

Emerging Issues for LGBT Immigrants: A Post-Windsor Update

“The arc of the moral universe is long, but it bends toward justice.” MLK



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Overview

- Marriage-based Adjustment of Status and other family-based remedies
- Domestic Violence – I-360 petitions

Love and Marriage

- United States citizens may petition for their "**children, spouses, and parents**" to be classified as "immediate relatives," who are therefore eligible for an immigrant visa and lawful permanent residence in the United States.
- The INA does not define the term "spouse." Rather, an individual's marital status typically is governed **by state law** i.e. **where the marriage was celebrated**.
- *See Matter of De la Cruz*, 141. & N. Dec. 686 (BIA 1974) ("the law is clear . . . [t]he validity of a marriage is generally governed by the law of the place of celebration").

USCIS Response to Windsor

- Within just a few days of the decision, USCIS announced that it would treat lawfully married LGBTQ couples in the same way it treats lawfully married straight couples for all immigration purposes.
 - USCIS approved a marriage-based petition for a Bulgarian gay man legally married to his U.S.C. husband on July 1, 2013.
 - USCIS released FAQs on July 2, 2013.

DHS FAQs of 7/2/2013

- **Implementation of the Supreme Court Ruling on the Defense of Marriage Act**
- **Statement from Secretary of Homeland Security Janet Napolitano:**
- “After last week’s decision by the Supreme Court holding that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional, President Obama directed federal departments to ensure the decision and its implication for federal benefits for same-sex legally married couples are implemented swiftly and smoothly. **To that end, effective immediately, I have directed U.S. Citizenship and Immigration Services (USCIS) to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse.”**
- **Frequently Asked Questions**
- **Q1: I am a U.S. citizen or lawful permanent resident in a same-sex marriage to a foreign national. Can I now sponsor my spouse for a family-based immigrant visa?**
- A1: Yes, you can file the petition. You may file a Form I-130 (and any applicable accompanying application). Your eligibility to petition for your spouse, and your spouse’s admissibility as an immigrant at the immigration visa application or adjustment of status stage, will be determined according to applicable immigration law and will not be automatically denied as a result of the same-sex nature of your marriage.
- **Q2: My spouse and I were married in a U.S. state that recognizes same-sex marriage, but we live in a state that does not. Can I file an immigrant visa petition for my spouse?**
- A2: Yes, you can file the petition. In evaluating the petition, as a general matter, **USCIS looks to the law of the place where the marriage took place when determining whether it is valid for immigration law purposes.** That general rule is subject to some limited exceptions under which federal immigration agencies historically have considered the law of the state of residence in addition to the law of the state of celebration of the marriage. Whether those exceptions apply may depend on individual, fact-specific circumstances. If necessary, we may provide further guidance on this question going forward.

Matter of Zeleniak

26 I&N Dec. 158 (BIA 2013)

- BIA Decision dated July 17, 2013
- BIA recognized that Section 3 of DOMA is no longer an impediment to the recognition of lawful same-sex marriages and spouses under the INA if the marriage is valid under the laws of the State where it was celebrated.
- Like all other marriages, same-sex couples must establish that their marriages are bona fide.

A Post-DOMA World in the Immigration Context

- Will help same-sex couples whose marriage is considered legally valid in the jurisdiction in which marriage took place.
 - Civil unions or other state recognition of relationship is not sufficient, if such recognition falls short of actual marriage.
 - The couple must be “married” in a state or country that has legalized same-sex marriage. Out-of-country marriages (i.e., Canada, Belgium) are OK, so long as the benefit is “marriage.”
- If a couple files for immigration benefits in a state that doesn’t have marriage equality, but had married legally in another state, the marriage will be considered a valid marriage by USCIS.

A Post-DOMA World in the Immigration Context

- Proving Bona Fides
 - Like opposite-sex couples, LGBTQ couples will need to prove to USCIS that their marriages are based on love and not entered into for the sole purpose of securing immigration benefits.
 - Typically, “bona fides” evidence includes a mix of “hard” and “soft evidence”
 - Some LGBTQ couples may have a much harder time than straight couples locating bona fides evidence, because of historical discrimination against their relationships, family pressure, etc.
 - Work with your clients on a customized list of bona fides evidence that is realistic for them to gather, taking into account their realities as a couple.

A Post-DOMA World in the Immigration Context

- Be creative in terms of gathering bona fides evidence.
- Encourage clients to begin financial intertwining, if they haven't already done so. [Note: many bi-national LGBTQ couples may have avoided having intertwined finances, upon the advice of immigration counsel, to help establish the non-citizen's "non-immigrant" intent.]

A Post-DOMA World in the Immigration Context

- Unique issues: prior “straight” marriages
- Unique issues: Allegations of Marriage Fraud
 - INA § 204(c)
 - Applies to any marriage entered into for the purpose of evading the immigration laws **even if** the foreign national did not ever file for immigration benefits based on the marriage
 - A sham marriage has been defined by the BIA as a marriage which may comply with all the formal requirements of the law but which the parties entered into with no intent, or "good faith", to live together and which is designed **solely** to circumvent the immigrations laws.

A Post-DOMA World in the Immigration Context

- The end of DOMA for immigration purposes does not only impact I-130 petitions and marriage-based adjustments.
 - Fiancé Visa
 - Same-sex spouse can be considered a spouse for derivative visas or I-140 petitions
 - I-730 – immediate relatives of asylees and refugees
 - Immediate relatives – non-LPR cancellation of removal and extreme hardship waiver cases
 - Remember step-children
 - ** Whenever you see reference to spouse or marriage in the immigration context, remember that LGBTQ spouses, marriages and family members COUNT!

Considerations for LGBT Immigrants Involving Domestic Violence

- Self Petition (I-360) under the Violence Against Women Act:
- Immigrant visa equivalent to an I-130 for the spouse, child or parent of an abusive U.S. citizen or lawful permanent resident.
- Gender neutral. Reference to “Women” doesn’t mean that only women benefit from VAWA-based forms of relief.
- Functions similarly to an I-130 in that it requires a further application for adjustment of status or consular processing to acquire permanent residency.
- Allows abused alien spouse, parent or child to file for permanent residency independent of his or her abuser.

VAWA I-360 Overview

- Married to or child of U.S. citizen or LPR
 - Also includes Cuban Adjustment, HRIFA and NACARA beneficiaries
- Resided with the USC/LPR spouse or parent
- Subjected to battery and/or extreme cruelty
- Marriage was entered into in good faith (for spousal petitions only)
- Applicant is otherwise eligible for IR (spouse or minor child of USC) or Preference (spouse or child of LPR) status
- Good Moral Character

Resources

- Immigration Equality:
 - <http://www.immigrationequality.org/>
 - Has an excellent on-line law library with an asylum manual, practice advisories, primary source materials, etc.
- Immigrant Legal Resource Center:
 - <http://www.ilrc.org/info-on-immigration-law/lgbt-immigrant-rights>
 - Webinar series, including “Best Practices”