New Jersey Law Journal

VOL. 213 - NO 14 MONDAY, SEPTEMBER 30, 2013 ESTABLISHED 1878

IN PRACTICE

IMMIGRATION LAW

Same-Sex Spouse Can Get Green Card

Immigration issues after *U.S. v. Windsor*

By Laurie Woog

The desire of many foreigners to live in the United States and obtain permanent residence is reflected in popular culture, including that staple of romantic comedies, the "green card" interview. We are all familiar with scenes featuring the nervous spouses bickering over where they met, he sweating in a business suit, she crossing and uncrossing skirt-clad legs. Well, Hollywood may want to remake that movie soon, featuring two actresses in the =leading roles.

For decades, immigration lawyers have helped foreign-born spouses obtain legal permanent residence in the U.S. However, if the spouses were of the same sex, this option was not available, even if a couple had been in a committed relationship for 20 years. The Defense of Marriage Act, or DOMA, prevented married gay and lesbian couples from obtaining green cards by defining marriage as a union between one man and one woman. Most same-sex "binational" couples had to make the difficult decision to live apart, relocate to another country or live with the threat of enforced removal of the foreign spouse.

All this changed on June 26, when the Supreme Court ruled in *U.S. v. Windsor* that the relevant portion of DOMA was unconstitutional. Although the case dealt with estate taxes, the ruling means that the U.S. government must treat all marriages equally with respect to the receipt of federal benefits, which include immigration benefits. There are an estimated 36,000 binational same-sex couples in the U.S., and New Jersey has a large share of that total. As a result of the Supreme Court's decision, lawyers are fielding an increasing number of questions from gay couples in the U.S. and abroad seeking immigration advice. This article will attempt to shed some light on lesser-known aspects of the decision's impact on immigration law for practitioners, now that DOMA is dead.

The most obvious result of the Supreme Court's decision is that a U.S. citizen or legal permanent resident can help his or her same-sex spouse obtain a green card, which is evidence of the right to live and work permanently in the U.S. Many couples wonder whether the government will approve a green card if the couple lives in a state where gay marriage is not allowed. The answer is yes, as long as the underlying marriage is legal.

For example, if a couple gets married in New York, but lives in or moves to New Jersey or Utah, the foreign spouse is still eligible to apply for a green card. The U.S. Citizenship and Immigration Service (USCIS) website states, "As a general matter, USCIS looks to the law of the place where the marriage took place when determining whether it is valid for immigration law purposes." The Board of Immigration Appeals confirmed this position in a recent decision. Nevertheless, some attorneys and law professors still suggest that the couple's residence *may* matter, because USCIS also states that the rule "is subject to some limited exceptions," which they contend means it is possible that the government may not approve cases where the couple lives in a state that expressly *prohibits* gay marriage. However, this concern seems to be misplaced. USCIS has not enunciated any applicable exceptions. More persuasive is the fact that USCIS has already approved cases in which the couple resides in a state without marriage equality. One such couple got married in New York, but lives in Florida, where an article of the state's constitution expressly defines marriage as between one man and one woman.

Attorneys who practice other types of law besides immigration should note that the "place of celebration" rule does not necessarily apply to every type of federal benefit. For example, under the Family and Medical Leave Act, the administration looks to an employee's state of primary residence to determine wheth-

Woog is the managing partner of the Woog Law Office in Scotch Plains. Her practice focuses on immigration and naturalization law.

Reprinted with permission from the SEPTEMBER 30, 2013 edition of *New Jersey Law Journal*. © 2013 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited.

er a person is considered a "spouse." But, at present, the government is carrying out its policy that a marriage will be recognized for federal immigration purposes as long as it is legal in the state or foreign country in which it was performed.

Another threshold issue is whether a domestic partnership or civil union forms the basis for federal immigration benefits. It does not. According to the U.S. Department of State website, "only a relationship legally considered to be a marriage in the jurisdiction where it took place establishes eligibility as a spouse for immigration purposes." The *Windsor* decision did not address civil unions or domestic partnerships. There is a bright line, and on one side of it is "marriage." However, it is possible the line may shift in the future to be more inclusive. The State Department's Foreign Affairs Manual has long included common-law marriage as a potential basis for immigration benefits in very limited situations. Also, in an online discussion of "Visa Guidelines for Same Sex Spouses" within the State Department's Office of Digital Engagement, some participants suggested that the allowable classes of spousal relationships may broaden over time. While proactive attorneys may wish to keep an eye on this issue for clients who are currently unable to marry in the U.S. or abroad, at present, only marriage will suffice.

Not every same-sex spouse is entitled to a green card, of course. As with opposite sex couples, in addition to meeting basic eligibility criteria, the couple must demonstrate that the marriage is not a "sham" — that is, that it was not entered into for the sole purpose of obtaining a green card. The couple must show the marriage is bona fide and submit evidence of their shared residence and financial arrangements. This can be daunting for couples who have to live apart due to work demands, or who are too young or financially pressed to have joint bank accounts or assets. It may be even more daunting for a same-sex couple to produce the required evidence, particularly if they have previously taken pains to keep their relationship under wraps, or if their state law prohibits such acts as jointly filing state taxes as a married couple. Therefore, an attorney handling this type of case should help her client assemble other acceptable forms of evidence that document the nature of the relationship, such as Facebook interaction, emails, tickets or itineraries from shared vacations, utility bills, phone card records, sworn affidavits from friends or colleagues, photos, joint purchases, children, wedding contracts or invitations. Prior domestic partnership registration should be used to demonstrate ongoing commitment, especially if a couple has not been married for very long.

Windsor's effects will also be felt overseas. Secretary of State John Kerry recently announced that the State Department will consider same-sex visa applications "in the same manner that it will consider the application of opposite-sex spouses." In addition to the issuance of immigrant (permanent) visas to foreign spouses of U.S. citizens and permanent residents, there are other less obvious benefits from the State Department policy.

First, U.S. citizens have the right to sponsor a foreign fiancé for a K-1 visa to enter the U.S. temporarily. As long as the couple marries within 90 days, the foreign spouse can apply for a green card. The State Department's implementation of *Windsor* means that same-sex engagements can also form the basis for a fiancé petition. The U.S. citizen must show evidence that the couple intends to be married in a state allowing gay marriage. In addition, a couple must show they have met within the two years prior to the application, to protect against fraudulent marriages. Given that many courtships now take place over the Internet, and some marriages are arranged, this requirement can prove difficult to meet. For same-sex couples, it may be even harder, if cultural or legal taboos against the relationship in the home country prevented the couple from meeting openly or amassing documentation of their relationship. Again, attorneys can help their clients to be creative in documenting their history, and should encourage a couple to meet and correspond in the two-year period prior to the application, if possible, rather than file a hasty petition and risk a fraud inquiry. (This article assumes that an attorney is comfortable that the relationship in question is bona fide.)

Second, same-sex couples abroad will benefit from the post-DOMA landscape if one of them wants to come to the U.S. to work, study or visit. Suppose a chemist from Uruguay is offered a job with a pharmaceutical company in Massachusetts and wants to receive an H-1b visa as a temporary professional worker. If the chemist had a same-sex spouse, because of DOMA, the chemist had to come to the U.S. without her family or turn down the job, because the Department of State could not issue the derivative visa to the chemist's spouse. Now, the chemist will be able to bring the same-sex spouse with her to the U.S. (Although with an H-4 dependent classification, the spouse is not allowed to work.) The key is that the underlying marriage must be valid and legal. This is an important change. By granting dependent visas to same-sex spouses, the U.S. government is conferring an immigration benefit on couples with a legal marriage even though neither is a U.S. citizen or permanent resident.

While the forms and basic eligibility requirements for same-sex couples are unchanged in the immigration arena, practitioners should not ignore the unique issues that may arise. For example, an applicant seeking immigration benefits based on a same-sex marriage may previously have been involved in a heterosexual marriage and worry whether this may be viewed by USCIS as an inconsistency that casts doubt on the credibility of the new marriage. An attorney should review the facts and prior circumstances with her clients to understand the situation. A prior marriage to an opposite-sex spouse does not necessarily mean that the new same-sex marriage is suspect. At the time of the first marriage, the client may not have felt comfortable with his or her sexuality, or may have given in to cultural or familial pressures. At the same time, attorneys may need to be sensitive to legal prohibitions against homosexuality or dangerous environments in certain countries if a foreign citizen has to process at a U.S. consulate. The attorney may need to remind the State Department visa officials why certain evidence is hard to come by or must be kept confidential.

In sum, the *Windsor* decision opens up new opportunities for foreign citizens in same-sex relationships who are seeking to visit or immigrate to the U.S. It is up to practitioners to make sure they understand how to maximize these opportunities for their clients.■