



Marriage Equality in Immigration Law: Immigration Benefits for Same-Sex Married Couples

On June 26, 2013, the U.S. Supreme Court held in *United States v. Windsor*, 570 U.S. ____ (2013) that Section 3 of the Defense of Marriage Act (DOMA) was unconstitutional. Section 3 of DOMA, for purposes of numerous federal programs and benefits, defined marriage as only a legal union between a man and a woman and defined a spouse as a person of the opposite sex. Since immigration is a federal benefit that had been restricted by DOMA, once the Supreme Court declared it unconstitutional, President Obama and Department of Homeland Security (DHS) Secretary Janet Napolitano directed the immigration agencies, such as United States Citizenship and Immigration Services (USCIS), to treat same-sex bi-national married couples the same as opposite-sex married couples for the purposes of immigration law including reviewing 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 and ensuring that federal benefits for same-sex legally married couples were implemented swiftly and smoothly. [USCIS](#) and the U.S. [Department of State](#) have both issued guidance on this issue.

Family-Based Petitions for Same-Sex Couples

USCIS has begun approving visa petitions for same-sex spouses, announcing that it will use the same criteria as for opposite-sex couples. To this end, the USCIS has stated that it will look to the law of the location where the marriage took place when determining whether a marriage is valid for immigration law purposes. Currently thirteen states (California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont and Washington) and the District of Columbia have marriage equality and recognize same-sex marriages as legal, valid marriages. Same-sex marriages have also been legalized in numerous other countries such as The Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal, Iceland, Argentina, Denmark, New Zealand, Uruguay, Brazil, France, certain parts of the United Kingdom and Mexico – and the list continues to grow.

Couples who do not currently live in a state or country that recognizes same-sex marriage may obtain a lawful marriage in one of the places that recognize marriage equality so long as the laws of that place permit out-of-state residents to marry there. As of now, only legal marriages establish eligibility for immigration purposes, which means that civil unions and domestic partnerships will not be viewed as a marriage for immigration purposes.

Example: Theresa is a U.S. citizen and her wife Jenny is from Trinidad and Tobago. They were married in Amherst, Massachusetts. Michael is a U.S. citizen and his husband Fernando is from Spain. They were married in Madrid, Spain. Sung Bae is a U.S. citizen and his husband Takeshi is from Canada. They were married in Vancouver, British Columbia, Canada. All three of these couples were married in places and times that made their marriages legal. As of now, these couples will finally be able to petition their spouses for immigration benefits.

Note: Eligibility to petition for a spouse based on a legal marriage, and a spouse's eligibility to receive a green card are two different criteria. To receive a green card, in addition to proving a qualifying family relationship, a foreign national will also have to prove he or she is admissible to the United States, pay filing fees, have a medical exam done, attend an interview, and more. Speak to an attorney or a BIA-accredited representative before deciding whether to petition for a spouse or family member.

For those previously submitted same-sex marriage family petitions that were denied solely because of DOMA, USCIS will reopen those cases. USCIS will try to notify certain petitioners of such action, but it's best to alert USCIS at USCIS-626@uscis.dhs.gov and request they reopen the case in light of the recent Supreme Court decision. This also applies to adjustment of status and employment authorization applications.

If a same-sex couple is not currently married, just as with opposite-sex couples, a U.S. citizen that is engaged to a foreign national of the same sex can file a fiancé or fiancée petition, which may allow him or her to enter the United States to get married. However, the couple must be married within a certain amount of time of the foreign national spouse's admission to the United States. Only certain U.S. states allow same-sex couples to legally marry, so they must make sure to marry in a marriage equality state.

Similarly to marriage-based petitions, abused spouses in same-sex marriages should also benefit under the Violence Against Women Act (VAWA) immigration provisions where the abusive spouse was or is a U.S. citizen or lawful permanent resident. The VAWA immigration benefits are available to both men and women and are now available to abused spouses from same-sex marriages. Make sure to research and prove the same-sex marriage was valid and legal in the location in which it took place at the time of the marriage.

Nonimmigrant Visas

As stated above, the U.S. Department of State also issued guidance regarding same-sex marriages. Same-sex spouses and their children, just like with opposite-sex spouses, are now eligible for nonimmigrant derivative visas. For example, stepchildren of the primary applicant (when the marriage took place before the child turned 18) can qualify as derivatives.

Certain visa categories will require approval of certain forms or documents before an interview can take place. These requirements are also required for opposite-sex couples. For example, same-sex spouses and children of a student visa (F or M) applicant will need to obtain

I-20A. Spouses of J visa holders will need an approved DS-2019. Spouses of those that have been a victim of a crime (U) or of trafficking (T) will need to submit Supplement A to Form I-918 or I-914, respectively, before receiving an approval.

Transgender Spouses

Transgender individuals in heterosexual marriages should no longer be subjected to any special requirements or conditions in order to prove that their marriage is in fact a “heterosexual” marriage due to the Supreme Court decision. Familiarity with the April 2012 USCIS Policy Memorandum regarding the adjudication of benefits for transgender individuals may still be helpful in matters concerning ways of documenting a change of gender identification for purposes of requesting the same be reflected on immigration documents. This memorandum clarifies that sex reassignment surgery is not necessary and it acknowledges a broader range of clinical treatments and other steps that can result in a legal change of gender under the various laws of the states.