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## Siskind's Immigration Bulletin

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### The ABC's of Immigration: Immigration Options for Gay, Lesbian, and Transgendered Individuals

As the world becomes a smaller place through globalization, more and more individuals are traveling abroad, for pleasure, for school, and for employment. Individuals who are in gay or lesbian relationships face difficulties in staying together when coming to the US either as immigrants or nonimmigrants. Furthermore, those individuals who have immigration issues related to sexual orientation or transgender may have questions about their rights under federal laws. This article explores the issues and provides information and assistance to the gay, lesbian and transgender communities for immigration purposes.

#### Are legally binding unions recognized as a marriage in an immigrant or nonimmigrant visa where marriage is an essential basis for qualification?

In 1996, Congress enacted the Defense of Marriage Act (DOMA), which states that a qualifying "marriage" for the purposes of federal law exists only between a man and a woman. Accordingly, a US citizen cannot petition for a green card for a same sex partner. This is true even if the couple has entered into a legally binding arrangement, such as the civil unions now performed in Vermont, or other similar domestic partnerships found in other countries. Given the anti-homosexual bias that is dominant in Congress, any legislation that may recognize familial rights of gays and lesbians in domestic partnership likely will not pass.

#### Will a marriage involving a transsexual individual be recognized for immigration purposes?

In recent case decided by Board of Immigration Appeals (BIA), *In Re Lovo*, the BIA held that a marriage between a postoperative male-to-female transsexual and a male can be the basis for benefits under section 201(b)(2)(A)(i) of the Immigration and Nationality Act. Since the state where the marriage occurred recognized the change in sex and considered the marriage valid, the BIA also found the marriage to be valid. The BIA overturned the decision of the Nebraska Service Center Director who denied the petitioner's instant visa petition under the INA on the basis that Congress has not enacted legislation that officially recognizes a marriage where one of the parties has undergone a sex change. This decision marked a victory for the recognition of marriage of transsexual post operatives by federal laws.

#### How can people in a same sex partnership stay together as

## **immigrants or non-immigrants?**

In this article, we outline some of the ways people in such a predicament can stay together. Detailed information on the visa categories mentioned below is available in other ABC's of Immigration articles which can be found online at <http://www.visalaw.com/abcs.html>.

### **Student visas**

Assuming that they otherwise qualify, the foreign national can enter the US on a student visa. They must, of course, comply with the terms of the visa, and the visa will eventually expire, meaning that the person must either leave the US or find another visa status.

### **Work visas**

Work visas allow a person to live and work in the US for, in some cases, an indefinite period of time. The primary drawback to most common work visas is that they allow the person to live in the US only for a limited period of time. For example, the time limit on H-1B visas is six years and for L visas it is five or seven years. There are some work visas that may be renewed indefinitely. The O visa for people of extraordinary ability can be issued in three-year increments for an indefinite period of time, as long as the visa holder is doing work in the area of their extraordinary ability. The E visa, for people making an investment to start a business in the US, can be issued in five-year increments for an indefinite period. TN visas for Canadian and Mexican professionals can also be renewed without limit.

Regardless of how long a person can live and work in the US on a work visa, however, there will always remain the fact that they are not permanent residents, and could be separated from their loved one on the whim of an employer or a down turn in economic conditions.

### **Green cards**

Because a US citizen in a same sex relationship with a foreign national cannot file for his or her immigration, the foreign national has to seek a green card through another route. If they have a qualifying family member (for example, a US citizen parent or sibling) the family member can apply for their immigration. This is, however, a long process. Permanent residents can file for their adult children, but these cases involve an even longer wait. Often, a quicker way of obtaining permanent residence is through an employer who is willing to sponsor the foreign national.

The foreign national can also apply for a green card through the diversity visa lottery if they are from a qualifying country. Given that only 50,000 visas are available each year and the fact that there are millions of applicants, this is by no means a sure way of getting a green card. Please refer the ABCs of Immigration at <http://www.visalaw.com/abcs.html> for more information about each of these categories.

## **Can homosexuality be a basis for asylum?**

A final way that the foreign national in a same sex partnership can remain in the US is through an asylum application. In recent years, courts have approved asylum cases submitted by homosexuals, a recognized social group, who show past persecution or well grounded fear of persecution due to sexual orientation, in the individual's home country. Information about laws relevant to sexual orientation in most countries can be found on the following websites:

The International and Lesbian and Gay Association World Legal Survey website at <http://www.ilga.info/index.html>

The International Gay and Lesbian Human Rights Commission website at <http://www.iglhrc.org>.

**What resources are available to same sex partners or gays and lesbians with immigrations issues?**

The bottom line is that couples in same sex relationships must be creative in devising workable visa strategies. If you are interested in learning more about immigration issues that affect the gay and lesbian community, visit the website of the Lesbian and Gay Immigration Rights Task Force at <http://www.lgirtf.org>.

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