

IMMIGRATION OPTIONS FOR LGBT FAMILIES AFTER DOMA

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On June 26, 2013, the U.S. Supreme Court held that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional in *United States v. Windsor*. Section 3 of DOMA was a federal law that limited federal marriage recognition to different-sex couples. When DOMA became law in 1996, no state or country permitted same-sex couples to marry. Since then, after Canada, Massachusetts, and other jurisdictions began to allow lesbian and gay couples to marry, the impact of DOMA became more pronounced, particularly in the area of immigration benefits. The only barrier to filing an application for lawful permanent residence for a same-sex foreign citizen spouse was Section 3 of DOMA, which stated that only marriages between a man and a woman would be recognized under federal law.

Now that the Supreme Court has struck down Section 3 of DOMA, many immigration benefits are available to lesbian and gay couples, including lawful permanent residence applications (a “green card”), fiancé visas, and derivative nonimmigrant benefits.

WHAT IS A VALID MARRIAGE?

There are currently over a dozen marriage-equality states plus the District of Columbia, and over a dozen countries with marriage equality. For a list of marriage-equality states and countries, and documentary requirements to marry, see <http://immigrationequality.org/issues/couples-and-families/where-can-wemarry/>. None of the current U.S. marriage equality states has a residence requirement to marry. However, if a couple lives in a state that does not recognize their marriage, they may be unable to divorce there. In addition, many marriage equality states have residence requirements in order to divorce.

When evaluating the validity of a marriage for immigration purposes, U.S. Citizenship and Immigration Services (USCIS) generally employs a “place of celebration” rule. Under this rule, if your marriage was valid in the state or country where you were married, that marriage makes you eligible to apply for a green card. This means that a couple need not live in a marriage equality state to be able to gain immigration benefits for a same-sex noncitizen spouse.

PROVING A BONA FIDE MARRIAGE

All couples who seek to have one spouse immigrate on the basis of their marriage must demonstrate that the marriage is bona fide; that is, that it was not entered into for the sole purpose of evading the immigration laws. Evidence demonstrating a bona fide marriage could include: proof that the parties filed joint state or federal tax returns as a married couple, registered as domestic partners, listed one another as beneficiaries on insurance policies, shared a bank account, were listed jointly on property leases, or owned a home together.

IS A CIVIL UNION ENOUGH?

One significant unanswered question is whether couples who have entered into civil unions, registered partnerships, or similar non-marital relationship recognition will be afforded full marriage benefits under immigration law. 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. If a couple that currently has a civil union can marry relatively easily, marrying will allow them to file an application with far more certainty than an application based on a civil union.

APPLYING FOR A GREEN CARD

Most foreign citizens married to a same-sex U.S. citizen spouse can now apply for a green card. Immigration law is complex and there will still be barriers to some couples, but the systemic discrimination that prevented our families from receiving the same respect under the law as others has ended. There

are two primary avenues available for green card processing, Adjustment of Status and Consular Processing.

Adjustment of Status

Adjustment of Status is green card processing within the United States. Under U.S. immigration law, the general rule is that a person who is in the United States without lawful status cannot change from within the United States from being here unlawfully to being here lawfully. One significant exception to this rule is that the spouse of a U.S. citizen can apply for a green card from within the United States (to “adjust status”) as long as he or she entered the United States through a valid port of entry, in other words, following inspection by a U.S. official. Another exception to the lawful entry requirement, called Section 245(i), allows people who entered the United States without inspection (“EWI”) but who had an immigration petition or labor certification filed on their behalf on or before April 30, 2001 to pay a \$1,000 fine and apply for Adjustment of Status from within the United States.

For those undocumented individuals who entered the United States without inspection (“EWI”) and are not eligible for the exception under Section 245(i), the applicant must return to his or her home country to apply for a green card and discretionary waiver of unlawful presence. In the past, this was unworkable for most families, because once the applicant left the country he or she was barred from returning for many years. There is now a “provisional waiver” available for spouses of U.S. citizens that can minimize the length and uncertainty of that wait. (Please see the Consular Processing section below.)

Spouses of U.S. citizens may apply for Adjustment of Status even if they are currently out of status due to having “overstayed” the period of admission that they were initially granted by the U.S. government (so long as they made a lawful entry), and even if they worked without authorization since arriving in the United States.

Steps in the Adjustment of Status process include filing the I-130 marriage petition and Adjustment of Status application with the USCIS, biometrics appointment, approval of an Employment Authorization Document (EAD) and Advance Parole (travel document), and an in-person interview of the couple at the local USCIS office. The U.S. citizen spouse must file an Affidavit of Support to show that s/he can support the foreign spouse by earning at least 125% of the federal poverty line for the couple’s family size, or has three times that poverty line amount available in cash assets. Green card approval usually takes about 6-9 months after the Adjustment of Status application is filed.

Consular Processing

A noncitizen spouse who is not in the United States can apply for lawful permanent residence through Consular Processing.

Consular Processing is also the avenue for green card processing for most individuals who entered the United States without inspection (“EWI”) (i.e. without being “inspected and admitted, or paroled”). Such individuals are generally not eligible to file for Adjustment of Status from within the United States, regardless of whether they are married to a U.S. citizen or Lawful Permanent Resident. When a person who entered without inspection departs to complete Consular Processing abroad, the departure may trigger an unlawful presence bar to returning that can only be waived through approval of a discretionary waiver. This waiver requires proof that refusal of admission of the immigrant would result in “extreme hardship” to a U.S. citizen or Lawful Permanent Resident spouse or parent.

Until recently, the only way to obtain an unlawful presence waiver was to apply from outside the United States in the course of consular processing. As a result, families would be separated for extended periods of time, often well over a year, while USCIS considered the waiver application. However, a rule effective March 4, 2013 permits immediate relatives of U.S. citizens (which includes spouses, parents, and minor children) to request a “provisional waiver” of unlawful presence from within the United States, prior to the individual’s departure. There are very strict rules concerning eligibility for a provisional waiver, and those who would require a waiver should consult with an immigration attorney prior to filing anything.

Steps in Consular Processing include filing an I-130 marriage petition with USCIS, processing by the National Visa Center, a medical exam and police clearances completed abroad, and an in-person interview of the foreign spouse at a U.S. consulate abroad. The U.S. citizen spouse must file an Affidavit of Support to show that s/he can support the foreign spouse by earning at least 125% of the federal poverty line for the couple's family size, or has three times that poverty line amount available in cash assets. Green card approval usually takes about 10-12 months after the I-130 marriage petition is filed.

APPLYING FOR A FIANCÉ VISA

If the noncitizen is outside the United States and the couple is not yet married, a U.S. citizen may petition for a K-1 fiancé visa for his or her partner. The visa is only available to individuals who are coming to the United States to conclude a valid marriage with the U.S. citizen within 90 days after entering the United States. The couple must show that they have a bona fide intention to marry and are legally able to marry. After the marriage takes place, the noncitizen may apply for Adjustment of Status and obtain a green card.

APPLYING FOR NONIMMIGRANT DERIVATIVE BENEFITS

If you and your spouse are both foreign citizens and your spouse holds a U.S. visa (such as an F-1, H-1B, L-1 etc.), you may be able to obtain a derivative visa, which means that you can accompany your spouse to the United States for the duration of his/her visa. However, as with different-sex couples, in many cases you will not be allowed to work in the United States.

ISSUES REQUIRING CAREFUL COUNSELING

Applicants for a green card or fiancé visa who have issues with prior immigration fraud, marriage fraud, criminal convictions, overstays, receipt of means-tested public benefits (such as welfare), entries without inspection, or prior removals from the United States should consult with an immigration lawyer to be sure that the noncitizen will be eligible for immigration benefits and will not be risking deportation from the United States by filing an immigration application.

IS BEING HIV-POSITIVE AN ISSUE?

The U.S. ban on immigration for people with HIV/AIDS ended in January 2010. When you take the medical examination as part of the green card/fiancé visa process, you will not be tested for HIV. However, the doctor can ask questions about your overall health and medications you take, and you should answer honestly. USCIS can take your health into account as one factor in determining whether you are "likely to become a public charge," that is, likely to need public assistance or social security disability benefits. If you have received cash or medical benefits related to HIV treatment in the past, you should consult with an immigration lawyer to assess whether the specific benefits that you received will affect your overall eligibility for a green card. Simply being HIV-positive, however, is not a reason for your application for lawful permanent residence or a fiancé visa to be denied.

CONCLUSION

For many years, LGBT people have faced systematic discrimination under federal law, including in the area of immigration law. With the end of DOMA, same-sex binational couples can now access the full range of marriage-based immigration benefits, fiancé visas, and derivative nonimmigrant benefits. Immigration advocates will be working closely with the federal agencies that regulate immigration law in the U.S., to ensure that the new benefits are provided in a flexible manner and with recognition of the history of discrimination that has existed for LGBT couples in U.S. immigration law.

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