

SCOTT LEGAL SERVICES, P.C.

The Law Firm For Entrepreneurs, Business Owners & Investors

Ian E. Scott

400 Chambers Street, Suite 15A

New York, NY 10282

TELEPHONE: (212) 223-2964

www.legalservicesincorporated.com

iscott@legalservicesincorporated.com

What Are The Immigration Consequences of the Fall of DOMA?

One of the key policy drivers behind Immigration law is family unification and several aspects of the law provide for preferential immigration treatment for spouses. Prior to June 26th, 2013 the Defense of Marriage Act (DOMA), which applied to all federal legislation, defined spouse to mean a marriage between a man and a woman so immigration spousal rights were not given to same-sex couples. With the fall of DOMA, both the United States Citizen & Immigration Service (USCIS) and the State Department have committed to treat a marriage between same-sex couples the same as a heterosexual marriage. This article summarizes the top 5 immigration questions and answers as they relate to the fall of DOMA.

1. Can same-sex couples start applying for green cards and visas now?

Alejandro Mayoral, the head and Director of USCIS announced at the American Immigration Lawyer Association (AILA) Annual conference last week that USCIS was "prepared to act" and that USCIS "has kept record of every I-130 denial for same sex marriage and they are now ready to reconsider those petitions."

Also, Janet Napolitano, Secretary of Homeland Security, issued the following statement after the Supreme Court issued its decision: "I applaud today's Supreme Court decision in United States v. Windsor holding that the Defense of Marriage Act (DOMA) is unconstitutional. This discriminatory law denied thousands of legally married same-sex couples many important federal benefits, including immigration benefits. I am pleased the Court agreed with the Administration's position that DOMA's restrictions violate the Constitution. Working with our federal partners, including the Department of Justice, we will implement today's decision so that all married couples will be treated equally and fairly in the administration of our immigration laws."

While the administration is committed to fully recognizing same-sex marriages, USCIS officials at the AILA conference made it clear that they would **not** process any same-sex marriage visa petitions until comprehensive guidance was developed. USCIS could not provide an estimate of how long it would take to develop this guidance or when they would be able to start adjudicating petitions. As such, while it appears possible to file immigrant and non-immigrant petitions, action will not be taken on them until guidance is developed. It is likely that Consulates will also not process same-sex applications until this guidance has been developed.

2. What are some of the immigration benefits that married couples get?

There are a wide range of immigration benefits for both immigrant (green cards) and non-immigrant visas. First, a U.S. citizen can sponsor his/her spouse for a green card and this category is not subject to any quotas or waits/lines. The processing time takes less than a year and this compares to over 10 years for some other family based categories. In addition, some immigration violations committed by a spouse prior to the marriage are “forgiven” where these same violations would serve as a bar for other applicants. Spouses are also often permitted to accompany a visa holder and in many cases the accompanying spouse can obtain work authorization. For example, if a foreign national holds an E-2 Investor visa, their spouse can accompany them to the U.S. and get work authorization in any field. Even the children of the E-2 holder are not afforded the benefit of work authorization but this benefit is given to the spouse.

3. What constitutes a valid marriage & what about Civil Unions?

A valid marriage is a marriage conducted in a country or state where marriage is permitted and the marriage laws conform to what the United States considers acceptable. For example, a marriage conducted on Skype would likely not be acceptable in the U.S. even if the country of marriage permitted this. Any marriage conducted in accordance the laws in any State would work (provided of course same sex marriage is permitted by that State).

It is unclear at this point how USCIS and State Department will deal with civil unions. The government is currently developing Guidance to address a number of procedural and policy questions related to the DOMA decision and this guidance should address this question.

4. What if I am married in another country or live in a state that does not recognize same-sex marriage?

The United States Citizenship and Immigration Services (“USCIS”) looks to see whether you entered into a valid marriage in the state or country where you married. The guidance that is being developed by the government will address this point in more detail but it likely that the new guidance will be the same as current procedure where the determining residence factor is where the marriage occurred and was celebrated. This means that your place of residence (and the laws in your place of residence) will not have any impact on your ability to file a same-sex visa petition. Moreover, a person from a State or country that does not permit same-sex marriage (eg. Virginia or China) could go to New York, get married and immediately go back to their home state or country and file a visa petition. Keep in mind that you must meet all of the requirements in the State or country that you get married including any residency marriage requirements a State or country may have. Currently all States in the U.S. that permit same-sex marriage do not have a residency requirement for the marriage. (although there are residency requirements for divorce).

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Marriages that occur in different countries should not be a problem. In fact, Edie Windsor, the plaintiff in the Supreme Court case, married her wife in Canada.

5. What is the best way to prove a marriage.

As with heterosexual marriages, it will be important for Visa applicants to substantiate that the marriage is legitimate and that the relationship is real. This would start with a valid marriage certificate but you will need much more. Evidence that you may be asked for may include, joint bank account statements, tax returns (if in your country or state you were already married), wedding photos, proof of joint ownership of property, evidence of cohabitation, and more. Further, green card applicants are often subject to an interview where both parties are separated and questioned. Immigration officials in this area often say that cases are either very good or very bad and it is not that difficult for them to ascertain whether or not a marriage is a sham.

If you are considering an immigration Visa, contact Scott Legal Services, P.C.. For more information on this and other immigration Visas click [here](#). You can also call us at 212-223-2964 or email us at iscott@legalservicesincorporated.com.

Also, click [here](#) for your free **White Paper** that summarizes the top 10 Immigration Questions and Answers.