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### *U.S. v. WINDSOR'S IMPACT ON IMMIGRATION LAW*

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The Defense of Marriage Act (DOMA), barred federal immigration authorities<sup>1</sup> as well as other federal officials from recognizing same-sex marriages. Now that DOMA has been declared unconstitutional in *U.S. v. Windsor*,<sup>2</sup> the federal officials that implement immigration law have declared that same-sex marriages will be recognized to the same extent as opposite-sex marriages. This has implications for several aspects of immigration law and practice. On July 1, 2013 the Secretary of Homeland Security directed the 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,”<sup>3</sup>

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<sup>1</sup> The familiar Immigration and Naturalization Service (INS), was disbanded and reorganized. The Homeland Security Act of 2002 abolished the INS. Abolishment of INS, 6 U.S.C.A. § 291, Pub.L. No. 107-296 § 471, 116 Stat. 2135 (2002). It initiated a governmental reorganization, transferring the majority of the INS functions from the Department of Justice (“DOJ”) to the Department of Homeland Security (“DHS”), but leaving the Executive Office of Immigration Review (including the immigration judges and Board of Immigration Appeals) under the auspices of the DOJ. The Department of State continues to be the agency in charge of determining eligibility of visas through its consulates when a non-citizen is not in the United States.

<sup>2</sup> 133 S.Ct. 2675 (2013).

<sup>3</sup> Statement, Janet Napolitano, Implementation of the Supreme Court Ruling on the Defense of Marriage Act (July 1, 2013), *available at* <http://www.dhs.gov/news/2013/07/01/>

and the USCIS posted additional information about implementation.<sup>4</sup> On August 2, the Secretary of State similarly stated “when same-sex spouses apply for a visa, the Department of State will consider that application in the same manner that it will consider the application of opposite-sex spouses,”<sup>5</sup> and the Department of State website provided further detail, in line with the USCIS position.<sup>6</sup>

Further, on July 17, 2013, the Board of Immigration Appeals (BIA) issued a decision<sup>7</sup> stating that DOMA was no longer an impediment to recognition of same-sex marriages; therefore, a same-sex spouse would be recognized under immigration law if the marriage were valid in the state in which it was celebrated, and was bona fide.<sup>8</sup> This case involved the non-citizen same-sex spouse of a U. S. citizen who had filed a petition on behalf of that spouse. The Director’s determination had found that the marriage was valid under the laws of Vermont where the marriage was celebrated, but did not grant the petition. The BIA held that, after *Windsor*, the sole remaining issue was whether the marriage was bona fide—i.e., whether the marriage was entered into solely for the purposes of immigration—and remanded the case to allow the Director to make that determination.

The administrative material also clarified that as a general matter a same-sex marriage would be recognized for immigration purposes if a same-sex couple married in a U.S. state or a foreign country that recognizes same-sex marriage, but live in a state that does not.<sup>9</sup> This follows the established approach to recognition of marriages under the immigration law. To determine whether a marriage is legally valid, the relevant immigration authorities generally assess whether the marriage was valid in the place it was performed.<sup>10</sup> For example, in *Matter of Lovo*, the BIA

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statement-secretary-homeland-security-janet-napolitano-implementation-supreme-court.

<sup>4</sup> *Same-sex Marriages: Frequently Asked Questions*, U.S. Citizenship and Immigration Services, available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=2543215c310af310VgnVCM100000082ca60aRCRD&vgnextchannel=2543215c310af310VgnVCM100000082ca60aRCRD> (last updated August 2, 2013).

<sup>5</sup> John Kerry, Sec’y of State, Announcement on Visa Changes for Same-sex Couples at U.S. Embassy London (August 2, 2013), available at <http://www.state.gov/secretary/remarks/2013/08/212643.htm>.

<sup>6</sup> *U.S. Visas for Same-Sex Couples: FAQs for Post-Defense of Marriage Act*, U.S. Dep’t of State, Bureau of Consular Affairs, [http://travel.state.gov/visa/frvi/frvi\\_6036.html](http://travel.state.gov/visa/frvi/frvi_6036.html) (last visited September 27, 2013).

<sup>7</sup> *Matter of Oleg B. Zeleniak*, 26 I. & N. Dec. 158 (BIA 2013).

<sup>8</sup> See 8 U.S.C. § 1151(b)(2)(A)(i); 8 C.F.R. § 204.2(a).

<sup>9</sup> U.S. Citizenship and Immigration Services, *supra* note 4; U.S. Dep’t of State, Bureau of Consular Affairs, *supra* note 6.

<sup>10</sup> See *Matter of Lovo*, 23 I. & N. Dec. 746, 748 (BIA 2005); *Matter of Luna*, 18 I. & N. Dec. 385, 386 (BIA 1983). See also Charles Gordon et al., 3 *Immigration Law and*

determined that a marriage with a transgender spouse would be recognized under the immigration law because the couple entered into a valid marriage under the laws of the state of North Carolina.<sup>11</sup> Other examples include common law marriages, customary marriages, and purely religious marriages that are considered legal marriages for immigration purposes if they are considered legal in the state or country in which they were performed.<sup>12</sup>

An early commentator expressed concern that there might be an exception made to this general approach,<sup>13</sup> as immigration authorities have occasionally not recognized some marriages that were lawful in the state of celebration but not lawful in the state of residence.<sup>14</sup> Non-recognition occurred in certain limited extreme circumstances that demonstrated a strong and enforced public policy against the marriage, such as when the state of residence criminally prosecuted couples for cohabitating.<sup>15</sup> However, none of the immigration authorities has raised any similar exceptions in the context of same-sex marriages. Further, it would be difficult to argue that same-sex marriage is analogous to marriages excepted on this basis under current law, since in addition to the holding in *Windsor*, the U.S. Supreme Court has held that a state statute criminalizing same-sex intimate behavior violated the Due Process Clause<sup>16</sup> and that a state statute banning administrative and local anti-discrimination provisions for sexual

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*Procedure*, § 36.02(2)(a) (Matthew Bender, Rev. Ed.).

<sup>11</sup> *Lovo*, 23 I. & N. Dec. at 748.

<sup>12</sup> See *Matter of Garcia*, 16 I. & N. Dec. 623 (BIA 1978); *Matter of Annang*, 14 I. & N. Dec. 502 (BIA 1973); *Matter of Leon*, 15 I. & N. Dec. 248 (BIA 1975).

<sup>13</sup> Scott Titshaw, *On United States v. Windsor and Immigration Law*, ImmigrationProf Blog (July 5, 2013), <http://lawprofessors.typepad.com/immigration/2013/07/guest-blog-post-scott-titshaw-on-united-states-v-windsor-and-immigration-law.html>.

<sup>14</sup> The immigration statute specifically addresses proxy marriages by rejecting them as the basis for immigration status unless the marriage has been consummated. 8 U.S.C.A. § 1101(a)(35). But see 9 Foreign Aff. Manual n.10.1 to 22 C.F.R. § 42.41 (permitting the issuance of a visitor's visa to an alien married by proxy to come to the United States to consummate the marriage). The statute indirectly addresses polygamous marriages by stating that those who "com[e] to the United States to practice polygamy" are inadmissible. 8 U.S.C.A. § 1182 (a)(10)(A). However, inadmissibility applies only to those intending to practice polygamy in the United States, thereby leaving open the possibility that a person who has been polygamous in the past but does not intend to continue polygamy in the U.S. could be admissible. See 9 Foreign Aff. Manual 40.101 N2, available at <http://www.state.gov/documents/organization/87124.pdf>.

<sup>15</sup> For an in depth discussion, see Scott Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537 (2010), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=scott\\_titshaw](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=scott_titshaw).

<sup>16</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

minorities violated the Equal Protection Clause.<sup>17</sup>

The administrative materials also addressed the application of post-*Windsor* recognition of marriages, which are valid under the laws of the state where celebrated, to aspects of the immigration law that involve the concept of spouse in addition to petitions for same sex-spouses by U.S. citizens. The BIA noted that these include, but are not limited to, fiancé and fiancée visas, immigrant visa petitions, refugee and asylee derivative status, inadmissibility and waivers of inadmissibility, removability and waivers of removability, cancellation of removal, and adjustment of status.<sup>18</sup>

The information on the USCIS website further addressed additional situations in which the holding in *Windsor* would apply. Spouses of individuals in various non-immigrant statuses such as students and exchange visitors can obtain non-immigrant visas that allow them to accompany their spouses.<sup>19</sup> Further, the child of a person recognized as a spouse will be designated as an eligible stepchild if the marriage took place before the child was eighteen.<sup>20</sup>

However, not all issues related to recognition of same-sex marriages have been specifically addressed. For example, there has been no specific administrative mention of the recognition of a same-sex spouse's ability to self-petition if there is abuse in the marital relationship or a spouse dies.<sup>21</sup> The ability of a non-citizen spouse to file a petition in situations of abuse or death is an exception to the general rule that the qualifying spouse, *e.g.*, the U.S. citizen spouse, must file a petition for the non-citizen spouse to obtain a visa. However, the general direction that same-sex marriages be treated like opposite-sex marriages would afford same-sex spouses the ability to

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<sup>17</sup> *Romer v. Evans*, 517 U.S. 620, 635 (1996).

<sup>18</sup> *See, e.g.*, 8 U.S.C. §§ 1101(a)(15)(K), 1153, 1154, 1157, 1158, 1182, 1227, 1229b, and 1255.

<sup>19</sup> U.S. Dep't of State, Bureau of Consular Affairs, *supra* note 6.

<sup>20</sup> U.S. Citizenship and Immigration Services, *supra* note 4; U.S. Dep't of State, Bureau of Consular Affairs, *supra* note 6.

<sup>21</sup> 8 C.F.R. § 204.2 (b),(c) (2007). Regarding self-petitioning after death of a spouse, see U.S. Citizenship and Immigration Services, *Widow(er)* (2010), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextchannel=3d7fa6c515083210VgnVCM100000082ca60aRCRD&vgnextoid=40d9ca07be2e3210VgnVCM100000082ca60aRCRD>; regarding self-petition when there is abuse, see U.S. Citizenship and Immigration Services, *Battered Spouse, Children & Parents* (2013), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=b85c3e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=b85c3e4d77d73210VgnVCM100000082ca60aRCRD>; William A. Kandel, *Immigration Provisions of the Violence Against Women Act (VAWA)* (2012), available at <http://digital.library.unt.edu/ark:/67531/metadc85403>. *See generally* Janet M. Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, But Not Its Demise*, 24 NO. ILL. U. L.R. 153 (2004).

self-petition in the same circumstances as opposite-sex spouses.

Additionally, the practical aspects of implementation may pose some special problems for same-sex spouses. For example, immigration authorities have certain expectations for couples to demonstrate that the marriage is bona fide<sup>22</sup> that may be more difficult for same-sex couples to meet, such as affidavits from family members acknowledging the relationship or evidence of intermingling of finances. Also, there is concern about how the Department of State will direct consulates to preserve the confidentiality of applications for marriage-based benefits in countries in which same-sex relationships are criminalized.<sup>23</sup>

The clear and consistent recognition of same-sex marriages by the applicable administrative agencies allows non-citizens in same-sex marriages to move forward with family reunification, a major objective of the immigration law. In practical terms, these executive opinions undermine the relevance of divergent views such as the opinion of former White House Counsel Alberto Gonzalez and David Strange published in *The New York Times*.<sup>24</sup> However, the arguments raised should be addressed, as these authors' reasoning has serious flaws.

The authors asserted that *Windsor* affirmed Congressional power to legislate marital rights and privileges, noting the majority opinion's mention of a provision in the immigration law barring recognition of a marriage entered into for immigration purposes, even if technically valid under state law. However, the statute and regulation noted in the opinion are directed at fraud, not at who can marry.<sup>25</sup> As noted above, the immigration law precludes fraud as a basis for immigration by requiring that a marriage be bona fide and not entered into solely to obtain an immigration benefit. Recognition that the federal government can control fraud does not undermine the *Windsor* opinion's recognition that marriage and other

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<sup>22</sup> The burden of proof is on the petitioner to demonstrate that the principal purpose of the marriage was to make a life together, that the marriage was "in good faith." *Lutwak v. United States*, 344 U.S. 604 (1953). However, a marriage will continue to be recognized as valid if it was valid at its inception, but later is no longer viable, as long as the legal marriage continues. *Chan v. Bell*, 464 F. Supp. 125, 130 (D.D.C. 1978); *see also* *Dabaghian v. Civiletti*, 607 F.2d 868, 869–70 (9th Cir. 1979); *Bark v. INS*, 511 F.2d 1200, 1201–02 (9th Cir. 1975); *Matter of Mowrer*, 17 I. & N. Dec. 613, 615 (B.I.A. 1981); *Austin T. Fragomen et al., Continued Validity of the Marriage: the Viability Issue*, 1 IMMIGR. L. & BUS. § 3:20 (2003).

<sup>23</sup> Victoria Nielson, *US Department of State Announces Guidelines for Same-Sex Couples*, IMMIGRATION EQUALITY (August 2, 2013), <http://immigrationequality.org/2013/08/departement-of-state-announces-guidelines-for-same-sex-couples/>.

<sup>24</sup> *See* Alberto Gonzalez & David N. Strange, *What the Court Didn't Say*, N.Y. TIMES, July 17, 2013, available at [http://www.nytimes.com/2013/07/18/opinion/what-the-court-didnt-say.html?\\_r=0](http://www.nytimes.com/2013/07/18/opinion/what-the-court-didnt-say.html?_r=0).

<sup>25</sup> 8 U.S.C. § 1151(b)(2)(A)(i) (2012); 8 C.F.R. § 204.2(a) (2013).

family matters are generally within the province of the states, nor its holding that a federal law that failed to recognize legally married same-sex couples was unconstitutional as a violation of equal protection.<sup>26</sup>

The authors also misplace reliance on *Adams v. Howerton*, a thirty-one-year old Ninth Circuit opinion.<sup>27</sup> In the more than thirty years since the case was decided, a growing number of states have passed laws recognizing same-sex marriages<sup>28</sup> and the Supreme Court has issued decisions that precluded the criminalization of same-sex intimate relations or explicit discrimination based in sexual orientation<sup>29</sup> and the immigration law was amended to remove homosexuality as a ground for exclusion.<sup>30</sup> However, in addition to these developments, the reasoning in *Adams v. Howerton* was flawed at the time it was decided.

In *Adams v. Howerton*, the court determined that the immigration statute did not recognize same-sex marriages.<sup>31</sup> The court acknowledged that the statute did not define the term spouse, but did not sufficiently recognize that, for immigration purposes, the consistent administrative practice determined who was a spouse by the law of the place of marriage celebration.<sup>32</sup> The court pointed to the statute's direction to not recognize unconsummated proxy marriages as an indication that the immigration statute did not contemplate recognition of all state sanctioned marriages.<sup>33</sup> However, this provision was an exception to the general recognition of marriage by place of celebration demonstrating that Congress knew how to make an exception when it chose to.

Further, the Ninth Circuit's statutory interpretation no longer holds thirty-one years later. First, the Ninth Circuit turned to a canon of statutory construction that, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."<sup>34</sup> To determine the ordinary, contemporary, common meaning the court looked to a 1971 version of Webster's dictionary that indicated "(t)he term 'marriage' ordinarily contemplates a relationship between a man and a woman." However, contemporary common meaning is different than forty-two years ago in 1971. The definition of marriage in the current online version of

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<sup>26</sup> See Ruthann Robson, *Case Comment: United States v. Windsor*, CUNY LAW REVIEW: FOOTNOTE FORUM (Sept. 2013), <http://www.cunylawreview.org/?p=806>.

<sup>27</sup> *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982).

<sup>28</sup> *Windsor*, 133 S.Ct. at 2690.

<sup>29</sup> See Robson, *supra* note 27.

<sup>30</sup> Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 4978 (1990).

<sup>31</sup> *Adams*, 673 F.2d at 1040-41.

<sup>32</sup> *Id.* at 1038-39.

<sup>33</sup> *Id.* at 1039.

<sup>34</sup> *Adams*, 673 F.2d at 1040 (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

Webster's dictionary includes "the state of being united to a person of the same sex" as well as "the state of being united to a person of the opposite sex."<sup>35</sup>

Second, the Ninth Circuit pointed to the exclusion statute in effect at the time, which in the court's view expressed an intent to not recognize same-sex spouses because the statute excluded homosexuals. The court reasoned that it was unlikely that Congress intended to give homosexual spouses preferential admission treatment while it mandated their exclusion. However, Congress amended the exclusion laws in 1990 to remove the barrier to admission based on homosexuality,<sup>36</sup> thereby removing the rationale relied on by the court. Further, at the time Congress removed the inadmissibility of homosexuals, it did not choose to define marriage to prevent the recognition of same-sex marriages. To date there is no definition of spouse or marriage in the immigration law that excludes same-sex marriage, in contrast to the statute that explicitly precludes recognition of unconsummated proxy marriages. Thus, the court's conclusion that the immigration statute precluded recognition of same-sex marriage is erroneous. The immigration law now, as in the past, does not define spouse, thereby allowing contemporary deferral to the concept of marriage in effect at the place of the marriage's inception.

After concluding that the immigration law precluded recognition of same-sex marriages, the *Adams* court turned to the question of whether the law as so interpreted violated equal protection; the court concluded it did not.<sup>37</sup> The court asserted that Congressional determinations regarding immigration are subject to only limited judicial review and that a Congressional preference for "heterosexual" marriages versus "homosexual" marriages was constitutionally sufficient. Yet, this is exactly the Congressional judgment declared unconstitutional in *Windsor*.

The Supreme Court's opinion in *Windsor* was not explicit about the level of equal protection scrutiny it applied. However, the Court did hold that a legislative purpose to impose inequality was unconstitutional<sup>38</sup> and that "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."<sup>39</sup> Supreme Court cases reflect at the very least "a limited judicial responsibility under the Constitution even with respect to

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<sup>35</sup> *Marriage Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/marriage>.

<sup>36</sup> Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 4978 (1990).

<sup>37</sup> *Adams*, 673 F.2d at 1041-43.

<sup>38</sup> *Windsor*, 133 S. Ct. at 2693-2694.

<sup>39</sup> *Id.* at 2696.

the power of Congress to regulate the admission and exclusion of aliens.”<sup>40</sup> Even within the context of immigration law, “individuals within a particular group may not be subjected to disparate treatment on criteria wholly unrelated to any legitimate governmental interest.”<sup>41</sup> Therefore, even with limited judicial review in an immigration law context, a legislative purpose to express disapproval of same-sex married couples by favoring opposite-sex marriages while disparaging and disadvantaging same-sex marriages cannot pass constitutional standards after *Windsor*.

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<sup>40</sup> *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977).

<sup>41</sup> *Francis v. I.N.S.*, 532 F.2d 268, 273 (2d Cir. 1976).