Immigration Issues for Binational Couples After DOMA

MCLE Training for ALRP San Francisco September 26, 2013



www.mccownevans.com

United States v. Windsor

- Edie Windsor's spouse, Thea Spyer, passed away in 2009, leaving her entire estate to Windsor
 - Windsor barred from claiming the unlimited marital deduction, and as a result was ordered by the I.R.S. to pay \$363,053 in estate taxes from Spyer's estate
 - Windsor sued for refund claiming that DOMA Section 3 was unconstitutional
- Supreme Court found Section 3 unconstitutional, granting federal marriage rights to same-sex married couples based on statesrights argument that states are allowed to define marriage:
 - "The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment."

United States v. Windsor

- Section 1 This Act may be cited as the "Defense of Marriage Act"
 no change, still on the books
- Section 2 Powers Reserved to States -- Allows States, territories, and Indian tribes not to recognized same sex marriages from other States – no change, still on the books
- Section 3 Definition of Marriage -- Defined marriage under federal law as "only a legal union between one man and one woman as husband and wife," and referred to "spouse" as referring only to a person of the opposite sex who is husband or wife – declared unconstitutional by *United States v. Windsor*, June 26, 2013, as violation of equal protection under the Fifth Amendment

Immigration Impact of Supreme Court Decision in United States v. Windsor

Federal Government can now recognize <u>legal</u> same sex marriages for all immigration purposes

U.S. citizens and Permanent Residents are able to sponsor their same sex spouses for immigration benefits

U.S. citizens can sponsor their partners for fiancé visas

And more!

U.S. Jurisdictions Allowing Same-Sex Marriage

- California see Perry v. Hollingsworth, U.S. June 26, 2013
- Connecticut
- Delaware
- lowa
- Maine
- Maryland
- Massachusetts
- Minnesota
- New Hampshire
- New York
- Rhode Island
- Vermont
- · Washington (state)
- Washington, D.C.

Immigration Benefits Available Now

- Green cards based on marriage for spouses of both U.S. citizens and Permanent Residents
- Fiancé visa petitions by U.S. citizens (K-1 visa)
- Step-children
 - U.S. citizens and residents can file petition for spouse's children as their own step-children
 - Parents married before child is 18, child now under 21 and unmarried
- Qualifying relative for "waivers" and cancellation of removal
- Dependent visas for non-immigrants
- Diversity visa lottery eligibility

What is a Valid Marriage?

- Definition of "marriage"
 - Place of celebration rule
 - If marriage valid in state or country where couple married, valid for U.S. immigration purposes
 - Confirmed in Matter of Oleg B Zeleniak 26 I&N Dec. 158 (BIA 07/17/2013)
 - Unclear if Domestic Partnerships or Civil Unions will qualify; better to marry if possible

Proving a "bona fide" marriage

- Cohabitation or property co-ownership
- Joint Finances
 - State or federal taxes
 - State domestic partnership registration
 - Credit cards
 - Bank/investment accounts
 - Loans
 - Insurance policies
- Trips taken together
- Affidavits from family/friends

Green Card Procedures: Adjustment of Status

- Preferred method -- process performed inside the U.S. and most have right to immigration court review if denied
- Requires a *lawful admission* to the U.S.
 - Must be "inspected, admitted, or paroled"
 - Spouses of U.S. citizens can apply for Adjustment of Status even if now out of status or worked without authorization
- Foreign spouse is not "inadmissible"
 - Waivers may be available for crimes, prior immigration/visa fraud

Green Card Procedures: Adjustment of Status

- Steps in process:
 - Case filing with USCIS numerous forms, filing fees, photos and supporting documents
 - Biometrics (fingerprints) appointment
 - Employment Authorization Document and Advance Parole issued for work and travel
 - In person interview
- Timing: 3-9 months

Green Card Procedures: Consular Processing

- Case processed through U.S. consulate with jurisdiction over foreign spouse's residence
- Takes longer than Adjustment of Status and more chance of delays
- Usually the only option for an applicant who "entered without inspection"
 - Departure will trigger a 3 or 10 year bar, requiring a discretionary waiver
 - Provisional waiver process for spouses of U.S. citizens to process the waiver in the U.S.

Green Card Procedures: Consular Processing

- Steps in process:
 - File Form I-130 with USCIS in the U.S. (marriage petition)
 - After approval, file other forms and supporting evidence with National Visa Center
 - In person interview conducted at U.S. consulate (foreign spouse only)
 - Immigrant visa issued
- Timing: 10-12 months

Avoiding Consular Processing

- Enter U.S. using a non-immigrant visa
- Do you advise waiting 60 days before marrying or filing application for Adjustment of Status?
 - BIA says no preconceived intent but not all jurisdictions agree with or will follow
 - Safest strategy given national differences between USCIS offices
- Risks:
 - Questions about purpose of trip or relationship
 - Denial of entry, or misrepresentation charge

Potential "Issues" Requiring Careful Counseling

- Prior immigration fraud
- Prior removal from U.S. or "voluntary return"
- Prior marriages and/or marriage fraud
- Criminal convictions
- Overstay over 180 days, followed by departure triggering 3 or 10 year bar
- Waivers are available spouse as qualifying relative

Conditional Permanent Residence

- Same standards apply to same-sex marriages
 - If married for less than two years at time of green card approval, two year "conditional" green card issued
 - Must file joint I-751 during 90 day window prior to expiration of "conditional" green card
 - Must prove that marriage was valid and relationship continues
 - If divorced then must show relationship was valid when married
- What if the couple has been together for years prior to legal marriage?

Fiancé Visas

- Consider if foreign spouse cannot get visa to U.S. and couple can't legally marry in foreign country
- Requirements:
 - Valid relationship that will lead to marriage
 - Met in person (usually)

Fiancé Visas

- Steps in process:
 - File Form I-129F with USCIS in the U.S. (K-1 petition)
 - After approval, file forms and supporting evidence with U.S. consulate abroad
 - In person interview conducted at U.S. consulate abroad
 - K-1 fiancé visa issued
 - Couple must marry within 90 days after fiancé enters the U.S. with K-1 visa; then file for Adjustment of Status
- Timing: 7-9 months

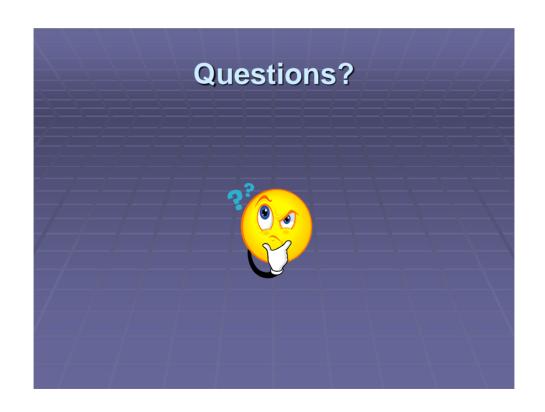
Some Potential Pitfalls of the Windsor Decision

- Travel as a visitor, student, and certain "temporary intent" visas
 - Previously not a problem, but may be more restricted now for a foreign spouse married to a U.S. citizen or Permanent Resident

Consultations

McCown & Evans offering complimentary consultations (up to 1 hour) on immigration options for same-sex spouses or fiancés

 Contact Andrea Gulyas at (415) 834-9123, or email andrea@mccownevans.com





McCown & Evans LLP
Two Transamerica Center
505 Sansome Street, Suite 1200
San Francisco, CA 94111
(415)834-9162 direct
(415)834-9123 main
kelly@mccownevans.com
jeptha@mccownevans.com
www.mccownevans.com