

Immigration for Same-Sex Couples Post DOMA

By Kirk A. Carter, Esq.

On June 26th the Supreme Court found the Defense of Marriage Act (DOMA) to be unconstitutional, striking down the law that prevented same-sex marriages, validly entered into in states recognizing such marriages, from being recognized by the federal government for benefits purposes. There are more than 1,000 federal benefits extended to heterosexual married couples that were previously denied to gay married couples. Among such benefits was the recognition of same-sex marriages for immigration purposes. Post DOMA, gay foreign nationals can more easily bring their same-sex spouses to the US while traveling for business, education, or pleasure, while gay US citizens legally married to or intending to marry a foreign national of the same sex can sponsor their spouse or fiancé for a visa to live with them permanently here in the United States.

Today same-sex marriage is recognized in 15 countries worldwide. Massachusetts was the first state to recognize same-sex marriage in 2004. Since then 12 other states and the District of Columbia have recognized same-sex marriage. Several states recognize civil unions, and many states expressly prohibit same-sex marriage. For many years gay US citizens in bi-national relationships have been denied the ability to sponsor their partners, despite their being in long-standing committed relationships. Many same-sex partners of US citizens have been deported from the United States, leading many US citizens to leave and live abroad in order to be with their loved ones. For 17 years DOMA expressly prohibited the federal government from recognizing such relationships, even if legally recognized in various states such as Massachusetts.

With the death of DOMA, gay American citizens can now sponsor their lawfully married spouses for permanent residence. If they are not yet married and their loved ones reside abroad, they can sponsor them for a fiancé visa to travel to the US for the purpose of getting married, provided they can demonstrate that they will be married in a state that recognizes same-sex marriage. United States Citizenship and Immigration Services (USCIS) has issued guidance that indicates they will look to the law of the jurisdiction where the marriage was celebrated to determine whether the marriage is valid. Thus, marriages entered into in one of the 14 other countries that recognize same-sex marriage can also support a petition for immigration benefits. Like all marriage-based petitions, couples seeking immigration benefits based on marriage face a high level of scrutiny, particularly as it relates to the bona fides of their relationship. This scrutiny will

likely be higher for same-sex couples in states where gay marriage is not recognized or by examiners who don't personally agree with the Supreme Court's decision.

The death of DOMA also makes it easier for foreign nationals in same-sex marriages to travel to the US for business, pleasure, work, or education. While opposite-sex spouses and their children have long been able to accompany their foreign national spouses to the US in a dependent visa category that allowed them to remain in the US for the same period as their spouse, gay couples have historically been denied this right. More recently same-sex partners have been allowed to accompany their spouses to the US, not under a dependent visa of the same duration, but instead on a visitor's visa limited to six months at a time. This required the "visiting" spouses to renew their "visitors" visa every six months even though their spouses may have been working on a three- or five-year visa. With DOMA out of the way, USCIS can now issue dependent visas in the same visa category and for the same duration as the primary visa holder to any legally married same-sex spouse.

The Obama administration has been quick to respond to the Supreme Court's decision, and both the Department of Homeland Security (DHS) and the Department of State (DOS) have issued preliminary guidance. USCIS has actually begun approving same-sex petitions filed prior to the Supreme Court's decision and is accepting new cases. While many issues remain unanswered, and further guidance from both DHS and DOS is anticipated, it is clear that bi-national same-sex couples, post DOMA, have opportunities that didn't previously exist, making this the opportune time to speak with an immigration attorney familiar with such issues.

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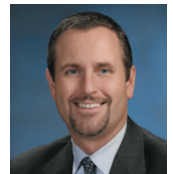
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