FAMILY-BASED IMMIGRATION LAW: A LAWYER'S GUIDE

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PREFACE

Family-based immigration has shaped our nation's identity and continues to reflect the importance of the family unit in U.S. immigration policy. The laws that govern who can immigrate to the United States and in what category illustrate the way we define and value our human relationships. This manual is designed to help practitioners navigate the complexities of family-based petitions and the process for obtaining permanent residency. Family-based immigration cases can be as unique and complicated as families themselves can be. For this reason, this manual goes beyond the fundamentals and addresses in a down-to-earth and practical way many critical issues surrounding these cases, including inadmissibility due to past immigration violations and immigration relief in situations of domestic violence. The manual concludes with a discussion of legal ethics, a topic of great significance for the protection of both practitioners and clients.

As we evolve as a nation, so do the laws and procedures involved in family-based immigration. Now more than ever, with the prospect of immigration reform and major judicial decisions just over the horizon, practitioners must remain vigilant for potential changes in the statute and regulations in order to represent their clients effectively.

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CHAPTER X

SAME-SEX MARRIAGE AND FAMILY-BASED IMMIGRATION LAW

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A recent study estimates that in the United States there are 267,000 undocumented LGBT individuals, 54,600 non-U.S. citizens that are part of a same-sex couple, and 32,300 non-U.S. citizens that are part of a same-sex binational couple.[1] Until the 1990 amendments to the Immigration and Nationality Act (INA), homosexuality was a bar to admission, in part due to its association with "sexual deviance," which was seen as adverse to the interests of U.S. culture. While lesbian, gay, bisexual and transgender (LGBT) immigrants are no longer refused admission into the United States on account of their sexual preference, they are hardly treated as equal members of society. However, the Supreme Court's decision in *United States v. Windsor*[2] held that Section 3 of the Defense of Marriage Act (DOMA),[3] violated the equal protection clause and paved the way for the recognition of same sex marriages for immigration purposes.

A. The pre-*Windsor* Immigration Landscape for Married Same-Sex Couples

The Defense of Marriage Act (DOMA), passed in 1996, defined marriage as a legal union between a man and a woman and also expressly affirmed states' rights to disregard marriages that are validly performed in another state.[4] When President Clinton signed DOMA in 1996,[5] he codified long-held judicial interpretation that immigration law only recognizes opposite gender marriages; thus, a U.S. citizen could only petition for a spouse of the opposite gender. Reacting to a growing movement for gay and lesbian equality, Congress demonstrated its determination to ensure that same-sex marriages would remain unrecognized for purposes of federal benefits and obligations, including those under immigration laws.[6] In contrast, six years earlier Congress had amended the INA to remove homosexuality as a ground of inadmissibility,[7] and nine years later the Supreme Court invalidated state laws criminalizing sodomy, thereby legalizing same-sex sexual activity.[8]

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[1] GARY J. GATES, THE WILLIAMS INSTITUTE, LGBT ADULT IMMIGRANTS IN THE UNITED STATES (Mar. 2013), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTImmigrants-Gates-Mar-2013.pdf.

[2] *United States v. Windsor*, No. 12-307, slip op. at 25-26 (U.S. June 26, 2013), http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf.

[3] Pub. L. No. 104-199, 110 Stat. 2419 (1996).

[4] *Id.*

[5] *Id.*

[6] H.R. Rep. No. 104-664, at 2 (1996) ("The first [purpose] is to defend the institution of traditional heterosexual marriage. The second is to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.").

[7] HUMAN RIGHTS WATCH & IMMIGRATION EQUALITY, FAMILY, UNVALUED: DISCRIMINATION, DENIAL, AND THE FATE OF BINATIONAL SAME-SEX COUPLES UNDER U.S. LAW 24-28 (2006), http://www.hrw.org/sites/default/files/reports/FamilyUnvalued.pdf [hereinafter FAMILY, UNVALUED] (discussing the historical underpinnings of the ban against homosexuals and the path to changing the state of the law).

[8] *Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986) in which the Court found that the right to privacy did not extend to same-sex sexual activity).

1. Marriage Recognition Under U.S. Immigration Law

The INA does not define either marriage or spouse.[9] Case law has held for many years "that there is no Federal definition of marriage and that the validity of a particular marriage is determined by the law of the State where the marriage was celebrated."[10] Therefore, immigration law has historically depended upon, and still depends upon, state family laws in determining familial relationships, including marriage.[11] In 1982, in denying a same-sex couple benefits under the INA, the Ninth Circuit explained in *Adams v. Howerton* that a valid marriage under state law is a necessary—but not sufficient—condition for a determination that a particular marriage is valid for the purposes of immigration law.[12] For example, the INA expressly provides that neither unconsummated proxy marriages nor marriages entered into for the purpose of evading immigration laws can confer immigration benefits.[13]

With the enactment of DOMA, same-sex marriages were barred from recognition under federal law without any reasonable justification and lower courts and the Executive began to question this policy. There are many types of immigration petitions and applications in which a marital relationship is a predicate requirement to obtaining benefits. These include benefits as an applicant-beneficiary for a family-based immigrant visa (*e.g.*, spousal petition or sponsorship of a step-child by a step-parent),[14] recognition as an applicant or qualifying relative for a waiver of

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[9] The INA elaborates upon the words marriage and spouse in two limited contexts: INA §101(a)(35) (stating only that "[t]he term 'spouse', 'wife', or 'husband' does not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated"); INA §216(d)(1)(A), 8 USC §1186a(d)(1)(A) (requiring attestations with regard to the bona fides of the marriage in conditional permanent resident status cases to ensure the genuineness of the marriage).

[10] *Matter of Lovo-Lara*, 23 I&N Dec. 746, 751 (BIA 2005) (stating that the legislative history contains nothing to indicate that Congress intended to abrogate or limit "long-standing" case law to this effect).

[11] *See Matter of Hosseinian*, 19 I&N Dec. 453, 455 (BIA 1987); *cf.* 9 Foreign Affairs Manual (FAM) 40.1 N1.1(c), *available at* http://www.state.gov/documents/organization/86920.pdf ("The underlying principle in determining the validity of the marriage is that the law of the place of marriage celebration controls. If the law is complied with and the marriage is recognized, then the marriage is deemed to be valid for immigration purposes.").

[12] *Adams v. Howerton*, 673 F.2d 1036, 1039-40 (9th Cir. 1982) *cert. denied*, 458 U.S. 1111 (1982) (considering the ordinary and common meaning of the words marriage and spouse at the time of the 1965 amendments to the INA). Signaling movement towards rendering the reasoning of *Adams* obsolete, on April 19, 2013 a district court stated that the definition of spouse as articulated by the Ninth Circuit "does not foreclose its consideration of [an] equal protection challenge to DOMA" because the reasons for limiting the definition of spouse in *Adams* are "irreconcilable with intervening statutory and policy changes." Order Granting in Part and Denying in Part Motions to Dismiss at 6, 10, Arenas/Deleon v. Napolitano, No. SACV12-1137-JVS (C.D. Cal. Apr. 19, 2013), *available at* http://www.centerforhumanrights.org/Order%20Denying%20in%20Part%20and%20Granting%20in%20Part%20Defendants.pdf (concluding that the plaintiff DeLeon has standing because her "application for an I-601 waiver of inadmissibility was denied solely due to DOMA").

[13] *See id.* (explaining that the INA excludes from spousal relationships those who have an unconsummated proxy marriage); *supra* note 9 (discussing marriage attestations). Note also that polygamists are inadmissible to the United States; therefore, a polygamous marriage could be valid elsewhere in the world, but is not recognized for the purposes of immigration law and it is also a ground of inadmissibility. INA §212(a)(10)(A), 8 USC §1182(a)(10)(A) (2006).

[14] INA §201(b)(2)(A)(i), INA §101(b)(1) ("The term 'child' means an unmarried person under twenty-one years of age who is a stepchild . . . provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred.").

inadmissibility or removability (previously referred to as deportation),[15] and derivative status as a spouse of an individual obtaining non-immigrant status or permanent residence through any channel.[16] DOMA prevented the federal government from recognizing otherwise valid same-sex marriages. Because *Windsor* eliminated DOMA's prohibition on federal recognition of same-sex marriages it allows the agencies which handle immigration matters to recognize same-sex marriages for immigration benefits. Immigration law clearly states that a validly celebrated marriage in one state must be recognized in another. Without DOMA, it is clear that same-sex couples living in states which prevent them from marrying may marry elsewhere and the U.S. citizen or permanent resident may file a petition in the state of domicile. While some scholars argue that it is possible that a state which expressly prohibits same-sex marriage could challenge a same-sex I-130 petition on the theory that it violates public policy,[17] it is highly unlikely that such an argument would prevail due to the policy position of the Executive, as discussed in the remainder of this section.

2. The BIA Limited the Applicability of DOMA and the Attorney General Questioned its Ongoing Validity

In 2002, the Board of Immigration Appeals (BIA) held that Congress' intent in DOMA was limited to prohibiting same-sex couples from marrying; hence, a marriage between a transgendered person and someone of the opposite gender (thus, a heterosexual marriage) could confer immigration benefits.[18] In analyzing DOMA, the BIA also concluded that Congress did not intend to overrule established case law that the "regulation of marriage is almost exclusively a State matter."[19]

In April 2011, Attorney General Eric Holder exercised a rarely used power to vacate a decision of the BIA in *Matter of Dorman*.[20] In that case, the law mandated Dorman's deportation unless he could show that his U.S. citizen or permanent resident spouse would suffer exceptional and extremely unusual hardship. The Immigration Judge ordered Dorman's removal, but because Dorman and his partner were engaged in a civil union, Attorney General Holder took the extraordinary step of ordering the BIA to make findings as to:

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[15] *See, e.g.*, INA §212(h)(1)(B), 8 USC §1182(h)(1)(B) (providing a waiver to crime-based inadmissibility that would result in "extreme hardship" to a U.S. citizen or lawful permanent resident spouse).

[16] In the non-immigrant visa context, *see, e.g.*, INA §101(a)(15)(F)(ii), 8 USC §1101(a)(15)(F)(ii) (student visa) and INA §101(a)(15)(L), 8 USC §1101(a)(15)(L) (intra-company transferee visa). In the employment-based immigrant visa (lawful permanent resident) context, *see* INA §203, 8 USC §1153. In the context of humanitarian relief, *see* INA §208(b)(3), 8 USC §1158(b)(3) (asylee) and INA §209(b)(3), 8 USC §1159(b)(3) (refugee).

[17] Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 591 (2010), http://scholarship.law.wm.edu/wmjowl/vol16/iss3/3. While the authors are hopeful that Congress would not build into the INA a specific exception for same-sex marriages, similar to the non-recognition of unconsummated proxy marriage, *infra* note 13 (and accompanying text), we would be remiss if we did not recognize that Congress has near plenary power to regulate immigration and Congress could establish other limits on the validity of marriage under the INA. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 797-99 (1977).

[18] *Matter of Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005) (reversing the denial of a marriage based petition filed by a transgendered female U.S. citizen on behalf of her male spouse because Congress defined marriage as being between two persons of different genders).

[19] *Id.* at 751.

[20] *Matter of Dorman*, 25 I&N Dec. 485 (AG 2011).

> 1) Whether respondent's same-sex partnership or civil union qualifies him to be considered a "spouse" under New Jersey law; 2) whether, absent the requirements of DOMA, respondent's same-sex partnership or civil union would qualify him to be considered a "spouse" under the Immigration and Nationality Act; 3) what, if any, impact the timing of respondent's civil union should have on his request for that discretionary relief; and 4) whether, if he had a "qualifying relative," the respondent would be able to satisfy the exceptional and extremely unusual hardship requirement for cancellation of removal.[21]

With *Dorman*, the administration signaled its expanding view of what constitutes immediate family for immigration purposes by asking the courts to examine a same-sex relationship in the context of marital relationships.[22] At the same time as *Dorman*, there were reports that similar types of inquiries, as to the bona fides of same-sex marriages, were being undertaken in I-130 denials appealed to the BIA.[23]

In October of 2012, in the context of prosecutorial discretion, Immigration and Customs Enforcement (ICE) issued a memo expressly stating that long-term LGBT relationships are included in the "family factor" used in assessing whether an unauthorized individual is a priority for deportation or warrants an exercise of discretion.[24] In spite of DOMA, the Department of Homeland Security (DHS) had ordered its prosecutors to begin to recognize both married and committed gay couples as families.

Practice Pointer: If your client is in deportation proceedings and is in a committed relationship with a U.S. citizen, consider asking for prosecutorial discretion, particularly if the only negative factor is that your client is in the US without authorization.

Decisions by the administration to allow same-sex spouses and long-term partners to qualify as families under its prosecutorial discretion guidelines opened the door for U.S. citizens to file I-130 petitions for their same-sex spouses so that the non-citizen spouses could legally work in the United States.[25] In 2011, U.S. Citizenship and Immigration Services (USCIS) stated that it could not approve these petitions as a matter of law, but that it was willing to look at the specific facts of a same-sex relationship for discretionary purposes.[26]

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[21] *Id.*

[22] *Id.*; *see* Chris Geidner, *EXCLUSIVE: DOJ Immigration Board Decisions Suggest Plans for a Post-DOMA America*, METROWEEKLY (Jun. 19, 2012), *available at* http://www.metroweekly.com/poliglot/2012/06/mote-than-a-year-ago.html; *cf.* BIA Remands I-130 Appeals in Same-Sex Marriage Cases (May 10, 2012, May 31, 2012, Jun. 7, 2012, and June 8, 2012), *posted on* AILA InfoNet at Doc. No. 12062553 (June 25, 2012).

[23] Geidner, *supra* note 22; BIA Remands, *supra* note 22.

[24] ICE Memorandum, G. Mead, "Applicability of Prosecutorial Discretion Memoranda to Certain Family Relationships" (Oct. 5, 2012), *available at* http://www.immigrationequality.org/wp-content/uploads/2012/11/PD-memo-10-5-2012-2.pdf.

[25] A pending I-130 petition (with concurrent adjustment of status application) permits the beneficiary to apply for work authorization and advance parole. Form I-765 Instructions at 4 (Aug. 15, 2012).

[26] Letter from Kelly Ryan, Department of Homeland Security, to Crystal Williams, American Immigration Lawyers Association (Jun. 21, 2011), *available at* http://www.aila.org/content/default.aspx?bc=1016|6715|8412|38207|35991.

3. DOS Recognized and Afforded Partners of Nonimmigrant Visa Holders the Opportunity to Live with their Partner in the U.S.

In 2001, just 5 years after DOMA, the Department of State (DOS) issued a cable to "remind" consular posts that a visa may be granted to the cohabitating partner of a long-term nonimmigrant to the United States.[27] The B-2 visa, often referred to as a temporary visitor visa, could be issued to the partner of a diplomat, student, foreign worker, and intracompany transferee, and "there is no absolute limit on the maximum length of stay available in B-2 status."[28] The DOS explained that this position was consistent with the prior practice of allowing elderly parents to accompany nonimmigrant visa holders, reasoning that the accompanying family member's purpose is simply to accompany the principal alien, not to live in the United States.[29]

Practice Pointer: With the decision in *Windsor*, same-sex spouses can now enter the U.S. in the same fashion as married opposite sex partners under their spouse's visa category and will no longer be limited to B-2 status or have to qualify independently for a nonimmigrant visa. However, long-term partners who are not legally married will still be governed by the 2001 cable unless they subsequently marry and change status in the U.S.

4. DOS Sought Recognition for the Same-Sex Partners of its Diplomatic Employees

In the context of foreign service officers, DOS not only recognizes same-sex partners of those posted from a foreign nation to the United States, but DOS also desires that the same-sex partners for U.S. citizen officers be recognized by foreign governments.[30] Even before the Court's decision in *Windsor*, DOS amended the definition of "immediate relatives" of an "ambassador, public minister, or career diplomatic or consular officer,"[31] to recognize domestic partners of those foreign officers. In the Foreign Affairs Manual, it then explicitly explained that the term "domestic partner" includes a same-sex partner.[32] Thus, the same-sex partner of a foreign officer is eligible for derivative status as an immediate relative of the primary visa applicant.

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[27] *See* B-2 Classification for Cohabitating Partners, 01 State 118790 (Jul. 2001), *available at* http://travel.state.gov/visa/laws/telegrams/telegrams_1414.html, *posted on* AILA InfoNet at Doc. No. 01071131 (Jul. 11, 2001) (revising the Foreign Affairs Manual and expressly stating that this visa could be issued for "both opposite and same-sex partners").

[28] *Id.*; *see* 9 Foreign Affairs Manual (FAM) § 41.31 N14.4 (noting that it is important to ensure that the accompanying partner who seeks the B-2 visa demonstrates compliance with the intent provisions of INA §214(b), regardless of whether the principal alien is required to do so under the terms of his/her visa).

[29] *Id.*

[30] *See* 9 FAM § 41.21 N5.1-2 ("Before you issue a derivative visa in an A or G classification other than G-4 to a domestic partner, you must confirm that the sending state would provide reciprocal treatment to domestic partners of U.S. Mission members.").

[31] 22 CFR § 41.21.

[32] *See* 9 FAM § 41.21 N5.1-2.

The inherent irony in seeking recognition of same-sex partners for U.S. Foreign Service officers, while not recognizing those unions for benefits under the INA, demonstrated once again the untenable position of DOMA.

B. Immigration Benefits After the Court Struck Down Section 3 of DOMA

In February of 2011, the Executive Branch announced that it would no longer defend the constitutionality of DOMA in federal courts where it could subject DOMA to heightened scrutiny for creating a classification based on sexual orientation.[33] Others took up the defense of DOMA,[34] and the Supreme Court recently decided two cases, *Hollingsworth v. Perry*,[35] and *United States v. Windsor*,[36] both of which independently questioned the constitutionality of DOMA and state laws banning same-sex marriage.

The issue in *Perry* was whether California's Proposition 8, a 2008 ballot initiative that amended the state constitution to restrict marriage to heterosexual couples, violated the Equal Protection Clause of the Fourteenth Amendment.[37] The plaintiffs in the original case are two same-sex couples that were denied marriage licenses in California.[38] After a lower court decision, the Ninth Circuit held that the ballot measure violated the U.S. Constitution.[39] In *Perry*, the Supreme Court held that the Petitioners did not have standing to appeal the trial court's decision and remanded the case to the Ninth Circuit instructing it to dismiss the appeal for lack of jurisdiction.[40] Thus, the District Court's decision, that Proposition 8 is unconstitutional under the laws of California, stands today.

The question in *Windsor* was whether DOMA denies legally married same-sex couples equal protection under the due process clause of the Fifth Amendment.[41] In *Windsor*, Thea Speyer left her same-sex spouse, Edith Windsor, a considerable estate and the Internal Revenue Service (IRS) levied a tax on the gain.[42] After paying the tax, Ms. Windsor sued arguing that

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[33] Letter from Eric Holder, Attorney General, to John A. Boehner, Speaker of the U.S. House of Reps. (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html (listing cases in California, Massachusetts, Florida, and Washington in which the Attorney General has defended DOMA).

[34] Matthew I. Hall, Stanford Law Review Online, *How Congress Could Defend DOMA in Court (and Why the BLAG Cannot)*, 65 STAN. L. REV. ONLINE 92 (Jan. 28, 2013) (stating that authors of DOMA, organized as the Bipartisan Legal Advisory Group of the House of Representatives (BLAG), hired Paul Clement, the former Solicitor General under President George W. Bush, to defend the constitutionality of DOMA).

[35] *Hollingsworth v. Perry*, No. 12-144, slip op. (U.S. June 26, 2013), http://www.supremecourt.gov/opinions/12pdf/12-144 8ok0.pdf.

[36] *United States v. Windsor*, No. 12-307, slip op. (U.S. June 26, 2013), http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf.

[37] Brief in Opposition (On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit), *Hollingsworth v. Perry* (No. 12-144), *available at* http://www.afer.org/wp-content/uploads/2012/08/2012-08-24-Plaintiffs-Brief-in-Opposition.pdf.

[38] *Id*.

[39] *Id*.

[40] *Hollingsworth v. Perry*, No. 12-144, slip op. at 17 (U.S. June 26, 2013), http://www.supremecourt.gov/opinions/12pdf/12-144_8ok0.pdf.

[41] Petition for a Writ of Certiorari Before Judgment, *Windsor v. US* (No. 12-63), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-63-Windsor-Cert-Petition.pdf.

[42] *Id*.

had she been in a heterosexual marriage, IRS' spousal exemption would have resulted in the bequest passing to her exempt from federal taxes.[43]

Windsor was also procedurally complex, but the Court found both standing and a live controversy because the Federal Government failed to refund the tax payment to Ms. Windsor in accordance with the lower court's judgment.[44] After discussing states' rights at length,[45] the Court struck down Section 3 of DOMA as a violation of equal protection under the Fifth Amendment.[46] As the dissent explains, the ramifications of this holding are uncertain. The decision in *Windsor* invalidated federal DOMA and left state DOMA laws intact. States remain empowered to decide who may marry in the exercise of the state power.[47] However, state laws banning same-sex marriage will continue to be challenged in the courts. The courts could find that state laws prohibiting same-sex marriage violate the equal protection clause of the Fourteenth Amendment.

Practitioners agree that the Supreme Court's holding in *Windsor* means that DHS must recognize otherwise valid marriages of same-sex couples who are living in states that recognize same-sex marriage.[48] In fact, USCIS Director Mayorkas announced at the AILA conference in June 2013, that since February 2011, USCIS has kept a list of all denied I-130 petitions filed by same-sex couples, and it is now prepared to act on these denials. On June 28, 2013 the USCIS approved its first I-130 petition filed by a same-sex married couple in Florida.[49] Therefore, the holding in *Dorman*, along with recent prosecutorial discretion policies, and a statement from Secretary Napolitano after the decision in *Windsor*,[50] gives hope that DHS will recognize valid same-sex marriages regardless of state of domicile and may also consider long-term partnerships as a factor in discretionary decisions, such as cancellation of removal.

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[43] *Id*.

[44] *United States v. Windsor*, No. 12-307, slip op. at 5-13 (U.S. June 26, 2013), http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf.

[45] *United States v. Windsor*, No. 12-307, slip op. at 13-26 (U.S. June 26, 2013), http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf. *See* Elspeth Reeve, *Chaos Looms if the Court Strikes Down DOMA and Punts on Prop 8*, THE ATLANTIC WIRE (Mar. 27, 2013), *available at* http://www.theatlanticwire.com/politics/2013/03/chaos-looms-if-court-strikes-down-doma-and-punts-prop-8/63610/ for a discussion regarding state's rights.

[46] *United States v. Windsor*, No. 12-307, slip op. at 5-13 (U.S. June 26, 2013), http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf.

[47] *United States v. Windsor*, No. 12-307, slip op. (U.S. June 26, 2013) (Roberts, J., dissenting), http://www.supremecourt.gov /opinions/12pdf/12-307_6j37.pdf; *see also supra* notes 9-13 (discussing marriage recognition); *see also* Tobias Barrington Wolff, *DOMA Repeal and the Truth About Full Faith & Credit*, THE BLOG (July 21, 2011, 10:47 AM), http://www.huffingtonpost.com/tobias-barrington-wolff/doma-repeal-and-the-truth_b_905484.html ("If tomorrow, we were to enact the Respect for Marriage Act and repeal DOMA in its entirety, states would possess the same power that they have always had to refuse to recognize out-of-state marriages on public-policy grounds.").

[48] *See, e.g.*, IMMIGRATION EQUALITY, The End of DOMA: What Your Family Needs to Know, http://immigrationequality.org/2013/06/the-end-of-doma-what-your-family-needs-to-know/ (last visited June 28, 2013).

[49] Julia Preston, *Gay Married Man in Florida Is Approved for Green Card*, NY TIMES (Jun. 30, 2013), http://mobile.nytimes.com/2013/07/01/us/gay-married-man-in-florida-is-approved-for-green-card.html.

[50] Press Release, *Statement by Secretary of Homeland Security Janet Napolitano on the Supreme Court Ruling on the Defense of Marriage Act* (July 1, 2013), *available at* http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act.

Practice Pointer: On I-130 petitions for same-sex married couples, it is necessary to review the totality of evidence that establish the bona fides of the marriage. This will be particularly true in states that do not recognize the marriage, as it will be harder to show that the couple is holding themselves out as married if state laws do not permit them to share health insurance or file state taxes jointly.

Practice Pointer: With regard to K-1 (fiancé/fiancée) petitions on behalf of United States citizens residing in states that prohibit same-sex marriage, it would be prudent to include a statement detailing where the parties plan to marry.

The LGBT community has come a long way from when *Adams* was decided in 1982 and homosexuality was still a ground of inadmissibility. At that time, the "INA would be internally inconsistent if it [had] barred gay men and lesbians from entering the United States while recognizing a right to immigrate on the basis of their same-sex relationship."[51] Homosexuality is not only *not* a bar to admissibility, but it is *often* the basis of a grant of asylum.[52] In addition, in the past 17 years, several states have legalized same-sex marriage.[53] Therefore, there has been little logic in permitting LGBT individuals to enter the United States, but not affording them equal benefits when they decide to enter into a lifelong commitment with a person of the same sex. With the Court's decision in *Windsor*, a whole new area of possible benefits has become available to same-sex spouses. Practitioners will need to continue to advocate diligently on behalf of LGBT clients to ensure the fair administration of immigration laws.

Practice Pointer: If your client seems to have few or no viable options to remain in the United States, consider reaching out to members of Congress, particularly if there are compelling hardship factors in the case. Media can also help draw attention to a client's urgent circumstances.

[51] Titshaw, *supra* note 17, at 591 (explaining why the *Adams'* decision was logical when decided but arguing that it does not stand the test of time).

[52] *See Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990) (granting asylum to a homosexual male); *see also Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) (overruled in part on other grounds by *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005)) ("Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them.").

[53] Nine states have legislatively legalized same-sex marriage: Massachusetts, Connecticut, Iowa, Maine, Maryland, New Hampshire, New York, Vermont, and Washington State. Pew Forum on Religion & Public Life, "High Court to Hear Same-Sex Marriage Cases" (Mar. 20, 2013), http://www.pewforum.org/Gay-Marriage-and-Homosexuality/High-Court-to-Hear-Same-Sex-Marriage-Cases.aspx.

GLOSSARY OF ACRONYMS

AAO: Administrative Appeals Office

AILA: American Immigration Lawyers Association

AOS: Adjustment of Status

BIA: Board of Immigration Appeals

CBP: Customs and Border Protection

CCA: Child Citizenship Act of 2000

CSPA: Child Status Protection Act

DHS: Department of Homeland Security

DOJ: Department of Justice

DOMA: Defense of Marriage Act

DOS: Department of State

EOIR: Executive Office for Immigration Review

ICE: Immigration and Customs Enforcement

IIRAIRA: Illegal Immigration Reform and Immigrant Responsibility Act of 1996

INA: Immigration and Nationality Act

INS: Immigration and Naturalization Service

LPR: Lawful Permanent Resident

NTA: Notice to Appear

POE: Port of Entry

USC: (1) U.S. Code; (2) U.S. Citizen

USCIS: U.S. Citizenship and Immigration Services

VAWA: Violence Against Women Act