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DOMA Overruled: Milestone for Applicants of Immigration Benefits

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On June 26, 2013, the U.S. Supreme Court in *United States v. Windsor* struck down Section 3 of the Defense of Marriage Act (DOMA) as unconstitutional, allowing for the recognition of same-sex marriages and making way for same-sex married couples to receive benefits under federal law. Two days later, the first gay married couple received notice that their marriage-based green card case had been approved. Without delay, the Obama administration sent a clear message that same-sex couples are now eligible to apply for immigration benefits as married heterosexual couples are permitted to.

While the DOMA overruling raises complex questions for employers with regard to benefit plan administration and FMLA benefits, the implementation of the game-changing decision is clear in the federal immigration context. (Read Proskauer's related client alerts regarding the impact of the *Windsor* decision on employer-sponsored benefit plans and FMLA Rights.) In a FAQ issued by the Department of Homeland Security Secretary Janet Napolitano, DHS affirmed that U.S. citizens and lawful permanent residents could file I-130 relative petitions for their same-sex spouse. In addition, the FAQ directly addressed the issue that, even if the couple resides in a state that does not recognize same-sex marriages, U.S. Citizenship and Immigration Services (UCSIS) generally will look to the "place of celebration" for the marriage law when determining whether the marriage is valid for immigration law purposes.

The *Windsor*decision has been celebrated widely for its immediate impact of allowing same-sex foreign nationals to apply for lawful permanent residence in the United States (green card). Equally as significant, although it has received less attention, a same-sex spouse who is married to a non-immigrant professional working in the U.S. now will be allowed to apply for a dependent visa to the United States. For example, the spouse of an H-1B professional or an L-1 transferee will now be eligible for an H-4 or L-2 spousal visa respectively. Up until the *Windsor*decision, same-sex spouses were only eligible to apply for a B-2 visitor visa, which in part is designated for cohabitating partners and household family members.

As of August 1, 2013, same-sex couples will have the right to marry in 13 states and the District of Columbia. There also are about 15 countries that provide full marriage equality. The *Windsor* decision is a game changer for binational couples and an immigration milestone. At Proskauer, we already are working actively on immigration applications for married same-sex couples. Please contact Proskauer's Immigration & Nationality Group if you have questions.