

Immigration Update

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The Post-DOMA Immigration Law Landscape

The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

—Justice Kennedy, *United States v. Windsor*, No. 12-307, slip op. at 21 (U.S. June 26, 2013).

On June 26, 2013, the Supreme Court found § 3 of

the Defense of Marriage Act (DOMA)¹ unconstitutional because it denied legally married same-sex couples equal protection under the due process clause of the Fifth Amendment.² In reaction to a growing movement for gay and lesbian equality, Congress enacted DOMA in 1996 and demonstrated its determination to ensure that same-sex marriages would remain unrecognized for purposes of federal benefits and obligations, including those under immigration laws.³ It 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 The Court's decision in *Windsor* invalidated the federal definition of marriage thereby allowing the federal government to recognize same-sex marriages for federal benefits and obligations.⁵ There have been widely different reactions to the *Windsor* decision: while agencies that have jurisdiction over immigration procedures have quickly issued statements outlining steps toward implementation, several state National Guards have refused to recognize same-sex marriages.⁶ It must also be noted that while no states have enacted new laws to ban same-sex marriage, states, including Pennsylvania and New Mexico, are moving to issue marriage licenses either in the absence of a prohibition or in defiance of state law.⁷ These actions will likely lead to the courts deciding upon the constitutionality of banning same-sex marriage under the equal protection clause of the Fourteenth Amendment.

In the years prior to *Windsor*, more than 30 states enacted laws that proscribe same-sex marriage by either statute or constitutional amendment.⁸ Based on these state laws, some scholars argued that

a state that prohibits same-sex marriage could challenge a same-sex immigration petition on the theory that recognizing it violates the public policy of the state by disregarding the express will of the people.⁹ While such a challenge to same-sex benefits would have likely failed in the courts, same-sex couples might have suffered under the inaction of the administration and held up federal benefits during adjudication. While states have not interfered in granting immigration benefits to same-sex couples, Louisiana, Mississippi, Oklahoma, and Texas have staked their turf in opposition to *Windsor* by denying benefits to same-sex National Guard spouses on state-run bases.¹⁰ While this opposition is significant, those spouses may obtain benefits at federally run bases within those states.¹¹

Marriage Recognition Under U.S. Immigration Law

Immigration law has historically depended upon, and still depends upon, state family laws in determining familial relationships, including marriage.¹² The Immigration and Nationality Act (INA) does not define either marriage or spouse.¹³ 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."¹⁴ 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 determining that a particular marriage is valid for the purposes of immigration law.¹⁵ 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.¹⁶

The enactment of DOMA barred same-sex marriages from recognition under federal law without any reasonable justification, and lower courts and the executive branch began to question this policy. Many types of immigration petitions and applications require a marital relationship to obtain benefits, including an applicant-beneficiary for a family-based immigrant visa (*e.g.*, spousal petition or sponsorship of a step-child by a step-parent),¹⁷ recognition as an applicant or qualify-

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ing relative for a waiver of inadmissibility or removability (previously referred to as deportation),¹⁸ and derivative status as a spouse of an individual obtaining nonimmigrant status or permanent residence through any channel.¹⁹ DOMA prevented the federal government from recognizing otherwise valid same-sex marriages. Because the decision in *Windsor* eliminated DOMA's prohibition on federal recognition of same-sex marriages, it allows the agencies that handle immigration matters to recognize same-sex marriages for immigration benefits.²⁰ Immigration law clearly provides 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 that prevent them from marrying may marry elsewhere, and the U.S. citizen or permanent resident may file a petition in the state of domicile.²¹

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.²² 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."²³

More generally, in February of 2011, the executive branch announced it would no longer defend the constitutionality of DOMA in federal courts where it could subject the act to heightened scrutiny for creating a classification based on sexual orientation.²⁴ Advocates then took up the defense of DOMA²⁵ and gave rise to the Supreme Court granting certiorari to cases such as *Windsor* and *Perry*.

In April 2011, Attorney General Eric Holder exercised a rarely used power to vacate a decision of the BIA in *Matter of Dorman*.²⁶ 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 under 8 USC § 1229b. 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:

- 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.²⁷

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.²⁸ At the same time as *Dorman*, reports of similar types of inquiries, as to the *bona fides* of same-sex marriages, were being undertaken in I-130 denials appealed to the BIA.²⁹

In October 2012, in the context of prosecutorial discretion, Immigration and Customs Enforcement (ICE) issued a memo expressly including long-term lesbian, gay, bisexual, and transgendered (LGBT) relationships in the "family factor" used to assess whether or not an unauthorized individual is a priority for deportation or warrants an exercise of discretion.³⁰ 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, thus, opening the door for advocates to argue that clients in deportation proceedings who are in committed same-sex relationships with U.S. citizens should be able to use the relationship as a positive factor in a request for prosecutorial discretion.

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 noncitizen spouses could apply for work authorization in the United States and be in a period of authorized stay.³¹ 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.³²

DOS Recognized and Afforded Partners of Nonimmigrant Visa Holders the Opportunity to Live with Their Partner in the United States

In 2001, just five years after DOMA, the Department of State (DOS) issued a cable to "remind" consular posts that they may grant visas to the cohabitating partner of a long-term nonimmigrant to the United States.³³ 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."³⁴ 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.³⁵ While DOS has clearly announced that a same-sex spouse is now eligible for the applicable derivative visa, *e.g.*, H-4 for the same-sex spouse of an H-1B, it is likely that the 2001 cable would still govern issuance of a B-2 visa for a cohabitating partner for a nonimmigrant spouse.

DOS Sought Recognition Abroad 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 also desires foreign governments to recognize the same-sex partners of U.S. citizen officers.³⁶ 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,"³⁷ 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.³⁸ Thus, the same-sex partner of a foreign officer is eligible for derivative status as an immediate relative of the primary visa applicant.

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.

Immigration Benefits After the Court Struck Down § 3 of DOMA

USCIS Director Alejandro Mayorkas announced at the American Immigration Lawyers Association (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, USCIS approved its first I-130 petition filed by a same-sex married couple in Florida.³⁹ The holding in *Dorman*, along with recent prosecutorial discretion policies, and the statement from then Secretary Janet Napolitano after the decision in *Windsor*,⁴⁰ gives hope that in states that do not recognize same sex marriage, DHS will consider long-term partnerships as a factor in discretionary decisions, such as cancellation of removal.

On July 17, 2013, the BIA issued a precedent decision explicitly stating that a valid same-sex marriage performed anywhere would be considered a marriage for the purposes of immigration law.⁴¹ As practitioners, it is necessary to review the totality of evidence that establish the *bona fides* of the marriage in a family-based marriage petition for a same-sex spouse. This is particularly true in states that do not recognize the marriage, as it will be more difficult to present evidence, such as insurance beneficiary documentation, that the couple is holding themselves out as married if state laws do not permit them to share basic elements of marriage, such as health insurance or jointly filed taxes.

DOS, the same agency that sought recognition of the same-sex marriages of its employees posted abroad, announced on August 2, 2013, that same-sex marriages would be recognized for immigration benefits at its 222 consular posts worldwide, regardless of whether the country of residence permits same-sex marriage.⁴² As with family-based marriage petitions, when filing K-1 (fiancé/fiancée) petitions on behalf of U.S. citizens residing in states that prohibit same-sex marriage, it might be necessary to include additional evidence, such as a statement detailing where the parties plan to marry if the fiancé/fiancée is issued the visa to enter the United States. ☉

Endnotes

¹Pub. L. No. 104-199, 110 Stat. 2419 (1996).

²*United States v. Windsor*, No. 12-307, slip op. at 5-13 (U.S. June 26, 2013), available at www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf. As a result of the operation of DOMA, the Internal Revenue Service (IRS) levied a tax on the estate that Thea Speyer left her same-sex spouse, Edith Windsor. Petition for a Writ of Certiorari Before Judgment, *Windsor v. United States* (No. 12-63), available at sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-63-Windsor-Cert-Petition.pdf. Ms. Windsor sued the IRS, arguing that had she been in a heterosexual marriage, IRS' spousal exemption would have resulted in the bequest passing to her exempt from federal taxes. *Id.* After discussing states' rights at length, *United States v. Windsor*, No. 12-307, slip op. at 13-26, the Court struck down Section 3 of DOMA as a violation of the protections of due process and equal protection under the Fifth Amendment. *United States v. Windsor*, No. 12-307, slip op. at 5-13 (U.S. June 26, 2013), 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 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.

³H.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.”). In contrast, six years earlier Congress had amended the Immigration and Nationality Act (INA) to remove homosexuality as a ground of inadmissibility and had granted asylum to a homosexual male, and nine years later the Supreme Court invalidated state laws criminalizing sodomy, thereby legalizing same-sex sexual activity. See *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990) (granting asylum to a homosexual male); HUMAN RIGHTS WATCH & IMMIGRATION EQUALITY, FAMILY, UNVALUED: DISCRIMINATION, DENIAL, AND THE FATE OF BINATIONAL SAME-SEX COUPLES UNDER U.S. LAW 24-28 (2006), 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); *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).

⁴Petition for a Writ of Certiorari Before Judgment, *Windsor v. United States* (No. 12-63), available at sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-63-Windsor-Cert-Petition.pdf.

⁵*United States v. Windsor*, No. 12-307 (U.S. June 26, 2013), www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf. *United States v. Windsor*, No. 12-307, slip op. (U.S. June 26, 2013) (Roberts, J., dissenting), www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf; see also *infra* notes 13-16 (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), 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.”). State laws banning same-sex marriage will continue to be challenged in the courts, and the courts could find that laws prohibiting same-sex marriage violate

the equal protection clause of the Fourteenth Amendment. On the same day as *Windsor*, the Court decided *Hollingsworth v. Perry* a case in which a state DOMA law was at issue. *Hollingsworth v. Perry*, No. 12-144, slip op. (U.S. June 26, 2013), www.supremecourt.gov/opinions/12pdf/12-1448ok0.pdf. In *Perry*, the 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. No. 12-144, slip op. at 17 (U.S. June 26, 2013). Thus, the District Court's decision, that Proposition 8 is unconstitutional under the laws of California, stands today.

⁶*Compare infra* notes 39-42 (discussing the announcements from DHS and DOS), Press Release, *Statement by Secretary Hagel on DOMA Ruling* (Jun. 26, 2013), available at www.defense.gov/releases/release.aspx?releaseid=16119 (stating that “[t]he Department of Defense intends to make the same benefits available to all military spouses—regardless of sexual orientation—as soon as possible”) and Chuck Hagel, Secretary of Defense, *Memorandum for Secretaries of the Military Departments Under Secretary of Defense for Personnel and Readiness* (Aug. 13, 2013), www.defense.gov/home/features/2013/docs/Extending-Benefits-to-Same-Sex-Spouses-of-Military-Members.pdf (“the Department will implement policies to allow military personnel in a [same sex] relationship non-chargeable leave for the purpose of traveling to a jurisdiction where [a same sex] marriage may occur”) with Karen Jowers, *Texas: Same-Sex Spouses Can't Enroll for Benefits at State Guard Facilities*, ARMYTIMES (Sep. 3, 2013), www.armytimes.com/article/20130903/BENEFITS07/309030015/Texas-Same-sex-spouses-can-t-enroll-benefits-state-Guard-facilities (stating that the conflict is between Department of Defense policies and the state constitution, which establishes that same-sex marriages are void in the state; thus, same-sex marriage are valid for benefits on federal military installations within Texas but not as of yet on Texas military installations) and Adam Serwer, *Post-DOMA, Gay Veterans Still Not Eligible for Benefits*, MSNBC (Aug. 27, 2013), tv.msnbc.com/2013/08/27/post-doma-gay-veterans-still-not-eligible-for-benefits/ (stating that the Veteran's Affairs Director announced that because Title 38 defines spouses as being of the opposite sex, that benefits would not accrue to same-sex spouses without revisions or a determination that the law is unconstitutional); see generally USA.gov, *Changes to Federal Benefits After the Supreme Court's Ruling on the Defense of Marriage Act (DOMA)*, (Sep. 18, 2013), blog.usa.gov/post/61597227689/changes-to-federal-benefits-after-the-supreme-courts (noting changes with regard to federal taxes, social security benefits, Medicare, benefits for uniformed service members, and employment benefits for federal employees).

⁷Alex Dobuzinskis, *County Clerks on Front Lines of U.S. Gay Marriage Battle*, REUTERS.COM (Sept. 21, 2013 1:39 PM EDT), www.reuters.com/article/2013/09/21/us-usa-marriage-clerks-idUSBRE98K09720130921; Colleen Curry, *Pennsylvania Governor Suing to Block Same-Sex Marriage Licenses*, ABCNEWS (Sept. 5, 2013), abcnews.go.com/US/pennsylvania-governor-suing-block-sex-marriage-licenses/story?id=20157278.

⁸Freedom to Marry, “Where State Laws Stand” (last accessed Sept. 26, 2013), www.freedomtomarry.org/pages/where-state-laws-stand.

⁹Scott 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), schol-

arship.law.wm.edu/wmjowl/vol16/iss3/3.

¹⁰ See, e.g., Mark Joseph Stern, *The National Guard Revives DOMA*, SLATE.COM (Sep. 23, 2013 12:27 PM), www.slate.com/blogs/outward/2013/09/23/the-national-guard-revives-doma-to-deny-benefits-to-gay-couples.html (arguing that the supremacy clause means that “when state law and federal law come into conflict in the United States, federal law wins” and that because a state National Guard “may be federalized by the president and commanded to follow his orders—sometimes contrary to a governor’s wishes” that the National Guard is not really a state-based institution); contra Michael Biesecker, *North Carolina National Guard to Recognize Same-Sex Marriages*, THE POST AND COURIER (Sep. 9, 2013), www.postandcourier.com/article/20130909/PC1610/130909376/1009/north-carolina-national-guard-to-recognize-same-sex-marriages (stating the North Carolina has a constitutional amendment that limits marriage to a man and a woman but that it will extend benefits to the same sex spouses of National Guard members).

¹¹See, e.g., Josh Hicks, *National Guard is New Gay Rights Battleground as Four States Refuse to Handle Federal Benefits*, WASHINGTON POST (Sep. 21, 2013), www.washingtonpost.com/politics/federal-government/national-guard-is-new-gay-rights-battleground-as-four-states-refuse-to-handle-federal-benefits/2013/09/21/9a4619e8-1bbd-11e3-82ef-a059e54c49d0_story.html (“The noncomplying National Guard units have encouraged same-sex couples to apply for benefits at federal installations in their states.”); Scott Neuman, *Texas, Mississippi National Guard Won't Process Same-Sex Claims*, NPR.ORG (Sep. 4, 2013 11:58 AM), www.npr.org/blogs/thetwo-way/2013/09/04/218915918/texas-mississippi-national-guard-wont-process-same-sex-claims.

¹²See *Matter of Hosseinian*, 19 I&N Dec. 453, 455 (BIA 1987); cf. 9 Foreign Affairs Manual (FAM) 40.1 N1.1(c), available at 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.”).

¹³The 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).

¹⁴*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).

¹⁵*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 toward 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* 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”).

¹⁶*See id.* (explaining that the INA excludes from spousal relationships those who have an unconsummated proxy marriage); *supra* note 13 (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 is also a ground of inadmissibility. INA § 212(a)(10)(A), 8 USC § 1182(a)(10)(A) (2006).

¹⁷INA § 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.”).

¹⁸*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).

¹⁹In the nonimmigrant 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).

²⁰*See, e.g.*, IMMIGRATION EQUALITY, *The End of DOMA: What Your Family Needs to Know*, immigrationequality.org/2013/06/the-end-of-doma-what-your-family-needs-to-know/ (last visited June 28, 2013) (arguing that that DHS must recognize otherwise valid marriages of same-sex couples who are living in states that recognize same-sex marriage). Some scholars argue it is possible that a state that expressly prohibits same-sex marriage could challenge a same-sex I-130 petition on the theory that it violates public policy, but it is highly unlikely that such an argument would prevail due to the policy position of the executive branch. 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), scholarship.law.wm.edu/wmjowl/vol16/iss3/3.

²¹While the authors are hopeful that Congress would not build into the INA a specific exception for same-sex marriages, similar to the nonrecognition of unconsummated proxy marriage, *supra* note 16 (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).

²²*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).

²³*Id.* at 751.

²⁴Letter from Eric Holder, Attorney General, to John A. Boehner, Speaker of the U.S. House of Reps. (Feb. 23, 2011), *available at* 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).

²⁵Matthew 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).

²⁶*Matter of Dorman*, 25 I&N Dec. 485 (AG 2011).

²⁷*Id.*

²⁸*Id.*; *see* Chris Geidner, *EXCLUSIVE: DOJ Immigration Board Decisions Suggest Plans for a Post-DOMA America*, METROWEEKLY (Jun. 19, 2012), *available at* 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).

²⁹Geidner, *supra* note 28; BIA Remands, *supra* note 28.

³⁰ICE Memorandum, G. Mead, “Applicability of Prosecutorial Discretion Memoranda to Certain Family Relationships” (Oct. 5, 2012), *available at* www.immigrationequality.org/wp-content/uploads/2012/11/PD-memo-10-5-2012-2.pdf.

³¹A 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).

³²Letter from Kelly Ryan, Department of Homeland Security, to Crystal Williams, American Immigration Lawyers Association (Jun. 21, 2011), *available at* www.aila.org/content/default.aspx?bc=10161671518412138207135991.

³³*See* B-2 Classification for Cohabiting Partners, 01 State 118790 (Jul. 2001), *available at* travel.state.gov/visa/laws/telegrams/telegrams_1414.html, *posted on* American Immigration Lawyers Association (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”).

³⁴*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).

³⁵*Id.*

³⁶*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.”).

³⁷22 CFR § 41.21.

³⁸*See* 9 FAM § 41.21 N5.1-2.

³⁹Julia Preston, *Gay Married Man in Florida Is Approved for Green Card*, NY TIMES (Jun. 30, 2013), mobile.nytimes.com/2013/07/01/us/gay-married-man-in-florida-is-approved-for-green-card.html.

⁴⁰Press Release, *Statement by Secretary of Homeland Security Janet Napolitano on the Supreme Court Ruling on the Defense of Marriage Act* (Jun. 26, 2013), *available at* www.dhs.gov/news/2013/06/26/statement-secretary-homeland-security-janet-napolitano-supreme-court-ruling-defense (stating that “we will implement today’s decision so that all married couples will be treated equally and fairly in the administration of our immigration laws”).

⁴¹*Matter of Zeleniak*, 26 I&N Dec. 158 (BIA 2013).

⁴²Remarks, *Announcement by Secretary of State John Kerry on Visa Changes for Same-Sex Couples* (Aug. 2, 2013), *available at* www.state.gov/secretary/remarks/2013/08/212643.htm.