

Practice Pointer: Post-DOMA Guidance for Same-Sex Couples Seeking Admission to the U.S.

On June 26, 2013, the Supreme Court of the United States (SCOTUS) struck down section 3 of the Defense of Marriage Act (DOMA) as unconstitutional (AILA Doc. No. 13062640).¹ Shortly after the SCOTUS decision, the Board of Immigration Appeals (BIA) issued a precedent decision holding that DOMA is no longer an impediment in recognizing same-sex couples under the Immigration and Nationality Act (INA), so long as the marriage is valid under the laws of the state where it was celebrated (AILA Doc. No. 13071750).²

Although USCIS and DOS have issued guidance on the implementation of *Windsor* and *Zeleniak*, CBP has not issued any guidance to the field on how to administer the INA provisions that permit same-sex couples to seek immigration benefits at a port of entry (POE) (AILA Doc. Nos. 13080242, 13072640 & 13070240).³ CBP informed AILA that the agency is awaiting internal guidance from its legal office and from the Department of Justice before issuing any guidance to the field. There is no definite timeframe on when the guidance will be issued.

As a practical matter, there are only two ways in which this issue might arise at a port of entry:

1. For citizens of all countries other than Canada, a same-sex spouse seeking admission as a dependent nonimmigrant or making an initial entry as a derivative immigrant would need to arrive at the port of entry bearing the appropriate visa. In those cases, as with opposite sex couples, the CBP officer would likely defer to the Department of State's determination of eligibility for the classification sought. However, CBP could ask for documentation of the marriage at the time of admission. The same-sex spouse presumably would be able to present the same documentation provided at the visa interview that the marriage is legally recognized in the state where it occurred.
2. Canadian citizens are visa exempt and may seek admission without a visa directly at a port of entry as a dependent of a nonimmigrant spouse. In those cases, the CBP officer at the port of entry would need to determine whether or not the marriage was legal in the state where it occurred. As with all applications for admission, the burden of proof of admissibility lies on the applicant for admission. It is therefore anticipated that when CBP guidance is issued, it will require the applicant for admission to prove that the marriage to the same-sex principal applicant for admission is legally recognized in the state where it occurred.

Currently, there is no CBP policy in place to permit the admission of same-sex couples as dependent nonimmigrants. This particularly impacts citizens of Canada, where same-sex marriage has been legal

¹ *U.S. v. Windsor*, 6/26/13; *Supreme Court Strikes Down Defense of Marriage Act*, AILA Doc. No. 13062640, <http://www.aila.org/content/default.aspx?docid=44908> Section 3 of DOMA defined a marriage, for U.S. federal legal purposes, as existing solely between a man and a woman. By striking down this provision, the Supreme Court made available to legally married same-sex couples all federal benefits available to legally married couples in the United States.

² *Matter of Zeleniak*, 26 I&N Dec. 158 (BIA 2013); *BIA Remands Denial of I-130 Field by Same-Sex Couple, Holds DOMA Is Not an Impediment*, AILA Doc. No. 13071750, <http://www.aila.org/content/default.aspx?docid=45102>

³ *DOS FAQs on DOMA*, AILA Doc. No. 13080242, <http://www.aila.org/content/default.aspx?docid=45271>; *USCIS Issues Additional DOMA FAQs*, AILA Doc. No. 13072640, <http://www.aila.org/content/default.aspx?docid=45197>; *DHS Issues Guidance on DOMA Implementation*, AILA Doc. No. 13070240, <http://www.aila.org/content/default.aspx?docid=44954>

since 2005. Until official guidance is issued, it is anticipated that CBP will not admit a same-sex spouse in a dependent classification. However, it would be perfectly legal for someone to apply for this benefit. In such a case, the best course of action would be for the attorney to call the port of entry in advance to discuss the case with the Chief. The Chief would need to run the question up the chain of command, and it is possible that case-specific advice would be given that would permit the granting of dependent status to the spouse in that particular case.

In the absence of case specific guidance, it is anticipated that CBP will continue to follow the guidance in the Foreign Affairs Manual (FAM) for admission of cohabitating partners. 9 FAM 41.31 N14.4 permits the granting of B-2 classification to "aliens who are members of the household of another alien in long-term nonimmigrant status, but who are not eligible for derivative status under that alien's visa classification." The B-2 I-94 can be issued for up to a year in such cases and can be renewed in 6-month increments for the duration of the principal's status. The granting of B-2 classification in such cases, and the duration of that admission, is a matter of discretion on the part of the admitting officer.

Related Resources:

DOS Secretary of State Announcement on Visa Changes for Same-Sex Couples (.pdf 554 KB) DOS Secretary of State John Kerry statement from the U.S. Embassy in London that effective immediately, when same-sex spouses apply for a visa, DOS will consider that application in the same manner that it will consider the application of opposite-sex spouses. AILA Doc. No. 13080245. <http://www.aila.org/content/default.aspx?docid=45274>

AILA/CBP Liaison Practice Pointer: Domestic Partner Admissions

AILA/CBP Liaison Committee offers a practice pointer on obtaining a one year admission for unmarried domestic partners. AILA Doc. No. 12022749. <http://www.aila.org/content/default.aspx?docid=38671>

Domestic Partners Eligible for B-2 Visas

State Dept. reminds posts that 'cohabiting partners' can be eligible for B-2 visas to accompany longer-term nonimmigrants in the U.S. Such B-2s remain subject to 214(b), even if the partner they are accompanying are not subject to that section.

AILA Doc. No. 01071131. <http://www.aila.org/content/default.aspx?docid=3294>

USCIS Policy Memo on B-2 Extensions for Cohabiting Partners and Other Household Members of Principal Nonimmigrants

An 8/17/11 policy memo on the uniform and consistent processing of Form I-539 for changes to and extension of B-2 status for cohabitating nonimmigrant partners and other household members of principal nonimmigrants. AILA Doc. No. 11082673.

<http://www.aila.org/content/default.aspx?docid=36777>