THE POSSIBLE IMPACT OF THE SUPREME COURT’S
WINDSOR DECISION ON INDIVIDUALS PREVIOUSLY
REMOVED\(^1\)
(\textit{July 2013})
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I. INTRODUCTION

This Practice Advisory analyzes how the Supreme Court’s decision in \textit{Windsor v. United States}, No. 12-307, 570 U.S. \underline{____}, 2013 U.S. LEXIS 4921 (June 26, 2013) may affect the ability of individuals who have already been deported to return to the United States if they are currently in a same-sex marriage or may enter into a same-sex marriage. \textit{This Practice Advisory does not provide comprehensive information about all of the potential avenues of return raised. For more information as to post-deportation mechanisms in general, see additional Practice Advisories on our website \url{www.bc.edu/postdeportation}, or contact our office at (617) 552-9261 or pdhrp@bc.edu.}

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II. WHAT DID THE SUPREME COURT SAY ABOUT DOMA?

On June 26, 2013, the Supreme Court issued its long-awaited decision in Windsor v. United States. The Court held that Section 3 of the Defense of Marriage Act (“DOMA”, Defense of Marriage Act of 1996, § 3, 10 Stat. 2419, 1 U.S.C. § 7 and 28 U.S.C. § 1738C), which defines marriage as limited to one man and one woman for federal purposes, is unconstitutional. At its core, the decision indicates that same-sex spouses should be treated the same for purposes of immigration benefits as different-sex spouses, though there may be certain complexities depending upon where the marriage was contracted and where the couple resides. Still, the core holding is significant because many immigration benefits depend on the recognition of the validity of a marriage. There are also discretionary aspects of certain immigration measures that should now weigh same-sex marriage as a powerful factor in the required balance.

On July 1, 2013, the Department of Homeland Security posted responses to “Frequently Asked Questions” on its website, clarifying that U.S. citizens or lawful permanent residents in a same-sex marriage to a foreign national can now sponsor their spouses for a family-based immigrant visa. The U.S. Citizenship and Immigration Service has already begun approving I-130 relative petitions filed by same-sex spouses.

Practitioners should note at the outset that the validity of same-sex marriages will be subject to the same sort of scrutiny as different-sex marriages. Most notably, in order for a marriage to be valid for immigration purposes, it must be valid under the law of the state or country in which it was entered into. USCIS Adjudicators’ Field Manual Ch. 21.3(a)(2); Matter of Ceballos, 16 I&N Dec. 765 (BIA 1979); Matter of Da Silva, 15 I&N Dec. 778 (BIA 1976).

The majority opinion in Windsor concluded that DOMA violated equal protection by discriminating against those to whom the states – acting in their capacity as regulators of marriage and domestic relations – have “sought to give further protection and dignity.” Slip Op. at 20. Because of the importance in the opinion placed on the role of the states in regulating marriage, it is not clear that all same-sex marriages will be recognized for purposes of immigration law. Same-sex marriages that are entered into in a state that recognizes the marriage are now clearly valid for immigration purposes, regardless of where the couple resides (including if they reside in a state that does not recognize same-sex marriages). It is equally clear that a same-sex marriage entered into in a foreign country that legally recognizes the marriage is valid for immigration purposes if the couple resides in a state that recognizes their same-sex marriage. (In fact, this was the scenario in Windsor).

6 The following states recognize same-sex marriage as of the date of this advisory, in addition to the District of Columbia: California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington.
7 The following countries recognize same-sex marriage as of the date of this advisory: Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, and Uruguay. In addition, same-sex marriages are recognized in some regions of Mexico.
However, it is not as clear that a same-sex marriage entered into in a foreign country would be recognized as valid if the couple resides in a state that does not recognize same-sex marriage. Adjudicators might draw an analogy to first-cousin marriages, which are valid in some countries and some states. The USCIS Adjudicators’ Field Manual states that “[i]n cases where such marriages do not offend the laws of the state where the parties reside, the marriage will be recognized for immigration purposes.” Ch. 21.3(a)(2)(C). While such an interpretation might violate the thrust of the Windsor decision, until additional agency guidance appears, it would be prudent to advise a couple who entered into a same-sex marriage in a foreign country to reside in a state that recognizes their marriage as valid to ensure that their marriage will be recognized for immigration purposes.

III. HOW DOES THE WINDSOR DECISION AFFECT INDIVIDUALS WHO HAVE ALREADY BEEN REMOVED?

Individuals who have already been removed and who wish to return to the United States face significant hurdles. The Supreme Court’s decision in Windsor opens up certain unprecedented opportunities for those in a same-sex marriage with a U.S. citizen or lawful permanent resident (LPR) to seek return to the United States. It may also affect eligibility for immigration benefits for same-sex spouses in a variety of scenarios. However, in a small number of cases, the validity of a same-sex marriage for purposes of immigration law may also have the effect of creating new hurdles.

A. Removed individuals seeking immigrant or nonimmigrant visas

(1) Ability of same-sex spouses to benefit from family-based petitions

Individuals in same-sex marriages may now benefit from a family petition (Petition for Alien Relative, Form I-130) filed on their behalf by their U.S. citizen or LPR spouse. The Department of Homeland Security has stated that it now recognizes same-sex marriages performed in a U.S. state that recognizes same-sex marriage even when the couple resides in a state that does not recognize same-sex marriages. Approval of a spousal petition requires evidence of a “bona fide” marriage, a standard which may require proof of joint ownership of property, commingling of finances, presence of children born into the marriage, affidavits, as well as other documentation. Similarly, U.S. citizens should also be able to file a fiancé(e)

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8 The Post-Deportation Human Rights Project has practice advisories on post-departure Motions to Reopen and Reconsider as well as obtaining nonimmigrant visas post-deportation. They are available on our website at www.bc.edu/postdeportation.


10 For a more in-depth look at family-based immigrant visa petitions and immigration through marriage, see IMMIGRATION LAW AND THE FAMILY, A PRACTICAL GUIDE TO FAMILY-SPONSORED IMMIGRATION (Charles Wheeler ed., 2nd ed. 2011).
petition (Petition for Alien Fiancé, Form I-129F) on behalf of a same-sex fiancé(e) if they intend to enter into a same-sex marriage in a U.S. state that recognizes same-sex marriages. Among many other requirements, fiancé(e) petitions must generally show that the individuals have met in person in the two years preceding the filing of the petition. INA §214(d)(1).

Same-sex spouses should also now be eligible for I-730 Refugee/Asylee Relative Petitions (filed by an individual granted asylum or refugee status for a spouse and unmarried children).

In addition to now being eligible to be the primary beneficiary of a petition filed by a U.S. citizen or LPR same-sex spouse, noncitizens may also benefit as derivatives on immigrant visa petitions of which their same-sex spouse is a primary beneficiary where the petition is filed in a category that allows for derivatives (i.e. family third and fourth preference categories where a noncitizen spouse is beneficiary of a petition filed by a U.S. citizen parent or sibling respectively, or employment-based immigrant visas). For example, a third preference family-based petition filed by a U.S. citizen parent on behalf of a married adult son may now include the same-sex spouse of the principal beneficiary as a derivative beneficiary. INA § 203(d).

The implications of Windsor extend far beyond the direct recognition of marriages. For example, to the extent that the recognition of a step-child/step-parent relationship depends on the existence of a valid marriage between the natural parent and the step-parent, individuals could also benefit from the recognition of same-sex marriages. Thus, step-children of U.S. citizens or LPRs in a same-sex marriage may now be treated as step-children for purposes of obtaining immigration benefits (such as family-based immigrant visas). Conversely, step-parents in a same-sex marriage may benefit from a petition filed by their adult U.S. citizen step-children.

(2) Same-sex spouses as qualifying relatives for purposes of obtaining an “extreme hardship” waiver

Those who have been removed and who subsequently seek immigrant visas through a relative or employer petition often require waivers of inadmissibility. Many such waivers require a showing of “extreme hardship” to a qualifying relative, which includes a U.S. citizen or LPR spouse. For example, this is the case for waivers of the three and ten year bars as a result of prior unlawful presence (INA § 212(a)(9)(B)(v)), the waiver for misrepresentation or fraud (INA § 212(i)), and the waiver for criminal grounds of inadmissibility (INA § 212(h)). Until now, individuals with same-sex partners or spouses but with no qualifying relatives for purposes of waiver eligibility were categorically ineligible to request a waiver. Now, same-sex spouses and fiancé(e)s (9 FAM 41.81 N9.3(a)) should be recognized as qualifying relatives for purposes of waiver eligibility.

(3) Same-sex spouses as derivatives of spouse’s nonimmigrant visa

All nonimmigrant visas allow for derivative status for spouses and children, through various mechanisms. This can be very significant for those who have been previously removed, as the waiver of inadmissibility for nonimmigrant visas is quite broad. INA § 212(d)(3).
Most directly, a number of nonimmigrant visa categories allow spouses to obtain derivative nonimmigrant status as spouses of the principal nonimmigrant. For example, H-1B and F-1 status nonimmigrant principals can obtain derivative status (in the form of H-4 and F-2 visas) for their spouses. 8 C.F.R. § 214.2(h)(9)(iv); 8 C.F.R. § 214.2(f)(3). Whereas in recent years same-sex partners who did not legally qualify for derivative status had been granted nonimmigrant status in the B-2 visa category pursuant to government policy, the derivative status is now available to lawfully married same-sex spouses.

Similarly, individuals granted a U visa can obtain derivative status for spouses and children (as well as parents or siblings if certain age requirements are met) by submitting an application on their behalf either at the time of filing or at a later date. 8 C.F.R. § 214.14(f). To a more limited extent, individuals granted a T visa may also apply for derivative status for spouses and children. 8 C.F.R. § 214.11(o). All of these derivative categories are now available for same-sex marriage, as described above.

(4) New liabilities/obstacles as a result of recognition of same-sex marriages

**Beneficiaries previously considered unmarried**

Some family-based visa categories require that the beneficiary be unmarried (e.g., unmarried children under the age of 21 of U.S. citizens as immediate relatives, and first and second preference categories unmarried sons and daughters of U.S. citizens and LPRs respectively). Previously, individuals in a same-sex marriage would have been treated as unmarried for purposes of immigration law and therefore may have qualified as beneficiaries in these categories. INA § 203(a). Now, individuals in a same-sex marriage would be considered married and therefore may no longer qualify as beneficiaries in those categories (for example, there is no preference category for married sons and daughters of LPRs), or be converted to a preference category with a more significant backlog (for example, from first preference unmarried sons and daughters of US citizens to third preference married sons and daughters of US citizens).

**Inadmissibility grounds that rely on family association**

Certain grounds of inadmissibility are premised not on the visa applicant’s own past activities or characteristics, but rather on a family association. This is the case for spouses and children of traffickers in controlled substances or in persons and for spouses and children of

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11 9 FAM 41.31 N14.4; PM-602-0045: Changes to B-2 Status and Extensions of B-2 Status for Cohabitating Partners and Other Nonimmigrant Household Members; Revisions to *Adjudicator’s Field Manual (AFM)* Chapters 30.2 and 30.3; *AFM* Update AD11-27 (Aug. 17, 2011).

12 Each of these visas is subject to differing eligibility and application requirements, as detailed in applicable statutory and regulatory sections. See INA § 101(a)(15)(U) and 8 C.F.R. §§ 214.14, 212.17 (U visa); INA § 101(a)(15)(T) and 8 C.F.R. § 214.11 (T visa).

13 See analysis above in Part II regarding recognition of same-sex marriages performed outside the United States.

14 In addition, because immigration law defines a “child” as an individual under the age of 21 and unmarried (INA § 101(b)(1)), any reference to a “child” in the INA would now exclude individuals under the age of 21 who are in a same-sex marriage now recognized for immigration purposes.
Marriage fraud grounds

INA § 204(c) bars approval of a subsequent immigrant visa petition where the noncitizen previously was granted or attempted to obtain LPR status through a marriage that is determined – in the course of the adjudication of the new I-130 – to have been entered into to evade immigration laws.

Presumption of immigrant intent

Individuals who are not eligible for an immigrant visa, regardless of the validity of same-sex marriage (for example, due to a “permanent bar” or a drug conviction for which no waiver is available), but who wish to seek nonimmigrant visas may face a larger hurdle in showing nonimmigrant intent if they are in a same-sex marriage to a U.S. citizen or LPR. Though marriage to a U.S. citizen or LPR alone, or even the presence of a pending I-130 petition, should not be sufficient to deny a nonimmigrant visa petition based on a finding of immigrant intent (INA § 214(b), 9 FAM 41.31 N14.1 and N14.3), it may nonetheless affect the analysis.

B. Administrative Motions to Reopen based on relief eligibility in light of Windsor

Individuals with same-sex spouses may have been denied relief from removal, such as adjustment of status or non-LPR cancellation of removal, because their marriage was not regarded as valid for purposes of immigration law. If a different outcome may have resulted had the Immigration Judge (IJ) or the Board of Immigration Appeals (BIA) considered the same-sex marriage as valid, filing a Motion to Reopen or a Motion to Reconsider with the body that last exercised jurisdiction over the case may be well-worth considering.

There are a number of discretionary forms of relief from removal in which the discretionary calculus takes into account the individual’s marriage to a U.S. citizen or LPR. If a form of relief was denied because the individual’s same-sex marriage was not recognized, that may lay the foundation for a Motion to Reopen or Reconsider. Some forms of relief in which marriage to a U.S. citizen or LPR may be relevant are:

- **LPR Cancellation of Removal (INA § 240A(a)/Relief under former INA § 212(c))**: The criteria for a favorable exercise of discretion for these forms of relief include the presence of family ties and hardship to the individual’s U.S. citizen and LPR family members, which now includes hardship to same-sex spouses. *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978) (212(c) case); *Matter of C-V-T-*, 22 I&N

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15 In addition, the language of the Supreme Court’s decision may be used to strengthen asylum claims based on one’s inability to enter into a same-sex marriage in their country of origin. However, this analysis is beyond the scope of this advisory.

- **Non-LPR Cancellation of Removal (INA § 240A(b))**: Statutory eligibility for this form of relief requires a showing of exceptional and extremely unusual hardship to the individual’s spouse, parent, or child who is a U.S. citizen or LPR. Same-sex U.S. citizen or LPR spouses are now qualifying relatives for purposes of demonstrating the requisite hardship.16

- **Waiver of inadmissibility pursuant to INA § 212(h)**: In order to qualify for 212(h) a waiver of inadmissibility, applicants must demonstrate hardship to a U.S. citizen or LPR spouse, parent, or child. Again, a same-sex spouse would now qualify. In addition, applicants must demonstrate that they are deserving of a favorable exercise of discretion, and family ties and hardship to a U.S. citizen and LPR spouses are discretionary factors. Matter of Mendez-Moralez, 21 I&N Dec. 296 (BIA 1996) (citing Matter of Marin, 16 I&N Dec. 581 (BIA 1978)).

Generally, individuals are limited to filing one motion to reopen within 90 days of the final administrative order of removal, and one motion to reconsider within 30 days of the final order. INA § 240(c)(7)(A), (C); INA § 240(c)(6)(A), (B). In addition, most circuit courts have recognized that the filing deadlines, and in some instances the numerical limitations, are not jurisdictional and are thus subject to equitable tolling.17 Therefore, there may be strong arguments that a motion nonetheless satisfies the time limitations despite being filed beyond the 30 or 90 day deadline. Finally, the regulations provide that the BIA and IJs have sua sponte authority to reopen or reconsider their own decisions “at any time,” without regard to the time and number limitations.18 The distinction between a timely or equitably tolled motion and a sua sponte one can be important as it may affect both whether a circuit court will review the denial of a motion, as well as whether a motion may be filed post-departure.19

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16 An abused spouse of a U.S. citizen or LPR may also qualify for cancellation of removal pursuant to the Violence Against Women Act. INA § 240A(b)(2).

17 See, e.g. Neves v. Holder, 613 F.3d 30 (1st Cir. 2010) (assuming, but not deciding, that time and number limitations are subject to equitable tolling); lavorski v. INS, 232 F.3d 124 (2d Cir. 2000) (time limitation subject to equitable tolling); Borges v. Gonzales, 402 F.3d 398 (3d Cir. 2005) (180 day time limitation to reopen in absentia order subject to equitable tolling); Davies v. US INS, 10 Fed.Appx. 223 (4th Cir. 2001) (unpublished) (time and number limitations subject to equitable tolling); Harchenko v. INS, 379 F.3d 405 (6th Cir. 2004) (time limitation subject to equitable tolling); Pervaiz v. Gonzales, 405 F.3d 488, 490 (7th Cir. 2005) (same); Hernandez-Moran v. Gonzales, 408 F.3d 496 (8th Cir. 2005) (same); Socap-Gonzalez v. INS, 272 F.3d 1176, 1183-85 (9th Cir. 2001) (same); Iturribaria v. INS, 321 F.3d 889 (9th Cir. 2003) (number limitation subject to equitable tolling); Riley v. INS, 310 F.3d 1253, 1257-58 (10th Cir. 2002) (time limitations subject to equitable tolling); Avila-Santoyo v. AG, 713 F.3d 1357 (11th Cir. 2013) (time limitations subject to equitable tolling). The Fifth Circuit has treated requests for equitable tolling as equivalent to requests for sua sponte reopening, and has held that it lacks jurisdiction to review the BIA’s denial of such motions. See e.g. Ramos-Bonilla v. Mukasey, 543 F.3d 216 (5th Cir. 2008).

18 8 C.F.R §§ 1003.2(a) (BIA), 1003.23(b)(1) (IJ). In addition, the regulations allow for joint motions to reopen which are not subject to time or numerical limitations. 8 C.F.R. § 1003.2(c)(3)(iii) (time); § 1003.23(b)(4)(iv) (time and number).

19 See, e.g. Zhang v. Gonzales, 469 F.3d 51 (1st Cir. 2006) (BIA decision to reopen sua sponte is unreviewable); Calle-Vujiles v. Ashcroft, 320 F.3d 472 (3d Cir. 2003) (same); Ekmian v. INS, 303 F.3d 1153 (9th Cir. 2002) (same). Three circuits have invalidated the departure bar on motions to reopen in the context of timely motions, but upheld the regulation in the context of sua sponte motions. Compare Garcia-Carias v. Holder, 697 F.3d 257 (5th
A Motion to Reopen can be filed based on new evidence, not previously available. INA § 240(c)(7)(B); 8 C.F.R. § 1003.2(c)(1). A Motion to Reconsider can be filed based on an error of law or fact. INA § 240(c)(6)(C); 8 C.F.R. §§ 1003.2(b)(1), 1003.23(b)(2). Either a Motion to Reopen or a Motion to Reconsider may be the proper vehicle to raise the changed circumstances as a result of the Supreme Court’s decision invalidating DOMA.20

Practitioners’ Tip ➔ Because of the existing barriers to motions to reopen (such as time and numerical limitations, and the “departure bar” discussed more fully in our Practice Advisory on Post-Departure Motions to Reopen and Reconsider (December 2012)), where the removed noncitizen is married to a U.S. citizen or LPR, consular processing may provide a more direct and easier route to return. This route is now available to same-sex couples, as described above.

Practitioners must of course consider the facts of each case, including the availability of equitable tolling, case law invalidating the “departure bar” and any applicable grounds of inadmissibility in deciding whether to pursue an administrative motion to reopen in addition to or instead of consular processing where consular processing is also an option.

If the case is also currently on appeal on a petition for review before a circuit court, counsel may wish to file a request to hold the case in abeyance while a Motion to Reopen is adjudicated by the BIA, seek a remand from the circuit court, and/or consider approaching the Office of Immigration Litigation attorney to discuss the possibility of a joint remand.21

20 PDHRP believes that the Windsor rationale should be applied retroactively to recognize the validity of marriages that took place prior to the Supreme Court’s decision. See, e.g., Chaidez v. United States, 133 S. Ct. 1103 (2013); Ovalles v. Holder, 577 F.3d 288 (5th Cir. 2009) (same). Some circuits, such as the Ninth Circuit, have established mediation procedures that would allow for a discussion with opposing counsel on obtaining a remand. See http://www.ca9.uscourts.gov/mediation/immigration.php. In the Ninth Circuit, after an I-130 has been approved, counsel can request that the case be placed in mediation. Once accepted into the mediation program, a petition for review is placed in abeyance to permit counsel to file a proposed joint motion to reopen with the relevant DHS office. The rates of success vary on each office’s policies regarding what circumstances warrant reopening to permit a noncitizen to pursue an adjustment application.
IV. CONCLUSION

The Post-Deportation Human Rights Project is devoted to addressing the harsh effects of U.S. deportation policies and to promoting the rights of individuals who have been removed. We are therefore interested in following and understanding how the Supreme Court’s decision invalidating DOMA will be interpreted and applied to individuals seeking immigration benefits or challenging their removal orders post-deportation. If you are working on a case of a removed individual that implicates the Supreme Court’s decision on DOMA and would like further guidance, please contact us at pdhrp@bc.edu.