

Married Same-Sex Couples Now Eligible For US Immigration Benefits

Roe v. Wade, Brown v. Board of Education, Bowers v. Hardwick, and now United States v. Windsor – the latest case to join the pantheon of landmark United States Supreme Court civil rights decisions. In their 26 June 2013 judgment, the Court struck down a key provision of the Defense of Marriage Act, effectively allowing married same-sex spouses the same immigration benefits as their heterosexual counterparts, for the first time in history.

Marriage Law vs. Immigration Law

In order to explain the significance of this decision, some background information might be helpful: In the US, family law is considered ‘state law’, which means that each of the 50 states can define marriage independently, including what types of marriages they will perform and what outside marriages they will recognise. Currently, same-sex marriages are allowed in just 13 of the 50 states, as well as Washington DC and five Native American tribes. In contrast, over 30 states specifically limit marriage to the union of one man and one woman. In 2003, Massachusetts became the first state to allow gay marriage. Most recently, Minnesota legalised same-sex marriages, which took effect this summer.

Immigration law, in contrast to marriage law, is considered ‘federal law’ because it applies to all states equally. Individual states cannot create their own immigration laws; this is reserved for the federal government.

Defense of Marriage Act

In 1996, President Clinton signed into law the ‘Defense of Marriage Act’ (DOMA). This Act is classified as federal law and therefore applies to all states equally. Section 2 of the Act provides that states are not required to recognise same-sex marriages performed in another state. For example, if two men were legally married in Massachusetts, the authorities in Alabama are not required to recognise the marriage and can treat them as two single men. Section 3 of the

Act then limited federal benefits ‘only to a person of the opposite sex who is a husband or a wife’. Examples of federal benefits include insurance benefits for government employees, social security survivors’ benefits, tax relief, and the ability to sponsor non-US citizen relatives for immigration purposes.

People were often shocked to learn that the same-sex spouse of a US citizen, even though legally married in a US state, was nevertheless ineligible to obtain any immigration benefit based on the marriage. With tens of thousands of same-sex marriages between US citizens and foreign-born spouses, this harsh law meant that families were faced with a difficult choice: In order to remain together in the US, the foreign-born spouse had to qualify for her/his own independent visa or live in the US illegally. Alternatively, many couples decided to start a life outside the United States.

Recent Supreme Court Ruling

Relief arrived on 26 June 2013, when the Supreme Court held that Section 3 of DOMA is unconstitutional and is therefore no longer law. The federal government is no longer limited to defining marriage as between opposite-sex spouses only, and can immediately begin offering immigration benefits to same-sex spouses.

The facts of the underlying case brought to the Supreme Court, *United States v. Windsor*, involved Edith Windsor and Thea Spyer. Edith and Thea shared their lives together for 44 years in New York. They were married in Canada in 2007 and two years later, Thea passed away, leaving her entire estate to her wife Edith. Although they were legally married and their marriage was fully recognised by the state of New York, Edith was forced to pay more than \$360,000 in federal estate taxes because the US government was prevented from recognising their marriage, thanks to Section 3 of DOMA. Edith therefore sued the federal government, seeking a refund of the estate taxes. In its highly anticipated decision, the Court found in Edith’s favour, ruling that DOMA’s rigid interpretation of ‘marriage’ and ‘spouse’ violates the US constitution.

In addition to striking down Section 3 of DOMA, the Supreme Court also simultaneously ruled on a case brought by supporters of Proposition 8 in California, a ballot measure opposing same-sex marriage in the state. The Court’s decision effectively legalised same-sex marriage in California, the most populous state in the country.

What This Ruling Means for Same-Sex Couples

The Supreme Court’s decision offers immediate immigration benefits to same-sex couples. US citizens can now begin sponsoring foreign-born same-sex spouses for permanent residency (green cards). In addition, the spouses of foreign-born workers who live in or plan to relocate to the US on a temporary work visa are now eligible to apply for dependant visas.

Regardless of where in the country a same-sex couple lives – even if in a state that expressly forbids same-sex marriages – the US government must recognise the marriage for immigration purposes. The only requirement is that the couple was legally married in a jurisdiction that allows for same-sex marriage and that the marriage was entered into in good faith – not just to obtain an immigration benefit. Note however, that whilst same-sex couples can live and work freely in any of the 50 states, if they happen to live in a state that does not recognise same-sex marriages on a local level, they may be ineligible for state-level benefits.

In addition, it is important to remember that whilst a lawful marriage between same-sex couples is now recognised under US federal law, the same recognition has not been officially extended to couples in civil partnerships, whether hetero- or homosexual. Nevertheless, guidance is currently being sought as to whether a civil partnership will suffice where is it identical to marriage in every way but name, for example, a civil partnership certificate from the UK or a *Pacte civil de solidarité* (PACS) from France.

Common Scenarios

Our US-citizen employee who has just married his Spanish partner. We now wish to transfer him to work in our

New York office. Is there a minimum amount of time they must have been married in order for his new husband to join him? Should his husband apply for a work visa or a green card? How long does the process take?

The process of applying for a green card whilst resident outside the US is referred to as 'consular processing'. There is no minimum amount of time that a couple must have been married in order to start the process, although this can affect the green card's validity. US citizens cannot sponsor their spouses (whether opposite- or same-sex) for a temporary work visa; sponsorship is limited to permanent residency (green cards). Depending on what country the couple lives in when they file the paperwork, the process can range from around four months up to a year. During this processing period, the non-US citizen spouse will need to continue residing abroad; she/he cannot actually move to the US until the process is completed.

An American employee in our Boston office lives with his Australian partner, who has an H-1B work visa. They now plan to get married and the Australian partner plans to apply for a green card. How long do they need to have lived in the US before they can get married there? Once married, how soon can they apply for his green card and how long will it take to be issued?

Each state – and often individual counties within each state – has its own procedural requirements for marriage. In most states the local residency requirements are fairly short, and eligibility information is readily available. Once the marriage certificate is issued, the couple can immediately file the green card paperwork; there is no minimum amount of time they must wait, although it is wise to first consult an experienced US immigration attorney to discuss timing issues. The process of applying for a green card whilst resident inside the US is referred to as an 'adjustment of status'. Processing times vary considerably depending on where in the country the application is filed, but it is normal to expect a wait of at least six months. The couple will be required to attend an in-person interview at a local immigration office, where the officer will ask questions and review documentary evidence to determine that it is a legitimate marital relationship. If successful, a green card will

follow in the mail within a few weeks.

We have a British employee whom we would like to transfer to the US under an L-1 (intra-company transfer) visa. She and her civil partner have lived together for over 20 years and have two young children. Can her partner apply for an L-2 visa as her dependant spouse?

Under the current law, only couples that are in a valid marriage – and can produce a marriage certificate – are entitled to spousal visas, so unfortunately this employee's partner cannot obtain an L-2 dependant visa. As an alternative, she may wish to consider a B-2 domestic partner visa, although this category does not allow for work authorisation and is less straightforward with regard to long-term residency rights.

One of our London-based employees is a dual US-UK citizen, married to a German citizen. We now wish to relocate her to our Houston office, but understand that same-sex marriage is not recognised in Texas. Can they live there together as a married couple?

US immigration laws apply to the entire country and same-sex couples are not restricted to living in one of the 13 states where same-sex marriages can be performed. However, remember that individual states are not required to recognise same-sex marriages for purposes of local state law. Therefore, there may be local benefits – such as state tax benefits – that are not available to same-sex couples living there.

We need to transfer our US-citizen employee to New York. His husband is British. Given the tax burden placed on permanent residents, our employee's British husband does not want a green card, but still wants to live in the US with his husband and be able to work there. What are his options?

One of the benefits of US citizenship is the right to sponsor certain family members for permanent residency (green card). However, there is no equivalent right to sponsor them for something less than permanent residency, such as a work visa. If the non-US citizen spouse does not wish to become a permanent resident, she/he will have to qualify independently for another type of visa. The most common work visas include the H-1B, L-1 and E-2.

One of our employees is a French citizen, married to his French husband. He will be transferred to California on a temporary work visa, and his husband

will be joining him on a dependant visa. Will his husband be able to seek employment in the US as well?

Some dependant visas allow spouses to seek employment whilst others do not. If the primary work visa holder is on an L-1, E-1, E-2 or E-3 visa, the spouse will be able to apply for a work authorisation card. In contrast, no work authorisation is granted to spouses of workers who hold H-1B, O-1 or TN visas. It should also be noted that the process of applying for a work authorisation card is not automatic: The application cannot be filed until the spouse is physically present in the US, and it can take up to three months for the card to arrive in the mail.

As a final point, remember that immigration law is characterised by constant change – as highlighted by this recent Supreme Court decision – and eligibility for benefits must be determined on a case-by-case basis. Therefore, please do not treat the contents of this article as legal advice.



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