter the U.S. with the intention to remain here temporarily and then have your intent change as circumstances in your life change. For example, a university student might meet someone after attending school here and decide to marry that person months or years after entering the U.S. on a student visa.

On the other hand, if a person enters the U.S. on a tourist visa, marries, and applies for a green card a short time after entering the U.S., USCIS may conclude that the individual misrepresented their lack of immigrant intent to the immigration official at the airport and this could in some cases make it difficult to have a green card application approved.

If someone shouldn't enter the U.S. on a tourist visa and apply for marriage-based adjustment of status, what's the best way to obtain U.S. residency when the foreign partner is outside the United States?

Couples may have several options and should consult with an immigration attorney. One option is for the U.S. citizen partner to file a fiancé(e) visa petition for the foreign national partner. American citizens can file a fiancé(e) visa petition for a partner with whom they have a committed relationship. The couple must marry in a marriage equality state within 90 days of the foreign partner's entry into the United States, and once married, the American spouse can file a marriage-based petition for the foreign spouse.

Another possibility would be for the foreign national partner to come to the U.S. as a tourist, get married here, and then returning to their home country to apply for a green card through consular processing. Families may also be able to marry in a different country that has marriage equality, which would then allow the foreign spouse to consular process. Different

consulates have different backlogs in different categories of petitions, so it would be helpful to consult with an immigration attorney to decide which option would be the best fit for your family's circumstances.

Once the application is submitted, how long will we have to wait until the foreign spouse can work?

For couples who live in the United States together, it is common to file an application for work authorization along with the application for lawful permanent residence. Processing times vary throughout the U.S., but generally employment authorization documents (EADs) are issued within 90 days, and marriage-based interviews are generally scheduled within 9 months after filing. Fiancé(e) visa recipients can apply for adjustment of status and an EAD after they arrive in the U.S. and marry their U.S. citizen partner. Spousal visa recipients become permanent residents upon clearing customs and can begin working in the U.S. right away.

My partner is here on a work visa. Is a marriage-based visa better?

It depends. In general, marriage-based petitions are adjudicated more quickly than many other applications for lawful permanent residence. Employment-based petitions are complex, with most categories requiring the employer to prove that there are no U.S. workers able, willing, and qualified to fill the position. There is also an annual cap on the number of employment-based green cards that can be issued, which has created years-long backlogs in several employment-based categories. Since there is no limit to the number of green cards that can be issued to the spouses of U.S. citizens, a marriage-based petition may result in a green card much more quickly. Regardless of whether a foreign national obtains a green card through a marriage-based petition or through a different avenue (like an employer), he or she can apply to become a citizen after three years (rather than five) if married to an American citizen.

I am undocumented, but my partner is American. Can we apply?

Maybe. While the general rule under U.S. immigration law is that an immigrant cannot change their status from unlawful to lawful from within the United States, one very important exception to that rule is for spouses of U.S. citizens. As long as the foreign partner entered the U.S. with inspection by a U.S. immigration officer, they can still file for a green card (adjust status) from within the U.S. even if they are currently here without lawful status. The situation is more complicated if they entered the U.S. without inspection, in which case, with very limited exceptions, they'd be required to apply for a green card from outside the country and may need to secure a waiver of an unlawful presence bar.

If the foreign partner is undocumented in the U.S. and is planning to travel across state lines to get married, please be aware that there are real risks involved in traveling via mass transit. Immigration and Customs Enforcement (ICE) agents and Customs and Border Protection officers are present at airports. ICE agents also regularly board interstate trains and buses in an effort to uncover immigrants in the U.S. without lawful status. We have heard from numerous undocumented immigrants who have ended up in removal proceedings as a result of encounters with ICE.

I am currently in removal proceedings. Can I still marry my partner and apply for a green card?

Yes, but it may be more complicated. Any time a couple submits a spousal petition, they must provide evidence that the marriage is real and was not entered into solely to obtain an immigration benefit. However, whenever someone who is in removal proceedings marries a U.S. citizen and applies for status, that person must prove that the marriage is real by "clear and convincing evidence." This is a very demanding level of proof and families in these circumstances will have to submit extensive

documentation establishing the genuine nature of their relationship.

A foreign national's relationship with a U.S. citizen partner may also help the foreign national to benefit from an exercise of "prosecutorial discretion." The Department of Homeland Security has issued written guidance clarifying that long-term, same-sex partners should be considered family members and that such family ties are a positive factor when exercising discretion and deciding which cases to pursue for removal. There have been a number of cases where immigration officials have exercised prosecutorial discretion and agreed to close removal proceedings against gay and lesbian spouses of U.S. citizens. There have also been cases where prosecutorial discretion has been granted to couples even if the couple is not legally married, so long as they can prove they are in a committed relationship. A grant of prosecutorial discretion does not result in the foreign national securing a lawful status, but being married to a U.S. citizen may help delay or prevent deportation.

I'm a lawful permanent resident and want to marry my foreign partner. Does the above still apply?

While lawful permanent residents (LPRs) can sponsor their foreign spouses for green cards, under current U.S. law, there is an annual cap on the number of immigrant visas available to the spouses of LPRs. This has created a backlog and on average a two-year wait before these spouses can file the second half of the green card application and apply for permanent resident status. This means that the foreign spouses of LPRs will need to qualify for an independent visa status in order to remain in the U.S. while waiting for their chance to apply for lawful permanent residence. Unfortunately, since many nonimmigrant visas require proof of nonimmigrant intent, it can be quite difficult to obtain a nonimmigrant visa or travel on a nonimmigrant visa once a spousal immigrant petition has been submitted. You can find more information on nonimmigrant visa options at the Visa page on this website.

Note that while Lawful Permanent Residents can petition for LPR status for their spouses, unlike U.S. citizens, LPRs cannot secure a fiancé(e) visa for a foreign national partner abroad. Because of these distinctions, LPRs who are eligible to apply for U.S. citizenship may consider taking that step.

We have children. How will this affect them?

Generally, when a U.S. citizen files an application for lawful permanent residence for a spouse, they can also file for the spouse's children as "step-children." Even if the U.S. spouse does not see these children as "step-children," if the foreign spouse is the biological parent of the children, filing a step-child petition for lawful permanent residence will probably provide the most efficient way to obtain their green cards. The couple must have married before the child turned 18, and the child must currently be under 21 and unmarried in order to get a green card at the same time as the parent's marriage-based green card.

What are the options for couples where one spouse is transgender?

In order for USCIS to recognize and issue gender-appropriate identification documents, a transgender spouse has to submit evidence about their medical transition as well as documents about legal recognition of their gender change. Since DOMA is no longer in effect, it should no longer matter to U.S. immigration whether the spouses were of different sexes or not. That said, if couples want to ensure that USCIS issues documents with the appropriate gender markers, it may still make sense to submit proof of a spouse's transition.

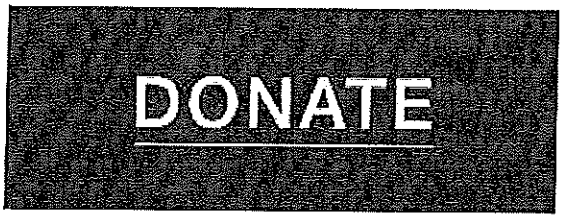
Do we need a lawyer? Do we need a lawyer that specializes in LGBT issues?

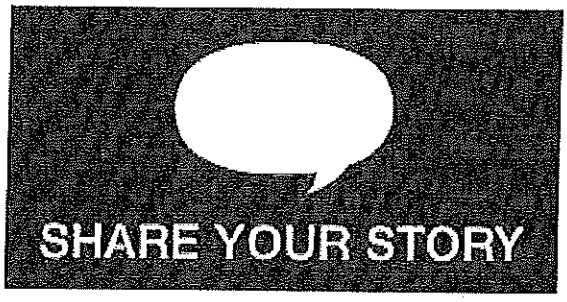
It's always a good idea to have a lawyer when applying for an immigration benefit and spousal petitions can be very complicated. Immigration

Equality maintains a referral list of private immigration attorneys who have an understanding of LGBT issues. To request an attorney referral from Immigration Equality, please fill out the Contact Us form.

Immigration law is very complicated. While many people successfully file marriage-based applications for lawful permanent residence without a lawyer, we generally recommend that people should seek out representation by qualified counsel.

Will Immigration Equality be our lawyer?





Need Help?

- Get Legal Help
- Legal Resources