

Do we have the answers to non-traditional relationships?

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AGENDA

- Overview of History of Anti-Gay Discrimination in U.S. Immigration Law
 - DOMA Victory: What changed in June 2013?
 - Who are/are not beneficiaries of the change?
 - Options for non-beneficiaries
 - Other non-traditional situations
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History of Anti-gay Discrimination in U.S. Immigration Act

Years	What Happened
1917-1990	Exclusion from the U.S.: INA exclusion of all gay persons as 'persons of psychopathic personality'
1950's-90's:	Denial of naturalization of gay persons as 'persons of bad moral character'
1973	American Psychiatric Association holds that being gay is not a disease
1986-2009	HIV exclusion with no humanitarian waiver from 1994 onward
1996	DOMA passed by Congress
1996	U.S. Attorney General finds that gays are a 'social group', owed protection from persecution
1997	Cancellation of Removal amended to exclude consideration of hardship to the foreign national
JUNE 26, 2013	U.S. Supreme Court overturns DOMA. Federal Agencies respond quickly & positively

DOMA: Impact on Immigration

For both immigrant and nonimmigrant visas, same-sex spouses and their child(ren) (stepchild of the principal) are eligible for derivative dependent benefits in the same way as opposite gender spouses for immigration purposes:

1. The marriage is legally valid in the jurisdiction (U.S. state or foreign country) where it (not where they reside).
 2. The stepchild(ren) was/were under 18 years old when the marriage took place.
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Where same sex marriage is legal

- ❑ Currently 14 states, the District of Columbia, and five Native American tribes permit same sex marriage. None have requirements that either party reside there, though tribes have membership requirements.
- ❑ Currently 17 countries or foreign jurisdictions permit same sex marriage. However, some have restrictive residence or citizenship requirements.
- ❑ For details: <http://immigrationequality.org/issues/couples-and-families/where-can-we-marry/>



Domestic Jurisdictions that permit same sex marriage

- | | |
|-------------------------|-------------------|
| 1. California | 9. Minnesota |
| 2. Connecticut | 10. New Hampshire |
| 3. Delaware | 11. New Jersey |
| 4. District of Columbia | 12. New York |
| 5. Iowa | 13. Rhode Island |
| 6. Maine | 14. Vermont |
| 7. Maryland | 15. Washington |
| 8. Massachusetts | |

As of October 2013

Overseas Jurisdictions that permit same sex marriage

- | | |
|--|---|
| 1. Argentina | 10. New Zealand (incl Ross Dependency, but excl Tokelau, Niue & the Cook Islands) |
| 2. Belgium | 11. Norway |
| 3. Brazil | 12. Portugal |
| 4. Canada | 13. Spain |
| 5. Denmark (excl the Faroe Islands & Greenland) | 14. South Africa |
| 6. France | 15. Sweden |
| 7. Iceland | 16. Uruguay |
| 8. Mexico (in Mexico City & in the state of Quintana Roo) | 17 U.K. (<i>England & Wales</i>)
<i>expected to be fully in force in 2014</i> |
| 9. Netherlands (excl Aruba, Curaçao & St Maarten) | |
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As of August 2013

DOMA: Impact in Immigration – What each agency says?

- ✓ Both **USCIS and DOS/Consular Offices Abroad** recognize this change and immediately applied it into their practice.
 - DOS Diversity Visa (DV) Program website “Important Notice”
http://travel.state.gov/visa/immigrants/types/types_1322.html
- ✓ **CBP** currently has no policy in place to permit the admission of same-sex couples as dependent nonimmigrants.
 - Until official guidance is issued, it is anticipated that CBP could deny admission of a same-sex spouse in a dependent classification.
 - However, it is perfectly legal for someone to apply for admission as a dependent.
 - The CBP officer would likely defer to the DOS’ determination of eligibility (shown on a visa stamp) for the visa classification sought --- Canadians!

Advising Recommendations:

- Travel with the principal
- Travel with legal documentation to demonstrate legality of the marriage

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U.S. v. Windsor, DOMA, and Immigration Benefits

September 04, 2013

Slides From NAFSA's August 1 Virtual Brown-Bag on U.S. v. Windsor.

On June 26, 2013, the Supreme Court of the United States (SCOTUS) held in *United States v. Windsor* that the Defense of Marriage Act (DOMA) "is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment."

Although the holding in *U.S. v. Windsor* will have implications for immigration benefits that derive from a marital relationship, the federal agencies involved in the immigration process must first implement the decision in their policies and procedures. They have *gradually* begun to do so. Here is what the Departments of State (DOS) and Homeland Security (DHS) have stated so far:

DOS	DHS
<ul style="list-style-type: none"> June 26, 2013 DOS statement: "To fully implement the requirements and implications of the Court's decision, we will work with the Department of Justice and other agencies to review all relevant federal statutes as well as the benefits administered by this agency. We will work to swiftly administer these changes to ensure that every employee and their spouse have access to their due benefits regardless of sexual orientation both at home and abroad." 	<ul style="list-style-type: none"> June 26, 2013 DHS statement: "I applaud today's Supreme Court decision in <i>United States v. Windsor</i> holding that the Defense of Marriage Act (DOMA) is unconstitutional. This discriminatory law denied thousands of legally married same-sex couples many important federal benefits, including immigration benefits. I am pleased the Court agreed with the Administration's position that DOMA's restrictions violate the Constitution. Working with our federal partners, including the

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Post-DOMA: Other Considerations

- **Federal Tax:** IRS has announced that all legally married same-sex couples will be able to file federal taxes as married, regardless of the state they live in.
- **The Family and Medical Leave Act (FMLA)**
- **The Free Application for Federal Student Aid (FAFSA)**
FAFSA applicants with same-sex married parents are required to list the incomes and contributions of both of their parents, and applicants with same-sex spouses are required to list their spouse as part of their household.
- **Social Security Spousal and Family Protections**, if the place of residence recognizes the same-sex marriage (state law governs)

Polygamous Marriages & Other Types of Marriages

Except for the first marriage of a polygamist, the other marriages will not be recognized for immigration benefits. See: [Matter of H., 9 I&N Dec. 640 \(BIA 1962\)](#)

9 FAM 40.1 N1.1 Marriage and Spouse Defined

(CT: VISA-2011; 08-02-2013)

<http://www.state.gov/documents/organization/86920.pdf>

A marriage, in order to be valid for immigration purposes, must be celebrated in the presence of both parties.

...

*c. Marriages, considered to be void under State law as contrary to public policy, **such as polygamous or incestuous marriages**, or which Federal law determines **does not meet the Federal definition of a marriage, cannot be recognized for immigration purposes** even if the marriage is legal in the place of marriage celebration.*

Without recognized marriage, what are their options?

1. B-2 visitor visa
9FAM 41.31 N14.4: Cohabiting Partners, Extended Family Members, and Other Household Members not Eligible for Derivative Status
 2. K visa (if the spouse is a USC)
 3. Get their own principal status
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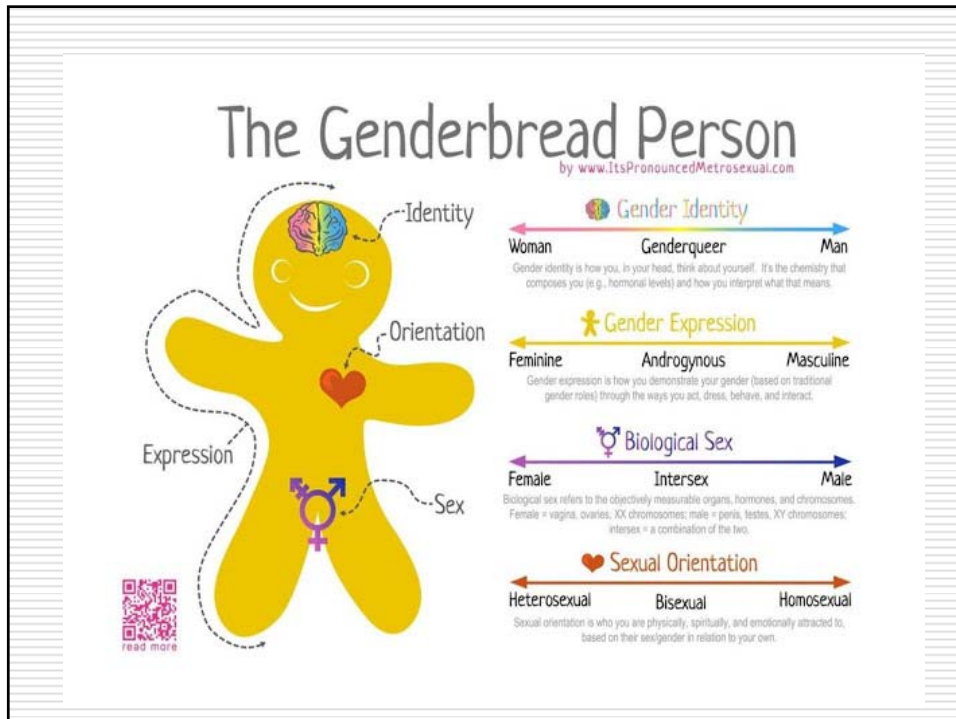
Language Matters

Sexual Preference:

What a person likes or prefers to do sexually; a conscious recognition or choice not to be confused with sexual orientation

Sexual Orientation:

An enduring emotional, romantic, sexual and relational attraction to another person; may be a same-sex orientation, opposite-sex orientation or bisexual orientation



Transgender Considerations

In April, 2012, USCIS issued an interim Policy Memorandum:

“Adjudication of Immigration Benefits for Transgender Individuals;
Addition of *Adjudicator’s Field Manual* (AFM) Subchapter 10.22 and
Revisions to AFM Subchapter 21.3 (AFM Update AD12-02)”

See:

http://www.uscis.gov/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/Transgender_FINAL.pdf

International Student/Scholar Advisor’s Responsibilities

Must recognize same-sex marriage if it is recognized in the
place of celebration

Continue to verify marriages consistent with current
practices

Poll: Do you review marriage certificate (or equivalent)?

Polygamy and SEVIS

International Student/Scholar Advisor's Responsibilities

- Cultural, religious issues among your staff:
 - Refusal to sign I 20's, DS 2019's
 - Refusal to deal with or different treatment of same sex couples in other ways
- Educate yourself and your staff
 - Training and sensitivity to religious/cultural may be helpful.

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QUESTIONS? THANK YOU!

**Please remember to complete
the session evaluation.**

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