



# FAMILY-BASED PETITIONS FOR LGBTQ COUPLES

## *Considerations When Documenting a Bona Fide Marriage*

By Em Puhl

### I. Introduction

According to the Williams Institute, approximately 113,300 foreign-born individuals were part of a same-sex couple in 2013.<sup>1</sup> Before 2013, these couples were denied access to benefits based on marriage in the immigration laws, due to the federal Defense of Marriage Act (DOMA). This law was enacted in 1996 and required a marriage to be between one man and one woman to be recognized under federal law. Even after DOMA was declared unconstitutional, not all states granted the right to marry to two people with the same sex assigned at birth.<sup>2</sup> Couples, and the immigration advocates representing them, needed to navigate a host of laws related to marriage, divorce, and gender identity that were inconsistent among U.S. states as well as among countries around the world.

Since 2013, the legal landscape related to marriage and divorce has simplified within the United States. In June 2013, the U.S. Supreme Court struck down DOMA in the case of *United States v. Windsor*, 570 U.S. \_\_\_; 133 S. Ct. 2675 (2013). This decision made federal marriage-based benefits available to same-sex couples. Two years later, *Obergefell v. Hodges*, 576 U.S. \_\_\_, 135 S. Ct. 2584, 2607, 192 L. Ed. 2d 609 (2015), held that “same-sex couples may exercise the fundamental right to marry in all States.” Because of these decisions, United States citizens (USCs) and lawful permanent residents (LPRs) can help their foreign spouses immigrate to the United States.<sup>3</sup>

Largely speaking, the process of immigrating to the United States as the spouse of a USC or an LPR should not be any different for a same-sex couple than any other couple. However, there are special considerations for legal representatives of same-sex couples. For example, can the couple get legally married? And, if not, what other options does a couple have? How might a marriage-based petition packet look different if the couple has not shared their marriage with one or both of their families, and so the family is unaware of the relationship?

This advisory will address the first step of the marriage-based immigration process for same-sex married couples: submitting evidence of a *bona fide* marriage. Note that a USC or LPR petitioner may also petition for their spouse’s child if the child is under 18 at the time the marriage takes place.<sup>4</sup> For more information about the family-based immigration process, see ILRC, *Family & Immigration: Practical Guide* (2017).<sup>5</sup>

Remember that a wide range of immigration benefits are available to married foreign nationals that are not covered in this advisory. For example, spouses of noncitizens can be derivatives of applications such as for U nonimmigrant status or other classes of nonimmigrant visas, such as employment-based visas. Additionally, the same-sex spouse of an applicant for asylum can also now qualify as a derivative.

**Example:** Pedro and his boyfriend fled their country to avoid violence caused by clashes between the government and citizens who supported an opposition party. Before fleeing, Pedro's boyfriend lost his government job and received multiple death threats because the government thought Pedro's boyfriend did not support the sitting president. If the couple marries in the United States, Pedro could be included as a derivative on his partner's asylum application.<sup>6</sup>

**A NOTE ON TERMINOLOGY:** The acronym *LGBTQ* stands for *lesbian, gay, bisexual, transgender and queer*. These terms refer to aspects of an individual's identity relating to their sex, their gender, their sexual orientation, their cultural background and sometimes their social and political views. Therefore, they are not parallel but can intersect. **Gender identity** refers to "each person's deeply felt internal and individual experience of gender, including the personal sense of the body and other expressions of gender, including dress, speech and mannerisms."<sup>7</sup> This may or may not be parallel with the **sex designation** assigned to them at birth, such as "male," "female" or "intersex," which is determined by a physician or medical professional. Finally, **sexual orientation** refers to "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender or more than one gender."<sup>8</sup> How we understand a person's sexual orientation may be connected to their sex, gender identity, or gender expression, but these things should not be conflated for they are different. People of all gender identities can be gay, straight, bisexual or have another understanding of their sexual orientation.

## I. Overview: Proving a Legally Valid and *Bona Fide* Marriage

In order for a person to immigrate to the United States through marriage, the petitioner (the USC or LPR spouse) must first file a Petition for Alien Relative on Form I-130, with the U.S. Citizenship and Immigration Services (USCIS). This is often referred to as the "visa petition."<sup>9</sup> The petitioner will first have to prove that they are a U.S. citizen or a lawful permanent resident.<sup>10</sup> The couple must also establish two facts to show that they have a qualifying relationship, or in this case, a **qualifying marriage**:

1. Their marriage is **legally valid** for immigration purposes; and
2. Their marriage is ***bona fide***, meaning that, at the time of the marriage, the spouses intended to live in a marital relationship, not marrying for the sole purpose of immigration benefits.

If these elements are met, USCIS must approve the visa petition and step one will be completed. On the other hand, if a couple fails to prove they have a qualifying marriage and USCIS denies the I-130 petition, the petitioner may appeal to the Board of Immigration Appeals (BIA).<sup>11</sup>

If the petition is approved, the applicant for permanent residence (and, if living together in the United States, the petitioner spouse) must also attend an interview with USCIS or the Department of State. The government adjudicator interviewing an applicant for permanent residence through marriage will ask a number of

questions at the interview to ensure that the marriage is “real” and not just for immigration purposes. Applicants should be prepared to answer questions about their marriage to assure the examiner that the marriage is valid and *bona-fide*.

If the marriage is determined to be legally valid and *bona fide* and no grounds of inadmissibility apply, the case should proceed and the adjustment or immigrant visa interview should be quite simple. Problems may arise, however, if there are questions about marriage fraud, which will be touched on below. Some couples may additionally be required to undergo a special “marriage fraud interview” specifically designed to address concerns the USCIS may have about the *bona fides* of the marriage on which the petition is based. Advocates can help their clients avoid such issues through careful screening before submitting the Form I-130 and by submitting careful documentation to show the *bona fides* of the marriage.

## II. The Legal Standard for a Same-Sex Marriage

### A. A Legal Marriage

Neither the term “marriage” nor “spouse” is defined in the Immigration and Nationality Act (INA). However, in order to be valid for immigration purposes, a marriage must be legal in the place where it was entered into. If the marriage complies with the relevant law and is recognized, then the marriage is deemed to be legally “valid” for immigration purposes.<sup>12</sup> There are some exceptions to this general rule. For example, marriages are not valid for immigration purposes if they are considered to be void under law in the state of residence<sup>13</sup> or are contrary to federal public policy, such as certain polygamous or incestuous marriages, even if the marriage is legal in the place of marriage celebration.<sup>14</sup>

After *Obergefell*, same-sex marriage is recognized in every jurisdiction in the United States. Additionally, if the couple lives in a state that recognizes common law marriages, a couple’s marriage should be valid for immigration purposes. It is critical to investigate the current law of the state in question if common law marriage is at issue in a particular case. Generally speaking, common law marriage rules require that the couple prove they have lived together for a certain number of years (one year in most states), that the spouses hold themselves out as married, and that they intend to be married.<sup>15</sup>

Nonetheless, some LGBTQ binational or dual noncitizen couples may have difficulty accessing immigration benefits through marriage where one or both partners live outside of the United States, because marriage equality is still not in place in all countries. The first step for such a couple is to verify whether they have the option to get married in the country where they are currently residing. If the country’s laws do not allow the couple to legally marry, the couple must consider travelling to the United States on a K-1 or B-2 visa, or to another country, in order to get married.<sup>16</sup> In these situations, it is very important to verify the requirements to obtain a lawful marriage in that specific jurisdiction, especially if there are any residency requirements.<sup>17</sup>

The chart below lists the 30 nations worldwide where same-sex couples can obtain a legal marriage.

Countries that Recognize Marriage Equality as of October 2019 <sup>18</sup>		
1. Argentina	11. Finland	21. Northern Ireland
2. Australia	12. France	22. Norway
3. Austria	13. Germany	23. Portugal
4. Belgium	14. Greenland	24. Scotland
5. Brazil	15. Iceland	25. South Africa
6. Canada	16. Ireland	26. Spain
7. Colombia	17. Luxembourg	27. Sweden
8. Denmark	18. Malta	28. Taiwan
9. Ecuador	19. The Netherlands	29. United States
10. England/Wales	20. New Zealand	30. Uruguay

Additionally, the Mexican states of Chihuahua, Coahuila, Jalisco, and Quintana Roo, and the Federal District of Mexico City also allow same-sex marriages. However, Mexico does not yet recognize marriage equality nationwide.<sup>19</sup>

Remember that only countries with marriage equality are listed, because only those *legal marriages* will be recognized by USCIS and the U.S. State Department for purposes of federal immigration law. This means that civil unions, domestic partnerships, or similar legally recognized relationships will not meet the U.S. federal definition of a legal marriage.<sup>20</sup> Unfortunately, couples who have registered to obtain such benefits will not be able to obtain approval of an immigrant visa petition as a married couple.

## B. Legal Termination of Any Prior Marriage

In order for USCIS to consider a marriage valid for immigration purposes, both members of the couple must legally terminate all prior marriages before entering into the subsequent marriage.<sup>21</sup> The termination of the marriage could take place through a valid divorce, annulment, or the death of the prior spouse. In order to be valid, divorces must meet the requirements of the jurisdiction where the marriage was ended, including residency requirements.<sup>22</sup> The validity of the divorce also depends on the law of the state where the subsequent marriage was celebrated.<sup>23</sup> Generally speaking, this means that the divorce must be recognized in the place where both parties were domiciled, or resided, at the time of the divorce, even if the divorce was procedurally valid in the place where it was granted.<sup>24</sup> Finally, the divorce must also be *bona fide* and not *solely* carried out for immigration purposes.<sup>25</sup>

It is important for advocates to understand the circumstances of the petitioner's and beneficiary's prior divorces. USCIS has generally refused to accept a divorce where neither person was present in the place where the divorce was obtained. Divorces where *one* person was not present may or may not be accepted. A final judgment must have been obtained before the subsequent marriage, as the spouse who petitions for divorce sometimes does not submit the final paperwork required to finalize the divorce. An annulment of a prior marriage should cure any defects in a visa petition, so long as there is no fraud or misrepresentation involved.<sup>26</sup>

Finally, a couple that has obtained a *legal separation* will no longer be considered married for immigration purposes even though the couple has not yet obtained a final divorce.<sup>27</sup> A *legal separation* is one obtained by written agreement recognized by a court, or by court order and recognized by the state in which the spouse resides. But beware that a couple that is no longer cohabitating is still legally married unless they have a legal separation.

**PRACTICE TIP:** The lack of a prior legal divorce might render a current marriage invalid. In these situations, it may be necessary for an individual to re-divorce and/or for a couple to remarry. Be sure to check dates carefully on marriage and/or divorce certificates and final judgments!

**IMPORTANT:** While all couples must show evidence of termination of prior marriages, such previous marriages may add an additional layer of complexity when an individual currently in a same-sex marriage was previously married to someone who was assigned the “opposite” sex at birth. While such marriages are generally not a reflection on the validity of the current marriage, some immigration officers may identify these circumstances as an indicator that the current marriage is not *bona fide*. It will be important for the advocate to build trust with the clients to understand and adequately document the circumstances of any prior marriage, the reasons for the end of a prior marriage, and how the current couple intends to share a life together. See Section V below for documenting and explaining such prior marriages.

**A Note Regarding Couples with Transgender Spouses.** Before 2013, when marriage equality was achieved at the federal level, the primary question was whether a couple’s marriage was considered a “heterosexual” one, or whether one person in the couple was legally recognized as being “female” and the other person as “male.” This issue hinged upon the laws regarding biological sex designation and gender identity in the state of birth, residence, and marriage.<sup>28</sup> It was of particular concern for marriages where at least one person in the couple identified as transgender. The question of whether or not a marriage was considered “heterosexual” hinged upon whether a person relied on their sex designation or gender marker under the law *before* or *after* a gender confirming treatment.

In *Matter of Lovo-Lara*, the BIA held that a marriage is valid for immigration purposes so long as it is considered a valid “heterosexual” marriage between two people of the opposite sex according to the law of the state where the marriage was celebrated.<sup>29</sup> Furthermore, USCIS had a policy that, in marriages where both people were assigned the same sex at birth, the agency would approve I-130 petitions only where a transgender spouse had undergone “sex reassignment” surgery *and* the surgery had resulted in a legal change of sex under the law of the place of marriage.<sup>30</sup> These policies led to absurd and discriminatory results and many LGBTQ marriages were unrecognized by USCIS.

Fortunately, the analysis of *Matter of Lovo-Lara* is no longer relevant after *U.S. v. Windsor*. Therefore, the issues that matter are the same in any marriage-based immigration case: simply, was the marriage *legally valid* and was it *bona fide at inception*? Neither the gender identity nor the sex designated at birth of either of the spouses should matter for determining the legal validity of their marriage. Additionally, USCIS clarified in 2012 that surgical treatment is not required to recognize a legal change of gender identity, as long as the person’s gender identity is recognized under relevant state law.

Should a USCIS adjudicator raise inappropriate questions regarding an individual's gender identity, gender confirming treatment, etc., legal representatives should be familiar enough with the vocabulary and the concepts involved so they can help educate the adjudicator and ensure the clients are treated with respect.

**PRACTICE TIP:** It is helpful for advocates to be familiar with the April 2012 USCIS Policy Memorandum to assist transgender clients in requesting the appropriate gender marker on immigration documents, such as a green card or employment authorization document.<sup>31</sup> The memorandum clarifies that surgical treatment is not necessary and it acknowledges a broader range of actions and other steps that can result in a legal change of gender under the various state laws.

#### IV. Documentary Evidence of a Bona Fide Marriage

As mentioned above, in order for a beneficiary spouse to qualify for a green card through marriage to a USC or an LPR, the couple will have to show that their marriage was *bona fide* at its inception. The rule regarding a “*bona fide* marriage” is simply that a marriage cannot be entered into for the primary purpose of circumventing the immigration laws.<sup>32</sup> To show this, the couple must prove that, at the time of the marriage, they intended to create a life together and not solely to obtain an immigration benefit.<sup>33</sup> For example, a USCIS officer cannot deny a visa petition based on a belief that the marriage is not good or will not be a lasting one, or because the officer disagrees with how the two people lead their lives. A marriage does not have to be currently *viable* in order to be *bona fide* for immigration purposes, since the important question is what the couple intended at the beginning of their marriage.<sup>34</sup> Finally, a green card can be one of many reasons (but not the *sole* reason) a couple gets married, as that is a valid goal for two married people who wish to live together in the same country.<sup>35</sup>

To prove that their marriage is *bona fide*, an LGBTQ couple must provide the same types of evidence as other marriages. The following documents should be gathered as evidence of “*bona fide*” intent wherever possible:

- Evidence of cohabitation: This may include proof of a joint lease agreement or documentation showing that utilities accounts are in both names. USCIS adjudicators also look at documents such as pay stubs to see if the address listed matches the claimed home address. And they may check bank statements to see if charges are being made in two different locations.

**NOTE:** Cohabitation is not absolutely necessary in order to prove that a marriage is *bona fide*. Nevertheless, USCIS adjudicators will often look closely for proof of cohabitation. Therefore, couples should prepare an explanation in cases where they are not living together.

- Comingling of some financial assets or the joint ownership of property: If the couple has a joint bank account, USCIS adjudicators will want to see that it is a real account that the couple actually uses, such as by checking whether this is the account where paychecks are deposited, etc. If the spouses live in different countries, evidence of financial support provided by one spouse to the other can be used to show comingling of finances.
- Joint tax returns or at least tax returns reflecting marital status: If the couple has not had the opportunity to file taxes since they married (for example, if they were not legally married at the end of the previous

year), the couple can provide prior tax returns if these show the couple was living at the same address. The couple should also ensure to file subsequent tax returns with the “married” status and provide any such returns at a subsequent interview.

- Evidence showing that one spouse has been added to the other’s health or life insurance policy
- Automobile titles and/or insurance in both names
- Proof that each spouse’s work records have been updated to reflect the marriage, if this is possible
- Affidavits from family members and friends who have seen the couple together at social gatherings or important events. Any such documents should be specific and include proof of the writer’s U.S. citizenship or lawful immigration status if they are in the United States.
- Other evidence to tell the story of how the couple met and how their relationship developed: This may include things such as cards exchanged for special occasions, e-mails, text messages, photos of time spent together, etc. Cards, letters, and photos from or including the USC or LPR petitioner’s family members are often particularly compelling.<sup>36</sup>

For couples that have children together, USCIS will want proof that they are both the parents of the child. For example, if the two parents adopted the child together, they should submit documents as evidence of the joint adoption. If one parent is the biological parent of the child, the couple should submit proof that the other parent has also become the legal parent or guardian of the child. Where a parent-child relationship has not been (or cannot be) legally formalized, the couple should still submit evidence that the non-biological parent is essentially acting as a parent.<sup>37</sup> This evidence could include school or medical records that list the names of both caretakers and show them both as emergency contacts.

**PRACTICE TIP: A Former Civil Union or Domestic Partnership Can Help to Demonstrate a *Bona Fide* Marriage.** Many same-sex couples had been together for many years before marriage equality. A couple may have registered as domestic partners or obtained a civil union before being able to lawfully marry and this evidence should be provided to USCIS as positive evidence of the *bona fides* of the marriage. However, no immigration benefit can be conferred on an individual as a result of a domestic partnership or a civil union.

Additionally, while the history of some relationships may be quite long, there is no need to document everything that has ever happened between the two people. The most important thing is that a couple show their marriage was *bona fide* at its inception and the marriage is legally valid at the time of the interview.

## V. Special Considerations in Documenting a Bona Fide Marriage: Steps to Avoid a Fraud Finding

### A. Dealing with “Opposite”-Sex Prior Marriages

By far the most common thorny issue advocates may see in cases of same-sex couples involves prior marriages to opposite-sex partners. As explained above, USCIS will not only need to verify that all prior marriages were properly terminated before the current marriage was entered into, but it will also confirm that

any such marriages were not fraudulent, or entered into for immigration purposes. Therefore, the advocate and the couple must be prepared to answer questions about the *bona fides* of both the prior and the current marriages.

Remember that opposite-sex prior marriages are not evidence of the validity of the couple's current marriage. Many individuals who identify as gay, lesbian, bisexual, or queer do not "come out" until well into their adult life, after having been married in an opposite-sex relationship and having children. Because of this, such marriages are common in the history of many LGBTQ individuals. Most of the time, those marriages were also *bona fide* and not entered into for immigration purposes. Therefore, evidence in a person's history that they have not always been "out" should not be confused with evidence that this person committed fraud before or is committing fraud now. If this confusion arises on the part of the government adjudicator, advocates should be prepared to help clarify and to protect the client from having to respond to accusatory and improper interrogations.

Nevertheless, it is extremely important for advocates to ask their clients about the circumstances of prior marriages. If a marriage was entered solely for immigration purposes, it would render the foreign national beneficiary ineligible to immigrate in the future through a family or employment visa petition under INA § 204(c). See Subsection E below. It is very important to verify whether or not the prior marriage resulted in the filing of a marriage-based immigrant visa petition. Additionally, a red flag may be triggered if the dates of a prior marriage overlap with the period when the current relationship began, so it will be important to explain the circumstances during this period of time.

## **B. Steps to Take When the Family is Not in the Picture**

USCIS often wants to see evidence that the families of the married couple have been involved in their life together, including at the wedding and subsequent to the celebration of the marriage. However, not all LGBTQ individuals are "out" to their families. Others may have relatives that do not support either their LGBTQ identity or their marriage, while others may be estranged from their families. Therefore, these couples and their advocates need to explain the situation to the adjudicator, either in a brief letter at the time of filing the I-130 visa petition or at the time of the interview with USCIS or the State Department. It may also be a good idea to be proactive about making the National Visa Center and the appropriate consulate aware of this, in the case of consular processing.

Be aware that government adjudicators should be receiving training on the issues related to parent or family involvement in the life and relationship of an LGBTQ couple. This is especially important so that a person's family is not contacted to verify the *bona fides* of the marriage, which is sometimes done in marriage cases. Where an LGBTQ individual is not out to their family, this raises two concerns: 1) that an adjudicating officer will identify a red flag where there is not actually an issue, because the family cannot vouch for a couple's relationship they do not know about; and 2) that the LGBTQ identity of the married individuals will be revealed by the adjudicator to the family. This is an inappropriate violation of a person's privacy and may be dangerous or life-threatening. However, it is not unlawful for officers to interview witnesses about the couple's marriage, including family members. Therefore, legal representatives should be proactive about reminding the government officer of this special issue when adjudicating the case of an LGBTQ couple. It is important for advocates to submit in writing a request that USCIS not contact family because the person has not shared their sexual orientation or gender identity with their family.<sup>38</sup> Should an adjudicator raise questions regarding

the lack of involvement of one of the spouse's family members or should they indicate they wish to contact the family, ask to speak to a supervisor.

If the couple is not out to their families or they do not have their support, the advocate should discuss this with the couple before filing their immigrant visa petition or before the adjustment or consular interview, to brainstorm together other ways to provide evidence that shows community support for their marriage. For example, the clients can submit declarations from close friends, coworkers, roommates, or other community members whom they consider family and provide photos in daily life and at special occasions celebrated with this group of people.

### C. Marriage During Deportation Proceedings

A person who marries after the initiation of removal proceedings is barred from seeking immigration benefits through that marriage for two years, unless they prove to USCIS by “clear and convincing evidence” that the marriage is bona fide, in order to obtain an exemption from this bar.<sup>39</sup> This person must specifically request an exemption from the two-year bar from USCIS pursuant to INA §§ 204(g) and 245(e)(2). Usually, USCIS only requires that a short, jointly signed request from both the petitioner and beneficiary be attached to the immigrant visa petition on Form I-130, along with the evidence of the bona fides of the marriage. No application or fee is required to request an exemption.

### D. Petitioners that Immigrated Through a Prior Marriage Within the Last Five Years

A person who immigrated through a marriage may not file a visa petition to immigrate a new spouse for five years, unless the person can prove by “clear and convincing evidence” that the first marriage was *bona fide*.<sup>40</sup> This restriction does not apply if the first marriage ended because of the death of the spouse.

### E. Cases of Marriage Fraud in the Past

Under INA § 204(c), a person cannot immigrate through a family or employment-based visa petition if USCIS finds that they have previously tried to immigrate based on a marriage deemed to be fraudulent, or even tried to marry in order to commit immigration fraud. Advocates should be aware that USCIS will closely scrutinize a case involving a same-sex marriage where either of the spouses tried to obtain an immigration benefit through a prior marriage before 2013, while DOMA was in effect. Furthermore, where this is a concern, advocates should warn their clients that marriage fraud is considered a serious crime. Both spouses face a possible prison sentence of up to five years and fines of up to \$250,000.<sup>41</sup>

**PRACTICE POINTER: Connecting with Other Attorneys Representing Same-Sex Couples in Consular Processing Cases.** The American Immigration Lawyers' Association (AILA) has a Gay, Lesbian, Bisexual and Transgender Interest Group (GLIG) that brings together practitioners representing clients with immigrant visa applications at consulates around the world. This interest group also engages in advocacy with the Department of State around issues related to consular processing. AILA member attorneys may find this network of practitioners helpful. For others who are not AILA members and do not have access to this particular group, Immigration Equality provides technical assistance on marriage-based cases of same-sex couples, at [www.immigrationequality.org](http://www.immigrationequality.org).

## End Notes

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\* Thanks to Aruna Sury for help with this advisory.

<sup>1</sup> Gary J. Gates, *LGBT Adult Immigrants in the United States*, THE WILLIAMS INSTITUTE (March 2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTImmigrants-Gates-Mar-2013.pdf>.

<sup>2</sup> Note that this practice advisory focuses on providing documentation to support a marriage-based Form I-130 for a “same-sex” couple, or two individuals in a marital relationship who were designated the same biological sex at birth. However, LGBTQ individuals in a “same-sex” couple may ascribe to myriad identities related to gender and/or sexual orientation. As such, the advisory, at times, uses a variety of descriptors to refer to these couples. See “A Note on Terminology” for more information on sexual orientation as it intersects with sex designations and gender identity.

<sup>3</sup> Note that the term “immigrate” here refers to the process through which a person becomes a lawful permanent resident of the United States and applies whether the person is already physically in the United States or outside the United States. For more information about the processes of adjustment of status and consular processing, see ILRC, *Family & Immigration: A Practical Guide* (2017), <https://www.ilrc.org/family-manual>.

<sup>4</sup> See INA § 101(b)(1)(B) and 8 CFR § 204.2(d)(2)(iv). The USC stepparent can file a separate Form I-130 for the child. If the petitioner is an LPR, the stepchild can be a derivative beneficiary on the beneficiary spouse’s Form I-130.

<sup>5</sup> <https://www.ilrc.org/family-manual>.

<sup>6</sup> Note that Pedro may also be able to apply for asylum if Pedro also has a well-founded fear of persecution based on a protected ground, including his sexual orientation or relationship to his husband, upon returning to his country.

<sup>7</sup> This definition is used in the “Guidelines on Claims to Refugee Status based on Sexual Orientation and/or Gender Identity” issued in October 2012 by the United Nations High Commissioner for Refugees (UNHCR),

[www.refworld.org/pdfid/50348afc2.pdf](http://www.refworld.org/pdfid/50348afc2.pdf); and in the “Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity,” March 2007, [http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles\\_en.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf). See also “Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles,” November 2017, [http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf).

<sup>8</sup> This definition is used in the “Guidelines on Claims to Refugee Status based on Sexual Orientation and/or Gender Identity” issued in October 2012 by the United Nations High Commissioner for Refugees (UNHCR), and available at [www.refworld.org/pdfid/50348afc2.pdf](http://www.refworld.org/pdfid/50348afc2.pdf); and in the “Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity,” March 2007, available at [www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf). See also “Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles,” November 2017, [http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf).

<sup>9</sup> A USC may also file a K-3 nonimmigrant petition on Form I-129F in conjunction with a Form I-130 petition for a beneficiary spouse who is outside the United States. If the K-3 petition is approved prior to the I-130, this could speed up the ability of the beneficiary spouse to enter the United States. The beneficiaries of the K visas then should apply for permanent residency through adjustment of status immediately after arrival in the United States. However, the K-3 process has rarely been quicker than simply filing an I-130 petition by itself, and so is rarely recommended. The K process has one distinct advantage for a current spouse, because they can also immigrate the children of the K beneficiary who are over age 18 at the time of the marriage, but who are still under the age of 21. A USC who is not yet married to their fiancé(e) may also file a K-1 nonimmigrant visa for their fiancé(e) and a K-2 for the fiancé(e)’s child.

<sup>10</sup> The regulations are very specific about what documents prove U.S. citizenship, including a birth certificate, U.S. passport, or naturalization certificate. Lawful Permanent Residents must submit a copy of their permanent resident card (“Alien Registration Card”) or Form I-551. See 8 CFR § 204.1(g)(1).

<sup>11</sup> In cases where the BIA upholds the USCIS determination and dismisses the appeal, the next appeal would need to be filed in federal district court. See, e.g., *Ruiz v. Mukasey*, 552 F.3d 269, 276 (2d Cir. 2009); see also *Ayanbadejo v. Chertoff*, 517 F.3d 273, 277-78 (5th Cir. 2008).

<sup>12</sup> See 9 FAM 102.8-1(E); see also *Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1982); *Matter of Lovo-Lara*, 23 I. & N. Dec. 746 (BIA 2005); *Matter of Hosseinian*, 19 I. & N. Dec. 453, 455 (BIA 1987).

<sup>13</sup> In contrast, marriages that are “merely voidable” but not necessarily void, such as certain marriages to minors, are recognized for immigration purposes. *Matter of G-*, 9 I. & N. Dec. 89 (BIA 1960).

<sup>14</sup> Note that DOMA prevented same-sex couples from accessing immigration benefits through marriage by specifying that, for purposes of federal law, the term “spouse” could only be a person of the opposite sex.

<sup>15</sup> See 9 FAM 102.8-1(F) for additional requirements for common law marriages in other countries to qualify as a “valid” marriage for immigration purposes.

<sup>16</sup> A USC can file a K-1 fiancé(e) visa petition for a partner with whom they have a committed relationship, but who lives outside of the United States. For more considerations related to these processes, see ILRC, *Family & Immigration: Practical Guide* (2017), <https://www.ilrc.org/family-manual>; Immigration Equality, *FAQs for Binational Couples*, [https://www.immigrationequality.org/get-legal-help/our-legal-resources/couples-families-2/faqs-for-binational-couples/#.XhYdp\\_ylZEY](https://www.immigrationequality.org/get-legal-help/our-legal-resources/couples-families-2/faqs-for-binational-couples/#.XhYdp_ylZEY) (last visited Jan. 8, 2020). Additionally, a foreign national can apply for a B-2 “cohabitating partner” visa to accompany a nonimmigrant partner to the United States, even if the couple is not legally married or in a formally recognized relationship. For more information, see Immigration Equality, *Dual Foreign National Couples*, [https://www.immigrationequality.org/get-legal-help/our-legal-resources/couples-families-2/dual-foreign-national-couples/#.XhYcf\\_ylZEY](https://www.immigrationequality.org/get-legal-help/our-legal-resources/couples-families-2/dual-foreign-national-couples/#.XhYcf_ylZEY) (last visited Jan. 8, 2020).

<sup>17</sup> Immigration Equality’s website provides additional information for a couple looking to marry in a jurisdiction recognizing marriage equality, available at [www.immigrationequality.org](http://www.immigrationequality.org).

<sup>18</sup> Pew Research Center, *Same-Sex Marriage Around the World*, (Oct. 28, 2019) <https://www.pewforum.org/fact-sheet/gay-marriage-around-the-world/#unitedstates>.

<sup>19</sup> *Id.*; see also *Mexico Supreme Court legalizes gay marriage in Jalisco state*, AP (Jan. 26, 2016), <https://apnews.com/864d975ffdbc42d28052b136ae0525a3>.

<sup>20</sup> However, the State Department has stated that, like a common law marriage, a civil union or domestic partnership can qualify as a “valid” marriage “if the place of celebration recognizes the status as equal in all respects to a marriage.” 9 FAM 102.8-1(G). See also 9 FAM 102.8-1(F).

<sup>21</sup> See, e.g., *Matter of Valerio*, 15 I. & N. Dec. 659 (BIA 1976).

<sup>22</sup> *Matter of Luna*, 18 I. & N. Dec. 385 (BIA 1983); *Matter of Hann*, 18 I. & N. Dec. 196 (BIA 1982); *Matter of Karim*, 14 I. & N. Dec. 417 (BIA 1973).

<sup>23</sup> *Jahed v. Acri*, 468 F.3d 230, 235 (4th Cir. 2006) (quoting *Matter of Hosseinian*, 19 I. & N. Dec. at 455).

<sup>24</sup> *Matter of Hosseinian*, 19 I. & N. Dec. at 455-56; *Matter of Assan*, 15 I. & N. Dec. 218 (BIA 1975); see also *Matter of Weaver*, 16 I. & N. Dec. 730, 733 (BIA 1979) (state law where subsequent marriage took place cannot invalidate a foreign divorce as long as the foreign divorce is valid in the couple’s state of domicile at the time that the divorce decree is issued).

<sup>25</sup> *Matter of Aldecoaotalora*, 18 I. & N. Dec. 430, 431 (BIA 1983) (beneficiary told immigration officer that she divorced her prior spouse because “she needed a green card in order that her children could remain in the United States” and continued to hold property and file joint tax returns with prior spouse).

<sup>26</sup> *Matter of Astorga*, 17 I. & N. Dec. 1 (BIA 1979); *Matter of F-*, 9 I. & N. Dec. 275, 277 (BIA 1961). *But see Garcia v. INS*, 31 F.3d 441 (7th Cir. 1994) (annulment does not cure misrepresentation of an applicant’s married status at the time of application or entry if married status is material to entry or receipt of immigration benefits).

<sup>27</sup> See 9 FAM 102.8-1(I). *But see Matter of Miraldo*, 14 I. & N. Dec. 704 (BIA 1974) (beneficiary’s legal separation in Brazil did not constitute the termination of the prior marriage because Brazilian law did not allow the spouses to remarry after a legal separation).

<sup>28</sup> *Matter of Lovo-Lara*, 23 I. & N. Dec. at 750-53.

<sup>29</sup> *Id.* at 753.

<sup>30</sup> USCIS Policy Memorandum, “Adjudication of Immigration Benefits for Transgender Individuals; Addition of *Adjudicator’s Field Manual* (AFM) Subchapter 10.22 and Revisions to AFM Subchapter 21.3 (AFM Update AD2-02),” April 13, 2012 at 2.

<sup>31</sup> *Id.* at 2-4.

<sup>32</sup> See *Matter of Laureano*, 19 I. & N. Dec. 1, 2-3 (BIA 1983).

<sup>33</sup> *Id.* at 3; see also *Lutwak v. U.S.*, 344 U.S. 604, 610 (1954); *Bark v. INS*, 511 F.2d 1200, 1201-02 (9th Cir. 1975); *Matter of McKee*, 17 I. & N. Dec. 332, 333 (BIA 1980). (“[W]e have always recognized that a fraudulent or sham marriage is intrinsically different from a nonviable or nonsubsisting one.”); USCIS Adjudicator’s Field Manual 21.3(H).

<sup>34</sup> 9 FAM 102.8-1(I)(a) (explaining that married couple who ceased cohabiting is still married for immigration purposes as long as it “was not contracted solely to qualify for immigration benefits” and no legal separation has been obtained); *Matter of Boromond*, 17 I. & N. Dec. 450, 454 (BIA 1980).

<sup>35</sup> *Cho v. Gonzales*, 404 F.3d 96, 102–03 (1st Cir. 2005).

<sup>36</sup> Advocates should read all e-mail or text correspondence provided by clients to prevent submitting documents to USCIS that inadvertently provides evidence triggering inadmissibility.

<sup>37</sup> Such evidence is also helpful for all couples where a parent has a child from a prior relationship.

<sup>38</sup> This could lay the groundwork for a civil action later, if USCIS does reveal the client’s sensitive information.

<sup>39</sup> INA § 204(g) and INA § 245(e)(3).

<sup>40</sup> INA § 204(a)(2)(A).

<sup>41</sup> INA § 275(c).



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### About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC’s mission is to protect and defend the fundamental rights of immigrant families and communities.