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# Next Steps On DOMA And FAQ's From The State Department (DOS)

## Next Steps On DOMA And FAQ's From The State Department (DOS) <sup>[1]</sup>

Submitted by Chief Editor on Aug 5th 2013

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AUG 13  
SUBJECT: NEXT STEPS ON DOMA**

### **GUIDANCE FOR POSTS**

1. On June 26, 2013, the Supreme Court held Section 3 of the Defense of Marriage Act (DOMA) unconstitutional. That decision has many immigration related implications for same sex couples.
2. Beginning immediately, consular officers should review visa applications filed by a same sex spouse in the same manner as those filed by an opposite sex spouse, unless a specific provision of the federal immigration laws requires a different approach. The Visa Office (VO) deleted 9 FAM 40.1 N1.1 (a), which limited the word "marriage" for immigration purposes to mean "only a legal union between one man and one woman as husband and wife," and the word "spouse" to mean only "a person of the opposite sex who is a husband or a wife." A same sex marriage is now valid for immigration purposes, as long as the marriage is recognized in the "place of celebration." A same sex marriage is valid for immigration purposes even if the couple intends ultimately to reside in one of the 37 states that do not recognize same sex marriages. The same sex marriage is valid even if the applicant is applying in a country in which same sex marriage is illegal.

### **Action Request**

3. The Department asks consular sections to identify what types of marriages are available for same sex couples in country and update the reciprocity tables, pursuant to 9 FAM 41.105. This information will be useful for Department and USCIS colleagues adjudicating I-130 petitions.

### **New Nonimmigrant Visa Policy**

4. Starting immediately, same sex spouses and their children are equally eligible for NIV derivative visas. Same sex spouses and their children (stepchildren of the primary applicant when the marriage takes place before the child turns 18) can qualify as derivatives where the law permits issuance of the visa to a spouse or stepchild without being named on a petition (or if a petition is not required). This would include: Diplomat (A), Commonwealth of the Northern Mariana Islands transitional worker (CW), treaty trader investor (E), international organization employee (G), temporary worker (H), information media representative (I), intracompany transferee (L), North Atlantic Treaty Organization (NATO), extraordinary ability (O), entertainer and athlete (P), religious worker (R), and North American Free Trade Agreement (TN) visa categories. If an applicant is otherwise qualified, he/she may be issued a derivative visa starting now.

5. Some NIV classifications require certain documentation before a visa issuance can take place. Same sex spouses (and stepchildren) of F and M student visa applicants (F-2 and M-2) will need to obtain an I-20a prior to issuance. Spouses of exchange visitors (J-2) will need an approved DS-

2019. Same sex spouses of victims of criminal activity (U-2) and human trafficking victims (T-2) will require completed Supplement I-918s or I-914s respectively, before an officer approves any derivative cases.

#### New Immigrant Visa Policy

6. A spouse of a U.S. citizen, as well as a spouse of a Lawful Permanent Resident (LPR) (when the priority date is current), may apply for an immigrant visa after USCIS approves the I-130. The validity of a marriage will depend on whether it was legally valid in the place of celebration, rather than the place of domicile.

Stepchildren acquired through such marriages are eligible to the same extent as stepchildren acquired through opposite sex marriage. Same sex spouses (and qualified children or stepchildren) can also qualify as dependents of employment based categories and family preference categories, and as follow to join derivatives.

7. Many same sex couples live abroad in countries where they are unable to marry. Starting immediately, same sex partners of U.S. citizens may apply for fiance nonimmigrant K -1 visas to wed in the United States. Once the union is contracted in a state permitting same sex marriage, the foreign spouse may apply for adjustment to LPR status through USCIS, or the U.S. citizen may file an I-130 with USCIS. A significant portion of same sex partners intending to immigrate to the United States may utilize fiance visas.

8. DV applicants may include same sex spouses in their initial entry or add spouses acquired after their initial registration. Follow to join DV 2013 applicants must be issued before the end of FY 2013. Typically, DV applicants who did not include their spouse on their initial entry are disqualified. However, for DV 2013 and DV 2014, same sex couples should not be automatically disqualified for not including their same sex spouse (or stepchildren) on their original entry, since those persons were not recognized as spouses for U.S. immigration purposes at the time of the entry (though the officer should be alert to potential fraud, as with any case in which a spouse is acquired after initial registration).

#### Public Outreach

9. Posts may use the following points to respond to public and media inquiries as we work with the Department of Justice:

Now that the Supreme Court has found section 3 of the Defense of Marriage Act (DOMA) unconstitutional, the President has directed the Attorney General to work with other members of his Cabinet to review all relevant federal statutes to ensure this decision, including its implications for Federal benefits and obligations, is implemented swiftly and smoothly. We recognize the significance of this decision for affected families, and we are working to

implement policy and procedural changes as soon as possible.

Effective immediately, U.S. embassies and consulates can accept visa applications filed on behalf of same sex spouses.

The Department of State is working with the Department of Justice to review all relevant federal statutes and regulations that affect visa processing and immigration benefits. For more information on submitting a visa application, please visit [travel.state.gov/visa](http://travel.state.gov/visa)

11. Minimize considered.

Kerry

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## **FAQs for Post-Defense of Marriage Act**

### **Q: How does the Supreme Court's Windsor v. United States decision impact immigration law?**

**A:** The Supreme Court has found section 3 of the Defense of Marriage Act (DOMA) unconstitutional. Effective immediately, U.S. embassies and consulates will adjudicate visa applications that are based on a same-sex marriage in the same way that we adjudicate applications for opposite gender spouses. This means that the same sex spouse of a visa applicant coming to the U.S. for any purpose ? including work, study, international exchange or as a legal immigrant ? will be eligible for a derivative visa. Likewise, stepchildren acquired through same sex marriages can also qualify as beneficiaries or for derivative status.

### **Q: Do we have to live or intend to live in a state in which same sex marriage is legal in order to qualify for an immigrant or nonimmigrant visa?**

**A:** No. If your marriage is valid in the jurisdiction (U.S. state or foreign country) where it took place, it is valid for immigration purposes. For more information, please review the following page on the United States

[Citizenship and Immigration Service's \(USCIS\) website.](#) [2]

### **Q: I am in a civil union or domestic partnership; will this be treated the same as a marriage?**

**A:** At this time, only a relationship legally considered to be a marriage in the jurisdiction where it took place establishes eligibility as a spouse for immigration purposes.

### **Q: I am a U.S. citizen who is engaged to be married to a foreign national of the same sex. We cannot marry in my fiancé's country. What are our options? Can we apply for a fiancé K visa?**

**A:** You may file a Form I-129F and apply for a fiancé(e) (K) visa. As long as all other immigration requirements are met, a same-sex engagement may allow your fiancé to enter the United States for the purpose of marriage. For information on adjusting status, please review the following page on [USCIS's website:](#) [3]

## **Nonimmigrant Visas (NIVs)**

**Q: Can same sex couples now apply for visas in the same classification?**

**A:** Yes. Starting immediately, same-sex spouses and their children are equally eligible for NIV derivative visas. Same-sex spouses and their children (stepchildren of the primary applicant when the marriage takes place before the child turns 18) can qualify as derivatives where the law permits issuance of the visa to a spouse or stepchild. In cases where additional documentation has always been required of a spouse applying with a principal applicant, such documentation will also be required in the case of a same-sex spouse (see below).

**Q: Are there nonimmigrant visa classifications which will require approval of certain documentation before an interview can take place?**

**A:** Yes. Same-sex spouses and stepchildren (F-2 and M-2) of student (F-1 and M-1) visa applicants will need to obtain an I-20A prior to application. Spouses (J-2s) of exchange visitors (J-1) visa holders will need an approved DS-2019. Finally, same-sex spouses of victims of criminal activity (U-2s) and human trafficking victims (T-2s) will require completed Supplement A to Form I-918 or I-914, respectively, before an officer approves any derivative cases. This additional documentation is also required for opposite gender spouses.

**Immigrant Visas**

**Q: My foreign national spouse has children. Can they also be included with my spouse's case?**

**A:** Yes, the children of foreign national spouses can be considered "step-children" of the U.S. citizens and can therefore benefit from a petition filed on their behalf in the IR2 category. In other categories, stepchildren acquired through same sex marriage can qualify as beneficiaries (F2A) or for derivative status (F3, F4, E1-E4, or DV). You and your spouse must have married before the child turned 18.

**Nonimmigrant Visas:**

General Nonimmigrant Visa [4]

**Citizenship and Naturalization:**

Citizenship [5]

**Green Card:**

Immigration through Marriage [6]

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[2] <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2543215c310af>

[3] <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2da73a4107083>

[4] <https://immigration.com/visa/nonimmigrant-visas/general-nonimmigrant-visa>

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