

## **Same Sex Marriage and DOMA - Immigration and Divorce Issues**

As same sex marriage continues to progress in the United States there are a number of issues and conflicts that have arisen as the rights conferred by the state come into conflict with those that still do not exist on the federal level thanks to the Defense of Marriage Act (DOMA). This article will examine some of the benefits and issues that arise when a state legalizes same sex marriage, looking at New York as the basis.

First, for those that are not aware, [DOMA](#) is the federal law passed by Congress in 1996 that specifically defines marriage as that between one man and one woman for all federal laws, programs, and benefits. DOMA does not make same sex marriage illegal across the country, but instead states that federal government will not recognize any marriage between those of the same sex for federal purposes. Additionally, DOMA also states that no state is required to recognize a valid same sex marriage performed in another state as they are required to do for marriages between a man and a woman.

This has a number of consequences for same sex couples that wish to get married that I will address below:

### **Immigration**

One of the biggest issues that affects a same sex couple where one of the members are not a United States Permanent Resident, is that any legal same sex marriage performed cannot be the basis for a Green Card, as it can be with a non-same sex couple marriage. Therefore, those couples thinking that they can travel to a legal same-sex marriage state, get married, and then apply for a VISA, will be unable to use the marriage as a basis for obtaining the Green Card. This is not to say that those in a same-sex marriage will be barred from obtaining a Green Card, but simply that marriage cannot be the basis.

There are still other channels that homosexual immigrants can use to obtain permanent residence. The first is a [work based visa](#). If the immigrant is in a field where their job skills are in demand, they may be able to find an employer who will sponsor a temporary work permit.

The second option is [Political asylum](#). Under this case, the immigrant must be able to prove that they have undergone persecution in their native country because of their sexual preferences. This persecution does not necessarily have to be from the government but can also be from other citizens of their native country. The main basis here has been that the government of their native country has done nothing to protect them from violence based on their sexual orientation.

There are a few other ways to get a Green Card besides the above, but they are very specific and limited in nature. You can find them listed here at the [U.S. Citizenship and Immigration Services Website](#).

### **Divorce**

So what happens to that couple that comes to New York from [one of the 41 other states](#) that does not recognize same-sex marriage in order to marry, and then wants a divorce? What if the basis of the marriage was to try and obtain legal residence for one of the spouses, but they find themselves unable to do so because they first [did not consult an attorney first](#)? Well firstly, most of these states, because they do not recognize the same-sex marriage as being legal, will not perform a legal divorce in that state. But to make matters worse, states such as New York have a [1 year residency requirement](#) prior to filing for divorce. This means that 1 of the spouses has to reside in New York State for 1 year prior to filing for divorce. But often times, it is difficult to impossible for a spouse to leave everything they have and move to another state for a year.

Same-sex couples that do not investigate this issue before hand, may find that they are legally married in New York, [residing in Florida](#), unable to file for divorce in Florida as Florida does not recognize the marriage, and financially unable to move to New York. They become stuck legally married in one state, with little means to obtain a legal divorce, and find that they must remain in limbo for years to come.

## Conclusion

This article just lightly touches on the issues of immigration and divorce in the same-sex marriage and DOMA context. However, there are still signs that there may be large changes to recognition of DOMA nationwide. Attorney General Eric Holder [released a memo in February 2011](#) that stated:

"After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in such cases."

If these challenges to DOMA make it to the Supreme Court, there is a chance the Supreme Court will find DOMA unconstitutional, or that political pressure will finally convince Congress to overturn DOMA. Until then, many same sex couples should at least inform themselves on what their rights will be if they do wish to pursue marriage in a state that allows same sex marriage.

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