Spelling Out The Demise of DOMA in 5-Steps

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Written by: Guest

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Although the modern immigration system is grounded in the concept of family unity, lesbian and gay American citizens and lawful permanent residents have been completely excluded from petitioning for their partners or spouses. When Congress enacted the Defense of Marriage Act ("DOMA") in 1996, which defines marriage for all federal purposes as only the union of one man and one woman, marriages for same-sex couples were not celebrated in any country or state. Today ten countries and five U.S. states plus the District of Columbia celebrate lesbian and gay marriages, and other states, including New York, fully recognize marriages celebrated elsewhere. The only reason these marriages are not recognized for immigration purposes is DOMA.

On February 23, 2011, the Department of Justice ("DOJ") announced that it would no longer defend DOMA in pending litigation challenging its constitutionality. At the same time, however, DOJ stated that it will continue to enforce DOMA until there is a final judicial resolution. What does all of this mean?

A detailed Practice Alert on DOMA and the legal challenges is available at AILA InfoNet Doc. No. 11033160 (posted March 31, 2011). These are the highlights:

1 – Practitioners should *not* race into court to *affirmatively* challenge DOMA.

Although DOJ has stated that it will no longer defend DOMA litigation, it is likely that the House of Representatives will. Planning is taking place now for strategic challenges in the immigration context to DOMA. If you would like to be part of the planning, send an email to Immigration Equality at vneilson@immigrationequality.org or AILA Amicus at amicus@aila.org.

The victories thus far in DOMA litigation have been the result of well planned strategy by lesbian, gay, bisexual and transgender ("LGBT") rights organizations. If we start losing DOMA federal cases everyone loses.

If a practitioner has a case in which removal is truly imminent or is appearing before the Board of Immigration Appeals or any of the Federal Courts of Appeals on a case where a non-citizen in a same-sex marriage might qualify for cancellation relief, a waiver, or adjustment if the marriage were recognized for federal immigration purposes, the authors of the post can help.

2 – Most lesbian and gay binational couples should probably marry.

For many years we at Immigration Equality have counseled most lesbian and gay couples not to marry because doing so has the immediate downside of demonstrating "immigrant intent" with little or no tangible benefit. We feel that the scales have now tipped in favor of marrying. If a foreign partner is a visa overstay, or is on a long-term work visa that allows for dual intent, the possible benefits of marrying (potentially providing a defense in proceedings; proving longevity of relationship when the law does eventually change) now seem to outweigh the possible risks. However, if a couple is making a relationship work by coming and going on a student visa, tourist visa or under the Visa Waiver Program, it may still be best to wait to marry.

3 – Most married lesbian and gay couples should *not* file I-130s affirmatively to challenge DOMA just yet.

Although DHS gave some indications in late March that it had put a temporary hold on lesbian and gay marriage cases, DHS spokesperson Christopher Bentley quickly moved to clarify that DHS had resumed denying same-sex marriage cases. AILA and Immigration Equality are pushing DHS and DOJ for an abeyance policy but unless such a policy is announced, it would be inadvisable to file an I-130 *affirmatively*. If in removal proceedings, practitioners are encouraged to reach out to Immigration Equality and AILA Amicus when filing an I-130 for a lesbian or gay spouse.

4 – Litigate and Advocate, but first Advocate.

A national litigation strategy on the DOMA challenge is emerging and will involve selecting cases in certain locations and pushing them forward to make good law. As it shapes up, advocacy will help create the successful atmosphere within which we can win these cases. DOMA could be repealed by Congress; DOMA could be found unconstitutional by the U.S. Supreme Court; the Uniting American Families Act ("UAFA"), a bill which would allow USCs and LPRs to sponsor their long-term partners for immigration benefits, could pass; the Administration could hold applications and/or deportations in abeyance pending any of the above permanent outcomes. For example, AILA, along with numerous other organizations, asked the administration to provide interim relief to bi-national gay and lesbian couples.

5 – Coordinate.

Immigration Equality and AILA Amicus may have resources to assist practitioners in individual cases with strategic decisions, advocacy with the administration for relief, and, in some cases, amicus help.