



# AFTER DOMA

## WHAT IT MEANS FOR YOU

The Supreme Court victory in *United States v. Windsor* striking down the discriminatory federal Defense of Marriage Act (DOMA) affirms that all loving and committed couples who are married deserve equal legal respect and treatment from the federal government. The demise of DOMA marks a turning point in how the United States government treats the relationships of married same-sex couples for federal programs that are linked to being married. At the same time, a turning point is part of a longer journey, not the end of the road. There is much work ahead before same-sex couples living across the nation can enjoy all the same protections as their different-sex counterparts.

### Keep in Mind:

- The Supreme Court's ruling in *Windsor* applies only to the federal government. It does not change discriminatory state laws excluding same-sex couples from state-conferred marriage rights.
- Federal agencies—large bureaucracies—may need and take some time to change forms, implement procedures, train personnel, and efficiently incorporate same-sex couples into the spousal-based system.
- Until same-sex couples can marry in every state in the nation, there will be uncertainty about the extent to which same-sex spouses will receive federal marital-based protections nationwide. For federal programs that assess marital status based on the law of a state that does not respect marriages of same-sex couples, those state laws will likely pose obstacles for legally married couples and surviving spouses in accessing federal protections and responsibilities.
- Securing fair access to federal protections that come with marriage for all same-sex couples in the nation will take some time and work. In some situations, it may require Congressional action or formal rule-making by agencies.
- Before making a decision, it is essential that you consult an attorney for individualized legal advice. This is particularly important for people who are on certain public benefits, as getting married may jeopardize your eligibility without providing you the full measure of protections other married couples enjoy. In addition, couples who travel to another place to marry and then return to live in a state that does not respect their marriage may be unfairly unable to obtain a divorce, which can lead to serious negative legal and financial consequences. People must make careful decisions when and where to marry, even as we work together to end this injustice.
- We are committed to winning universal access to federal marital protections for married same-sex couples through ongoing public policy advocacy, and, where necessary, strategic litigation. Contact our organizations if you have questions, for updates and to learn more about what you can do to achieve full equality for those who are LGBT.

This Guidance is intended to provide general information regarding major areas of federal marriage-based rights and protections based on how the various federal agencies have administered federal benefits. ***It should not be construed as legal advice or a legal opinion on any specific facts or circumstances, and does not create an attorney-client relationship.*** Past practice is no guarantee of future developments. While laws and legal procedure are subject to frequent change and differing interpretations in the ordinary course, this is even more true now as the federal government dismantles DOMA and extends federal protections to same-sex couples. None of the organizations publishing this information can ensure the information is current or be responsible for any use to which it is put.

No tax advice is intended, and nothing therein should be used, and cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

Contact a qualified attorney in your state for legal advice about your particular situation.

## IMMIGRATION

These FAQs address some of the questions we anticipate LGBT families with immigration issues will have following a Supreme Court decision striking down the Defense of Marriage Act (DOMA). For general information about U.S. immigration law and how it affects LGBT individuals and their families, see the Immigration Equality website, [immigrationequality.org](http://immigrationequality.org). Immigration is a complicated area of law, with many factors to consider specific to each individual. Consult with a qualified immigration attorney about your specific situation.

**Immigration attorneys told me in the past not to marry my partner because this will ruin my chances of getting a visa. Now that DOMA has been struck down, should I seek advice about whether this may have changed?**

For those seeking permanent resident status in the United States, yes, that advice may change now. A reason attorneys have advised foreign partners of U.S. citizens not to marry is that for many of the most common types of non-immigrant visas, such as tourist visas (B1/B2) and student visas (F1), the foreign national entering the U.S. must demonstrate to the U.S. immigration official that he or she does not have the intent to remain in the U.S. permanently. Since there now is a legal means to apply for permanent immigrant status in the U.S. based on a marital relationship, in many cases it will make sense to go ahead and marry and file for permanent benefits.

**Now that DOMA has been held unconstitutional, if I marry my partner can I sponsor her for a green card?**

In many cases, yes. Options for families will vary from case to case, based upon a number of factors, including: whether the partners are living together or in different countries; whether the partners are living together in the United States or abroad; whether the partners have married; whether the partners can marry; and for families together in the United States, whether the non-U.S. citizen partner arrived here after having been inspected by an immigration officer or whether the partner entered without inspection. Same-sex couples will also have to meet the general criteria for marriage-based immigration. For general information about the procedure to apply for marriage-based immigration petitions on behalf of foreign spouses who are inside the U.S., see Immigration Equality's [adjustment of status](http://immigrationequality.org/issues/transgender/adjustment-of-status-procedural-steps/) page ([immigrationequality.org/issues/transgender/adjustment-of-status-procedural-steps/](http://immigrationequality.org/issues/transgender/adjustment-of-status-procedural-steps/)), and for foreign spouses who are outside the U.S., see Immigration Equality's [consular processing](http://immigrationequality.org/issues/transgender/consular-processing-procedural-steps/) page ([immigrationequality.org/issues/transgender/consular-processing-procedural-steps/](http://immigrationequality.org/issues/transgender/consular-processing-procedural-steps/)).

The following outlines some common circumstances for same-sex binational couples.

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American Civil Liberties Union | Center for American Progress | Family Equality Council | Freedom to Marry | Gay & Lesbian Advocates & Defenders  
Human Rights Campaign | Immigration Equality | Lambda Legal | National Center for Lesbian Rights | National Gay and Lesbian Task Force | OutServe-SLDN.

## WE ARE BOTH IN THE UNITED STATES

### My spouse and I married in a marriage equality state and live in a state that recognizes our marriage. Can I file for her?

Yes, your application should be treated exactly as the application of a different-sex couple.

### My spouse and I married in a marriage equality state but live in a state that does not recognize our marriage. Can I still file for him?

U.S. Citizenship and Immigration Services (USCIS) focuses on the place where the marriage was entered (the place of celebration), not the place where one spouse or both spouses live. As long as the marriage was validly entered into under the laws of the state or country of celebration, it should not matter where you currently reside.

### If my partner and I entered into a civil union (for example in New Jersey) or a Domestic Partnership (for example in California) with all the rights of marriage, but are not actually married, can I sponsor her for a green card?

The answer to this is not entirely clear, and we hope to have guidance on this soon. If it is possible for you and your partner to marry even if you have to travel to a different state to do so, you may be better off marrying because you could then feel more secure in filing right away without having to wait for further guidance.

## OTHER CONSIDERATIONS:

### FOR IMMIGRANTS WHO ARE IN LAWFUL IMMIGRATION STATUS

#### I am in the U.S. legally on a non-immigrant visa that allows me to have the intention to stay in the U.S. (for example an H1B or L1 visa). I am married to my spouse; can she file a green card application for me?

Yes, as long as the two of you are lawfully married, and you meet the other general immigration marriage requirements, you should be able to apply to adjust status to lawful permanent resident and process your paperwork from within the U.S. See [immigrationequality.org/issues/transgender/adjustment-of-status-procedural-steps/](https://immigrationequality.org/issues/transgender/adjustment-of-status-procedural-steps/)

#### I am in the United States on a non-immigrant visa (for example a tourist or student visa) that required me to demonstrate that I did not have the intent to immigrate to the U.S. Is it a problem for me to marry my partner and have her file a marriage-based green card application?

Maybe. As with many areas of immigration law, this is an area that will involve a fact-intensive inquiry by the USCIS. It is considered acceptable to enter the U.S. with the intention to remain here temporarily and then have your intent change as circumstances in your life change. For example, a university student might meet someone after attending school here and decide to marry that person months or years after entering the U.S. on a student visa. On the other hand, if a person enters the U.S. on a tourist visa, marries, and applies for a green card within three weeks of entering the U.S., USCIS may conclude that the individual misrepresented her lack of immigrant intent to the immigration official at the airport and this could

lead to a denial of the application. This is the law for different-sex couples, and we expect it will apply identically to same-sex couples.

### FOR IMMIGRANTS WHO ARE OUT OF STATUS

#### I entered the U.S. with a visa several years ago and never left. Can my U.S. citizen spouse file a green card application for me even though I am now here without legal status?

Yes. While the general rule under U.S. immigration law is that you cannot change your status from unlawful to lawful from within the United States, one very important exception to that rule is for spouses of U.S. citizens. As long as you entered the U.S. with inspection by a U.S. immigration officer, you can still file for a green card (adjust status) from within the U.S. even if you are currently here without lawful status.

#### I entered the U.S. without a visa and without inspection, by crossing the Mexican border. Can my spouse sponsor me for a green card?

It's complicated. You cannot file for a green card from within the United States if you entered without inspection. (There is an exception to this rule for people who had an immigration petition or labor certification filed on their behalf on or before April 30 2001.) That means you will have to return to your home country to apply for a green card through consular processing. However, when you leave the U.S. to apply, you will probably be prohibited from returning because of the three year/ten year bar on returning to the U.S. following the accrual of unlawful presence [immigrationequality.org/issues/immigration-basics/most-common-questions/#unlawful-presenceundocumented-immigrants](https://immigrationequality.org/issues/immigration-basics/most-common-questions/#unlawful-presenceundocumented-immigrants) here. You may be able to file for a provisional waiver [immigrationequality.org/issues/transgender/the-provisional-unlawful-presence-waiver/](https://immigrationequality.org/issues/transgender/the-provisional-unlawful-presence-waiver/) of this bar from within the U.S. and wait here for the waiver to be approved before you leave the U.S. to use consular processing. This is a complicated application, and you will need to consult with an immigration attorney.

### I AM IN THE UNITED STATES BUT MY PARTNER IS ABROAD

#### My spouse and I are legally married. I live in the United States but my spouse currently lives abroad because she had no way to get a green card here. What do we do now?

The two of you can file a marriage-based green card application. Since she is currently outside the United States, the application will be processed through the U.S. consulate in her country (consular processing) [immigrationequality.org/issues/transgender/consular-processing-procedural-steps/](https://immigrationequality.org/issues/transgender/consular-processing-procedural-steps/), meaning that the U.S. consular staff will interview her there, rather than in the U.S. If her application is approved and she enters the U.S., she should be able to do so as a lawful permanent resident.

#### I live in the United States in a marriage equality state and my partner currently lives abroad because he had no way to get a green card here. We are not married, and same-sex couples are unable to marry in my partner's home country. What should we do now?

You have several options and should consult with an immigration attorney about them. One possible option is for you to file a fiancé visa petition for him. American citizens can file a fiancé/e visa [immigrationequality.org/issues/transgender/fiancee-visas-procedural-steps/](https://immigrationequality.org/issues/transgender/fiancee-visas-procedural-steps/) petition for a partner

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overseas with whom he or she has a committed relationship. The couple must marry within 90 days of the foreign partner's entry into the United States. Once married, the American citizen spouse can file a marriage-based petition for the foreign spouse.

If your partner is able to travel to the United States as a tourist, another possibility would be for him to come to the U.S. as a tourist, marry, and then return to his home country and go through consular processing there. Different consulates have different backlogs in different categories; consult with an immigration attorney to decide which option would be fastest and most appropriate.

**I live in the United States in a marriage equality state and my partner lives abroad in a country where same-sex couples are unable to marry. He has never been able to get a visa to the United States, and we are not married. What do I do now?**

As with the previous answer, you should be able to file a fiancé visa petition for him. Since he cannot travel to the United States another way, this may be your only option to bring him to the U.S. You may also be able to marry in a third country that has marriage equality if you and your partner can travel to another marriage equality country. He then could apply for lawful permanent residence through consular processing.

**I live in a state that does not have marriage equality, and my partner lives abroad in a country where same-sex couples are unable to marry. She has never been able to get a visa to the United States, and we are not married. What do I do now?**

As with the previous answer, you should be able to file a fiancée visa petition for her. However, since the state in which you reside would not allow a same-sex couple to celebrate a marriage, you would have to submit evidence with your fiancée petition that indicates you plan to marry in a marriage equality state. This is the approach that USCIS has taken [www.immigrationequality.org/wp-content/uploads/2012/04/USCIS-guidance-Transgender\\_FINAL.pdf](http://www.immigrationequality.org/wp-content/uploads/2012/04/USCIS-guidance-Transgender_FINAL.pdf) for fiancé/e visas where one spouse is transgender, which is another area of marriage law where different states have different rules. Another option is that you may be able to marry in a third country that has marriage equality if you and your partner can travel to another marriage equality country and then she could apply for lawful permanent residence through consular processing.

**MY PARTNER AND I ARE IN EXILE – LIVING TOGETHER OUTSIDE OF THE UNITED STATES**

**Since my spouse was not able to find a permanent immigration solution in the U.S., we relocated abroad, where we have lived for many years. What do we need to do now to relocate to the U.S.?**

To file a marriage-based green card application, the U.S. citizen spouse generally must reside, or submit proof of an intention to reside, in the U.S. If the U.S. citizen spouse lives abroad, part of the application packet should be a letter describing his or her intent to establish a residence in the U.S.

**Since my spouse was not able to find a permanent immigration solution in the U.S., we have been living abroad for many years. We are not yet ready to move back to the U.S., but I want to do what I can to establish his right to live there. Can I file for my spouse from abroad if we don't intend to live in the U.S.?**

No, once an individual applies for lawful permanent residence in the U.S., he or she must actually live here. In fact, a green card holder who moves abroad for an extended period of time can lose his or her right to return to the U.S. You should wait until you are ready to actually live in the U.S. to file an application for lawful permanent residence.

**OTHER ISSUES**

**I am the foreign national spouse of a U.S. citizen and am HIV-positive. Can my spouse still sponsor me for a green card?**

Yes. The U.S. ban on immigration for people with HIV/AIDS ended in January 2010. When you take the medical examination as part of the green card application process you will not be tested for HIV. However, the doctor can ask questions about your overall health and medications you are taking, and you should answer honestly. USCIS can take your health into consideration as one factor in determining whether you are “likely to become a public charge,” that is, likely to need public assistance or social security disability benefits. Simply being HIV-positive, however, is not a reason to deny an application for lawful permanent residence, especially if you have a work history.

**My foreign national spouse has a child who was born abroad. Can I also file a green card application for her child when I file for my spouse?**

You should be able to. Under current law, a U.S. citizen can petition for the minor children of a foreign spouse once a step-parent/step-child relationship has been formed.

**I am a lawful permanent resident of the U.S. – I have a green card, but I am not a citizen. Can I sponsor my foreign national spouse for a green card?**

Lawful permanent residents can sponsor a spouse for immigration benefits, but under current U.S. law as it applies to all married couples, your spouse would not qualify as an “immediate relative,” but rather would fall under the “family preference system” [www.travel.state.gov/visa/bulletin/bulletin\\_5953.html](http://www.travel.state.gov/visa/bulletin/bulletin_5953.html) in category F2A. That means that rather than filing the application for an immigrant visa (I-130) and the application for lawful permanent residence (I-485) simultaneously, you would first have to file the I-130, and then wait for the visa to be current. Presently, there is about a two year wait before she would be able to apply for permanent residence. However, if you become a citizen while she is “in line” to file for permanent residence, she could immediately file for the green card once you are naturalized.

Individuals who fall under the family preference system and wish to apply to adjust status from within the U.S. must be in lawful status and must not have accrued any unlawful presence here. This is different than the rule for spouses of U.S. citizens, who can apply to adjust status even if they are here unlawfully, as long as they entered with inspection.

Also, unlike U.S. citizens, lawful permanent residents cannot sponsor a fiancé/e for a fiancé/e visa, though it may be possible to marry in a third country and go through consular processing for a green card after the marriage.

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### How soon after I get residence can I apply to become a U.S. citizen?

While the general rule is that an individual must be a lawful permanent resident for five years before applying to become a citizen, spouses of U.S. citizens can apply three years after obtaining their green card, provided they remain married and living together as a couple.

### WILL THINGS WE SAID OR DID IN THE PAST AFFECT OUR FUTURE APPLICATION?

**I have been in the U.S. for three years on a student visa. I live with my partner and he provides financial support for me, but I have always indicated on my immigration papers that he is a “family friend.” Will the fact that I never disclosed that he’s my partner before make it harder for him to sponsor me for a green card now?**

The answer to this may depend on the specific facts of your case. We are advocating that USCIS take a fair and reasonable approach to issues such as this, given the systemic discrimination that LGBT families have faced under U.S. law. If you have any fear that USCIS could find fraud in your case, you should consult with an immigration attorney before filing your application.

### INFORMATION FOR DUAL FOREIGN NATIONAL COUPLES

**My spouse and I are both citizens of a foreign country. I have been offered a skilled worker visa (for example an H-1B) to work in the U.S. Can my spouse come with me while I’m in the U.S.?**

Yes, she will qualify for an H-4 “derivative” visa, which means your spouse can accompany you for the duration of your visa. However, as with different-sex spouses, your spouse will not be entitled to work while in the U.S.

### Where can I get more information?

The Immigration Equality website [immigrationequality.org/](http://immigrationequality.org/) has a great deal of general information on U.S. immigration law and its application to LGBT people. If the website does not answer your question, you may [submit an inquiry immigrationequality.org/contact-us/](http://immigrationequality.org/contact-us/) online to the Immigration Equality legal staff. You can also consult with the legal organizations below.



## FOR MORE INFORMATION, CONTACT

### IMMIGRATION EQUALITY

[immigrationequality.org](http://immigrationequality.org)

### NATIONAL CENTER FOR LESBIAN RIGHTS

[nclrights.org](http://nclrights.org)

### AMERICAN CIVIL LIBERTIES UNION

[aclu.org/lgbt](http://aclu.org/lgbt)

### GAY & LESBIAN ADVOCATES & DEFENDERS

[glad.org](http://glad.org)

### LAMBDA LEGAL

[lambdalegal.org](http://lambdalegal.org)

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