

Immigration Benefits for Same-Sex Couples Post DOMA

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Practices: Immigration

After the Supreme Court struck down Section 3 of the Defense of Marriage Act (DOMA) as unconstitutional, the U.S. Department of Homeland Security (DHS) took immediate steps to issue guidance to ensure that immigration benefits for legally married same-sex couples are implemented quickly. Subsequently, the U.S. Citizenship and Immigration Services (USCIS) released a "Frequently Asked Questions" (FAQ) offering guidance on how it would adjudicate visa petitions filed on behalf of same-sex spouses. Below is a summary of the new immigration benefits available to same-sex couples under the new guidance and how the USCIS intends to implement the change:

- Generally, the USCIS looks to the law of the place where the marriage took place when determining whether it is valid for immigration law purposes. Consequently, as long as the couple was married in a state that recognizes same-sex marriages, the marriage will be considered valid even if the couple now lives in a state that does not recognize same-sex marriages. Under some circumstances, the USCIS looks to the law of the state of residence in addition to the law of the state of celebration of the marriage. Whether those exceptions apply may depend on individual, fact-specific circumstances.
- Eligible same-sex couples can file petitions with the USCIS right away. There is no need to wait for further USCIS guidance or instructions.
- Previously submitted applications and petitions which were denied solely on the basis that the couple was of the same-sex will be reopened and reconsidered. The USCIS will make an effort to identify denials of I-130 petitions that occurred on the basis of DOMA section 3 after February 23, 2011 because it has kept a record of those cases. However, applicants are encouraged to reach out to the USCIS to ensure adjudication of their previously denied cases. For denials of I-130 petitions that occurred prior to February 23, 2011, petitioners must notify the USCIS by March 31, 2014, in order for USCIS to act on its own to reopen the I-130 petition.
- Reopened I-130 petitions will be treated as new petitions based upon previous information and any new information provided. USCIS will also concurrently reopen associated applications as may be necessary to the extent they also were denied as a result of the denial of the I-130 petition (such as concurrently filed Form I-485 applications). The USCIS has also indicated that for those cases which are being reopened and reconsidered, it will process Employment Authorization Documents (EAD) expeditiously, and applicants will not have to wait for the adjudication of the motion to reopen or reconsider to receive the EAD.
- If another type of petition or application (other than an I-130 petition or associated application) was denied based solely upon DOMA section 3, the USCIS needs to be notified by March 31, 2014. The USCIS will

promptly consider whether reopening of that petition or application is appropriate under the law and the circumstances presented.

- Married same-sex couples are also eligible for family-preference sponsorship, derivative visas, fiancés visas, etc. In cases where the immigration laws condition the benefit on the existence of a "marriage" or on one's status as a "spouse," same-sex marriages qualify as marriages for purposes of these benefits. Foreign nationals who seek to qualify as a spouse accompanying or following to join a family-sponsored immigrant, an employment-based immigrant, certain subcategories of nonimmigrants, or an alien who has been granted refugee status or asylum will be treated exactly the same as an opposite-sex marriage.
- There are some situations in which either the individual's own marriage, or that of his or her parents, can affect whether the individual will qualify as a "child," a "son or daughter," a "parent," or a "brother or sister" of a U.S. citizen or of a lawful permanent resident. In these cases, same-sex marriages will be treated exactly the same as opposite-sex marriages.
- Now, same-sex marriages, like opposite-sex marriages, reduce the residence period required for naturalization to three years for naturalization cases based on marriage to a U.S. citizen.
- Married same-sex couples will also be eligible for discretionary waivers of certain inadmissibility grounds. Whenever the immigration laws condition eligibility for a waiver on the existence of a "marriage" or status as a "spouse," same-sex marriages will be treated exactly the same as opposite-sex marriages.

While the USCIS has been quick to implement guidance to promptly adjudicate the petitions and applications of same-sex couples, inevitably, problems and issues unique to same-sex couples will arise which may result in delays. For example, same-sex couples with pending adjustment of status applications may face difficulty proving the bona fide nature of their marriage due to lack of documentation demonstrating comingling of finances. Masuda Funai has attorneys who are experienced in this area and can work with you to establish eligibility for immigration benefits as a same-sex couple. If you have any questions related to eligibility requirements as a same-sex couple, please contact Fazila Vaid at 847-734-8832 or fvaid@masudafunai.com.

Additional information about the implementation of same-sex immigration benefits will be contained in our firm's future Immigration Updates when it becomes available.