

PRACTICE ADVISORY¹

**IMMIGRATION BENEFITS AND PITFALLS FOR LGBT
FAMILIES IN A POST-DOMA WORLD**

August 5, 2013

INTRODUCTION

On June 26, 2013, the U.S. Supreme Court issued a landmark decision in *United States v. Windsor*, holding that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional. See *United States v. Windsor*, No. 12-307, 570 U.S. ___, 2013 WL 3196928 (June 26, 2013) (striking 1 U.S.C. § 7). When DOMA was enacted by Congress and signed into law by President Clinton in 1996, no state or country in the world permitted same-sex couples to marry. Over the last decade, after Canada, Massachusetts, and then other jurisdictions began to allow lesbian and gay couples to marry, the impact of DOMA became more concrete. Section 3 of DOMA was the only impediment to filing applications for lawful permanent residence for noncitizen spouses.² There are an estimated 36,000 lesbian and gay binational couples who have been affected by DOMA.³ In finding that “no legitimate purpose overcomes [DOMA’s] purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity,” the Supreme Court ended this chapter of institutional discrimination.

The immigration agencies have begun the task of implementing the *Windsor* decision. As practitioners and advocates, we are working to minimize delay and unnecessary hurdles in order to ensure that noncitizens in same-sex marriages are afforded the same immigration benefits as all other couples. This practice advisory highlights some of the issues LGBT families will face

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² As of this writing, there are thirteen marriage equality states plus the District of Columbia, and over a dozen countries with marriage equality. The states are California, Connecticut, Delaware, Iowa, Maine, Massachusetts, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington. For a list of marriage equality states and countries and documentary requirements to marry, see Immigration Equality, “Where Can We Marry?” available at <http://immigrationequality.org/issues/couples-and-families/where-can-we-marry/>

³ See Family, Unvalued: Discrimination, Denial, and the Fate of Binational Same-Sex Couples under U.S. Law, by Human Rights Watch and Immigration Equality, 2006, available at <http://www.hrw.org/sites/default/files/reports/FamilyUnvalued.pdf>

in a post-DOMA world. It is not intended to provide exhaustive guidance on all marriage-related immigration issues. We encourage practitioners to contact Immigration Equality and the American Immigration Council at vneilson@immigrationequality.org or clearinghouse@immcouncil.org about problems they encounter, as this will inform ongoing advocacy.

***Windsor* and the Immediate Response of Immigration Agencies**

In *United States v. Windsor*, the Supreme Court struck down Section 3 of DOMA, which defines the term “marriage” as a union between a man and a woman for purposes of all federal statutes and federal agency regulations and rulings. The immigration agencies relied upon this provision to deny immigration benefits to noncitizens in valid same-sex marriages with United States citizens (USC) or lawful permanent residents (LPR). Although *Windsor* involved federal estate taxes rather than immigration benefits, the Court’s holding applies broadly to all federal programs impacted by DOMA. In finding that DOMA violated the equal protection clause of the Fifth Amendment to the U.S. Constitution, the Court explained, “DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal.” Slip Op. at 22.

Shortly after issuance of the decision, Department of Homeland Security (DHS) Secretary Janet Napolitano stated that DHS would take steps to implement the ruling and ensure that “all married couples will be treated equally and fairly.” Subsequently, U.S. Citizenship and Immigration Services (USCIS) released a “[Frequently Asked Questions](#)” (FAQ) (discussed in more detail in § I.B, *infra*) and has begun approving visa petitions filed on behalf of noncitizens by their USC spouses. And on July 26, 2013, USCIS expanded on the initial FAQ with a new webpage entitled “[Same-Sex Marriages](#).” (Same-Sex Marriage Guidance). Among other things, this guidance sets forth procedures for reopening visa petitions that USCIS denied solely based on Section 3 of DOMA prior to *Windsor*. See § II.B, *infra*.

The Department of State (DOS) also weighed in early on, asserting, “We recognize the significance of this decision for affected families, and we are working to interpret the decision and implement policy and procedural changes as soon as possible.” On August 2, 2013, DOS posted “[FAQs for Post-Defense of Marriage Act](#)” (DOS FAQs). The DOS FAQs state that “[e]ffective immediately, U.S. embassies and consulates will adjudicate visa applications that are based on a same-sex marriage in the same way that we adjudicate applications for opposite gender spouses.” DOS concurrently issued internal guidance entitled, “[Next Steps on DOMA – Guidance for Posts](#)” (DOS Guidance for Posts), which expands on some of the issues addressed in the DOS FAQs.

Perhaps most significantly, on July 17, 2013, the Board of Immigration Appeals (BIA or Board) – whose decisions are binding on all DHS officers and employees and immigration judges, 8 C.F.R. § 1003.1(g) – issued its first post-*Windsor* published decision. [Matter of Zeleniak](#), 26 I&N Dec. 158 (BIA 2013). The BIA stated, “The Supreme Court’s ruling in *Windsor* has therefore removed section 3 of the DOMA as an impediment to the recognition of lawful same-sex marriage and spouses if the marriage is valid under the laws of the State where it was celebrated.” [Matter of Zeleniak](#), 26 I&N Dec. at 159.

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I. ESTABLISHING A MARRIAGE

A. Marriage and Immigration Law

There are a number of immigration benefits and forms of relief from removal that depend on the existence of a valid marriage. Thus, the validity of a marriage can be an issue in an affirmative application for an immigration benefit filed with USCIS or DOS or in an application for relief from removal filed with an immigration judge (IJ). The following are examples of immigration benefits and forms of relief that are dependent on the existence of a marriage.

- Adjustment of status or consular processing based on a family-based visa petition
- Adjustment of status or consular processing based on being a derivative of a beneficiary of a visa petition (family-based or employment-based)
- Cancellation of removal requiring a qualifying relative
- Waivers that require a qualifying relative (such as § 212(h), § 212(i) and unlawful presence waivers)
- Derivative beneficiary of an asylum application
- Derivative beneficiary of a nonimmigrant visa
- Fiancé/e petition
- VAWA self-petition

In *Matter of Zeleniak*, the BIA explicitly recognized the broad range of INA provisions affected by *Windsor*. 26 I&N Dec. at 159 (noting that Supreme Court’s ruling impacts the benefits and forms of relief listed above).

B. Place of Celebration Rule

With 13 U.S. states plus the District of Columbia offering LGBT families marriage equality, one of the most immediate questions is whether the couple has to live in a marriage equality state in order to apply for immigration benefits. The most straightforward scenario is one in which a couple was married in and resides in a state with marriage equality, such as Vermont. But what happens if the couple that married in Vermont lives in Florida at the time the visa petition is filed and adjudicated? When evaluating the validity of a marriage for immigration purposes, DHS generally employs a place of celebration rule. Under this rule, “the validity of a marriage is determined by the law of the State where the marriage was celebrated.” *Matter of Lovo-Lara*, 23 I&N Dec. 746, 753 (BIA 2005). The BIA recently affirmed this rule in *Matter of Zeleniak*, 26 I&N Dec. at 160 (citing *Matter of Lovo-Lara*). In the example above, because the marriage was validly celebrated in Vermont, and assuming it is otherwise bona fide, it should not matter that the couple could not have married in Florida, their subsequent state of domicile.

In its [FAQ](#) issued after *Windsor*, USCIS affirmed that this is its general policy, but clouded the issue by stating that there were “some limited exceptions under which immigration agencies have historically considered the law of the state of residence in addition to the law of the state of celebration of the marriage.” See “[DHS Issues Guidance on DOMA Implementation](#),” AILA InfoNet Doc. #13070240. The longer [Same-Sex Marriage Guidance](#) initially included the same ambiguous language, but significantly, on August, 2, 2013, USCIS removed the reference to

“exceptions” to the place of celebration rule.⁴ Furthermore, the BIA’s decision in *Matter of Zeleniak* does not indicate any exceptions to this rule. The [DOS Guidance for Posts](#) goes further and states explicitly, “The same-sex marriage is valid even if the applicant is applying in a country in which same-sex marriage is illegal.”

It is notable that the first reported gay married couple to receive an approved visa petition reside in Florida and married in New York.⁵ And, the first I-485 was approved for a Colorado lesbian couple who married in Iowa.⁶ In both instances, the couple married in a marriage equality state but lived in a state with a constitutional amendment banning same-sex marriage. The couple in *Zeleniak* married in Vermont and resided in New Jersey, a state that offers civil unions but not full marriage equality. If you have a case in which this issue is raised, please contact Immigration Equality or the American Immigration Council at vneilson@immigrationequality.org or clearinghouse@immcouncil.org.

C. Requirements to Marry in Marriage Equality States and Countries

Since many people live in states and countries that do not have marriage equality, practitioners may get questions about where couples can marry. Importantly, none of the U.S. marriage equality states has a residence requirement, though in some states there may be a wait of a few days between obtaining a license and performing a ceremony. However, if a couple lives in a state that does not recognize their marriage, they may be unable to divorce there, and many marriage equality states do have residence requirements in order to divorce. Some countries have residence requirements to marry or allow a couple to marry only if at least one spouse is a citizen of the country.⁷

D. Proving Bona Fides

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. The petitioner has the burden of showing – by a preponderance of the evidence – that the marriage was entered into in good faith. *See Matter of Casillas*, 22 I&N Dec. 154, 156 (BIA 1998); *see also* INA § 291 (burden on petitioner to demonstrate eligibility for visa petition). In general, USCIS will consider whether the parties intended to establish a life together. *Matter of Laureano*, 19 I&N Dec. 1, 2-3 (BIA 1983).

⁴ The [DOS FAQs](#) state, “If your marriage is valid in the jurisdiction (U.S. state or foreign country) where it took place, it is valid for immigration purposes” and direct readers to the USCIS Same-Sex Marriage Guidance for more information.

⁵ “Gay Married Man in Florida Is Approved for Green Card,” by Julia Preston, *The New York Times*, June 30, 2013, available at http://www.nytimes.com/2013/07/01/us/gay-married-man-in-florida-is-approved-for-green-card.html?_r=0.

⁶ “HISTORY MADE! First Same-Sex Spouse Granted Green Card,” by Diane Anderson, *The Advocate*, July 4, 2013, available at <http://www.advocate.com/society/marriage-equality/2013/07/04/history-made-first-same-sex-spouse-granted-green-card>.

⁷ For further information, *see* “Where Can We Marry?” available at <http://immigrationequality.org/issues/couples-and-families/where-can-we-marry/>.

While the parties' intent at the time that they married is the issue, conduct subsequent to the marriage can be relevant to their intent at the time of marriage. *Matter of Laureano*, 19 I&N Dec. at 3 (citing *Lutwick v. United States*, 344 U.S. 604, 617 (1953)).

In different-sex marriages, evidence that is often presented to demonstrate that a marriage is bona fide includes, though it is not limited to: proof that the parties filed joint tax returns as a married couple, listed one another as beneficiaries on insurance policies, shared a bank account, were listed jointly on property leases, or owned a home together. *See, e.g., Matter of Phillis*, 15 I&N Dec. 385, 387 (BIA 1975). Other evidence that is typically submitted includes written testimony (from both the couple and family members) and pictures and other documentation of the parties' courtship, marriage, and shared experiences. *Id.* Proving that a marriage is bona fide may be more challenging for an LGBT couple than for a different-sex couple because evidence of joint assets and liabilities are often not available to them. Prior to June 26, 2013, married same-sex couples were prohibited from filing federal taxes jointly. Even post-*Windsor*, couples who do not live in marriage equality states likely will not be able to file state taxes jointly.

Significantly, no federal anti-discrimination law covers sexual orientation. While some states and localities have anti-discrimination protections, many others do not.⁸ Moreover, even in jurisdictions that do provide protections, small employers and employers with religious affiliations are often exempted. Therefore, some couples may choose not to mingle finances (e.g., add a spouse to employer-sponsored health insurance or retirement benefits, a lease or mortgage, or a bank account) for fear of facing discrimination. For couples living together abroad or where the foreign spouse lives abroad, the fear of being "outed" may be even greater, especially if the foreign spouse lives in a country where LGBT people face persecution and possible criminal penalties.

In addition to added challenges in showing intermingled finances, it may be more difficult to provide extrinsic evidence of courtship and emotional ties. Some couples may choose not to be open about their relationship with family members who may disown an LGBT child or even become violent. Thus, the couple may not be able to provide photos of themselves taken with their extended families or have proof of a public wedding celebration.

E. Marriage Fraud and Related Provisions

The INA includes several marriage fraud and related provisions, any one of which could impact the adjudication of a visa petition that is premised upon a same sex-marriage. Same-sex marriages will be scrutinized by USCIS to the same degree as different-sex marriages. Moreover, while at least one issue discussed below may not be of concern immediately, all of these issues eventually will be relevant to same-sex marriages.

⁸ See Lambda Legal, "In Your State," for a breakdown of anti-discrimination laws, available at <http://www.lambdalegal.org/states-regions/?gclid=CLXI4cWaqrgCFcyj4Aod-DkAdA>.

- **INA § 204(c).** Under this provision, an individual who is determined to have engaged in marriage fraud will be barred from receiving a visa on any basis in the future.⁹ Marriage fraud under the statute is broadly defined. It includes marriages (or attempts or conspiracies to marry) that the government finds were entered into for the purpose of evading the immigration laws whether or not the parties applied for and/or were granted a visa petition. INA § 204(c)(1), (2).¹⁰ USCIS must have substantial and probative evidence that the noncitizen committed, attempted to commit, or conspired to commit marriage fraud and must make an independent decision based upon the evidence in the record. *Matter of Tawfik*, 20 I&N Dec. at 167. The petitioner should be afforded an opportunity to review all derogatory information and documents considered by the agency, as well as an opportunity to rebut the derogatory evidence and to present evidence in support of the visa petition prior to the issuance of the adverse decision. 8 C.F.R. § 103.2(b)(16)(i), (ii).

In adjudicating a petition based on a same-sex marriage, a prior petition based on a different-sex marriage might be cause for USCIS to suspect marriage fraud with respect to the prior marriage. Note that there is a difference between failing to produce evidence of a bona fide marriage and a sham marriage. Compare 8 C.F.R. §§ 204.2(a)(1)(iii)(B) with 204.2(a)(1)(ii). There are many reasons that people marry. For example, the beneficiary may be bisexual; the beneficiary may not have identified as lesbian or gay at the time of the marriage (and may have “come out” later in life); the beneficiary may have wanted to combat the fears of family or community members about his sexual orientation. None of these reasons would support a finding that the prior marriage was fraudulent, nor should they lead to a finding that the *current* marriage is not bona fide. However, it is important for practitioners to explore fully the factual reasons for the prior marriage and to prepare the applicant to explain the marriage. In some instances, it may be helpful to submit an affidavit from an expert, such as a mental health counselor or religious advisor, who may have helped the applicant sort through coming out issues.

- **204(g), restriction where marriages entered into while in removal proceedings.** In general, a visa petition filed by a USC or LPR for a spouse based upon a marriage entered into while the beneficiary was in removal proceedings may not be approved until the beneficiary has lived outside of the United States for two years, beginning on the date of the marriage. INA § 204(g). A person is considered to be in removal proceedings during both administrative and judicial appeals of the proceedings. INA §§ 204(g), 245(e)(2). Additionally, a person is considered to be in removal proceedings when such proceedings are administratively closed. See *Matter of Munoz-Santos*, 20 I&N Dec. 205, 207 (BIA

⁹ Note that there also are criminal penalties for knowingly engaging in marriage fraud for the purpose of evading any provision of the immigration laws. INA § 275(c). This practice advisory addresses only the civil immigration-related aspects of marriage fraud.

¹⁰ See also *Matter of Tawfik*, 20 I&N Dec. 166, 167 (BIA 1990) (explaining that where marriage fraud is found, “the district director must deny any subsequent visa petition for immigrant classification filed on behalf of such alien, regardless of whether the alien received a benefit through the attempt or conspiracy”).

1990) (describing administrative closure as an “administrative convenience” that does not result in a final deportation order).

A major exception to this restriction is for bona fide marriages. *See* INA § 245(e)(3).¹¹ To satisfy the bona fide marriage exception, the beneficiary must demonstrate by clear and convincing evidence that he married in good faith, in accordance with the laws of the place of celebration, did not marry to procure admission as an immigrant, and did not marry as a result of a financial arrangement. *Id.* The regulations set forth the procedure to be followed and evidence required to establish the bona fide marriage exemption. 8 C.F.R. § 204.2(a)(1)(iii).

Because, up until the *Windsor* decision, same-sex marriages were not recognized under immigration law, a noncitizen would not have entered such a marriage for the purpose of procuring an immigration benefit and thus should not have a problem establishing that the marriage was entered into in good faith. Thus, § 204(g) should not present a problem for couples whose marriages predate *Windsor*. However, with respect to same-sex marriages entered into after *Windsor*, USCIS likely will consider this issue as seriously as it does for different-sex marriages.

- **212(a)(6)(C), Prior Misrepresentation.**

Any noncitizen who, by fraud or willfully misrepresenting a material fact, seeks, has sought, or has procured any benefit under the INA is inadmissible. INA § 212(a)(6)(C)(i). A defense to this ground of inadmissibility is that the statement was not a knowing and deliberate misrepresentation. *See, e.g., Matter of Healy and Goodchild*, 17 I&N Dec. 22 (BIA 1979) (recognizing that a noncitizen must know that the statement is false); *Espinoza-Espinoza v. INS*, 554 F.2d 921, 925 (9th Cir. 1977) (requiring that the statement must be made with knowledge of its falsity). Even if a person is found subject to § 212(a)(6)(C), he may apply for a discretionary “fraud waiver” under INA § 212(i) if he: 1) is the spouse or son or daughter of a USC or an LPR; and 2) can demonstrate that the denial of admission would result in extreme hardship to this relative.

In the past, lesbian and gay binational couples were in the uniquely disadvantaged position of having their relationships recognized for the purpose of finding immigrant intent under INA § 214(b)¹² and having nonimmigrant visa applications – such as student or visitor visas – denied for this reason, but not recognized for the purpose of granting benefits. As a result, couples may have been less than forthcoming about the nature of their relationship when interacting with DHS or DOS. For example, a noncitizen may have indicated that his financial sponsor for a student visa was a family friend, when he

¹¹ Note that the restriction and exemption applicable to visa petitions also apply to adjustment of status applications. *Id.*; *see also* 8 C.F.R. § 245.1(c)(8).

¹² INA §214(b) states that, with only limited exceptions, applicants for nonimmigrant visas will be presumed to be immigrants until they demonstrate to the satisfaction of both the consular officer, at the time of their visa application, and the immigration officer, at the time of admission, their nonimmigrant intent.

was actually a partner or husband. It is unclear how the agencies will handle these situations. We are hopeful that DHS and DOS will take a reasonable approach given the systematic and unconstitutional discrimination that such couples faced.

One issue that arose frequently before *Windsor* was whether a noncitizen in a marriage with a same-sex partner should answer “married” or “single” on agency forms. This question was posed to USCIS in a listening session and the agency response was “USCIS is looking into this issue and will provide a response as soon as possible.”¹³ Since USCIS never answered this question definitively, it seems unlikely either answer – “single” or “married” – would be considered a misrepresentation.

F. Marriages Where a Spouse Is Transgender

Windsor also has implications for couples where one spouse is transgender. In April 2012, USCIS issued guidance on adjudicating marriage-based petitions where a spouse or fiancé/e is transgender. See “[Adjudication of Immigration Benefits for Transgender Individuals](#),” AILA InfoNet Doc. No. 12041360. USCIS took the position that a transgender person would be considered her affirmed gender as long as she had either amended identity documents or obtained a medical certification from a doctor affirming gender. This guidance went a long way towards clarifying USCIS policies and allowing many transgender individuals to benefit from marriage-based petitions. Nonetheless, while DOMA was in effect, USCIS did not recognize marriages involving a transgender spouse where the transgender individual was unable to provide documentary or medical evidence of gender transition.

Post *Windsor*, a couple may file a marriage-based petition or fiancé/e visa even if the transgender person cannot meet the requirements of the USCIS transgender guidance. For example, a transgender woman in the Philippines who has taken few or no medical steps to transition to female likely would not be able to obtain a medical certification that she is female. However, her USC partner could file a fiancé/e visa even if the couple is legally viewed as same-sex. It is advisable for the attorney to refer to the couple in a way that respects the self-identification of the couple, but explains their legal rights under current guidance. An appropriate explanation may be: “I represent a U.S. citizen male in a long-term relationship with a transgender woman from the Philippines. Because she has not taken steps to medically transition to female, it is my understanding that USCIS will view this relationship as same-sex.” Such a framing will alert USCIS to the legal standard while also respecting the fact that the couple may not view themselves as same-sex. The couple then can proceed with their application as a same-sex couple would. Note, however, that USCIS’s guidance indicates that the transgender spouse will not be provided identity documents in the affirmed gender unless she provides appropriate legal or medical documentation.

¹³ USCIS “Listening Session -- LGBT Community” Questions and Answers, June 9, 2010, available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnexto id=5a87338dc3d19210VgnVCM100000082ca60aRCRD&vgnnextchannel=994f81c52aa38210VgnVCM100000082ca60aRCRD>.

G. Civil Unions

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. In fact, in the 2011 Attorney General decision *Matter of Dorman*, 25 I&N Dec. 485, 485 (A.G. 2011), one of the questions posed to the Board of Immigration Appeals was, “whether respondent’s same-sex partnership or civil union qualifies him to be considered a ‘spouse’ under New Jersey law.”¹⁴

The [DOS FAQs](#) indicate that the agency will not treat civil unions as marriages. The guidance provides:

Q: I am in a civil union or domestic partnership; will this be treated the same as a marriage?

A: 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.

To date, DHS has not addressed this issue in its guidance. It is unclear if USCIS’s adjudication of applications based on non-marital relationship recognition will be different from DOS’s adjudication, given the somewhat different contexts in which the agencies will confront the issue. Moreover, given DOS’s inclusion of temporal language—“at this time”—in its guidance, it is possible that the agency may be considering the issue further. Nonetheless, if a couple that currently has a civil union can marry relatively easily, doing so will allow them to file an application with far more certainty than an application based on a civil union.

There are circumstances, however, where a couple may have a civil union but be unable to marry now. For example, the authors are aware of the following scenarios:

Case 1: A couple has entered into a New Jersey civil union. The noncitizen partner applies for asylum; the application is denied, and he is removed from the United States. He is not eligible for a waiver to return to the United States unless his USC partner is considered a qualifying relative.

Case 2: A lesbian couple had a child together in Australia. At the time the noncitizen partner gave birth, the two had been joined in a Vermont civil union. The couple later moved to the United States and the foreign partner died. If the child is considered a “step-child,” then the USC can petition for her. If not, she may be unable to obtain permanent residency because the child’s Australian grandparent is opposed to an adoption.

There is support for the argument that the immigration agencies should consider a civil union as the functional equivalent of a marriage. The Foreign Affairs Manual recognizes common law marriages, but only if they are the full legal equivalent of marriage:

¹⁴ The BIA has yet to rule on this issue in *Matter of Dorman* or in any published decision.

In the absence of a marriage certificate, an official verification, or a legal brief verifying full marital rights, a common law marriage or cohabitation is considered to be a “valid marriage” for purposes of administering the U.S. immigration law only if:

- (1) It bestows all of the same legal rights and duties possessed by partners in a lawfully contracted marriage; and
- (2) Local laws recognize such cohabitation as being fully equivalent in every respect to a traditional legal marriage, e.g.:
 - (a) The relationship can only be terminated by divorce;
 - (b) There is a potential right to alimony;
 - (c) There is a right to intestate distribution of an estate; and
 - (d) There is a right of custody, if there are children.

9 FAM 40.1 N1.2 Cohabitation, (CT:VISA-1614; 01-07-2011), available at <http://www.state.gov/documents/organization/86920.pdf>. Thus, the argument that a civil union is the equivalent of a marriage likely would be dependent on the specific rules governing the rights and obligations imposed under the law of the state or country that granted the civil union status.

Regardless of whether DHS and DOS accept civil unions for marriage-based benefits under the INA, there may be arguments that that children of the relationship qualify as step-children if the laws of the state or country that celebrated the civil union bestow parental rights.

II. APPLYING FOR BENEFITS

A. When Can Couples File?

The short answer is now. Within a week of the ruling, Secretary Napolitano issued a statement “direct[ing] 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” effective immediately. The [Same-Sex Marriage Guidance](#) confirms that applications can be filed now and that there is no need to wait for further regulations, forms or guidance. As discussed above, already, USCIS has approved I-130s and adjustment of status applications. Likewise, the [DOS FAQs](#) provide that “effective immediately, U.S. embassies and consulates will adjudicate visa applications that are based on a same-sex marriage in the same way that we adjudicate applications for opposite gender spouses.” The only reason to delay filing is if there are complex legal questions and the practitioner wants to wait for further DHS and/or DOS guidance.

B. Previously Denied Visas

Before *Windsor*, some USCs filed I-130s on behalf of their same-sex spouses. While some of these petitions remained pending on the date the Supreme Court issued *Windsor*, others had been

denied. For those that are still pending, USCIS now is adjudicating them. The authors also are aware of several previously denied I-130s being reopened by USCIS.

Moreover, the [Same-Sex Marriage Guidance](#) specifies that USCIS will reopen cases it denied solely because of Section 3 of DOMA after February 23, 2011, the date that DOJ stopped defending DOMA in Court. The agency will “make a concerted effort” to identify the petitions and notify the petitioner, at the last known address, of reopening and request updated information in support of the application. Any related application, “such as a concurrently filed I-485,” also will be reopened. In addition, any person with an I-130 that was denied because of DOMA, regardless of the date of the denial (including those denied prior to February 23, 2011), can contact USCIS directly at USCIS-626@uscis.dhs.gov. However, if the I-130 was denied before February 23, 2011 (when USCIS began to keep a list of denials), then he or she must notify USCIS **before March 31, 2014** at USCIS-626@uscis.dhs.gov to request reopening. No fee will be required to reopen any of these applications.

The [Same-Sex Marriage Guidance](#) also provides information about employment authorization that previously was denied or revoked. Where USCIS cannot immediately make a decision on a reopened adjustment of status application, it will “(1) immediately process any pending or denied application for employment authorization or (2) reopen and approve any previously revoked application for employment authorization.” If the applicant has not yet had biometrics taken, he or she will be scheduled for an appointment, and if he or she has had biometrics taken, the EAD can issue without further action by the applicant.

The [Same-Sex Marriage Guidance](#) further specifies that applicants for other types of benefits, besides I-130s, who were denied due to DOMA, can contact the agency at USCIS-626@uscis.dhs.gov. The Guidance does not specify what these other benefits may be, but as discussed in this advisory, they could include: fiancé/e visas; derivative benefits; step-parent/child petitions; and follow to join petitions.

There may still be some instances when an individual may prefer to file a new I-130 and I-485 rather than wait for reopening. The Guidance clarifies that applications can be filed anew, but that the applicable fees would then apply.

C. Unlawful Presence and Waivers

In most cases, individuals who entered the United States without being admitted or paroled are not eligible to adjust status, regardless of whether they are married to a USC. INA § 245(a). Likewise, individuals, other than immediate relatives (i.e., spouses or minor children of USCs or parents of adult USCs), who entered lawfully but overstayed their visas are not eligible to adjust status. INA § 245(c)(2). These individuals must leave the United States and pursue an immigrant visa through consular processing. However, because many of these individuals will have accrued unlawful presence, departing the United States will likely trigger the 3 or 10 year bar to admissibility. INA § 212(a)(9)(B) (3 year bar if unlawfully present for more than 180 days but less than one year, and 10 year bar if unlawfully present for more than one year).

There are waivers available for spouses of USC's and LPRs who can show that refusal of admission of the immigrant would result in extreme hardship to the immigrant's USC or LPR spouse or parent. INA § 212(a)(9)(B)(v). 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 new rule, effective March 4, 2013, permits immediate relatives of USC's (but not LPRs) to request a provisional unlawful presence waiver prior to travelling abroad for consular processing. *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives*, 78 Fed. Reg. 536 (Jan. 3, 2013). For more information about provisional waivers, see AILA InfoNet Featured Topic entitled, "Provisional (Stateside) Waivers," available at <http://www.aila.org/Issues/Issue.aspx?docid=38225>.

To qualify for a waiver of unlawful presence, the applicant must demonstrate extreme hardship to his USC spouse or parent.¹⁵ Like other waivers, hardship to a USC spouse or parent may include evidence of age, family ties in the United States (and lack of ties abroad), length of time spent in the United States, health/medical conditions, economic and financial conditions, etc. In addition, hardship for lesbian and gay married couples may be bolstered by evidence similar to that submitted in asylum applications if there are reports of persecution or extreme discrimination against LGBT people in the noncitizen spouse's home country.

D. Concerns with Consular Processing

A noncitizen spouse who is not in the United States can apply for lawful permanent residence through consular processing. However, in some countries, this may create a significant threat to the safety of the foreign national. According to a report issued by the United Nations in November 2011, there are 76 countries that criminalize homosexuality.¹⁶ The Department of State also has acknowledged the dangers that LGBT American travelers may face in certain countries, including, "fines, deportation, flogging, or even [death] sentence[s]."¹⁷

Immigration Equality and AILA have expressed concerns to DOS about the safety of individuals seeking to consular process in countries where they could face criminal prosecution. They have asked DOS to protect the identities of LGBT applicants for marriage-based benefits and to take additional steps to ensure applicants' safety and confidentiality. Moreover, they have asked DOS to allow some same-sex fiancé/es or spouses to utilize third country processing, if the circumstances in the home country are unusually dangerous.

¹⁵ [The Same-Sex Marriage Guidance](#) specifies that "same-sex marriages will be treated exactly the same as opposite-sex marriages" for purposes of waivers.

¹⁶ "Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity," Report of the United Nations High Commissioner for Human Rights, November 17, 2011, at 13, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41_English.pdf.

¹⁷ See LGBT Travel Information, April 9, 2013, available at http://travel.state.gov/travel/cis_pa_tw/lgbt/lgbt_5887.html.

Until DOS issues guidance on how it will ensure the safety of applicants in dangerous countries, practitioners are advised to alert their clients to the potential dangers. Third country processing is available and may be requested in cases where the applicant is “homeless” or where a nonresident is legally and physically present in the consular district, or if not physically present, where there are “exceptional circumstances.” 22 C.F.R. § 42.61(a); 9 FAM 42.61 N.3.1-3.2. Practitioners should reach out to the consulate before filing to discuss safety concerns or consider requesting third country processing.

III. OTHER EFFECTS OF THE SUPREME COURT’S DECISION

A. Family Preference Visas

With the end of DOMA, USCs and LPRs may file immigrant visa petitions (Form I-130) for their spouses. Unfortunately, there also are some adverse consequences for gay and lesbian noncitizens who seek status through the family preference system.

Noncitizens with lesbian or gay spouses, who previously qualified as “unmarried sons and daughters,” of USCs (F1) now will be considered married sons and daughters under the F3 category, which has a much longer waiting period. For example, if a USC filed an I-130 for her Dutch daughter who is married to a Dutch woman, under DOMA, the beneficiary would have fallen under the F1 category because the marriage would not have been legally recognized. With the demise of DOMA, the beneficiary now will be considered married, and she will fall into the F3 category which, under the most recent Visa Bulletin, will add another four years’ waiting time.¹⁸ The silver lining in this dark cloud is that when the beneficiary’s priority date finally does become current, she could include her spouse as a derivative on her immigrant visa application.

Noncitizens who were considered unmarried sons and daughters of LPRs (F2B) under DOMA will no longer be eligible for a family preference visa, as LPRs may not sponsor a married son or daughter. The would-be beneficiary now will have to wait for the parent to become a U.S. citizen. Of course, in either of the scenarios above, if the noncitizen is married to a USC or LPR, the USC or LPR spouse could file an I-130 on the noncitizen’s behalf.

B. Dual Foreign Nationals/Derivative Beneficiaries

In the past, dual foreign national couples (where both spouses are noncitizens), were unable to come to the United States as principal and derivative beneficiaries on the same family- or employment-based visa petition. For example, a South African engineer on an H-1B visa could not bring his husband as an H-4. Instead the noncitizen spouse was relegated to a “co-habiting B” visa, which required the spouse to prove nonimmigrant intent and maintain a foreign residence. After *Windsor*, the spouse can derive status through the primary beneficiary’s

¹⁸ DOS posts the visa bulletins at http://www.travel.state.gov/visa/bulletin/bulletin_1360.html.

nonimmigrant visa¹⁹ and obtain lawful permanent residence if the primary visa holder's employer ultimately sponsors him for permanent status. Where a Petition for Alien Worker (Form I-140) and/or Application for Adjustment of Status (Form I-485) is currently pending, practitioners should consider filing an amended I-140 or filing an application for adjustment of status for the newly acquired or recognized spouse. However, if the spouse recently entered the United States in B-2 status or other status where INA § 214(b) controls, a better course may be to return home to consular process after the principal's visa is granted to avoid an immigrant intent issue. Additional steps may be required for a newly-acquired spouse to receive follow-to-join benefits, including the need to update the I-140 as explained above and/or the need to file an Application for Action on an Approved Application or Petition (Form I-824) to request USCIS to inform the National Visa Center of the family member's future consular processing.

Practitioners also should be mindful of the fast-approaching deadline to secure an immigrant visa for winners of the 2013 Diversity Visa Lottery. Because all lottery winners must obtain their LPR status (adjustment of status approved or immigrant visa issued) by September 30, 2013, it is advisable to act quickly to amend the application. For additional information, see AILA Practice Alert, "Diversity Visa 2013 Winners and the End of the Defense of Marriage Act," AILA InfoNet Doc. No. 13071749. Moreover, the [DOS Guidance for Posts](#) specifies that winners of DV 2013 and DV 2014 may include their same-sex spouses and step-children acquired through a same-sex marriage as derivatives on their immigrant visa application even though they were not included in the initial lottery application.

C. Step-Children

With the end of DOMA, USC or LPR spouses may now petition for the biological children of their spouse as step-children. Where the couple planned to have a child together, both parents will probably see themselves as "parents," rather than "step-parents," but under the INA, a non-biological parent who is married to the child's biological parent is considered a step-parent so long as the marriage took place before the child turned 18.²⁰ INA § 101(b)(1)(B). Practitioners also should consider arguing that a step-child relationship can be formed in the context of a civil union or other non-marital relationship, provided that the law of the state or country where the union took place grants parental rights based on the relationship. See § I.G, *supra*, for a discussion of civil unions.

¹⁹ See [DOS FAQs](#) ("Starting immediately, same-sex spouses and their children are equally eligible for NIV derivative visas. Same-sex spouses and their children . . . can qualify as derivatives where the law permits issuance of the visa to a spouse or stepchild."). The DOS FAQs also confirm that documentation requirements for certain nonimmigrant visa classifications will apply to same-sex spouses and stepchildren in the same way that they apply to opposite gender spouses. For example, F-2 and M-2 applicants will need to obtain an I-20A prior to application.

²⁰ While the USCIS FAQs does not specifically address step-children, the [DOS Guidance for Posts](#) does, stating, "Stepchildren acquired through such marriages are eligible to the same extent as stepchildren acquired through opposite sex marriage. Same-sex spouses (and qualified children or stepchildren) can also qualify as dependents of employment-based categories and family-preference categories, and as follow-to-join derivatives."

D. Naturalization

Most LPRs must wait five years to apply to for naturalization. However, the spouse of a USC can apply for naturalization after three years if the couple has “been living in marital union” for three years. 8 C.F.R. § 319.1(a)(3). *See also* INA § 319(a). [The Same-Sex Marriage Guidance](#) states that for purposes of this provision, “same-sex marriages will be treated exactly the same as opposite-sex marriages.” Note that there is nothing in the statute or the regulations requiring the applicant to have obtained LPR status through a marriage-based petition in order to apply for naturalization after three years. For example, an individual who obtained LPR status subsequent to obtaining asylee status could qualify to naturalize three years after becoming a resident, as long as she was living “in marital union” with her wife for three years.

IV. NONCITIZENS WITH PENDING OR COMPLETED REMOVAL PROCEEDINGS

With section 3 of DOMA no longer an obstacle, many gay and lesbian noncitizens will be eligible to apply for relief from removal that is dependent on the existence of a marriage to a USC or LPR. As discussed above, these forms of relief include adjustment of status, cancellation of removal for nonimmigrants, waivers under INA §§ 212(h) and (i), and VAWA protection. This section offers strategies to consider for noncitizens whose removal cases are affected by the Supreme Court’s decision in *Windsor*.

A. Noncitizens with Pending Removal Cases

Individuals who are in removal proceedings before the immigration court should apply for relief in the regular course of proceedings. If the case is on appeal at the BIA, the individual may file a motion to remand to the immigration court for a hearing on the application. By filing a remand motion *before* the BIA rules on the appeal, a person preserves the statutory right to file *one* motion to reconsider and reopen, should the need later arise. Motions to remand generally are subject to the same substantive requirements as motions to reopen, and therefore the noncitizen should submit supporting evidence and applications along with the motion itself. *See Matter of Coelho*, 20 I&N Dec. 464, 471 (BIA 1992); 8 C.F.R. § 1003.23(b)(3) (setting forth substantive requirements for motion to reopen). *See also* Board of Immigration Appeals Practice Manual, § 5.8, available at <http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap5.pdf>.

If a noncitizen is eligible for adjustment of status, he should file the visa petition (I-130) with USCIS, and, if needed, request that the IJ continue proceedings. *See* 8 C.F.R. § 1003.29 (authorizing the IJ to grant a continuance “for good cause shown”). There is a presumption that a continuance will be granted in this situation. *See Matter of Hashmi*, 24 I&N Dec. 785, 790 (BIA 2009).²¹

²¹ The Board set forth the following factors the IJ may consider in adjudicating a motion for a continuance to await the adjudication of a pending family-based visa petition: (1) the DHS response to the motion; (2) whether the underlying visa petition is prima facie approvable; (3) the noncitizen’s statutory eligibility for adjustment of status; (4) whether the respondent’s

If the IJ or the BIA had administratively closed the individual's case,²² she may move to recalendar the case or reinstate the appeal in order to apply for relief from removal. *See Matter of Avetisyan*, 25 I&N Dec. 688, 695 & n.5 (BIA 2012). Note that a person may choose *not* to file a motion to recalendar or reinstate if that is not in his best interest; however, DHS may move to recalendar or reinstate even if the noncitizen does not. Either party can oppose a motion to recalender.

B. Noncitizens with Final Orders

Pending Petition for Review. A person who has a pending petition for review challenging a removal order may seek a remand from the court of appeals. If the lawyer for the Department of Justice consents to the motion to remand, it is likely that the court will grant it.

Administrative Motion to Reconsider or Reopen. Regardless of whether an individual sought judicial review, he may file a motion to reconsider and/or a motion to reopen with the BIA or the immigration court (whichever entity last had jurisdiction over the case). *See* INA §§ 240(c)(6) and (7). A motion to reconsider is used to request that the IJ or BIA correct a factual or legal error in a prior decision based on the existing record. Alternatively, a motion to reopen asks the court to reopen proceedings for consideration of new evidence. Typically, when a person is asking to apply for a form of relief that was previously unavailable (such as adjustment of status or cancellation of removal), she files a motion to reopen. *See* 8 C.F.R. § 1003.23(b)(3) (addressing motions to reopen for the purpose of applying for relief). The motion, *inter alia*, should be accompanied by an application for relief and supporting evidence. *Id.*

Keep in mind, individuals who were granted withholding of removal (for example, after having missed the one year deadline for applying for asylum) may move to reopen if they now are eligible for another form of relief. If, however, an individual was granted withholding instead of asylum because of a criminal conviction or because the applicant did not merit a favorable exercise of discretion, the practitioner should first research whether these adverse factors would render the individual ineligible for the new relief sought.

As with all cases where a motion is filed, there may be some risk that DHS will arrest and detain the individual.

Adjustment of Status with Pending Visa Petition

Even if the noncitizen does not have an approved visa petition, he still may file a motion to reopen after the visa petition (I-130) is filed on his behalf. Under BIA case law, a "properly filed" motion to reopen may be granted to adjust status if: (1) the motion is timely filed; (2) the motion is not numerically barred by the regulations; (3) the motion is not barred by *Matter of*

application for adjustment merits a favorable exercise of discretion; and (5) the reason for the continuance and other procedural factors. *Matter of Hashmi*, 24 I&N Dec. at 790.

²² IJs administratively closed many cases affected by DOMA over the past couple of years, particularly following DOJ's announcement that it no longer would defend DOMA in the courts.

Shaar, 21 I&N Dec. 541 (BIA 1996) (did not overstay an order of voluntary departure), or on any other procedural grounds; (4) the motion presents clear and convincing evidence indicating a strong likelihood that the marriage is bona fide; and (5) DHS does not oppose the motion. *Matter of Velarde-Pacheco*, 23 I&N Dec. 253 (BIA 2002). Importantly, the fifth factor – DHS’s opposition – is not dispositive. *Matter of Lamus-Pava*, 25 I&N Dec. 61, 64-65 (BIA 2009) (finding that DHS does not have “veto power” over a motion to reopen).

Dealing with the Filing Deadline

If a removal order was issued recently and the person is within the 30 or 90 day period for filing a motion to reconsider or a motion to reopen, she should try to submit the motion before the deadline. See INA §§ 240(c)(6)(B) and (c)(7)(C)(i).

If the time for filing has elapsed, individuals may be able to establish that the statutory deadline should be equitably tolled. In order to show due diligence as required by the equitable tolling doctrine, it is important to file as soon as practicable, if possible, within 30 or 90 days of *Windsor* (June 26, 2013).

DHS also may join a motion to reconsider or reopen, which would excuse the filing deadline. 8 C.F.R. § 1003.23(b)(iv). ICE has issued prosecutorial discretion guidance strongly encouraging DHS trial attorneys to join motions to reopen. Specifically, ICE provides, “[w]here a motion to reopen for adjustment of status or cancellation of removal is filed on behalf of an alien with substantial equities, no serious criminal or immigration violations, and who is eligible to be granted the relief except that the motion is beyond the 90-day limitation contained in 8 C.F.R. § 1002.23, [trial attorneys should] *strongly consider* exercising prosecutorial discretion.” William Howard, Principal Legal Advisor, ICE, “[Prosecutorial Discretion](#)” (Oct. 24, 2005) (emphasis added).

Finally, the IJ and the BIA have *sua sponte* authority to reopen at any time. See 8 C.F.R. §§ 1003.2(a) and 1003.23(b)(1). The BIA has said that an “exceptional situations” standard applies when adjudicating *sua sponte* motions. See *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). A significant development in the law constitutes an exceptional situation. See, e.g., *Matter of Muniz*, 23 I&N Dec. 207, 207-08 (BIA 2002) (reopening *sua sponte* where the Ninth Circuit interpreted the meaning of “crime of violence” differently from the BIA).

Noncitizens Who Are Outside the United States

Noncitizens outside the United States should consider whether the departure bar regulations, 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1), pose an additional obstacle to obtaining relief. Although the BIA interprets these regulations as depriving immigration judges and the BIA of jurisdiction to adjudicate post-departure motions to reopen or reconsider, see *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008), the courts of appeals (except the First and Eighth Circuits, which have not decided the issue) have invalidated the bar.²³ If filing a motion to reconsider or reopen in the

²³ See *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Carias v.*

First or Eighth Circuits, the BIA or immigration judge likely will refuse to adjudicate the motion for lack of jurisdiction based on the departure bar regulations.

It is important to note that the cases invalidating the departure bar regulation have done so by considering whether the regulation is unlawful in light of the motion to reopen or reconsider statute. Thus, it is advisable to make an argument that the motion qualifies under the motion statutes (INA §§ 240(c)(6) or 240(c)(7)), i.e., is filed within 30 or 90 days of the removal order or the filing deadline should be equitably tolled. To date, the departure bar litigation has not been successful in the *sua sponte* context. See, e.g., *Ovalles v. Holder*, 577 F.3d 288, 295-96 (5th Cir. 2009); *Zhang v. Holder*, 617 F.3d 650, 658-65 (2d Cir. 2010); *Desai v. AG of the United States*, 695 F.3d 267, 268 (3d Cir. 2012). In addition, the courts of appeals generally have held that they lack jurisdiction to review *sua sponte* motions. See, e.g., *Tamenut v. Mukasey*, 521 F.3d 1000, 1003-04 (8th Cir. 2008) (compiling cases from other circuits).

Please contact the Legal Action Center at clearinghouse@immcouncil.org for advice about cases implicating the departure bar.

C. Prosecutorial Discretion

Gay and lesbian noncitizens in long term relationships or married to USCIs or LPRs who are in removal proceedings but are not eligible for relief or who are denied relief should consider seeking prosecutorial discretion from DHS. This may include individuals who entered the United States without being admitted or paroled and thus are not eligible for adjustment of status, those who are unable to marry, and those who are unable to meet the hardship standard for cancellation of removal or a waiver.

“Prosecutorial discretion” is the authority of a law enforcement agency or officer charged with enforcing a law to decide whether to enforce the law in a particular case. A law enforcement officer who decides *not* to enforce the law against a person has *favorably* exercised prosecutorial discretion. Examples of the favorable exercise of prosecutorial discretion in the immigration context include granting a stay of removal or deferred action; deciding not to issue a Notice to Appear or canceling it before it is filed with the immigration court; or declining to appeal a favorable IJ decision. DHS also has discretion to grant deferred action in cases with strong humanitarian factors.

On October 5, 2012, ICE issued a memorandum regarding prosecutorial discretion for LGBT families. Specifically, ICE states that the “family relationships” – a favorable factor in deciding whether to exercise prosecutorial discretion – “encompasses two adults who are in a committed, long-term, same-sex relationship.” See Gary Mead, Executive Associate Director, ICE, et al., [“Applicability of Prosecutorial Discretion Memoranda to Certain Family Relationships”](#) (October 5, 2012). See also the American Immigration Council’s practice advisories

Holder, 697 F.3d 257 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012) (en banc); *Jian Le Lin v. United States AG*, 681 F.3d 1236 (11th Cir. 2012).

[Prosecutorial Discretion: How to Advocate for Your Client](#) (June 24, 2011), [DHS Review of Low Priority Cases for Prosecutorial Discretion](#) (Feb. 13, 2012), and [Deferred Action for Childhood Arrivals](#) (Oct. 25, 2012); and Penn State Law’s Center for Immigrants’ Rights, in collaboration with Maggio + Kattar and Duane Morris LLP, toolkit on deferred action, [Private Bills and Deferred Action Toolkit](#).

V. COUPLES WHO ARE NOT MARRIED

A. Fiancé/e Visas

If the noncitizen is outside the United States, a USC may petition for a K-1 fiancé/e visa (I-129F) for her partner.²⁴ The visa is only available to individuals who are coming to the United States “solely to conclude a valid marriage with the petitioner within ninety days after admission.” INA § 101(a)(15)(K)(i). The couple must show that they have a bona fide intention to marry and are legally able to marry. INA § 214(d)(1). If the petitioner resides in a state that does not celebrate marriages for same-sex couples, it is important to provide an affidavit detailing the couple’s plans to marry in a jurisdiction that has marriage equality and to attach any documentary evidence to support the affidavit (e.g., contract with a venue for the ceremony, travel itinerary, etc.).²⁵ In addition, the couple must establish that they previously have met in person within two years of filing the petition. INA § 214(d)(1). USCIS has discretion to waive this requirement in limited circumstances, including where there is extreme hardship. *See* 8 C.F.R. § 214.2(k)(2).

After the marriage takes place, the noncitizen may pursue adjustment of status. However, if the marriage does not take place within 90 days, the noncitizen is required to leave the United States or risk deportation. INA § 214(d)(1).

As discussed in § II.D, *supra*, practitioners must be alert to potential safety issues for noncitizens who are seeking fiancé/e visas in countries where same-sex relationships are criminalized.

B. Couples Who Cannot Marry

There are various situations in which individuals will face significant hurdles in marrying their partners. One situation is where a person fled her home country to seek asylum in the United States and now is unable to file an asylee relative petition for her partner overseas because they are not married. In most countries from which LGBT individuals can win asylum, marriage

²⁴ The [Same-Sex Marriage Guidance](#) specifies that a USC can file a fiancé/e visa for a same-sex partner so long as all other requirements for the visa are met. Likewise, the [DOS FAQs](#) provide that “a same-sex engagement may allow your fiancé to enter the United States for the purpose of marriage.”

²⁵ In the analogous situation of applications for fiancé/e visas where one spouse is transgender, USCIS explicitly directs the petitioner to include evidence of plans to marry in a state which would recognize the couple’s marriage if the petitioner lives in a state that would not allow the couple to marry. *See* “[Adjudication of Immigration Benefits for Transgender Individuals](#),” AILA InfoNet Doc. No. 12041360.

would not have been an option in the country of origin. Also, since only USCs can file fiancé/e visa applications, an asylee is not able to petition for a partner left behind for at least five years (i.e., until after she naturalizes). In cases where the foreign partner is in danger, humanitarian parole may be an option.²⁶ It remains to be seen whether USCIS will extend humanitarian parole more broadly to cover the partners of LGBT asylees.

There also may be couples in the United States who – due to advanced age, disability, or extreme poverty – cannot travel to a marriage equality state to wed. Furthermore, individuals who live in states without marriage equality may be unable to obtain a divorce from a prior same-sex marriage in the courts of the state of residence, and the state of celebration may require residence to divorce. In this situation, a gay man or lesbian may be unable to marry a current partner if he or she cannot divorce a previous same-sex spouse.

If the noncitizen is in removal proceedings, he may be able to obtain prosecutorial discretion based on the relationship with a USC or LPR even if the couple is not married. See Gary Mead, Executive Associate Director, ICE, et al., “[Applicability of Prosecutorial Discretion Memoranda to Certain Family Relationships](#)” (October 5, 2012). See also § IV.C, *supra* (discussing prosecutorial discretion).

Some noncitizens who are detained also may be unable to marry. While the Performance-Based National Detention Standards allow ICE detainees to marry,²⁷ if the person is detained in a state that does not have marriage equality, permission to marry likely will be denied. Practitioners may advocate with ICE to release the detainee under an alternatives to detention program or transfer the noncitizen to a jurisdiction where she can marry if there is a bona fide relationship and marrying would afford immigration relief.

CONCLUSION

For many years, LGBT people have faced systematic discrimination under federal law, including immigration law. With the end of DOMA, married LGBT binational couples can access the panoply of marriage-based immigration benefits. Thus far, the immigration agencies have taken prompt and positive steps toward implementing *Windsor*. Undoubtedly, however, problems and unique issues will arise over the coming months. Practitioners may need to educate adjudicators about changes in the law as well as unique factual circumstances encountered by LGBT families. Immigration Equality, the American Immigration Council, and AILA will be monitoring implementation and advocating with the immigration agencies. Please contact us at

²⁶ See USCIS “Questions and Answers: Humanitarian Parole,” at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=ed662cc252f93210VgnVCM100000b92ca60aRCRD&vgnnextchannel=accc3e4d77d73210VgnVCM100000082ca60aRCRD>.

²⁷ ICE states that requests for marriage by those in detention will be considered on a case-by-case basis, and “[o]rdinarily, a detainee’s request for permission to marry shall be granted.” See “Performance-Based National Detention Standards 2011” at 339, available at <http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf>. However, the Guidelines state that the individual must be legally eligible to marry in the state where he is being held.

vneilson@immigrationequality.org or clearinghouse@immcouncil.org if you encounter difficulties with the agencies or have specific questions about case strategies that are not covered by this advisory.