

## Same-Sex Binational Couples and the Federal Defense of Marriage Act

**SHIRLEY TAN AND Jay Mercado have been in a committed relationship since 1986 and are raising twin sons together in suburban San Mateo County in California. Shirley came to the United States from the Philippines as a student and eventually overstayed her visa in order to stay in the United States with Jay. Shirley applied for asylum in 1995, but the couple never received the notice that her application was denied in 2002.**

Early in the morning of January 28, 2009, immigration officials showed up at the family's door, put Shirley in handcuffs, and led her away. She was soon released back to her home with an electronic monitoring bracelet, and her deportation was set for April 3, 2009. The family was horrified at the thought that Shirley would shortly be torn apart from her children and spouse.

Fortunately, Shirley and Jay managed to pull off a minor miracle to save their family. Friends got them in touch with California's Sen. Dianne Feinstein, who was moved by their family's plight. Senator Feinstein introduced a private bill in the U.S. Senate to permit Shirley to stay in the country. Although the Senate never voted on the bill, the fact of the bill's introduction alone allowed Shirley to stay for two years while the bill was pending. In 2011, Senator Feinstein reintroduced the bill, extending the clock another two years.

That procedure was extremely unusual, however. Most same-sex binational couples who wish to stay together in the United States have few options under current federal immigration law. For couples whose partners are of the opposite sex, the process is straightforward: the partner who is a U.S. citizen can petition for a visa for a foreign partner as a fiancé(e) or spouse. But the federal Defense of Marriage Act (DOMA), enacted in 1996, bars the federal government from recognizing marriages between same-sex couples as marriages for purposes of federal law, including immigration law.

That means that, even if a same-sex couple is married or part of a civil union or a registered domestic partnership in the state where the couple lives, there is currently no way for the couple to obtain legal sta-

tus for the foreign partner based on the couple's relationship. The lucky couples are those who can use another kind of long-term visa—whether it is granted for purposes of a job or college attendance or because the person is a member of a U.S. citizen's family—to extend the foreign partner's time in the United States or even ultimately turn such a visa into a permanent green card.

For the unlucky couples who don't have those options or who can't afford to stay in school indefinitely, the options are few and grim. One possibility is to live apart most of the time, stringing together tourist visas and hoping that the foreign partner doesn't get rejected for a visa or turned away at the airport for appearing to have "immigrant intent."

A second option—possible only for some couples—is to abandon the United States for good and move together to the foreign partner's home country if that nation is one of more than 20 that recognize relationships of same-sex couples for purposes of immigration (including the United Kingdom, Canada, Spain, and South Africa) or to a third country that will accept the couple.

Finally, a third path that many same-sex couples choose is to defy U.S. immigration laws and stay together in the United States, living in the shadows and hoping to avoid detection by immigration authorities. For binational couples who are raising children together, like Shirley and Jay, or who have other dependent family members, this is often the only choice.

Noemi Calonje, director of the Immigration Project at the National Center for Lesbian Rights, reports that the organization receives "calls from same-sex couples every day who want to know how they can stay together legally in the United States. Unfortunately, there's not much I can tell them." She adds, "It's really frustrating not to be able to help these couples that just want to be able to keep their family together, when any different-sex couple has that ability."

Amos Lim, a founder of the grassroots organization Out4Immigration, knows first hand the many challenges that same-sex binational couples face. Lim, a native of Singapore, met his current husband, Mickey, online in 1995. They struck up an online conversation about a book, and, when Mickey visited Lim in Singapore two years later, they "fell in love then and there," says Lim. The couple then faced the problem of figuring out how they could live in the same place. Lim began looking for a job in the United States, but,

when nothing came through, he obtained a student visa and came to the United States in 1999 to get his M.B.A.

Before Lim graduated, he found a job that was willing to sponsor him for an employment-based H1B visa. But after the terrorist attacks of September 11, that arrangement fell through. The couple then “started looking for Plan B: moving to Vancouver.” Canada, Lim notes, is one of the more than 20 countries that recognize same-sex couples for purposes of immigration. “Miraculously,” he says, just two weeks before the couple intended to move, Mickey was approached about a job opportunity in Oakland, and he said he’d be open to it if the employer could hire Lim as well. The employer agreed not only to hire Lim but also to fast-track his application for an H1B visa as well as for his green card. Lim is now a permanent resident of the United States. He and Mickey were legally wed in 2008, and the two are raising an adopted daughter.

Lim says that the other same-sex binational couples he’s met through Out4Immigration share a sense of anger and frustration. Many are surprised when they learn about the lack of options for same-sex partners. Lim notes that many believe in the “story” that America is “the land of the free, everybody’s welcome. And most days it is until you’re hit with a problem like this—you fall in love and [then] realize, ‘What do you mean I can’t sponsor my partner for a green card?’”

Noemi Calonje of the National Center for Lesbian Rights similarly concludes that “the United States is no longer a welcoming place to immigrants. At every turn we encounter overwhelming hurdles that make it impossible for any immigrant to find a path to legal status.” And same-sex couples in particular “are outright denied their basic right to keep their families united simply because of their sexual orientation.”

Judy Rickard and her partner Karin, a British citizen, have both been living a nomadic existence in the United States and abroad since 2005, as documented in Judy’s book, *Torn Apart*, which was published in 2011. Judy can’t leave the United States permanently, because she is responsible for aging parents here, and Karin has no means of obtaining permanent residence in the United States. Even though the women held a commitment ceremony attended by 200 family and friends in 2007, they have avoided marrying, because that could raise the attention of U.S. immigration authorities and potentially cause problems for Karin when entering the United States on her tourist visa.

Even without a marriage license, the fear of encountering immigration officials almost came true on one visit in 2008. When the two women were returning to San Francisco together from a trip to England, U.S. Customs and Border Patrol officials detained Karin alone for several hours. Despite having a valid B1/B2 tourist visa, officials found a photo of the two women together in Karin’s purse and asked who Judy was. They were also suspicious because of Karin’s Oregon driver’s license and her history of extended stays

in the United States. After detaining and interrogating her for three hours, the officials finally let Karin enter the United States but told her that she would have to leave after four months and then remain outside the United States for an indefinite period of time. Both women were extremely shaken by the experience, after which they had to stay apart for what they called an “excruciating” nine months.

Other couples, like Shirley and Jay, live in the United States together, hoping to remain undetected by immigration authorities as long as possible. Lim says that sometimes couples who contact Out4Immigration seeking help “just disappear,” and he usually assumes they’ve “gone underground” to avoid detection after the noncitizen partner overstays his or her last visa.

Remaining in the United States without legal status is extremely risky, of course. If discovered, the undocumented partner could face deportation and a lengthy ban on ever returning to the United States. For that reason, individuals who choose to stay in the United States without documentation can’t travel outside the country even to care for a sick relative or to attend a parent’s funeral, because they would not be able to re-enter the country. They are also barred from legally working, voting, and, under the 2005 federal REAL ID Act, obtaining a driver’s license. Undocumented same-sex partners of U.S. citizens therefore live in constant fear of discovery, detention, and deportation.

Under new rules promulgated in 2011 by the Obama administration, however, immigration authorities have increased autonomy to halt deportation proceedings in certain “low-priority” cases. A memo issued by John Morton, the director of U.S. Immigration and Customs Enforcement (ICE), on June 17, 2011—referred to as the “Morton memo” by lawyers in the field—clarifies that ICE officials are encouraged to “regularly exercise ‘prosecutorial discretion’” to avoid proceeding with detention or deportation in certain cases in order “to ensure that the aliens [ICE] removes represent, as much as reasonably possible, the agency’s enforcement priorities.” The memo specifies that the agency’s priorities for enforcement will be “serious felons” and those “who pose a clear risk to national security.” The memo also lists “positive factors” for ICE staff to weigh, such as “the person’s ties and contributions to the community, including family relationships” and “whether the person has a U.S. citizen or permanent resident spouse, child, or parent.” On Nov. 17, 2011, the Obama administration began a review of all 300,000 removal cases that were pending under these new criteria.

While administration officials have stated that “family ties” will include LGBT families, none of the written guidance includes this language. It therefore remains unclear whether the agency will interpret the protections the new guidelines give to “family relationships” and “spouses” to include same-sex couples.

**COUPLES** *continued on page 46*

In at least some cases in the past year, ICE has agreed to halt enforcement proceedings against same-sex partners of U.S. citizens or permanent residents. For instance, in a widely reported case heard in June 2011, an immigration judge stopped deportation proceedings against Henry Velandia, a Venezuelan man married to an American who was of the same sex, after the ICE attorney agreed that this would be an appropriate case for the exercise of prosecutorial discretion. As a result, the couple no longer has to live in fear that Velandia will be deported. But staying removal in this context does not affirmatively confer lawful status, which means that the foreign partner is not eligible for a green card and cannot legally work in the United States.

The new prosecutorial discretion rules may be a start, but same-sex couples won't have access to fully equal immigration rights until federal law is changed to permit recognition of their relationships on a par with the marriages of couples whose partners are of the opposite sex. Legislation has been introduced in Congress to allow a U.S. citizen or permanent resident to file a petition for a visa for a "permanent partner." Such a provision is also part of the most recent version of the Comprehensive Immigration Reform bill introduced in June 2011.

Same-sex couples who are able to marry would also benefit from repeal or invalidation of the federal Defense of Marriage Act. Absent DOMA, a U.S. citizen or permanent resident should be able to sponsor a same-sex spouse or fiancé(e) for legal status just as opposite-sex couples can. A bill to repeal DOMA has also been introduced in Congress, and constitutional challenges to the law have begun advancing through the federal courts. Those legal challenges are on track to reach the U.S. Supreme Court within a couple of years. The first case in the pack, *Gill v. Office of Personnel Management*, resulted in a decision by the federal district court in Massachusetts in July 2010 concluding that DOMA is unconstitutional because it violates same-sex couples' rights to equal protection under the law. The district court's decision is currently on appeal to the First Circuit.

In an uncommon move, the Obama administration issued a public memo on Feb. 23, 2011, stating that the U.S. government would no longer defend DOMA in these court challenges, because Attorney General Eric Holder and the President agreed that the law is unconstitutional. However, a group of congressional Republicans has been permitted to intervene in the pending cases to defend the law.

One question to which the answer remains unclear is what effect the decision not to "defend" the law will have on same-sex couples in the immigration context. Can the administration justify having ICE attorneys and immigration judges enforce a law that the administration has already concluded is unconstitutional?

On April 26, 2011, the attorney general made an attempt to get further clarity on these questions by issuing a precedential decision in an immigration case involving a same-sex couple, *Matter of Dorman*, 25 I&N Dec. 485 (A.G. 2011). That was a removal case involving a British man who had entered into a civil union with his partner, a U.S. citizen. Attorney General Holder's decision remanded the case to the Board of Immigration Appeals and asked it to consider, among other things, whether the civil union would qualify Dorman as a "spouse" under New Jersey law and under federal immigration law (assuming DOMA did not apply).

The board's decision on remand in *Matter of Dorman* could open up additional avenues for same-sex binational couples seeking to stay together in the United States. Such couples won't be assured of equal treatment, however, until they are permitted equal access to marriage in every state and the federal government repeals the discriminatory laws that bar recognition of their marriages.

In the meantime, until federal law resolves these questions, the handful of couples who manage to get tremendous support from the media and members of Congress may find a way to stay in the United States, although generally in legal limbo. The rest will continue to live with the constant fear of being permanently separated. **TFL**

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