



U.S. Citizenship and Immigration Services

DOMA Training
Academy Training Center Development for
FOD & SCOPS

Guidelines and Guidance on Same-Sex Marriages

navigating the post-DOMA immigration legal landscape



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2
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Introduction

Statement from Secretary of Homeland Security Janet Napolitano on July 1, 2013:

“After last week’s decision by the Supreme Court holding that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional, President Obama directed federal departments to ensure the decision and its implication for federal benefits for same-sex legally married couples are implemented swiftly and smoothly. To that end, effective immediately, I have directed U.S. Citizenship and Immigration Services (USCIS) to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse.”

- The Secretary has directed USCIS to review immigration visas in the same manner as those filed on behalf of an opposite-sex spouse
- Treat same-sex marriages exactly the same as opposite-sex marriages



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3
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Overview

- Define the general guidance from the Chief Counsel
- Recall the countries and U.S. states which recognize same-sex marriages
- Review July 01, 2013, statement from Secretary Napolitano and same-sex marriage frequently asked questions (FAQs)
- Review same-sex marriage interview considerations
- Explore same-sex marriage interview scenarios



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Objectives

Define the General Guidance from USCIS Chief Counsel (OCC)

- Supreme Court (SCT) decision in *United States v. Windsor*
- OCC guidance regarding *Adams v. Howerton*
- BIA precedent decision in *Matter of Zeleniak*
- Legal Memorandum: General Guidance to the Field in Same-Sex Marriage Cases
- Legal Memorandum: Guidance to the Field on the Application of the Place-of-Celebration Rule to Same-Sex Marriage Cases
- U.S. states and D.C. that recognize same-sex marriages
- Countries that recognize same-sex marriages



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Supreme Court Decision in *United States v. Windsor*

- Argued on March 27, 2013
- Decided on June 26, 2013



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Supreme Court Decision in *United States v. Windsor*

Opinion of the Supreme Court of the United States (SCT):

1. The SCT has jurisdiction to consider the merits of the case.
2. DOMA is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment.
 - a. DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal.
 - b. The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State.



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OCC Guidance: *Adams v. Howerton*

Questions concerning the continuing validity of a 1982 decision of the Ninth Circuit, *Adams v. Howerton*.

- That court interpreted the INA's references to "marriage" and "spouse" as limited to opposite-sex marriages; and,
- It held that the statute was constitutional.
- OCC concluded that *Adams* is no longer controlling.
- Adjudicators **may not** rely upon or cite *Adams* in any USCIS adjudications.



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BIA Precedent Decision: *Matter of Zeleniak*

- BIA decision on July 17, 2013
- Big Thought:

Section 3 of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, 2419 (1996), is no longer an impediment to the recognition of lawful same-sex marriages and spouses under the Immigration and Nationality Act if the marriage is valid under the laws of the State where it was celebrated.



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BIA Precedent Decision: *Matter of Zeleniak*

Background:

- The United States citizen (USC) petitioner filed a Petition for Alien Relative (Form I-130) on behalf of the beneficiary as his spouse.
- USCIS denied the petition.
- The USC appealed to the BIA.
- USCIS denied the petition again.
- The petitioner appealed the second denial to the BIA.



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BIA Precedent Decision: *Matter of Zeleniak*

Provisions and Requirements of Law:

- An alien spouse of a USC may acquire lawful permanent resident status in the United States.
- The USC petitioner must establish:
 - A legally valid marriage exists; and,
 - The beneficiary qualifies as a spouse under the Act.



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BIA Precedent Decision: *Matter of Zeleniak*

Facts to Consider:

- The petitioner and beneficiary have a valid marriage under the laws of Vermont.
- Their relationship did not meet the requirements of section 3 of the DOMA (which was the controlling Federal statute).
- *Zeleniak* appeal was pending on June 26, 2013.



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BIA Precedent Decision: *Matter of Zeleniak*

Facts to Consider (*cont'd*):

- On June 26, 2013, the SCT ruled section 3 of the DOMA unconstitutional. (See *United States v. Windsor*.)
- The SCT's ruling in *Windsor* removed section 3 of the DOMA as an impediment to the recognition of lawful same-sex marriages and spouses—provided the marriage is valid under the laws of the state where it was celebrated.



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BIA Precedent Decision: *Matter of Zeleniak*

BIA Conclusion:

- The petitioner and beneficiary have a valid marriage under the laws of Vermont.
- BIA sustained the petitioner's appeal
- Remaining inquiry: *Has the petitioner established that his marriage is bona fide?*



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General Guidance to the Field in Same-Sex Marriage Cases (OCC Chief Counsel Memo, July 26, 2013, Page 2)

Big Thought:

This memorandum provides that references to marriage (or relationships implicating a marriage) in the immigration laws, the implementing regulations, and related agency policies shall be construed as encompassing same-sex marriages.



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General Guidance to the Field in Same-Sex Marriage Cases (OCC Chief Counsel Memo, July 26, 2013, Page 2)

- The words “marriage” and “spouse” (or references to these words) are prevalent throughout the immigration laws and supporting documents.
- The validity of a marriage is relevant in the administration of the immigration laws in many instances.
- Absent DOMA § 3, *Zeleniak* demonstrates that “marriage” in the federal immigration laws encompass same-sex marriages.



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General Guidance to the Field in Same-Sex Marriage Cases (OCC Chief Counsel Memo, July 26, 2013, Page 2)

- The INA and its implementing regulations do not define “spouse” or “marriage.”
- Gender-neutral language of the INA does not limit the definition of marriage to opposite-sex couples.
- **“With respect to any matter involving a provision of law deemed potentially gender-specific, the matter shall be raised through supervisory channels to component leadership for resolution.”**



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General Guidance to the Field in Same-Sex Marriage Cases (OCC Chief Counsel Memo, July 26, 2013, Page 2)

- Interpret federal immigration laws as recognizing both same-sex marriages and opposite-sex marriages for all administrative actions.
- The rules that apply to one apply to the other.
- **EXCEPTION:** an express statutory or regulatory requirement calls for a different approach.



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General Guidance to the Field in Same-Sex Marriage Cases (OCC Chief Counsel Memo, July 26, 2013, Page 3)

- U.S. immigration law promotes family unity.
- Recognition of same-sex marriages furthers the policies that immigration law promotes.
- “In light of the *Windsor* and *Zeleniak* decisions and the issues discussed in this guidance, USCIS personnel are directed that **for purposes of the immigration laws, the existence of a same-sex marriage provides a basis for every immigration action for which the presence of a marriage is relevant, absent any express statutory or regulatory requirement for a different approach.**”



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Application of Place-of-Celebration Rule to Same-Sex Marriage Cases

Observations and Considerations:

Cases will arise in which a same-sex couple celebrated their marriage in a jurisdiction that permits same-sex marriages but now reside in a jurisdiction that does not recognize same-sex marriages.

- As a general matter, the place-of-celebration rule determines the legal validity of a marriage.
- Following *Zeleniak*, OCC concluded that same-sex marriages are not excepted from the general place-of-celebration rule.



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Application of Place-of-Celebration Rule to Same-Sex Marriage Cases

Conclusion:

The place-of-celebration rule governs same-sex marriages in exactly the same way that it governs opposite-sex marriages. Unless the marriage is incestuous, polygamous, or otherwise falls within an exception to the usual rule, the legal validity of a same-sex marriage is determined exclusively by the law of the jurisdiction where the marriage was celebrated. The domicile state's laws and policies on same-sex marriages will not bear on whether USCIS will recognize a marriage as valid.



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Recognized Same-Sex Marriages – U.S.A.

In the U.S., recognition of same-sex marriage varies by state.

Jurisdiction:

Effective Date:

California:

June 16–November 5, 2008;
then again June 27, 2013 on

Connecticut:

October 28, 2008

Delaware:

July 1, 2013

Iowa:

April 27, 2009

Maine:

December 29, 2012

Maryland:

January 1, 2013

Massachusetts:

May 17, 2004



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Source: www.freedomtomarry.org/states

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Recognized Same-Sex Marriages – U.S.A.

Jurisdiction:

Effective Date:

Minnesota:

August 1, 2013

New Hampshire:

January 1, 2010

New Jersey:

October 21, 2013

New York:

July 24, 2011

Rhode Island:

August 1, 2013

Vermont:

September 1, 2009

Washington:

December 6, 2012

Washington, DC:

March 3, 2010



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Source: www.freedomtomarry.org/states

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Recognized Same-Sex Marriages – Int'l

<u>Jurisdiction:</u>	<u>Effective Date:</u>
Argentina:	July 22, 2010
Belgium:	June 1, 2003
Brazil:	May 14, 2013
Canada:	July 20, 2005
Denmark:	June 15, 2012
France:	May 18, 2013
Iceland:	June 27, 2010
MEXICO:	Varies by Region (<i>see below</i>)
– Mexico City:	March 4, 2010
– Quintana Roo:	May 2012
– Oaxaca:	December 2012



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Source: www.freedomtomarry.org/landscape/entry/c/international

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Recognized Same-Sex Marriages – Int'l

<u>Jurisdiction:</u>	<u>Effective Date:</u>
Netherlands:	April 1, 2001
New Zealand:	August 19, 2013
Norway:	January 1, 2009
Portugal:	June 5, 2010
South Africa:	November 30, 2006
Spain:	July 3, 2005
Sweden:	May 1, 2009
Uruguay:	August 5, 2013



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Source: www.freedomtomarry.org/landscape/entry/c/international

25
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Same-Sex Marriage Statement

Statement from Secretary of Homeland Security Janet Napolitano on July 1, 2013:

“After last week’s decision by the Supreme Court holding that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional, President Obama directed federal departments to ensure the decision and its implication for federal benefits for same-sex legally married couples are implemented swiftly and smoothly. To that end, effective immediately, I have directed U.S. Citizenship and Immigration Services (USCIS) to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse.”

- The Secretary has directed USCIS to review immigration visas in the same manner as those filed on behalf of an opposite-sex spouse.
- Same-sex marriages will be treated exactly the same as opposite-sex marriages.



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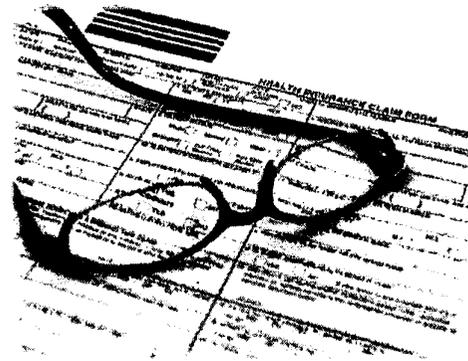
26
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Pe Petitioning for my Spouse

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- An applicant's eligibility to petition for a spouse will not be denied as a result of the same-sex nature of the marriage.
- USCIS applies all relevant laws to determine the validity of a same-sex marriage.
- Same-sex marriages will be treated exactly the same as opposite-sex marriages.
- Civil unions or domestic partnerships will not be recognized.



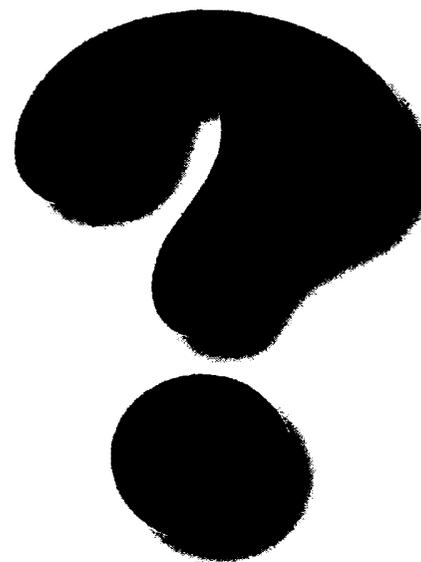
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Petitioning for my Spouse

- I am a U.S. citizen who is engaged to be married to a foreign national of the same sex. Can I file a fiancé or fiancée petition for him or her?
 - A. Yes
 - B. No



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Petitioning for my Spouse



- Answer: Yes
- You may file a Petition for Alien Fiancé(e) (Form I-129F).



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Petitioning for my Spouse

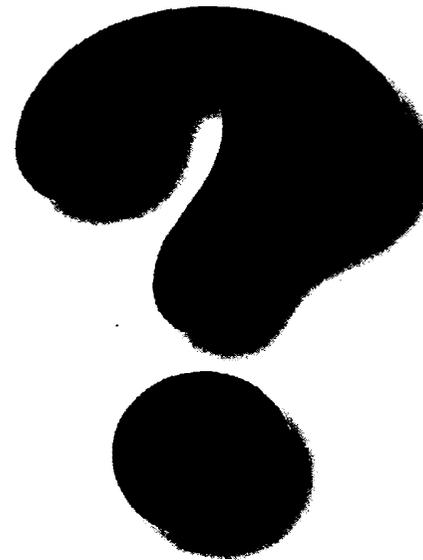
- The law of the place where the marriage was celebrated determines whether the marriage is legally valid for immigration purposes.
- USCIS applies all relevant laws to determine the validity of a same-sex marriage.
- Same-sex marriages will be treated exactly the same as opposite-sex marriages.



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Petitioning for my Spouse

- My spouse and I were married in a U.S. state (or a foreign country) that recognizes same-sex marriage, but we live in a state that does not. Can I file an immigrant visa petition for my spouse?
 - A. Yes
 - B. No



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Petitioning for my Spouse



- Answer: Yes
- The law of the place where the marriage was celebrated determines whether the marriage is legally valid for immigration purposes.

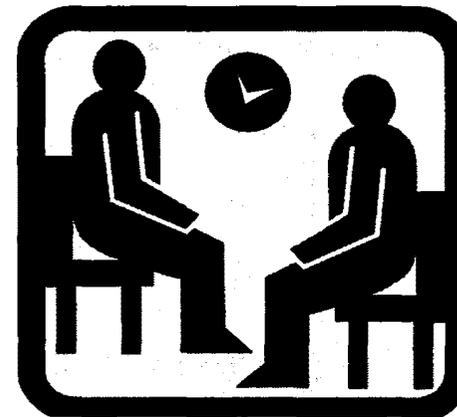


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New Applications & Petitions

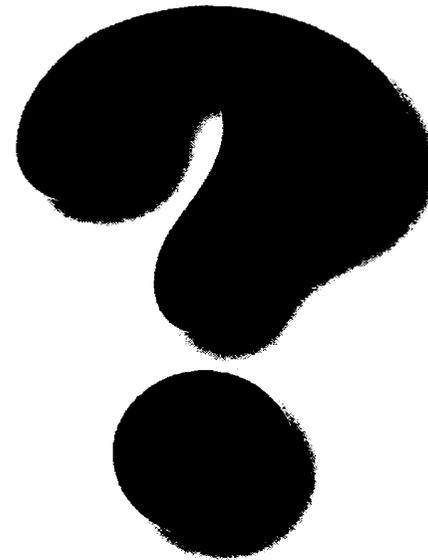
- ▣ There is no wait until USCIS issues new regulations, guidance or forms to apply for benefits based upon the Supreme Court's decision in *Windsor*.
- ▣ An applicant may apply right away for benefits for which he or she believes he or she is eligible.



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New Applications & Petitions

- Do I have to wait until USCIS issues new regulations, guidance or forms to apply for benefits based upon the Supreme Court's decision in *Windsor*?
 - A. Yes
 - B. No



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37
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New Applications & Petitions



- Answer: No
- You may apply right away for benefits for which you believe you are eligible.



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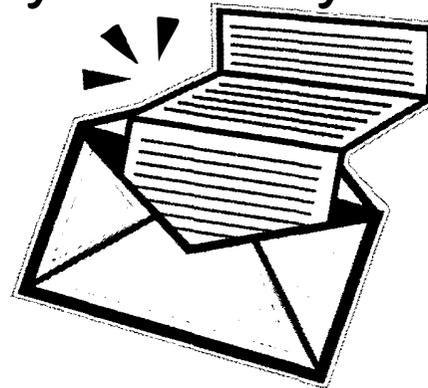
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Previously Submitted Applications

- USCIS will make a concerted effort to identify denials of I-130 petitions that occurred on the basis of DOMA section 3 after February 23, 2011.
- USCIS will reconsider its prior decision.
- USCIS will also concurrently reopen associated applications as may be necessary.
- For denials of I-130 petitions that occurred prior to February 23, 2011, petitioners must notify USCIS by March 31, 2014.



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39
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Previously Submitted Applications

- My Form I-130, or other petition or application, was previously denied solely because of DOMA. Will USCIS will reopen those petitions or applications?
 - A. Yes
 - B. No



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Previously Submitted Applications



- Answer: Yes.
- USCIS will reopen those petitions or applications that were denied solely because of DOMA section 3.



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Changes in Eligibility

- Eligibility for benefits for other than immediate relatives depends on the meanings of the terms “marriage” or “spouse.”
- Examples of who qualify for benefits:
 - Alien who seeks to qualify as a spouse accompanying or following to join a family-sponsored immigrant
 - An employment-based immigrant
 - Certain subcategories of nonimmigrants
 - Alien who has been granted refugee status or asylum
- Same-sex marriages will be treated exactly the same as opposite-sex marriages



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42
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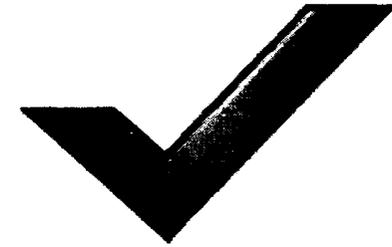
Changes in Eligibility

- Could a same-sex marriage affect my eligibility?
 - A. Yes
 - B. No
 - C. In some situations



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Changes in Eligibility



- **Answer: In some situations**
- **There are some situations in which either the individual's own marriage, or that of his or her parents, can affect whether the individual will qualify as a "child," a "son or daughter," a "parent," or a "brother or sister" of a U.S. citizen or of a lawful permanent resident. In these cases, same-sex marriages will be treated exactly the same as opposite-sex marriages.**

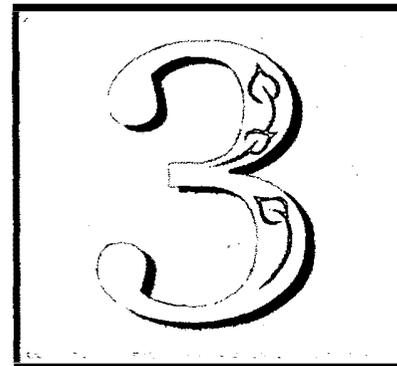


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44
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Residency Requirements

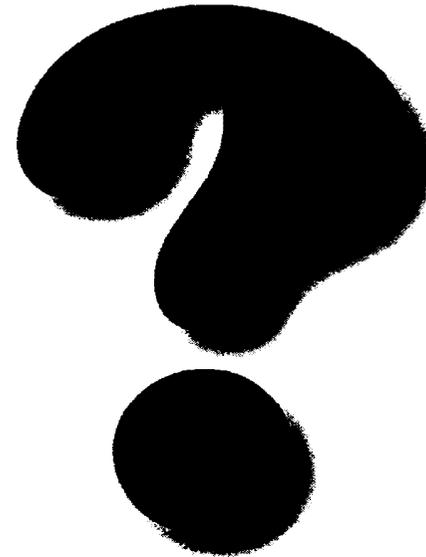
- Same-sex marriages, like opposite-sex marriages, may reduce the residence period required for naturalization.
- Naturalization generally requires five years of residence.
- In a same-sex marriage, naturalization is available after three years if the applicant meets certain eligibility requirements.
- Same-sex marriages will be treated exactly the same as opposite-sex marriages.



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Residency Requirements

- Can same-sex marriages, like opposite-sex marriages, reduce the residence period required for naturalization?
 - A. Yes
 - B. No



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Residency Requirements



- Answer: Yes
- According to the immigration laws, naturalization is available after a required residence period of three years, if during that three year period you have been living in “marital union” with a U.S. citizen “spouse” and your spouse has been a United States citizen during such period.



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47
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Inadmissibility Waivers

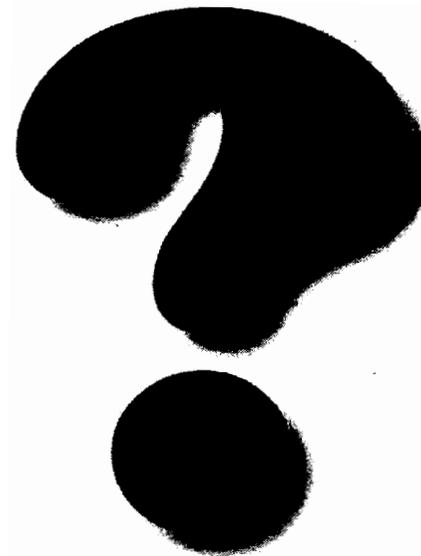
- Immigration laws allow discretionary waivers.
- The applicant has to be the “spouse” or other family member of a U.S. citizen or of a lawful permanent resident.
- Same-sex marriages count for the waiver if the definition of “spouse” is met.
- Same-sex marriages will be treated exactly the same as opposite-sex marriages.



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Inadmissibility Waivers

- In cases where the required family relationship depends on whether the individual or the individual's parents meet the definition of "spouse," will same-sex marriages count for that purpose?
 - A. Yes
 - B. No



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Inadmissibility Waivers



- Answer: Yes
- Whenever the immigration laws condition eligibility for a waiver on the existence of a “marriage” or status as a “spouse,” same-sex marriages will be treated exactly the same as opposite-sex marriages.



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Documentary Requirements

- Petitioners in same-sex marriage cases, like those in opposite-sex marriage cases, must demonstrate that a marriage is bona fide.
- This can be accomplished through testimony, documentary evidence, or a combination of the two.
- Some documentary evidence routinely seen in opposite-sex cases may not be available in same-sex marriage cases.



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Documentary Requirements

Unavailable evidence may include:

- Tax returns (since the parties couldn't file in married status until after *Windsor*);
- Affidavits from friends and/or family members (one or both parties may not have “come out” to certain people);
- Medical insurance or pension/death benefit paperwork (if the individual is concerned about being “outed” at work as a result of listing the spouse in such documents);
- Joint leases naming both parties as tenants (the parties may fear discrimination).



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Documentary Requirements

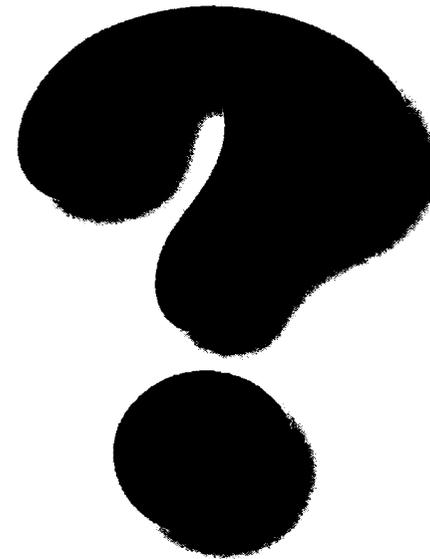
- Rather than focus on the evidence that is unavailable, adjudicators should review the evidence that is in the record.
- The only issue is whether the petitioner met his or her burden of proof (either a preponderance of the evidence or clear and convincing evidence).
- Individuals should not be penalized for failing to produce certain documents that the adjudicator may expect.



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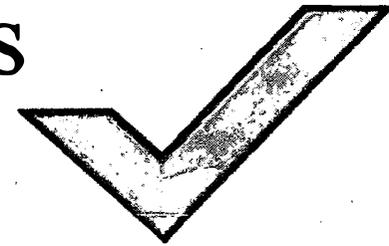
Documentary Requirements

- Should adjudicators be flexible in considering failures to provide specific evidence in response to RFEs in same-sex marriage cases?
 - A. Yes
 - B. No



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Documentary Requirements



- Answer: Yes
- All petitioners must meet the applicable standard of proof in establishing the bona fide nature of their marriages; however, adjudicators should remember that petitioners in same-sex marriages may not be able to produce the same documents as those in opposite-sex marriages. There is no statutory or regulatory requirement that certain documentary evidence (e.g., tax returns, affidavits) be submitted to establish a bona fide marriage. The adjudicator should focus on the evidence in the record and make a decision based only on that.



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Interview Considerations

- Environment to discuss a same-sex marriage
- Applicant's request for a particular sex of interviewer
- Interpreter's effect on the interview
- Setting the tone of the interview



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Interview Considerations

- Explain why certain questions are necessary.
- Ask what title to use for the applicant.
- Ask what legal name is to be used on the form.
- Refrain from irrelevant and/or extraneous comments or questions.



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Interview Considerations

- Be mindful that for many people there is no topic more difficult to discuss with a stranger than matters relating to sexual orientation.
- Remind the applicant that the interview is confidential.
- Try to use the same language the applicant has used.



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Interview Considerations

- Do not assume that being a sexual minority is a lifestyle or a choice
- Appropriate lines of inquiry in asking questions to the applicant
- Child considerations
- The bottom line is that it is important to create a non-threatening interview environment



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Role Play/Exercise

- In each of the next 10 situations provided, determine if you see any part of the interview that may not be going properly, please?
- How you would do it differently?



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Situation 1

Adjudicator: *Hi, ummm, Mr. or Mrs. Jones, how are you today?*

- What problem(s) are we having?
- How you would do it differently?



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Situation 2

Adjudicator: *Shall I refer to one of you as a wife and the other as a husband?*

Client (*hesitant, clearly disturbed*): *No, you can use the term "spouse" when speaking of my partner.*

Adjudicator: *Whew! This is good because I really don't know much about your types and I am really nervous.*

- *What problem(s) are we having?*
- *How you would do it differently?*



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Situation 3

Adjudicator: *How could it be that you have children since you are a homosexual?*

- *What problem(s) are we having?*
- *How you would do it differently?*



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Situation 4

Adjudicator: *So, why do you feel you wanted to be gay?*

- *What problem(s) are we having?*
- *How you would do it differently?*



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64
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Situation 5

Adjudicator: *Wow! You two don't look gay to me!*

- *What problem(s) are we having?*
- *How you would do it differently?*



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Situation 6

Adjudicator: *Since you say you are a lesbian, I am going to use some terminology that you should be familiar with.*

- *What problem(s) are we having?*
- *How you would do it differently?*



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Situation 7

Adjudicator: *How does your family feel about you being in a gay marriage?*

Client *(hesitant, clearly disturbed): I haven't told my family that I'm married. I haven't come out to my family yet.*

Adjudicator: *That's a great excuse to hide a sham marriage.*

- *What problem(s) are we having?*
- *How you would do it differently?*



U.S. Citizenship
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67
FOUO | Do Not Disclose

Situation 8

Adjudicator: *If you and your spouse really wanted to get married for years, like you claim, why didn't you go to one of the states with gay marriage?*

- *What problem(s) are we having?*
- *How you would do it differently?*



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68
~~FOUO~~ | Do Not Disclose

Situation 9

Adjudicator: *Don't you think it's suspicious that you and the beneficiary claim to have been together for years but only rushed out to get married after you could get immigration benefits?*

- *What problem(s) are we having?*
- *How you would do it differently?*



**U.S. Citizenship
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69
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Situation 10

Adjudicator (speaking to a stepchild beneficiary): *How do you feel about having a gay mother/father?*

- *What problem(s) are we having?*
- *How you would do it differently?*



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70
FOUO | Do Not Disclose

Any
Questions?



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71
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Summary

- Defined the general guidance from OCC;
- Reviewed the U.S. states and countries which recognize same-sex marriages;
- Reviewed the July 1, 2013, statement from the Secretary and the accompanying FAQs;
- Reviewed same-sex marriage interview considerations; and,
- Talked through several likely same-sex marriage interview scenarios.



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72
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Resources for ISOs



- June 26, 2013, Supreme Court decision in *United States v. Windsor* 26-June-2013 SCT Windsor Decision
- July 01, 2013, Chief Counsel Guidance regarding *Adams v. Howerton* 01-July-2013 OCC Memo Adams v Howerton
- July 17, 2013, BIA precedent decision in *Matter of Zeleniak* 17-July-2013 BIA Decision on Zeleniak
- July 26, 2013, Chief Counsel Legal Memorandum: General Guidance to the Field in Same-Sex Marriage Cases 26-July-2013 OCC Memo -- General Guidance on SSM
- September 30, 2013, Legal Memorandum: Guidance to the Field on the Application of the Place-of-Celebration Rule to Same-Sex Marriage Cases 30-Sep-2013 Place-of-Celebration



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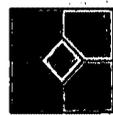
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FOUO | Do Not Disclose



U.S. Citizenship and Immigration Services



OFFICE OF HUMAN CAPITAL AND TRAINING



The
USCIS ACADEMY
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Guidelines and Guidance on Same-Sex Marriages

Instructor Guide

Revision Date: 1 November 2013



GUIDELINES AND GUIDANCE ON SAME-SEX MARRIAGES

Creation Date: September 30, 2013

Revision Date: November 1, 2013

Notice to Instructors: The purpose of the role-play exercise is to underscore the interviewing sensitivities with same sex marriage applicant(s) and also to emphasize that the adjudicator should avoid questions about a person's sexual orientation/practices when there is no connection between the applicant's eligibility for a benefit and his or her sexual orientation. This training does not contain individually-scored participant assessments contained in individual training records.

Acknowledgements:

Important Note: "This text has been compiled for TRAINING ONLY. It is not intended to, does not, and may not be relied upon to create or confer any right(s) or benefit(s), substantive or procedural, enforceable at law by any individual or other party in benefit applications before USCIS, in removal proceedings, in litigation with the United States, or in any other form or manner. This training does not have the force of law, or of a DHS directive and it should NOT be used in place of official directives or publications. The text information is current according to the references listed. You should, however, remember that it is YOUR responsibility to keep up with the latest professional information available for your area of responsibility."

**Office of Human Capital and Training
Training and Career Development Division
USCIS Academy Training Center (ATC)
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Content Feedback POC:

**Officer Winnifred (Winnie) Noel-Charles
USCIS Academy Training Center (ATC)
[ECN Link to Training Corrections Intake Form](#)**

TABLE OF CONTENTS

TITLE	PAGE
Notice to Instructors	ii
Acknowledgements	ii
INSTRUCTOR PREPARATION	1
Classroom	1
Required Material	1
Equipment Setup.....	1
LESSON TITLE	2
INTRODUCTION	2
Attention	2
Motivation.....	2
Instructor Introduction	2
Class Rules and Housekeeping	3
Overview.....	3
Safety	3
GENERAL GUIDANCE FROM USCIS OCC	4
Lesson Objectives	4
Lesson Content.....	4
RECOGNIZED SAME-SEX MARRIAGES	10
U.S. States and DC.....	10
Other Countries	10
STATEMENT FROM DHS S-1 AND FAQs	11
S-1 Statement on DOMA.....	11
FAQs	12
SAME-SEX MARRIAGE INTERVIEWS	20
LGBTI Background	20
Interview Considerations	21
SAME-SEX MARRIAGE INTERVIEWS EXERCISE	24
CONCLUSION	32

APPENDIX

CREATE YOUR OWN CLASSROOM SETUP.....	A-1
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Instructor Preparation

Classroom Determined by location of training.

Required Material Same-Sex Marriage Guidelines Instructor Guide (Insert ECN Link)

Same-Sex Marriage Guidelines PowerPoint (Insert ECN Link)

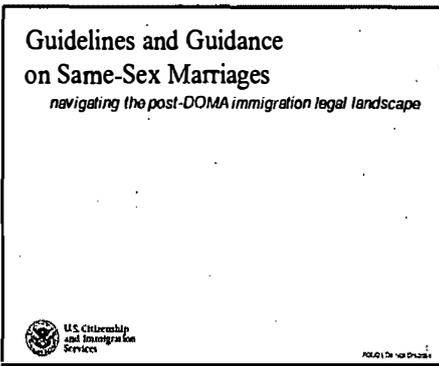
Note final PowerPoint slide, *Resources for ISOs*, which provides links to the OCC memos, court decisions, etc.

*INSTRUCTOR NOTE: Familiarize yourself with the documents **before** you present this deliverable.*

Equipment Setup Projector for PowerPoint Presentation

GUIDELINES AND GUIDANCE ON SAME-SEX MARRIAGES

Introduction



Attention → DOMA.

The Defense of Marriage Act.

When President Clinton signed DOMA into law in 1996, many folks rejoiced and felt a good thing had happened, while others reached a vastly different conclusion.

When the U.S. Supreme Court overturned section 3 of DOMA earlier this year, many folks rejoiced and felt a good thing had happened, while others reached a vastly different conclusion.

Few words conjure up responses and emotions as varied and divergent as these do.

Yet, here we are — our diverse personal and individual viewpoints notwithstanding — to learn together how to navigate the post-DOMA immigration landscape.

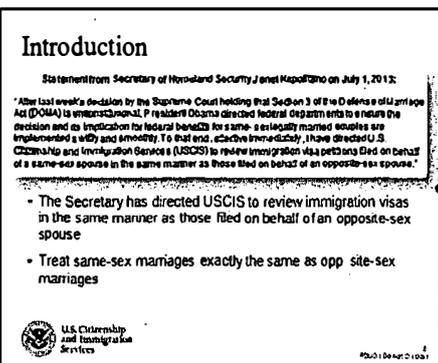
Motivation

As sworn officers of the immigration services of the United States of America, our role is to apply the law of the land. Of our own volition, we have taken an oath to support and defend the Constitution of the United States. The U.S. Supreme Court's holding on June 26, 2013 that Section 3 of the Defense of Marriage Act (DOMA) is not consistent with the Constitution is the law of the land.

Already, there is a resulting increase in filings of applications for same-sex spouses wishing to immigrate to the United States. It is important for you to understand the guidance for addressing petitions and applications involving same-sex marriages.

In keeping with the President's instructions, the Secretary of Homeland Security has directed USCIS to:

- Review immigration visa petitions in the same manner as those filed on behalf of an opposite-sex spouse; and,
- Treat same-sex marriages exactly the same as opposite-sex marriages.



Instructor Introduction

Introduce yourself as the instructor for this session

Class Rules and Housekeeping *Establish rules for questions (parking lot), discussion, breaks, cell phones, etc...*



Safety *Fire Safety, Weather notifications, etc...*

Overview When we conclude our time together you will have the tools you need to recognize the new legal landscape due to the reversal of Section 3 of the Defense of Marriage Act (DOMA) and understand interviewing sensitivities with respect to same-sex marriages. Specifically, we will help you to:

Overview

- Define the general guidance from the Chief Counsel
- Recall the countries and U.S. states which recognize same-sex marriages
- Review July 01, 2013, statement from Secretary Napolitano and same-sex marriage frequently asked questions (FAQs)
- Review same-sex marriage interview considerations
- Explore same-sex marriage interview scenarios



PLANS 2014-01-01

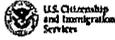
- Define the General Guidance from the Chief Counsel
- Review the U.S. States and countries which recognize same-sex marriages
- Review the July 1, 2013, statement from the Secretary and the accompanying FAQs
- Review Same-Sex Marriage Interview Considerations
- Demonstrate Interviewing Sensitivities

As you might imagine, each of these main points have several sub-points. Together, they will guide us to the overall objective.

Lesson Content

General Guidance from USCIS Chief Counsel (OCC)

- Supreme Court (SCT) decision in *United States v. Windsor*
- OCC guidance regarding *Adams v. Howerton*
- BIA precedent decision in *Matter of Zeleniak*
- Legal Memorandum: General Guidance to the Field in Same-Sex Marriage Cases
- Legal Memorandum: Guidance to the Field on the Application of the Place-of-Celebration Rule to Same-Sex Marriage Cases
- U.S. states and D.C. that recognize same-sex marriages
- Countries that recognize same-sex marriages



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Lesson Objectives

The first block of instruction speaks to the General Guidance from the USCIS Office of the Chief Counsel (OCC).

Recall:

- Supreme Court (SCT) decision in *United States v. Windsor*
- OCC guidance regarding *Adams v. Howerton*
- BIA precedent decision in *Matter of Zeleniak*
- Legal Memorandum: General Guidance to the Field in Same-Sex Marriage Cases
- Legal Memorandum: Guidance to the Field on the Application of the Place-of-Celebration Rule to Same-Sex Marriage Cases
- U.S. states and D.C. that recognize same-sex marriages
- Countries that recognize same-sex marriages

Supreme Court Decision in *United States v. Windsor*

- Argued on March 27, 2013
- Decided on June 26, 2013



U.S. Citizenship and Immigration Services

Lesson Content

Recall June 26, 2013, Supreme Court decision in *United States v. Windsor*, 133 S.Ct. 2675 (2013)

Background:

- Argued March 27, 2013
- Decided June 26, 2013

The State of New York recognizes the marriage of New York residents Edith Windsor and Thea Spyer, who wed in Ontario, Canada, in 2007. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the federal estate tax exemption for surviving spouses, but was barred from doing so by §3 of the federal Defense of Marriage Act (DOMA), which amended the Dictionary Act—a law providing rules of construction for over 1,000 federal laws and the whole realm of federal regulations—to define “marriage” and “spouse” as excluding same-sex partners. Windsor paid \$363,053 in estate taxes and sought a refund, which the Internal Revenue Service denied. Windsor brought this refund suit, contending that DOMA violates the principles of equal protection incorporated in the Fifth Amendment. While the suit was pending, the Attorney General notified the Speaker of the House of Representatives that

the Department of Justice would no longer defend §3's constitutionality. (Syllabus to *Windsor* decision, 133 S.Ct. 2675)

Supreme Court Decision in
United States v. Windsor

Opinion of the Supreme Court of the United States (SCT):

1. The SCT has jurisdiction to consider the merits of the case.
2. DOMA is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment.
 - a. DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal.
 - b. The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State.



16051201-100 01/13/13

Opinion of the Supreme Court of the United States (SCT):

1. The SCT has jurisdiction to consider the merits of the case.
2. DOMA is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment (pp. 13–26).
 - a. DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal.
 - b. The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State.

Lesson Content Recall July 1, 2013, Legal Memorandum:
Guidance to the Status of *Adams v. Howerton*,
673 F.2d 1036 (9th Cir. 1982)

OCC Guidance: *Adams v. Howerton*

Questions concerning the continuing validity of a 1982 decision of the Ninth Circuit, *Adams v. Howerton*.

- That court interpreted the INA's references to "marriage" and "spouse" as limited to opposite-sex marriages; and,
- It held that the statute was constitutional.
- OCC concluded that *Adams* is no longer controlling.
- Adjudicators may not rely upon or cite *Adams* in any USCIS adjudications.



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Legal Memorandum from Stephen H. Legomsky, USCIS
Chief Counsel

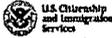
- Questions have arisen concerning the continuing validity of a 1982 decision of the Ninth Circuit, *Adams v. Howerton*.
 - That court interpreted the INA's references to "marriage" and "spouse" as limited to opposite-sex marriages; and,
 - It held that the statute was constitutional.
- OCC explains why they concluded that *Adams* is no longer controlling.
 - The 1990 repeal of 8 U.S.C. § 1184(a)(4), an INA provision that rendered gay aliens inadmissible, removed support for the *Adams* interpretation of the INA.
 - The *Windsor* decision also undermines the *Adams* rationale (as it relates to "marriage" and "spouse").
 - The prior *Adams* interpretation does not preclude a new agency interpretation of these statutory terms.
 - The congressional rationale regarding promotion of family unity applies to same-sex marriages.
- Adjudicators may not rely upon or cite *Adams* in any USCIS adjudications.

Lesson Content Recall July 17, 2013, BIA Precedent Decision in *Matter of Zeleniak*, 26 I&N Dec. 158 (BIA 2013)

The Board of Immigration Appeals (BIA) issued its decision on July 17, 2013.

BIA Precedent Decision: *Matter of Zeleniak*

- BIA decision on July 17, 2013
- Big Thought:
 - Section 3 of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, 2419 (1996), is no longer an impediment to the recognition of lawful same-sex marriages and spouses under the Immigration and Nationality Act if the marriage is valid under the laws of the State where it was celebrated.



FD-501 (Rev. 04-2013)

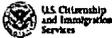
Big Thought:

Section 3 of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, 2419 (1996), is no longer an impediment to the recognition of lawful same-sex marriages and spouses under the Immigration and Nationality Act if the marriage is valid under the laws of the State where it was celebrated.

BIA Precedent Decision: *Matter of Zeleniak*

Background:

- The United States citizen (USC) petitioner filed a Petition for Alien Relative (Form I-130) on behalf of the beneficiary as his spouse.
- USCIS denied the petition.
- The USC appealed to the BIA.
- USCIS denied the petition again.
- The petitioner appealed the second denial to the BIA.



FD-501 (Rev. 04-2013)

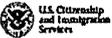
Background:

- The United States citizen (USC) petitioner filed a Petition for Alien Relative (Form I-130) on behalf of the beneficiary as his spouse in March 2010.
- USCIS denied the petition on July 27, 2010.
- The petitioner appealed the denial to the BIA.
- The April 18, 2012, decision of the BIA remanded the record to USCIS with two issues:
 - Is the marriage valid under State law?
 - Does the marriage qualify under the INA?
- USCIS denied the petition again on June 19, 2012.
- The USC petitioner appealed the second denial.

BIA Precedent Decision: *Matter of Zeleniak*

Provisions and Requirements of Law:

- An alien spouse of a USC may acquire lawful permanent resident status in the United States.
- The USC petitioner must establish:
 - A legally valid marriage exists; and,
 - The beneficiary qualifies as a spouse under the Act.



FD-501 (Rev. 04-2013)

Provisions and Requirements of Law:

- An alien spouse of a USC may acquire lawful permanent resident status in the United States. [See INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2012).]
- The USC petitioner must establish:
 - That a legally valid marriage exists; and,
 - That the beneficiary qualifies as a spouse under the Act, which includes the requirement that the marriage be bona fide.

BIA Precedent Decision: *Matter of Zeleniak*

Facts to Consider:

- The petitioner and beneficiary have a valid marriage under the laws of Vermont.
- Their relationship did not meet the requirements of section 3 of the DOMA (which was the controlling Federal statute).
- Zeleniak appeal was pending on June 28, 2013.



FD-501 (Rev. 04-2013)

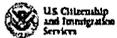
Facts to Consider:

- The petitioner and beneficiary have a valid marriage under the laws of Vermont.
- Their relationship did not meet the requirements of section 3 of the DOMA (which was the controlling Federal statute).

BIA Precedent Decision: *Matter of Zeleniak*

Facts to Consider (cont'd):

- On June 26, 2013, the SCT ruled section 3 of the DOMA unconstitutional. (See *United States v. Windsor*.)
- The SCT's ruling in *Windsor* removed section 3 of the DOMA as an impediment to the recognition of lawful same-sex marriages and spouses—provided the marriage is valid under the laws of the state where it was celebrated.



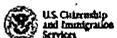
U.S. Citizenship and Immigration Services

- Zeleniak appeal was pending on June 26, 2013.
- On June 26, 2013, the SCT ruled section 3 of the DOMA unconstitutional. [*See United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013).]
- The SCT's ruling in *Windsor* removed section 3 of the DOMA as an impediment to the recognition of lawful same-sex marriages and spouses—provided the marriage is valid under the laws of the State where it was celebrated.

BIA Precedent Decision: *Matter of Zeleniak*

BIA Conclusion:

- The petitioner and beneficiary have a valid marriage under the laws of Vermont.
- BIA sustained the petitioner's appeal
- Remaining inquiry: *Has the petitioner established that his marriage is bona fide?*



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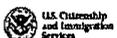
BIA Conclusion:

- The petitioner and beneficiary have a valid marriage under the laws of Vermont.
- The BIA sustained the petitioner's appeal and remanded the case.
- Remaining inquiry: *Has the petitioner established that his marriage to the beneficiary is bona fide?*

General Guidance to the Field in Same-Sex Marriage Cases (OCC Chief Counsel Memo, July 26, 2013, Page 2)

Big Thought:

This memorandum provides that references to marriage (or relationships implicating a marriage) in the immigration laws, the implementing regulations, and related agency policies shall be construed as encompassing same-sex marriages.



U.S. Citizenship and Immigration Services

Lesson Content

Recall July 26, 2013, Legal Memorandum: General Guidance to the Field in Same-Sex Marriage Cases, Page 2

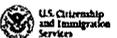
Legal Memorandum from Stephen H. Legomsky, USCIS Chief Counsel

Big Thought:

This memorandum provides that references to marriage (or relationships implicating a marriage) in the immigration laws, the implementing regulations, and related agency policies shall be construed as encompassing same-sex marriages.

General Guidance to the Field in Same-Sex Marriage Cases (OCC Chief Counsel Memo, July 26, 2013, Page 2)

- The words "marriage" and "spouse" (or references to these words) are prevalent throughout the immigration laws and supporting documents.
- The validity of a marriage is relevant in the administration of the immigration laws in many instances.
- Absent DOMA § 3, *Zeleniak* demonstrates that "marriage" in the federal immigration laws encompass same-sex marriages.

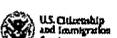


U.S. Citizenship and Immigration Services

- The words "marriage" and "spouse" (or references to these words) are prevalent throughout the INA, other immigration laws, implementing regulations, relevant agency policies, and case law.

General Guidance to the Field in Same-Sex Marriage Cases (OCC Chief Counsel Memo, July 26, 2013, Page 2)

- The INA and its implementing regulations do not define "spouse" or "marriage."
- Gender-neutral language of the INA does not limit the definition of marriage to opposite-sex couples.
- "With respect to any matter involving a provision of law deemed potentially gender-specific, the matter shall be raised through supervisory channels to component leadership for resolution."



U.S. Citizenship and Immigration Services

- The validity of a marriage is relevant in the administration of the immigration laws in many instances.
- In the absence of DOMA § 3, *Zeleniak* demonstrates that "marriage" in the federal immigration laws encompass same-sex marriages.
- The INA and its implementing regulations do not provide a definition of "spouse" or "marriage."

General Guidance to the Field in Same-Sex Marriage Cases (OCC Chief Counsel Memo, July 26, 2013, Page 2)

- Interpret federal immigration laws as recognizing both same-sex marriages and opposite-sex marriages for all administrative actions.
- The rules that apply to one apply to the other.
- EXCEPTION: an express statutory or regulatory requirement calls for a different approach.



- The INA does not limit the definition of marriage to opposite-sex couples and universally relies on gender-neutral language in referring to marriages.
- **“With respect to any matter involving a provision of law deemed potentially gender-specific, the matter shall be raised through supervisory channels to component leadership for resolution.”**
- Interpret federal immigration laws as recognizing both same-sex marriages and opposite-sex marriages for all administrative actions.
 - The rules that apply to one apply to the other.
 - EXCEPTION: an express statutory or regulatory requirement calls for a different approach.

General Guidance to the Field in Same-Sex Marriage Cases (OCC Chief Counsel Memo, July 26, 2013, Page 3)

- U.S. immigration law promotes family unity.
- Recognition of same-sex marriages furthers the policies that immigration law promotes.
- **“In light of the Windsor and Zeleniak decisions and the issues discussed in this guidance, USCIS personnel are directed that for purposes of the Immigration laws, the existence of a same-sex marriage provides a basis for every immigration action for which the presence of a marriage is relevant, absent any express statutory or regulatory requirement for a different approach.”**



Lesson Content

Recall July 26, 2013, Legal Memorandum: General Guidance to the Field in Same-Sex Marriage Cases, Page 3

- United States immigration laws promote family unity.
- The recognition of same-sex marriages furthers the policies that the immigration laws promote.
- **“In light of the Windsor and Zeleniak decisions and the issues discussed in this guidance, USCIS personnel are directed that for purposes of the immigration laws, the existence of a same sex-marriage provides a basis for every immigration action for which the presence of a marriage is relevant, absent any express statutory or regulatory requirement for a different approach.”**

Application of Place-of-Celebration Rule to Same-Sex Marriage Cases

Observations and Considerations:

Cases will arise in which a same-sex couple celebrated their marriage in a jurisdiction that permits same-sex marriages but now reside in a jurisdiction that does not recognize same-sex marriages.

- As a general matter, the place-of-celebration rule determines the legal validity of a marriage.
- Following Zeleniak, OCC concluded that same-sex marriages are not excepted from the general place-of-celebration rule.



Lesson Content

Recall September 30, 2013, Legal Memorandum: Guidance to the Field on the Application of the Place-of-Celebration Rule to Same-Sex Marriage Cases

Observations and Considerations:

Cases will arise in which a same-sex couple celebrated their marriage in a jurisdiction that permits same-sex marriages but now reside in a jurisdiction that does not recognize same-sex marriages.

As a general matter, the place-of-celebration rule determines the legal validity of a marriage.

Following Zeleniak, OCC concluded that same-sex marriages are not excepted from the general place of celebration rule.

Questions have arisen concerning the existence of some BIA case law establishing a “public policy” exception to the general “place-of-celebration” rule for marriage.

In some circumstances, a marriage valid in the place of celebration will not be recognized for immigration purposes if it violates a strong public policy of the state of domicile.

Hence, the question arises whether otherwise valid same-sex marriages will be recognized if the state of domicile has a law stating a public policy against same-sex marriage.

The answer is that if the marriage is valid in the state of celebration, it does not matter whether the state of domicile has a public policy against same sex marriages, regardless of how strongly expressed; no “public policy exception” will be applied based on that.

Only if the case involves an otherwise applicable sex-neutral “public policy” situation under the narrow BIA case law (such as a marriage that is criminal incest in the state of domicile, or a polygamous marriage) might the exception apply.

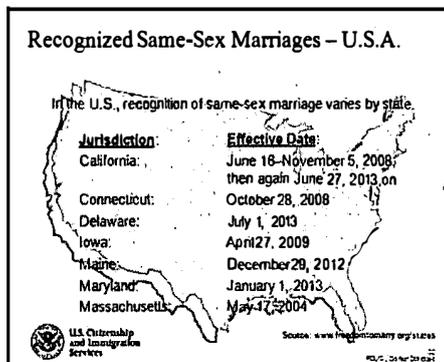
Conclusion:

The place-of-celebration rule governs same-sex marriages in exactly the same way that it governs opposite-sex marriages. Unless the marriage is incestuous, polygamous, or otherwise falls within an exception to the usual rule, the legal validity of a same-sex marriage is determined exclusively by the law of the jurisdiction where the marriage was celebrated.

Lesson Content Recall U.S. States and D.C. that Recognize Same-Sex Marriages

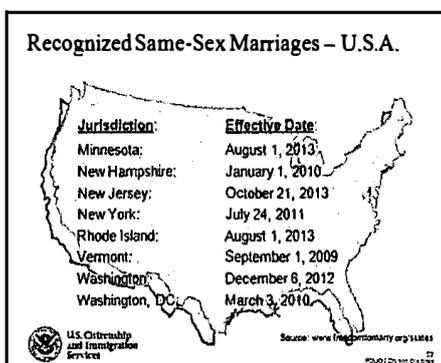
In the United States of America, recognition of same-sex marriages varies by state.

NOTE: The legal landscape of which jurisdictions recognize same-sex marriage, while correct at the present time, is particularly subject to change due to new jurisdictions recognizing same-sex marriage.



<u>Jurisdiction:</u>	<u>Effective Date:</u>
California:	June 16, 2008 to November 5, 2008; then again June 27, 2013 forward
Connecticut:	October 28, 2008
Delaware:	July 1, 2013
Iowa:	April 27, 2009
Maine:	December 29, 2012
Maryland:	January 1, 2013
Massachusetts:	May 17, 2004
Minnesota:	August 1, 2013
New Hampshire:	January 1, 2010
New Jersey:	October 21, 2013
New York:	July 24, 2011
Rhode Island:	August 1, 2013
Vermont:	September 1, 2009
Washington:	December 6, 2012
Washington, DC:	March 3, 2010

Source: www.FreedomToMarry.org/states



Lesson Content Recall Countries that Recognize Same-Sex Marriages

<u>Jurisdiction:</u>	<u>Effective Date:</u>
Argentina:	July 22, 2010
Belgium:	June 1, 2003
Brazil:	May 14, 2013
Canada:	July 20, 2005
Denmark:	June 15, 2012
France:	May 18, 2013
Iceland:	June 27, 2010

MEXICO: Varies by Region (*see below*)

- Mexico City: March 4, 2010
- Quintana Roo: May 2012
- Oaxaca: December 2012

⇒ Netherlands: April 1, 2001

New Zealand: August 19, 2013

Norway: January 1, 2009

Portugal: June 5, 2010

South Africa: November 30, 2006

Spain: July 3, 2005

Sweden: May 1, 2009

Uruguay: August 5, 2013

Recognized Same-Sex Marriages – Int'l	
Jurisdiction	Effective Date
Netherlands	April 1 2001
New Zealand	August 19, 2013
Norway	January 1, 2009
Portugal	June 5 2010
South Africa	November 30 2006
Spain	July 3, 2005
Sweden	May 1, 2009
Uruguay	August 5, 2013

U.S. Citizenship and Immigration Services Source: www.freedomtomarry.org/archives/entry/international

Source: www.FreedomToMarry.org/international

Lesson Content

Lesson Content: Provide background to Same-Sex Marriages.

There is clear guidance specifically to USCIS on same-sex marriage recognition that has been issued by the Secretary of Homeland Security.

Statement from Secretary of Homeland Security Janet Napolitano on July 1, 2013:

After last week's decision by the Supreme Court holding that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional, President Obama directed federal departments to ensure the decision and its implication for federal benefits for same-sex legally married couples are implemented swiftly and smoothly. To that end, effective immediately, I have directed U.S. Citizenship and Immigration Services (USCIS) to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse.

Same-Sex Marriage Statement

Statement from Secretary of Homeland Security Janet Napolitano on July 1, 2013:

After last week's decision by the Supreme Court holding that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional, President Obama directed federal departments to ensure the decision and its implication for federal benefits for same-sex legally married couples are implemented swiftly and smoothly. To that end, effective immediately, I have directed U.S. Citizenship and Immigration Services (USCIS) to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse.

- The Secretary has directed USCIS to review immigration visas in the same manner as those filed on behalf of an opposite-sex spouse.
- Same-sex marriages will be treated exactly the same as opposite-sex marriages.

U.S. Citizenship and Immigration Services

Petitioning for my Spouse

- An applicant's eligibility to petition for a spouse will not be denied as a result of the same-sex nature of the marriage.
- USCIS applies all relevant laws to determine the validity of a same-sex marriage.
- Same-sex marriages will be treated exactly the same as opposite-sex marriages.
- Civil unions or domestic partnerships will not be recognized.

U.S. Citizenship and Immigration Services

Lesson Content

A U.S. citizen or lawful permanent resident in a same-sex marriage to a foreign national can now sponsor his or her spouse for a family-based immigrant visa.

An applicant may file a Form I-130 (and any applicable accompanying application). An applicant's eligibility to petition for his or her spouse, and his or her spouse's admissibility as an immigrant at the immigration visa application or adjustment of status stage, will be determined according to applicable immigration law and will not be denied as a result of the same-sex nature of the marriage.

Civil unions or domestic partnerships will not be recognized.

NOTE FROM OCC: Consistent with the general requirements of 'Windsor' as implemented by the Department that same-sex marriages should be treated equally with opposite-sex marriages, if a same-sex relationship is recognized as a marriage in the jurisdiction of celebration, it should be recognized as a marriage for our purposes as well, and this principle extends to common-law marriages. Please note that, because there could be other legal issues that need to be considered with a common-law marriage on a state-by-state basis, if you encounter a situation whereby a same-sex couple seeks benefits based upon a common-law marriage, please consult OCC as to the whether such marriage will be recognized under the INA.

Petitioning for my Spouse

- I am a U.S. citizen or lawful permanent resident in a same-sex marriage to a foreign national. Can I now sponsor my spouse for a family-based immigrant visa?
- A. Yes
- B. No



U.S. Citizenship and Immigration Services

Progress Check

Read the question to the participants.

I am a U.S. citizen or lawful permanent resident in a same-sex marriage to a foreign national. Can I now sponsor my spouse for a family-based immigrant visa?

- A. Yes
- B. No

Petitioning for my Spouse

- Answer: Yes
- You may file a Form I-130 (and any applicable accompanying application).



U.S. Citizenship and Immigration Services

Progress Check Answer

Read the answer and rationale.

Answer: Yes

You can file the petition. You may file a Form I-130 (and any applicable accompanying application). Your eligibility to petition for your spouse, and your spouse's admissibility as an immigrant at the immigration visa application or adjustment of status stage, will be determined according to applicable immigration law and will not be denied as a result of the same-sex nature of your marriage.

NOTE: The answer would depend on whether the same-sex marriage was legal where it took place.

Petitioning for my Spouse

- A U.S. citizen who is engaged to be married to a foreign national of the same sex can file a fiancé or fiancée petition for him or her.
- USCIS applies all relevant laws to determine the validity of a same-sex marriage.
- Same-sex marriages will be treated exactly the same as opposite-sex marriages.



U.S. Citizenship and Immigration Services

Lesson Content

A U.S. citizen who is engaged to be married to a foreign national of the same sex can file a fiancé or fiancée petition for him or her.

The applicant may file a Petition for Alien Fiancé(e) (Form I-129F), as long as all other immigration requirements are met, a same-sex engagement may allow an applicant's fiancé to enter the United States for marriage.

Petitioning for my Spouse

- I am a U.S. citizen who is engaged to be married to a foreign national of the same sex. Can I file a fiancé or fiancée petition for him or her?
- A. Yes
- B. No



U.S. Citizenship and Immigration Services

Progress Check

I am a U.S. citizen who is engaged to be married to a foreign national of the same sex. Can I file a fiancé or fiancée petition for him or her?

- A. Yes
- B. No

Petitioning for my Spouse

- Answer: Yes
- You may file a Petition for Alien Fiancé(e) (Form I-129F).



U.S. Citizenship and Immigration Services

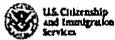
Progress Check Answer

Answer: Yes

You may file a Form I-129F, as long as all other immigration requirements are met, a same-sex engagement may allow your fiancé to enter the United States for marriage.

Petitioning for my Spouse

- The law of the place where the marriage was celebrated determines whether the marriage is legally valid for immigration purposes.
- USCIS applies all relevant laws to determine the validity of a same-sex marriage.
- Same-sex marriages will be treated exactly the same as opposite-sex marriages.



FOUO | Do Not Release

Petitioning for my Spouse

- My spouse and I were married in a U.S. state (or a foreign country) that recognizes same-sex marriage, but we live in a state that does not. Can I file an immigrant visa petition for my spouse?
 - A. Yes
 - B. No



FOUO | Do Not Release

Petitioning for my Spouse



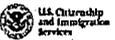
- Answer: Yes
- The law of the place where the marriage was celebrated determines whether the marriage is legally valid for immigration purposes.



FOUO | Do Not Release

New Applications & Petitions

- There is no wait until USCIS issues new regulations, guidance or forms to apply for benefits based upon the Supreme Court's decision in *Windsor*.
- An applicant may apply right away for benefits for which he or she believes he or she is eligible.



FOUO | Do Not Release

New Applications & Petitions

- Do I have to wait until USCIS issues new regulations, guidance or forms to apply for benefits based upon the Supreme Court's decision in *Windsor*?
 - A. Yes
 - B. No



FOUO | Do Not Release

Lesson Content

A petitioner and spouse who were married in a U.S. state or a foreign country that recognizes same-sex marriage, but who both live in a state that does not recognize a same-sex marriage can still file an immigrant visa petition for the spouse.

As a general matter, the law of the place where the marriage was celebrated determines whether the marriage is legally valid for immigration purposes. Just as USCIS applies all relevant laws to determine the validity of an opposite-sex marriage, we will apply all relevant laws to determine the validity of a same-sex marriage.

Progress Check

My spouse and I were married in a U.S. state (or a foreign country) that recognizes same-sex marriage, but we live in a state that does not. Can I file an immigrant visa petition for my spouse?

- A. Yes
- B. No

Progress Check Answer

Answer: Yes

As a general matter, the law of the place where the marriage was celebrated determines whether the marriage is legally valid for immigration purposes. Just as USCIS applies all relevant laws to determine the validity of an opposite-sex marriage, we will apply all relevant laws to determine the validity of a same-sex marriage.

Lesson Content

There is no wait until USCIS issues new regulations, guidance or forms to apply for benefits based upon the SCT's decision in *Windsor*.

An applicant may apply right away for benefits for which he or she believes he or she is eligible.

Progress Check

Do I have to wait until USCIS issues new regulations, guidance or forms to apply for benefits based upon the Supreme Court's decision in *Windsor*?

- A. Yes
- B. No

New Applications & Petitions 

- Answer: No
- You may apply rightaway for benefits for which you believe you are eligible.

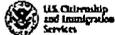
 U.S. Citizenship and Immigration Services

Progress Check Answer

Answer: No
 You may apply right away for benefits for which you believe you are eligible.

Previously Submitted Applications

- USCIS will make a concerted effort to identify denials of I-130 petitions that occurred on the basis of DOMA section 3 after February 23, 2011.
- USCIS will reconsider its prior decision.
- USCIS will also concurrently reopen associated applications as may be necessary.
- For denials of I-130 petitions that occurred prior to February 23, 2011, petitioners must notify USCIS by March 31, 2014.

 U.S. Citizenship and Immigration Services 

Lesson Content

USCIS will reopen those petitions or applications that were denied solely because of DOMA section 3. If such a case is known to us or brought to our attention, USCIS will reconsider its prior decision, as well as reopen associated applications to the extent they were also denied as a result of the denial of the Form I-130 (such as a concurrently filed Application to Register Permanent Residence or Adjust Status (Form I-485)).

USCIS will make a concerted effort to identify denials of I-130 petitions that occurred on the basis of DOMA section 3 after February 23, 2011. USCIS will also make a concerted effort to notify the petitioner/applicant at the last-known address, of the reopening and request updated information in support of the petition or application.

To alert USCIS of an I-130 petition that the petitioner believes falls within this category, USCIS recommends the petitioner sends an e-mail from an account that can receive replies to USCIS at USCIS-626@uscis.dhs.gov stating that he or she has a pending petition. USCIS will reply to that message with follow-up questions as necessary to update the petition for processing. (DHS has sought to keep track of DOMA denials that occurred after the President determined not to defend Section 3 of DOMA on February 23, 2011; although, to ensure that DHS is aware of a denial, petitioners/applicants may alert USCIS if they believe their application falls within this category.)

For denials of I-130 petitions that occurred prior to February 23, 2011, petitioners must notify USCIS by March 31, 2014, in order for USCIS to act on its own to reopen the I-130 petition. A petitioner may notify USCIS by sending an e-mail to USCIS at USCIS-626@uscis.dhs.gov and noting that he or she believes that the petition was denied on the basis of DOMA section 3.

Once the I-130 petition is reopened, it will be considered anew—without regard to DOMA section 3—based upon the information previously submitted and any new information provided. USCIS will also concurrently

reopen associated applications as may be necessary to the extent they also were denied as a result of the denial of the I-130 petition (such as concurrently filed Form I-485 applications).

Additionally, if work authorization was denied or revoked based upon the denial of the Form I-485, the denial or revocation will be concurrently reconsidered, and a new Employment Authorization Document (EAD) issued, to the extent necessary. If a decision cannot be rendered immediately on a reopened adjustment of status application, USCIS will either (1) immediately process any pending or denied application for employment authorization or (2) reopen and approve any previously revoked application for employment authorization. If USCIS has already obtained the applicant's biometric information at an Application Support Center (ASC), a new EAD will be produced and delivered without any further action by the applicant. In cases where USCIS has not yet obtained the required biometric information, the applicant will be scheduled for an ASC appointment.

If another type of petition or application (other than an I-130 petition or associated application) was denied based solely upon DOMA section 3, petitioners or applicants should notify USCIS by March 31, 2014, by sending an e-mail to USCIS at USCIS-626@uscis.dhs.gov as directed above. USCIS will promptly consider whether reopening of that petition or application is appropriate under the law and the circumstances presented.

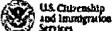
No fee will be required to request USCIS to consider reopening a petition or application pursuant to this procedure. In the alternative to this procedure, petitioners/applicants may file a new petition or application to the extent provided by law and according to the form instructions including payment of applicable fees as directed.

Previously Submitted Applications

• My Form I-130, or other petition or application, was previously denied solely because of DOMA. Will USCIS will reopen those petitions or applications?

- A. Yes
- B. No



 U.S. Citizenship and Immigration Services

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Progress Check

My Form I-130, or other petition or application, was previously denied solely because of DOMA. Will USCIS reopen those petitions or applications?

A. Yes

B. No

Previously Submitted Applications



- Answer: Yes.
- USCIS will reopen those petitions or applications that were denied solely because of DOMA section 3.

U.S. Citizenship and Immigration Services

Progress Check Answer

Answer: Yes.

USCIS will reopen those petitions or applications that were denied solely because of DOMA section 3.

USCIS will make a concerted effort to identify denials of I-130 petitions that occurred on the basis of DOMA section 3 after February 23, 2011. USCIS will also make a concerted effort to notify you (the petitioner), at your last known address, of the reopening and request updated information in support of your petition.

Changes in Eligibility

- Eligibility for benefits for other than immediate relatives depends on the meanings of the terms "marriage" or "spouse."
- Examples of who qualify for benefits:
 - Alien who seeks to qualify as a spouse accompanying or following to join a family-sponsored immigrant
 - An employment-based immigrant
 - Certain subcategories of nonimmigrants
 - Alien who has been granted refugee status or asylum
- Same-sex marriages will be treated exactly the same as opposite-sex marriages



U.S. Citizenship and Immigration Services

Lesson Content

Provide background to Changes in Eligibility.

A same-sex marriage could affect my eligibility if I am seeking admission under a program that requires me to be a "child," a "son or daughter," a "parent," or a "brother or sister" of a U.S. citizen or of a lawful permanent resident.

There are some situations in which either the individual's own marriage, or that of his or her parents, can affect whether the individual will qualify as a "child," a "son or daughter," a "parent," or a "brother or sister" of a U.S. citizen or of a lawful permanent resident. In these cases, same-sex marriages will be treated exactly the same as opposite-sex marriages.

Changes in Eligibility

- Could a same-sex marriage affect my eligibility?
 - A. Yes
 - B. No
 - C. In some situations



U.S. Citizenship and Immigration Services

Progress Check

Read the question to the participants.

Could a same-sex marriage affect my eligibility?

- A. Yes
- B. No
- C. In some situations

Changes in Eligibility



- Answer: In some situations
- There are some situations in which either the individual's own marriage, or that of his or her parents, can affect whether the individual will qualify as a "child," a "son or daughter," a "parent," or a "brother or sister" of a U.S. citizen or of a lawful permanent resident. In these cases, same-sex marriages will be treated exactly the same as opposite-sex marriages.

U.S. Citizenship and Immigration Services

Progress Check Answer

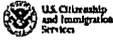
Read the answer and rationale.

Answer: In some situations

There are some situations in which either the individual's own marriage, or that of his or her parents, can affect whether the individual will qualify as a "child," a "son or daughter," a "parent," or a "brother or sister" of a U.S. citizen or of a lawful permanent resident. In these cases, same-sex marriages will be treated exactly the same as opposite-sex marriages.

Residency Requirements

- Same-sex marriages, like opposite-sex marriages, may reduce the residence period required for naturalization.
- Naturalization generally requires five years of residence.
- In a same-sex marriage, naturalization is available after three years if the applicant meets certain eligibility requirements.
- Same-sex marriages will be treated exactly the same as opposite-sex marriages.



FOUO | ON MAR 23, 2011

Lesson Content

Provide background to Residency Requirements.

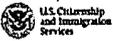
Same-sex marriages, like opposite-sex marriages, can reduce the residence period required for naturalization.

As a general matter, naturalization requires five years of residence in the United States following admission as a lawful permanent resident. But, according to the immigration laws, naturalization is available after a required residence period of three years, if during that three year period you have been living in “marital union” with a U.S. citizen “spouse” and your spouse has been a United States citizen during such period. For this purpose, same-sex marriages will be treated exactly the same as opposite-sex marriages.

INSTRUCTOR NOTE: We should be using the actual date of the marriage, rather than the date of Windsor, as the applicable date in any situation involving time periods since marriage.

Residency Requirements

- Can same-sex marriages, like opposite-sex marriages, reduce the residence period required for naturalization?
 - A. Yes
 - B. No



FOUO | ON MAR 23, 2011

Progress Check

Read the question to the participants.

Can same-sex marriages, like opposite-sex marriages, reduce the residence period required for naturalization?

A. Yes

B. No

Residency Requirements



- Answer: Yes
- According to the immigration laws, naturalization is available after a required residence period of three years, if during that three year period you have been living in “marital union” with a U.S. citizen “spouse” and your spouse has been a United States citizen during such period.



FOUO | ON MAR 23, 2011

Progress Check Answer

Read the answer and rationale.

Answer: Yes

According to the immigration laws, naturalization is available after a required residence period of three years, if during that three-year period you have been living in “marital union” with a U.S. citizen “spouse” and your spouse has been a United States citizen during such period.

Inadmissibility Waivers

- Immigration laws allow discretionary waivers.
- The applicant has to be the “spouse” or other family member of a U.S. citizen or of a lawful permanent resident.
- Same-sex marriages count for the waiver if the definition of “spouse” is met.
- Same-sex marriages will be treated exactly the same as opposite-sex marriages.



FOUO | ON MAR 23, 2011

Lesson Content

Provide background to inadmissibility waivers.

Immigration laws allow discretionary waivers of certain inadmissibility grounds under certain circumstances. For some of those waivers, the person has to be the “spouse” or other family member of a U.S. citizen or of a lawful permanent resident. In cases where the required family relationship depends on whether the individual or the individual’s parents meet the definition of “spouse,” same-sex marriages count for that purpose. Whenever the immigration laws condition eligibility for a waiver on the existence of a “marriage” or status as a “spouse,” same-

sex marriages will be treated exactly the same as opposite-sex marriages.

NOTE: A same-sex marriage may also create a parent-child relationship under INA § 101(b)(1)(B). That could be relevant for either the parent (e.g., 212(h)) or the child (for many waivers).

Inadmissibility Waivers

• In cases where the required family relationship depends on whether the individual or the individual's parents meet the definition of "spouse," will same-sex marriages count for that purpose?

- A. Yes
- B. No



FD-101 (Rev. 04-2014)

Progress Check

Read the question to the participants.

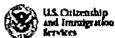
In cases where the required family relationship depends on whether the individual or the individual's parents meet the definition of "spouse," will same-sex marriages count for that purpose?

- A. Yes
- B. No

Inadmissibility Waivers

• Answer: Yes

• Whenever the immigration laws condition eligibility for a waiver on the existence of a "marriage" or status as a "spouse," same-sex marriages will be treated exactly the same as opposite-sex marriages.



FD-101 (Rev. 04-2014)

Progress Check Answer

Read the answer and rationale.

Answer: Yes

Whenever the immigration laws condition eligibility for a waiver on the existence of a "marriage" or status as a "spouse," same-sex marriages will be treated exactly the same as opposite-sex marriages.

Documentary Requirements

- Petitioners in same-sex marriage cases, like those in opposite-sex marriage cases, must demonstrate that a marriage is bona fide.
- This can be accomplished through testimony, documentary evidence, or a combination of the two.
- Some documentary evidence routinely seen in opposite-sex cases may not be available in same-sex marriage cases.



FD-101 (Rev. 04-2014)

Lesson Content

Provide background regarding Documentary Requirements.

USCs or LPRs who petition for a spouse must establish that the marriage is bona fide. This requirement exists whether it's a same-sex or opposite-sex marriage. *See* 8 CFR 204.2(a)(2).

Documentary evidence can take many forms including, but not limited to, proof that the beneficiary has been listed as the petitioner's spouse on insurance policies, property leases, income tax forms, or bank accounts. *See Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983). Petitioners in same-sex marriage cases may not be able to provide the same documents routinely submitted in opposite-sex marriage cases.

Documentary Requirements

Unavailable evidence may include:

- Tax returns (since the parties couldn't file in married status until after *Windsor*);
- Affidavits from friends and/or family members (one or both parties may not have "come out" to certain people);
- Medical insurance or pension/death benefit paperwork (if the individual is concerned about being "outed" at work as a result of listing the spouse in such documents);
- Joint leases naming both parties as tenants (the parties may fear discrimination).



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Documentary Requirements

- Rather than focus on the evidence that is unavailable, adjudicators should review the evidence that is in the record.
- The only issue is whether the petitioner met his or her burden of proof (either a preponderance of the evidence or clear and convincing evidence).
- Individuals should not be penalized for failing to produce certain documents that the adjudicator may expect.



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Documentary Requirements

- Should adjudicators be flexible in considering failures to provide specific evidence in response to RFEs in same-sex marriage cases?

- A. Yes
- B. No



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Documentary Requirements



- Answer: Yes
- All petitioners must meet the applicable standard of proof in establishing the bona fide nature of their marriages; however, adjudicators should remember that petitioners in same-sex marriages may not be able to produce the same documents as those in opposite-sex marriages. There is no statutory or regulatory requirement that certain documentary evidence (e.g., tax returns, affidavits) be submitted to establish a bona fide marriage. The adjudicator should focus on the evidence in the record and make a decision based only on that.



FILED Do Not Erase

Lesson Content

For example, tax returns may not be available because until the *Windsor* decision, federal law did not permit a same-sex couple to file in one of the "Married" status categories. Other documents, such as affidavits from friends/family or certain employment-related documents, might not be available if either the petitioner or the beneficiary is unwilling to "come out."

Lesson Content

Adjudicators should focus on the evidence that is present in the file rather than penalize a petitioner/beneficiary for being unable to provide certain types of documents that are "normal" or "expected." Certain features of the case (e.g., hiding the marriage from family members) may be a sign that the parties are in a sham marriage; however, adjudicators should remember that same-sex marriage cases possess considerations that do not exist in opposite-case cases.

Progress Check

Read the question to the participants.

Should adjudicators be flexible in considering failures to provide specific evidence in response to RFEs in same-sex marriage cases?

A. Yes

B. No

Progress Check Answer

Read the answer and rationale.

Answer: Yes

All petitioners must meet the applicable standard of proof in establishing the bona fide nature of their marriages; however, adjudicators should remember that petitioners in same-sex marriages may not be able to produce the same documents as those in opposite-sex marriages. There is no statutory or regulatory requirement that certain documentary evidence (e.g., tax returns, affidavits) be submitted to establish a bona fide marriage. The adjudicator should focus on the evidence in the record and make a decision based only on that.

Even if the petitioner fails to provide specifically requested documents in response to an RFE, the adjudicator should consider whether the evidence is available or even necessary. For example, if an adjudicator requested pension statements from the petitioner's workplace, but the petitioner claimed not to have told an employer of the marriage because he or she fears discrimination, the adjudicator should take that into

account. In that example, the adjudicator should not deny simply for the failure to provide those documents.

However, the petitioner still has to meet the standard of proof. He or she cannot attempt to evade the burden of proof by simply stating that he or she cannot provide evidence because of a fear of discrimination that may result from revealing the marriage.

Interview Considerations

- Environment to discuss a same-sex marriage
- Interpreter's effect on the interview
- Setting the tone of the interview



U.S. Citizenship
and Immigration
Services

HS-01 (2-14-09) 31

Lesson Content

Provide background to Interview Considerations.

It is important to create an interview environment that allows applicants to freely discuss the elements and details of their applications or petitions to identify issues that may be related to sexual orientation or imputed sexual orientation.

Transgender

An umbrella term for people whose gender identity and/or gender expression differs from the sex they were assigned at birth. The term may include but is not limited to: transsexuals, cross-dressers and other gender-variant people. Transgender people may or may not decide to alter their bodies hormonally and/or surgically.

Intersex

Describing a person whose biological sex is ambiguous. The term intersex is not interchangeable with or a synonym for transgender.

INSTRUCTOR NOTE: These resources provide useful information to help you discuss and/or answer questions regarding the LGBTI-associated terms:

- Sexual orientation and homosexuality: <http://www.apa.org/topics/sexuality/orientation.pdf>
- LGBTI Information: <http://www.glaad.org/reference>

Interpreters play a critical role in ensuring clear communication between you and an applicant. The actions of an interpreter can affect the interview as much as those of the interviewing Officer. As in all interviews, you should confirm that the applicant and the interpreter fully understand each other.

While you must conduct all of your interviews in a non-adversarial manner, it is crucial when interviewing LGBTI applicants that you set a tone that allows the applicant to testify comfortably and that promotes a full discussion. You must conduct the interview in an open and nonjudgmental atmosphere designed to elicit the most information from the applicant.

Interview Considerations

- Explain why certain questions are necessary.
- Ask what title to use for the applicant.
- Ask what legal name is to be used on the form.
- Refrain from irrelevant and/or extraneous comments or questions.



U.S. Citizenship
and Immigration
Services

FD-501 (04 Nov 04) 531

Lesson Content

If you feel that it is necessary to ask a question that the applicant may perceive as intrusive, you should explain why the answer to the question is legally necessary.

It is best to ask at the beginning of the interview what pronoun the applicant feels more comfortable with.

If you are confused about the applicant's gender self-identification, you should respectfully admit to feeling confused and ask the applicant what title of address he or she prefers, such as, Ms., Mrs., Mr., Dr., Sir, Ma'am, or other.

When going through the biographical information on the application form at the beginning of the interview, it is appropriate for you to inquire whether the applicant has legally changed his or her name. If yes, you can request the legal name change documents. If no, you should explain why it is necessary to use the legal name on the form, but that during the interview you will refer to the applicant by the name that the applicant feels most comfortable using.

Refrain from making extraneous comments or asking extraneous questions, as they are irrelevant to the purpose of the interview and detract from the professional demeanor the officer should maintain. Avoid questions about a person's sexual practices unless they are relevant to determine the individual's eligibility for a benefit.

Interview Considerations

- Be mindful that for many people there is no topic more difficult to discuss with a stranger than matters relating to sexual orientation.
- Remind the applicant that the interview is confidential.
- Try to use the same language the applicant has used.



U.S. Citizenship
and Immigration
Services

FD-501 (04 Nov 04) 531

Lesson Content

You should be mindful that for many people there is no topic more difficult to discuss with a stranger than matters relating to sexual orientation, gender identity, and serious illness.

Asking questions about difficult or private issues is a sensitive balancing act you face in all interviews. On the one hand, you need to obtain detailed testimony from the applicant. On the other hand, you do not want to badger or traumatize the applicant. The most important thing to understand is that this may be a difficult topic for the applicant to talk about and to be respectful in discussing sexual orientation, gender identity, and serious illness.

Remind the applicant that the interview is confidential. It can also help to ease the applicant's nervousness if you explain confidentiality to the interpreter in the presence of the applicant.

Try to use the same language that the applicant has used in his or her own application. For instance, if an applicant refers to himself as "gay," you should use the term "gay" also, rather than "homosexual" and vice

Interview Considerations

- Do not assume that being a sexual minority is a lifestyle or a choice
- Appropriate lines of inquiry in asking questions to the applicant
- Child considerations
- The bottom line is that it is important to create a non-threatening interview environment



40071-02-000-0001 11

Lesson Content

versa. The most important thing is to understand what a difficult topic this may be for the applicant to discuss and to be respectful.

Do not assume that being a sexual minority is a lifestyle or a choice. This will help you avoid asking questions in a way that may put the applicant on the defensive and result in the applicant holding back information rather than imparting it.

Appropriate lines of inquiry will be used in asking questions about a same-sex marriage application. The applicant's specific sexual practices are not relevant to the claim. Therefore, asking questions about "what he or she does in bed" is an "inappropriate line of inquiry." If the applicant begins to volunteer such information, you should politely tell him or her that you do not need to hear these intimate details in order to fairly evaluate the claim.

What if the applicant has children? Many applicants describe enormous social pressure to marry and being forced into an opposite-sex marriage by their family or society. Therefore, there may be children from a previous opposite-sex marriage in a same-sex marriage application. (Also, individuals may have children within a same-sex marriage through adoption or assisted reproductive technology.) It is not uncommon for lesbians or gay men to marry people of the opposite sex in an effort to conform to societal norms.

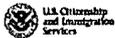
While some lesbians and gay men may feel that they have always known their sexual orientation, others do not come to terms with their sexual identity until much later in life. If you have concerns about the credibility of an LGBTI applicant who is married, it may be appropriate to ask the applicant a few questions surrounding the reasons for marriage. If the applicant is able to provide a consistent and reasonable explanation of why he or she is married and/or has children, that portion of the testimony should be found credible.

While there are some individuals who identify as gay who may also consider themselves effeminate and some individuals who identify as lesbian who may also consider themselves masculine, many men who identify as gay will not appear effeminate and many women who identify as lesbians will not appear masculine.

The bottom line: It is important to create an interview environment that allows applicants to freely discuss the elements and details of their applications or petitions to identify issues that may be related to sexual orientation.

Role Play/Exercise

- In each of the next 9 situations provided, determine if you see any part of the interview that may not be going properly, please?
- How you would do it differently?



Role-Play Exercise

INSTRUCTOR NOTE: Follow the instructions below and conduct role-play and discussions in each of the nine situations. The role-plays/exercises are design for the instructor-led or webinar-delivery methods.

ROLE PLAY/EXERCISE: SAME-SEX MARRIAGE CLIENT INTERVIEW

Instructions to Instructor/Presenter

- **Instructor-led training:**

- Two people to conduct role play on Situations 1 and 2
- Instructor will lead the discussion after each situation
- Presenter allow for discussion and clarification before moving on to the next situation or before ending the lesson.

- **Webinar:**

- Presenter reads each situation.
- Presenter asks participants to raise their virtual hand when they think the interview may not be going properly.
- Presenter stops and asks, "What problem are we having here?" Presenter calls on participant(s) to respond.
- For situations 1 and 2, the presenter asks, "Given the training that was just presented to you today, how might the adjudicator handle the situation differently?"
- Presenter allow for discussion and clarification before moving on to the next scenario or before ending the lesson.

INSTRUCTOR NOTE: The purpose of this role play/exercise is to underscore the interviewing sensitivities with same-sex marriage applicant(s) and also to emphasize that the adjudicator should avoid questions about a person's sexual orientation/practices when there is no connection between the applicant's eligibility for a benefit and his or her sexual orientation.

SPOKEN INTRODUCTION to class:

This is a role-play exercise where adjudicator demonstrates appropriate sensitivities and avoids inappropriate lines of inquiry when interviewing LGBTI applicant(s).

Please raise your hand (real or virtual) if you see and/or hear any part of the interview that you think may not be going properly. Then we can discuss (1) what problems we are having and (2) how to do it differently.

Situation 1:

Situation 1
Adjudicator: *Hi, ummm, Mr. or Mrs. Jones, how are you today?*

- What problem(s) are we having?
- How you would do it differently?

 #00123456789

Adjudicator: “Hi, ummm, Mr. or Mrs. Jones, how are you today?”

(Hopefully, people raise hands.)

WHAT PROBLEM ARE WE HAVING?

Anticipated responses:

- If you are confused about the applicant’s gender self-identification, you should respectfully admit to feeling confused; and,
- Ask the applicant what title or honorific to address them by, such as Ms., Mrs., Mr., Dr., Sir, Ma’am, or other.

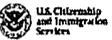
HOW MIGHT THE ADJUDICATOR HANDLE IT DIFFERENTLY?

Adjudicator: “Before we get started, tell me how you prefer that I address you, please?”

Situation 2:

Situation 2
Adjudicator: *Shall I refer to one of you as a wife and the other as a husband?*
Client (hesitant, clearly disturbed): *No, you can use the term “spouse” when speaking of my partner.*
Adjudicator: *Whew! This is good because I really don’t know much about your types and I am really nervous.*

- What problem(s) are we having?
- How you would do it differently?

 #00123456789

Adjudicator: “Shall I refer to one of you as a wife and the other as a husband?”

(Hopefully, people raise hands.)

Client (hesitant, clearly disturbed): “No, you can use the term ‘spouse’ when speaking of my partner.”

Adjudicator: “Whew! This is good because I really don’t know much about your types and I am really nervous.”

(Hopefully, people raise hands.)

WHAT PROBLEM ARE WE HAVING?

Anticipated Responses:

- Sounds disrespectful
- Sounds judgmental

HOW MIGHT THE ADJUDICATOR HANDLE IT DIFFERENTLY?

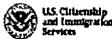
Adjudicator: “Sir/ Ma’am may I have the name of your spouse, please?”

Situation 3:

Situation 3

Adjudicator: *How could it be that you have children since you are a homosexual?*

- *What problem(s) are we having?*
- *How you would do it differently?*

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41
PMSI 26 Nov 07 03081

Adjudicator: “How could it be that you have children since you are a homosexual?”

(Hopefully, people raise hands.)

WHAT PROBLEM ARE WE HAVING?

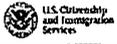
Anticipated Responses:

- It is important to conduct the interview in an open and nonjudgmental atmosphere. Try to use the same language that the applicant has used. For example if the applicant refers to himself as gay, you should use this term rather than homosexual and vice versa.
- It is not uncommon for lesbians or gay men to marry people of the opposite sex in an effort to conform to societal norms. While some lesbians and gay men may feel that they have always known their sexual orientation, many others do not come to terms with their sexual identity until much later in life and therefore might have children.
- Some LGBTI individuals have children through adoption or assisted reproductive technology, as well as (in some cases) through an opposite-sex relationship at one time.
- If you have concerns about the credibility of an LGBTI applicant who has children it may be appropriate to ask the applicant a few questions surrounding why he or she has children. If the applicant is able to provide a consistent and reasonable explanation of why he or she has children, that portion of the testimony should be found credible.

Situation 4:

Situation 4
Adjudicator: So, why do you feel you wanted to be gay?

- What problem(s) are we having?
- How you would do it differently?

 POLICE OF THE CHIEF

Adjudicator: “So, why do you feel you wanted to be gay?”

(Hopefully, people raise hands.)

WHAT PROBLEM ARE WE HAVING?

Anticipated Responses:

- Don’t assume that being LGBTI is a choice. This will help you avoid asking questions in a way that that may put the applicant on the defensive.
- Avoid questions about a person’s sexual orientation/practices when there is no connection between the applicant’s eligibility for a benefit and his or her sexual orientation/practice.
- What does this question have to do with the benefit being sought?

Situation 5:

Situation 5
Adjudicator: Wow! You two don't look gay to me!

- What problem(s) are we having?
- How you would do it differently?

 POLICE OF THE CHIEF

Adjudicator: “Wow! You two don’t look gay to me!”

(Hopefully, people raise hands.)

WHAT PROBLEM ARE WE HAVING?

Anticipated Responses:

- While there are some individuals who identify as gay who may also consider themselves effeminate and some individuals who identify as lesbian who may also consider themselves masculine, many men who identify as gay will not appear effeminate and many women who identify as lesbians will not appear masculine.

Situation 6:

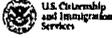
Situation 6

Adjudicator: *How does your family feel about you being in a gay marriage?*

Client (hesitant, clearly disturbed): *I haven't told my family that I'm married. I haven't come out to my family yet.*

Adjudicator: *That's a great excuse to hide a sham marriage.*

- *What problem(s) are we having?*
- *How you would do it differently?*

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Adjudicator: “How does your family feel about you being in a gay marriage?”

(People may raise hands.)

Petitioner (hesitant, clearly disturbed): “I haven’t told my family that I’m married. I haven’t come out to my family yet.”

Adjudicator: “That’s a great excuse to hide a sham marriage.”

(Hopefully, people raise hands.)

WHAT PROBLEM ARE WE HAVING?

Anticipated Responses:

- Sounds disrespectful
- Sounds judgmental and/or accusatory.
- While it’s true that many people in sham marriages hide the marriage from close family members, opposite-sex marriages can sometimes be complicated by the fact that the petitioner and/or beneficiary may not have come out to family members.
- This is a legitimate concern that adjudicators need to keep in mind.
- Rather than attack the petitioner/beneficiary, the adjudicator should focus on other ways to determine that the parties are in a bona fide relationship.

Situation 7:

Situation 7

Adjudicator: *If you and your spouse really wanted to get married for years, like you claim, why didn't you go to one of the states with gay marriage?*

- *What problem(s) are we having?*
- *How you would do it differently?*

 U.S. Citizenship and Immigration Services

Adjudicator: “If you and your spouse really wanted to get married for years, like you claim, why didn’t you go to one of the states with gay marriage?”

(Hopefully, people raise hands.)

WHAT PROBLEM ARE WE HAVING?

Anticipated Responses:

- It is important to conduct the interview in an open and nonjudgmental atmosphere.
- Try to use the same language that the applicant has used. For example if the applicant refers to himself as gay, you should use this term rather than homosexual and vice versa.
- Using “same-sex marriage” rather than “gay marriage” will likely help avoid inadvertently offending the petitioner/applicant.
- Although several states have allowed same-sex marriages for years, adjudicators should not penalize petitioners/beneficiaries for not traveling to one of those jurisdictions to get married earlier.

Situation 8:

Situation 8

Adjudicator: *Don't you think it's suspicious that you and the beneficiary claim to have been together for years but only rushed out to get married after you could get immigration benefits?*

- *What problem(s) are we having?*
- *How you would do it differently?*

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Adjudicator: “Don’t you think it’s suspicious that you and the beneficiary claim to have been together for years but only rushed out to get married after you could get immigration benefits?”

(Hopefully, people raise hands.)

WHAT PROBLEM ARE WE HAVING?

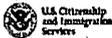
Anticipated Responses:

- Getting married shortly after the *Windsor* decision does not mean the parties are carrying out a sham marriage.
- It's possible that the couple was advised by an attorney not to get married (to avoid issues of immigrant intent if the beneficiary was maintaining a nonimmigrant status) or simply wasn't motivated to take the step of marriage until they were able to gain the same legal privileges of opposite-sex couples.
- Adjudicators should look at all factors and not focus on any one detail they may find suspicious.

Situation 9:

Situation 9
Adjudicator (speaking to a stepchild beneficiary): How do you feel about having a gay mother/father?

- What problem(s) are we having?
- How you would do it differently?

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Adjudicator (speaking to a stepchild beneficiary): “How do you feel about having a gay mother/father?”

(Hopefully, people raise hands.)

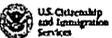
WHAT PROBLEM ARE WE HAVING?

Anticipated Responses:

- It is important not to be offensive or judgmental.
- Not only are a child's personal feelings about a parent's sexuality completely irrelevant in an adjudication, it's important to keep in mind that this would likely be an extremely sensitive topic for any child.

END OF EXERCISE

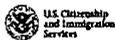
Any Questions?

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Conclusion

Summary

- Defined the general guidance from OCC;
- Reviewed the U.S. states and countries which recognize same-sex marriages;
- Reviewed the July 1, 2013, statement from the Secretary and the accompanying FAQs;
- Reviewed same-sex marriage interview considerations; and,
- Talked through several likely same-sex marriage interview scenarios.



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Review In our time together, we covered much ground. About 36–48 hours from now, it will begin to dawn on you just how much we covered during this short time. Specifically, here’s what we spoke about today:

- Defined the general guidance from the Chief Counsel;
- Reviewed the U.S. states and countries which recognize same-sex marriages;
- Reviewed the July 1, 2013, statement from the Secretary and the accompanying FAQs;
- Reviewed same-sex marriage interview considerations; and,
- Talked through several likely same-sex marriage interview scenarios.

Resources for ISOs



- [26-June-2013 Supreme Court Windsor Decision](#)
- [01-July-2013 OCC Memo on Adams v Howerton](#)
- [17-July-2013 BIA Decision on Zeleniak](#)
- [26-July-2013 OCC Memo – General Guidance on SSM](#)
- [30-September-2013 OCC Guidance on Place-of-Celebration Rule](#)



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Resources for ISOs

(Links to germane documents on ECN)

- [26-June-2013 Supreme Court Windsor Decision](#)
- [01-July-2013 OCC Memo on Adams v Howerton](#)
- [17-July-2013 BIA Decision on Zeleniak](#)
- [26-July-2013 OCC Memo -- General Guidance on SSM](#)
- [30-September-2013 OCC Guidance on Place-of-Celebration Rule](#)

Remotivation As we said at the onset, our role, as sworn officers of the immigration services of the United States of America, is to apply the law of the land — which includes the repeal of Section 3 of the Defense of Marriage Act (DOMA).

As filings of the petitions and applications for same-sex spouses wishing to immigrate to the United States continue to increase, one cannot overstate the importance in understanding the guidance for addressing petitions and applications involving same-sex marriages.

Please note, the goal is not to extend “extra” or “special” privileges to a select population. Rather, the aim is to extend the same benefits to all eligible couples — and treat them with the same measure of dignity and respect.



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