

## Notes and Comments

### MARRIAGE-BASED IMMIGRATION FOR SAME-SEX COUPLES AFTER DOMA: LINGERING PROBLEMS OF PROOF AND PREJUDICE\*

*Anna Carron*

**ABSTRACT**—In 2013, the Supreme Court changed the lives of thousands of same-sex couples in America by declaring the Defense of Marriage Act (DOMA) unconstitutional in *United States v. Windsor*. This decision allowed same-sex spouses to receive the same marriage-based immigration benefits under federal law that “traditional marriages” had long received. Although this holding is a victory for binational same-sex couples, bias still exists in the practices U.S. Customs and Immigration Services (USCIS) uses to evaluate the legitimacy of marriages. This bias manifests itself in the proof USCIS requires to show a relationship is bona fide, proof that often assumes couples conform to a traditional American family archetype. Although theoretically same-sex couples should now have equal immigration rights, this bias may disadvantage same-sex couples in achieving the same federal benefits that the *Windsor* Court expressly allowed. This Note will examine the USCIS’s current spousal visa requirements and marriage fraud review process in light of the practical realities many same-sex couples face. Specifically, this Note will argue that these requirements should be amended to recognize that historic, systemic barriers and global prejudice may hinder same-sex couples from showing that their relationships are bona fide.

**AUTHOR**—J.D., Northwestern University School of Law, 2015; B.A., Saint Louis University, 2011. I am incredibly grateful to Professor Erin Delaney for her guidance during my drafting of this Note. Also, special thanks to the *Northwestern University Law Review* editors and staff members for their hard work and insightful comments.

---

\* Editor’s Note: The Note that follows was originally submitted for publication prior to the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). While there was limited time to substantially modify the Note before going to print, the tenets of the Note’s substance addressing marriage-based immigration for same-sex couples are still relevant to the current—though rapidly changing—legal landscape.

NORTHWESTERN UNIVERSITY LAW REVIEW

INTRODUCTION ..... 1022

I. BACKGROUND: MARRIAGE IN THE IMMIGRATION CONTEXT ..... 1025

    A. *Immigration Law Restrictions and Preferential Treatment for Spouses of U.S. Citizens* ..... 1026

    B. *Only “Valid” and “Bona Fide” Marriages Count for Immigration Purposes*..... 1027

    C. *Procedures for Obtaining a Spousal Visa* ..... 1030

    D. *Discretion and Deference in the Immigration Context*..... 1033

    E. *Same-Sex Marriage and Immigration*..... 1034

II. SAME-SEX COUPLES AND MARRIAGE BONA FIDES: PROBLEMS OF PROOF AND PREJUDICE ..... 1037

    A. *Existing Procedural Challenges for Nontraditional Heterosexual Couples*..... 1038

    B. *Homosexuality, Systemic Bias, and Unique Problems of Proof*..... 1043

    C. *Same Problems of Prejudice and Proof, New Context* ..... 1045

III. PROPOSED SOLUTIONS ..... 1048

CONCLUSION ..... 1052

INTRODUCTION

U.S. immigration law values family reunification,<sup>1</sup> and thus allows foreign nationals to acquire legal status based on marriages to American citizens.<sup>2</sup> As immediate family members, spouses of U.S. citizens receive special treatment under the Immigration and Nationality Act (INA).<sup>3</sup> Thus, seeking permanent residence based on marriage is the most popular path to obtaining a green card.<sup>4</sup>

While the Defense of Marriage Act (DOMA), a statute that defined “marriage” for all federal purposes as “a legal union between one man and one woman as husband and wife,” was in place, this immigration privilege

---

<sup>1</sup> Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1638 (2007) (“Immigration law uses marriage as a category for assigning immigration status and does this as part of an explicit policy goal of family unification.”).

<sup>2</sup> 8 C.F.R. § 204.2(a)(1) (2014).

<sup>3</sup> See Abrams, *supra* note 1, at 1637–38.

<sup>4</sup> For example, in 2012, 273,429 immigrants became lawful permanent residents based on their marriages to U.S. citizens, which represents 26.5% of all the immigrants who obtained permanent residence in 2012. RANDALL MONGER & JAMES YANKAY, DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, U.S. LEGAL PERMANENT RESIDENTS: 2012, at 3 tbl.2 (2013), available at [http://www.dhs.gov/sites/default/files/publications/ois\\_lpr\\_fr\\_2012\\_2.pdf](http://www.dhs.gov/sites/default/files/publications/ois_lpr_fr_2012_2.pdf) [http://perma.cc/Y4GS-WLNT].

was unavailable to same-sex couples.<sup>5</sup> However, when the Supreme Court declared section 3 of DOMA unconstitutional in *United States v. Windsor*, it removed the statutory barrier to same-sex couples benefiting from this immigration policy.<sup>6</sup>

On July 1, 2013, the Secretary of Homeland Security issued a statement in light of the *Windsor* decision, explaining she had “directed 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>7</sup> The “estimated 36,000 same-sex binational couples [currently] living in the United States”<sup>8</sup> may initially view this statement as a victory. However, same-sex couples will likely be disadvantaged if the same standards are used to evaluate the legitimacy of their relationships because the proof USCIS requires to show a relationship is bona fide often assumes couples conform to a traditional American family archetype.<sup>9</sup>

Due to a fear of foreign nationals using marriage-based immigration as a loophole to circumvent immigration quotas, the law includes certain safeguards.<sup>10</sup> One of these safeguards is that petitioners must prove they entered into their marriage in good faith (i.e., not solely for the purpose of evading immigration laws).<sup>11</sup> To show a marriage was not entered into for the purpose of evading the immigration laws, USCIS requires petitioners to provide proof such as “[d]ocumentation showing joint ownership of property,” a “[l]ease showing joint tenancy of a common residence,” “[d]ocumentation showing commingling of financial resources,” and importantly, “[a]ffidavits of third parties having knowledge of the bona fides of the marital relationship.”<sup>12</sup> Additionally, the reviewing immigration

---

<sup>5</sup> Defense of Marriage Act, Pub. L. No. 104-199, §§ 1–3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006)).

<sup>6</sup> See 133 S. Ct. 2675, 2682 (2013).

<sup>7</sup> Press Release, Secretary of Dep’t of Homeland Sec. Janet Napolitano, Statement by Secretary of Homeland Security Janet Napolitano on the Implementation of the Supreme Court Ruling on the Defense of Marriage Act (July 1, 2013), <http://www.dhs.gov/news/2013/07/01/statement-secretary-homeland-security-janet-napolitano-implementation-supreme-court> [<http://perma.cc/8W6K-FKGA>] [hereinafter Napolitano Statement].

<sup>8</sup> Victoria Neilson, *The End of DOMA: What Your Family Needs to Know*, IMMIGR. EQUALITY (June 26, 2013), <http://www.lawhelpny.org/files/B23B29BF-0DED-F7B9-2149-1DB14E1A7DE5/attachments/71A00902-9343-4B78-9BCA-6E1D9DE58951/the-end-of-doma-immigration-2013.pdf> [<http://perma.cc/V74Y-YE4A>].

<sup>9</sup> See Samantha L. Chetrit, Note, *Surviving an Immigration Marriage Fraud Investigation: All You Need Is Love, Luck, and Tight Privacy Controls*, 77 BROOK. L. REV. 709, 723 (2012).

<sup>10</sup> See H.R. REP. NO. 99-906, at 6 (1986).

<sup>11</sup> See Zeleniak, 26 I. & N. Dec. 158, 158 (B.I.A. 2013) (citing 8 C.F.R. § 204.2(a) (2013)).

<sup>12</sup> 8 C.F.R. § 216.4(a)(5) (2014). This list is not exhaustive.

officer may also choose to interview the couple to determine whether the marriage is bona fide.<sup>13</sup>

However, same-sex couples may have more difficulty than heterosexual couples proving they married in good faith because evidence of joint assets and liabilities are often not available to them. For example, prior to the *Windsor* decision, married same-sex couples were unable to file joint federal taxes unless they followed a burdensome, complicated procedure.<sup>14</sup> Additionally, even without the barrier of DOMA, couples living in states that do not allow same-sex marriage “likely will not be able to file state taxes jointly.”<sup>15</sup> Even without an institutional barrier, some couples may choose not to commingle finances “for fear of facing discrimination,” especially because no federal law prohibits employment or housing discrimination because of sexual orientation.<sup>16</sup>

These requirements are also problematic because they largely use public indicia of a relationship as a proxy for the legitimacy of the relationship. However, foreign nationals from countries where homosexuality is not considered a moral or cultural norm may have taken measures to hide evidence of their relationships out of fear of being rejected by their families, being persecuted, or facing possible criminal penalties.<sup>17</sup> This may create problems for couples that are or have been closeted in the past. For example, closeted same-sex couples may have chosen not to live together, and thus may not have a joint lease or co-owned property. Additionally, same-sex couples may have trouble finding third parties to corroborate the validity of their marriage, or providing photos of themselves with friends and family or of their wedding ceremony.<sup>18</sup> Further, current immigration laws require noncitizen spouses who need to apply for an inadmissibility waiver<sup>19</sup> to return to their home

---

<sup>13</sup> See *id.* § 216.4(b)(1).

<sup>14</sup> 133 S. Ct. 2675, 2694 (2013) (citing State of Vermont Dep’t of Taxes Technical Bulletin TB–55, 2010 Vt. Tax LEXIS 6 (Oct. 7, 2010)).

<sup>15</sup> Victoria Neilson et al., AM. IMMIGRATION COUNCIL & IMMIGRATION EQUAL., *Immigration Benefits and Pitfalls for LGBT Families in a Post-DOMA World* 6 (2013), available at <http://immigrationequality.org/wp-content/uploads/2013/08/Immigration-Benefits-and-Pitfalls-for-LGBT-Families-in-A-Post-DOMA-World-FIN-8-5-13.pdf> [<http://perma.cc/D2G2-YC5Q>].

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> *Id.*

<sup>19</sup> Noncitizens may be deemed “inadmissible” if they fall into one of multiple categories defined by the INA. 8 U.S.C. § 1182(a) (2012). These categories include noncitizens who have been convicted of certain crimes, lied about immigration status, been in the United States illegally, and used false documents to obtain entry into the United States. *Id.* § 1182(a)(2), (a)(6)(A), (a)(6)(C)(i). When filing for a green card based on marriage, USCIS determines whether the individual falls into one of these categories. If found inadmissible, noncitizens in the United States are subject to deportation, while noncitizens outside the United States are not allowed to enter. See *id.* § 1182(a). However, spouses of

country and apply for a spousal visa through a consular office.<sup>20</sup> However, for many couples, the benefit of obtaining legal status may not be worth the safety risk of returning to a home country where homosexuality is not tolerated.<sup>21</sup>

This Note will examine the current spousal visa requirements and marriage fraud review process in light of the practical realities many same-sex couples face. Part I will provide a background of the applicable family-based immigration laws and how *Windsor* affected them. In Part II, this Note will discuss the problems with the existing procedures as they have been applied to heterosexual couples with nontraditional lifestyles. Part II will then explain how same-sex couples will face heightened challenges with the family-based immigration standards due to potentially insufficient documentation of their relationships, cultural norms within the LGBT community that may be seen as red flags to USCIS officers, and a fear of being “outed” and facing discrimination.

Finally, Part III will argue that the current requirements and review procedures are inherently discriminatory, and should be amended to recognize that historic systemic barriers and global prejudice may hinder same-sex couples from showing that their relationships are in fact bona fide. USCIS should first implement sensitivity training to its officers about LGBT issues, so officers will understand why many same-sex couples may not have traditionally expected extrinsic evidence of a relationship. To cabin stereotyping and bias in the review process, USCIS should adopt objective criteria for determining a marriage is not bona fide. However, the regulations should still retain flexibility in how a couple may demonstrate a marriage is bona fide. Finally, USCIS should relax its processes surrounding consular processing for inadmissibility waivers. Specifically, petitioners should be able to seek consular processing in a third-party country if they are afraid to return home due to their LGBT status.

#### I. BACKGROUND: MARRIAGE IN THE IMMIGRATION CONTEXT

To analyze the problems existing marriage-based immigration procedures may pose for same-sex couples, it is first necessary to present the current immigration law. Thus, this Part will explain the specific immigration benefits afforded to spouses of U.S. citizens, the requirements

---

U.S. citizens may apply for inadmissibility waivers so that they may still be allowed to enter or remain in the United States based on their marital relationship to a U.S. citizen. *See infra* notes 32–35 and accompanying text.

<sup>20</sup> § 1187(g).

<sup>21</sup> Telephone Interview with Lavi Soloway, Founder, Immigration Equal. (Nov. 1, 2013) [hereinafter Soloway Interview].

of proving a marriage for immigration purposes, the procedures for obtaining marriage-based immigration benefits, and the discretionary nature of these procedures. Against this backdrop, this Part will next discuss how these immigration laws have dealt with same-sex marriage before and after *Windsor*.

*A. Immigration Law Restrictions and Preferential Treatment for Spouses of U.S. Citizens*

The INA is the primary federal statute that controls immigration, regulating the flow of immigrants in three key ways.<sup>22</sup> The first way the INA regulates immigration is by establishing numerical quotas limiting the number of persons who can immigrate to the United States.<sup>23</sup> Specifically, the INA caps the number of people who can immigrate from each foreign country,<sup>24</sup> and it also places limits on the number of people who can immigrate based on certain admission categories (e.g., employment-based immigration).<sup>25</sup> Second, the INA prevents certain aliens from entering the country. Generally, even if an immigrant is otherwise eligible to receive a U.S. visa, that immigrant may be deemed “inadmissible” if she falls into one of many categories of inadmissibility criteria as defined by the INA.<sup>26</sup>

Finally, the INA gives certain classes of noncitizens preferential treatment,<sup>27</sup> such as spouses of U.S. citizens,<sup>28</sup> who are excluded from the foreign country and categorical numerical quotas.<sup>29</sup> This benefit is particularly helpful because the number of people trying to obtain a U.S. visa exceeds the current quota limits. This creates a large backlog of visa applications, which can make the path to permanent residency long and frustrating for most immigrants.<sup>30</sup> However, because spouses of U.S.

---

<sup>22</sup> See generally Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

<sup>23</sup> 8 U.S.C. § 1151; see also Nat’l Immigration Forum Staff, *Immigration Backlogs are Separating American Families*, NAT’L IMMIGR. F. (July 26, 2012), <https://immigrationforum.org/blog/immigration-backlogs-are-separating-american-families/> [https://perma.cc/7PLH-DSR5] (detailing the quota system).

<sup>24</sup> § 1152.

<sup>25</sup> *Id.* § 1151(a)(2).

<sup>26</sup> *Id.* § 1182(a) (outlining the various grounds for inadmissibility).

<sup>27</sup> *Blackwell v. Thornburgh*, 745 F. Supp. 1529, 1531 (C.D. Cal. 1989).

<sup>28</sup> *Id.*; see also *Abrams*, *supra* note 1, at 1635–36.

<sup>29</sup> § 1151(b)(1)(A), (2)(A)(i).

<sup>30</sup> The State Department issues a monthly bulletin describing how many visas are available in each category and the respective wait times for obtaining a visa. For the most recent visa backlog information at the time of printing, see *Visa Bulletin – Immigrant Numbers for December 2013*, U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS (Nov. 8, 2013), [http://travel.state.gov/content/dam/visas/Bulletins/visabulletin\\_december2013.pdf](http://travel.state.gov/content/dam/visas/Bulletins/visabulletin_december2013.pdf) [http://perma.cc/85RT-8P9H]. For an overview of

citizens are not subject to these quotas, they often have a faster path to obtaining lawful permanent residence in the United States than other types of immigrants.<sup>31</sup>

In addition to expediency, marital status can offer substantive privileges unavailable to other categories of immigrants. Specifically, marital status can qualify immigrants for exceptions or waivers if they are being denied entry into the United States due to ineligibility or are facing deportation.<sup>32</sup> Thus, marriage to a U.S. citizen can make a previously inadmissible alien admissible.

For example, alien spouses of U.S. citizens who are inadmissible as a result of certain criminal convictions may still be granted a green card if denying their entry would result in “extreme hardship” to their U.S. citizen spouses.<sup>33</sup> A similar discretionary “extreme hardship” waiver is available for alien spouses who lied about their immigration status or used false documents to enter the country.<sup>34</sup> Therefore, marrying a U.S. citizen can provide a path to permanent residency that would have otherwise been unavailable to certain aliens.

#### *B. Only “Valid” and “Bona Fide” Marriages Count for Immigration Purposes*

To be eligible for the spousal visa, the petitioner must show (1) the marriage is valid for immigration purposes and (2) the marriage is bona fide (i.e., was not entered into for the sole purpose of evading the immigration laws).<sup>35</sup> Because the U.S. citizen seeks a benefit from the U.S. government, the petitioner has the burden of showing her spouse’s eligibility.<sup>36</sup>

---

the impact of the long wait times for American bi-families, see Nat’l Immigration Forum Staff, *supra* note 23.

<sup>31</sup> Note, *The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238, 1240 n.13 (1986). However, although immediate family members face less of an administrative backlog than other types of immigrants, the process can still be slow. See *infra* notes 60–65 and accompanying text.

<sup>32</sup> § 1182(h)(1)(B); see also Abrams, *supra* note 1, at 1635 (“Spouses of U.S. citizens or residents, however, are eligible for discretionary waivers of many of these inadmissibility provisions.”).

<sup>33</sup> § 1182(h)(1)(B).

<sup>34</sup> *Id.* § 1182(i)(1).

<sup>35</sup> See, e.g., Zeleniak, 26 I. & N. Dec. 158, 158 (B.I.A. 2013) (“In order to determine whether a marriage is valid for immigration purposes, the United States citizen petitioner must establish that a legally valid marriage exists and that the beneficiary qualifies as a spouse under the Act, which includes the requirement that the marriage must be bona fide.”).

<sup>36</sup> The petitioner must by a preponderance of the evidence show that the marriage was entered into in good faith. See Casillas, 22 I. & N. Dec. 154, 156 (B.I.A. 1998).

The first eligibility requirement is the validity of the marriage. Generally, a marriage is valid for immigration purposes so long as it is legal in the place where it was “celebrated” (i.e., entered into).<sup>37</sup> The rule contains some exceptions, however. For example, even if a marriage is legal in the place where it was celebrated, it may nevertheless be invalid for immigration purposes if it violates a strong state or national public policy.<sup>38</sup> Marriages that trigger this exception have traditionally involved incest or polygamy.<sup>39</sup>

The second eligibility requirement is that the marriage is bona fide, meaning it was entered in to in good faith, and not solely for the evasion of immigration laws.<sup>40</sup> Accordingly, the parties’ intent at the time they married is the key issue in determining whether a marriage is bona fide.<sup>41</sup> However, conduct after the marriage can be relevant to determine the parties’ intent at the time of marriage.<sup>42</sup>

The laws are stricter for couples that fall into certain categories of suspicion identified by the Immigration Marriage Fraud Amendments of 1986 (IMFA).<sup>43</sup> The preferential treatment afforded to spouses of U.S. citizens creates an incentive for aliens to marry U.S. citizens to obtain immigration benefits.<sup>44</sup> Aware of this incentive, and concerned about aliens abusing the privilege to circumvent immigration laws,<sup>45</sup> Congress passed the IMFA to “deter immigration related marriage fraud.”<sup>46</sup>

---

<sup>37</sup> Da Silva, 15 I. & N. Dec. 778, 779 (B.I.A. 1976) (“The legal validity of a marriage is generally determined by the law of the place of the celebration.”).

<sup>38</sup> Abrams, *supra* note 1, at 1670–73 (discussing examples of marriages that have been found to violate strong public policies of the state of domicile and the federal government, respectively).

<sup>39</sup> *Id.* at 1666–67.

<sup>40</sup> 8 C.F.R. § 216.4(a)(5) (2014).

<sup>41</sup> Dabaghian v. Civiletti, 607 F.2d 868, 869, 871 (9th Cir. 1979) (finding the determination of whether a marriage is bona fide depends on whether the parties intended to establish a life together at the time they were married, not whether the marriage was “factually dead” at the time the noncitizen applied for adjustment of status).

<sup>42</sup> Laureano, 19 I. & N. Dec. 1, 3 (B.I.A. 1983) (citing Lutwak v. United States, 344 U.S. 604, 617 (1953)).

<sup>43</sup> Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified in scattered sections of 8 U.S.C.).

<sup>44</sup> H.R. REP. NO. 99-906, at 6 (1986).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* Congress passed the IMFA based on an INS survey finding “that approximately 30% of all petitions for immigrant visas involve suspect marital relationships.” *Id.* However, INS only surveyed field investigators in three cities, and the resulting 30% figure was based on the number of cases the investigators suspected were fraudulent, rather than “cases where actual fraud had been proven.” James A. Jones, *The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation?*, 24 FLA. ST. U. L. REV. 679, 699 (1997). In fact, at the time Congress passed the IMFA, INS had never determined the exact number of known cases of immigration marriage fraud. *Id.* USCIS does not post statistics about marriage fraud, so the exact number is still unknown. *See also* Manwani v. INS, 736 F.



The IMFA tightened controls on marriage-based immigration petitions in multiple ways. First, it established a conditional legal status for those seeking a green card based on a recent marriage (i.e., the marriage was entered into during the two years before the alien petitioned to gain legal status based on such marriage).<sup>47</sup> This conditional permanent residency status is valid for two years.<sup>48</sup>

Further, at any point during this two-year period, the Secretary of Homeland Security may terminate the conditional legal status and initiate removal proceedings against the noncitizen for a variety of reasons. The Secretary can invoke this authority if he determines that the marriage (1) “was entered into for the purpose of procuring an alien’s admission as an immigrant,” (2) has ended, or (3) was exchanged for a fee or some other consideration.<sup>49</sup>

This two-year requirement applies to any noncitizen newlywed seeking permanent residency based on a recent marriage, not just noncitizens that married abroad and then came to the United States for the first time. For example, if a noncitizen was already in the United States on a temporary visa (e.g., for school) and met and married a U.S. citizen while in the country, she could apply for permanent residency to stay in the United States once the existing visa expired.<sup>50</sup> However, if the noncitizen applied for permanent residency within the first two years of her marriage, she would be subject to the conditional residency period, regardless of her previous lawful presence in the United States.

This temporary status creates additional administrative hoops through which recently married couples must jump. The procedural implications of this conditional status will be discussed below in Section C.

Second, the IMFA created a presumption that a marriage entered into after the initiation of removal proceedings is fraudulent, unless the petitioner can show by clear and convincing evidence that the marriage is bona fide.<sup>51</sup> Thus, U.S. citizens who marry aliens in deportation

---

Supp. 1367, 1373 (W.D.N.C. 1990) (explaining that Congress should not have relied on the INS survey to pass the IMFA).

<sup>47</sup> RICHARD D. STEEL, *STEEL ON IMMIGRATION LAW* § 5:29 (2014 ed.), available at Westlaw STEEL; see also 8 U.S.C. § 1186a(h)(1) (2012).

<sup>48</sup> At the end of the conditional two-year period, the couple must jointly file to have the conditional status removed. Mary L. Sfasciotti & Luanne Bethke Redmond, *Marriage, Divorce, and the Immigration Laws*, 81 ILL. B.J. 644, 646 (1993); see also § 1186a(b)(1).

<sup>49</sup> § 1186a(b)(1).

<sup>50</sup> See, e.g., *Smolniakova v. Gonzales*, 422 F.3d 1037, 1042–43 (9th Cir. 2005) (alien petitioner met her husband through a mutual friend at a New Year’s party while in the United States on a six-month visitor’s visa).

<sup>51</sup> H-A-, 22 I. & N. Dec. 728, 730 (B.I.A. 1999).

proceedings have a higher burden of proof than the normal preponderance of the evidence standard.<sup>52</sup>

Third, the IMFA established stricter penalties for affirmative findings of immigration marriage fraud. For example, it increased the criminal penalty for committing marriage fraud to a \$250,000 fine on both parties<sup>53</sup> and permanently barred any alien from immigrating to the United States who has tried to obtain an immigration benefit based on marriage fraud.<sup>54</sup> Thus, after the 1986 amendments, the process of proving a bona fide marriage has become more difficult, and the stakes for raising USCIS suspicion have been raised.

### *C. Procedures for Obtaining a Spousal Visa*

Usually the U.S. citizen files the petition for a spousal visa on behalf of her spouse.<sup>55</sup> To obtain a spousal visa, the U.S.-citizen petitioner must file a form evidencing the validity and bona fides of her relationship, called the I-130.<sup>56</sup> Along with the form, the petitioner must submit a copy of the marriage certificate, documents proving any previous marriages were legally terminated, passport-style photos, and a separate form with biographical information.<sup>57</sup>

USCIS also recommends the parties submit additional evidence to prove the bona fides of the marriage, including but not limited to: “[d]ocumentation showing joint ownership [of] property,” “[a] lease showing joint tenancy of a common residence,” “[d]ocumentation showing co-mingling of financial resources,” “[b]irth certificate(s) of child(ren)” born to the petitioner and her spouse, and “[a]ffidavits . . . by third parties having personal knowledge of the bona fides of the marital relationship.”<sup>58</sup> If USCIS is unsatisfied with the evidence submitted in the I-130 form, it may request that the petitioner send additional evidence or appear in person for an interview with her spouse to further investigate the validity and bona fide nature of the marital relationship.<sup>59</sup>

---

<sup>52</sup> See Casillas, 22 I. & N. Dec. 154, 156 (B.I.A. 1998).

<sup>53</sup> § 1325(c).

<sup>54</sup> § 1154(c).

<sup>55</sup> Abrams, *supra* note 1, at 1636; see also 8 C.F.R. § 204.2(a) (2014).

<sup>56</sup> See U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., OMB No. 1615-002, INSTRUCTIONS FOR FORM I-130, PETITION FOR ALIEN RELATIVE 3, 6 (2012), available at <http://www.uscis.gov/sites/default/files/files/form/i-130instr.pdf> [<http://perma.cc/G95P-ZM9C>].

<sup>57</sup> *Id.* at 2–3.

<sup>58</sup> *Id.* at 3.

<sup>59</sup> *Id.* at 6.

Unfortunately, this process can be cumbersome. USCIS sometimes cannot keep up with the large influx of I-130 applications it receives, which can create significant administrative backlogs.<sup>60</sup> For example, although USCIS claims it can usually process I-130 forms within six months,<sup>61</sup> during 2013–2014 processing times “stretched to 15 months, and more than 500,000 applications became stuck in the pipeline . . . keeping families apart.”<sup>62</sup> Thus, a married couple navigating this complex bureaucracy may have to face a long wait.

However, the procedure is even more complex for couples who are recently married and, therefore, subject to the IMFA’s two-year conditional legal status requirement. In addition to filing the initial I-130 form and supporting documentation, couples subject to the conditional legal status requirement must jointly file a petition requesting removal of the conditional status within three months prior to the end of the two-year period.<sup>63</sup> Then, the alien spouse and petitioning spouse must appear for a personal interview with a USCIS officer to further prove the bona fides of their marriage.<sup>64</sup> Failure to complete any of these steps can result in the alien spouse’s deportation.<sup>65</sup>

This process is further complicated for spouses who require an inadmissibility waiver. As previously discussed, spouses of U.S. citizens are eligible for certain inadmissibility waivers, providing a path to permanent residence that would otherwise be unavailable as a result of past criminal conduct, lying about immigration status, or falsifying immigration documents. However, the procedure for obtaining an inadmissibility waiver can still be burdensome for many families.

---

<sup>60</sup> See Julia Preston, *Program Benefiting Some Immigrants Extends Visa Wait for Others*, N.Y. TIMES, Feb. 8, 2014, [http://www.nytimes.com/2014/02/09/us/program-benefiting-some-immigrants-extends-visa-wait-for-others.html?\\_r=0](http://www.nytimes.com/2014/02/09/us/program-benefiting-some-immigrants-extends-visa-wait-for-others.html?_r=0) [<http://perma.cc/PC65-3DJV>].

<sup>61</sup> *USCIS Focused on Addressing Delays in the Processing of Form I-130*, USCIS PROCESSING TIMES, <http://www.uscisprocessingtimes.org/general/uscis-focused-on-addressing-delays-in-the-processing-of-form-i-130/> [<http://perma.cc/UZ73-J48Q>].

<sup>62</sup> Preston, *supra* note 60. According to USCIS records, just between July 1 and September 31, 2013, USCIS received 131,962 I-130 forms for immediate relatives. U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., NUMBER OF I-130 ALIEN RELATIVE PETITIONS BY CATEGORY OF RELATIVES, CASE STATUS, AND USCIS FIELD OFFICE OR SERVICE CENTER LOCATION: JULY 1 – SEPTEMBER 31, 2013 (2014), available at <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/I-130-Q42013.pdf> [<http://perma.cc/YR5U-PYZJ>]. During this time, USCIS processed a total of 82,348 I-130 forms, but 352,855 were still pending. *Id.* The I-130 form is used for all immediate relatives, not just spouses, and USCIS does not individually report filing rates for each type of familial relationship. However, the majority of immediate relatives are spouses. See, e.g., MONGER & YANKAY, *supra* note 4, at 3 (in 2012, spouses of U.S. citizens represented 57% of all immediate relative lawful permanent residents).

<sup>63</sup> 8 U.S.C. § 1186a(c)(1)(A) (2012).

<sup>64</sup> *Id.* § 1186a(c)(1)(B), (d)(3).

<sup>65</sup> See *id.* § 1186a(c)(2)(A).

To apply for an inadmissibility waiver, alien spouses must return to their home countries, complete a visa interview abroad, and then submit their application through the local U.S. consulate office.<sup>66</sup> While USCIS processes their applications, spouses are required to remain abroad.<sup>67</sup> Processing waiver applications can often take over a year, which can result in families being separated for indefinite periods of time.<sup>68</sup>

The Department of Homeland Security and USCIS have recently recognized that requiring alien relatives of U.S. citizens to apply for permanent resident status and inadmissibility waivers can be burdensome to binational families. In January 2013, the agencies changed the filing process for certain inadmissibility waivers for eligible immediate relatives currently present in United States.<sup>69</sup> Under the new regulation, immediate relatives who meet certain requirements, and are inadmissible solely for unlawful presence in the United States, can “apply for a provisional unlawful presence waiver while they are still in the United States and before they leave to attend their immigrant visa interview abroad.”<sup>70</sup> The regulation is designed to reduce time during which nuclear families are separated, but it still requires the alien relative to travel abroad for the interview, which can be expensive and inconvenient.

Additionally, the waiver only applies to a narrow subset of noncitizens: those who are inadmissible solely due to unlawful U.S. presence.<sup>71</sup> However, there are numerous reasons why a noncitizen may be deemed inadmissible, some of which seem trivial when considering the severity of the consequences: facing deportation or flying back to one’s home country to apply for a family-based waiver and waiting indefinitely for consular processing.

For example, conviction under any law relating to a controlled substance, including possession, or even mere admission to using any controlled substance, renders a noncitizen inadmissible.<sup>72</sup> Similarly, if the

---

<sup>66</sup> Waiver of Certain Grounds of Inadmissibility, 8 C.F.R. § 212.7 (2014); *see also* Provisional Unlawful Presence Waivers, U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., <http://www.uscis.gov/family/family-us-citizens/provisional-waiver/provisional-unlawful-presence-waivers> [<http://perma.cc/K3TN-TZRR>] (“Under current law, immediate relatives of U.S. citizens who are not eligible to adjust status in the United States must travel abroad and obtain an immigrant visa.”).

<sup>67</sup> Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 Fed. Reg. 536, 536 (Jan. 3, 2013) (to be codified at 8 C.F.R. pts. 103 & 212).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2012); *see, e.g.*, *Olivan–Duenas v. Holder*, 416 F. App’x 678 (10th Cir. 2011) (eighteen-year-old noncitizen was convicted of possessing less than one ounce of marijuana within 1000 feet of a church, a drug-free zone, rendering him inadmissible).

court determines a noncitizen was convicted of a crime involving “moral turpitude,” an amorphous concept that generally relates to the *mens rea* of the crime regardless of the crime’s severity, the noncitizen is also inadmissible.<sup>73</sup>

There is no exact way to tell how many binational families this affects. USCIS neither publishes statistics on the annual number of inadmissibility waivers sought based on marital relationships nor tracks the underlying basis for inadmissibility waiver petitions filed. However, the federal government does track illegal drug use through surveys.<sup>74</sup> These statistics show a majority of adults surveyed had tried both marijuana and an illicit substance other than marijuana at least once.<sup>75</sup> Based on these statistics, just considering the inadmissibility grounds for controlled substances, the majority of American adults could be inadmissible if they admitted this to immigration officials or had ever been caught.<sup>76</sup> Thus, if the noncitizen adults marrying U.S. citizens are even remotely similar to their spouses regarding past drug experimentation habits, it is likely that many must return home for consular processing.<sup>77</sup>

#### D. Discretion and Deference in the Immigration Context

Determining whether a marriage is bona fide is inherently subjective. Although the INA requires an investigation of the facts of each marriage-based visa petition, it does not provide specificity or guidelines for investigating whether a marriage is bona fide.<sup>78</sup> Instead, the standards for

---

<sup>73</sup> See § 1182(a)(2)(A)(i)(I); see, e.g., *Michel v. INS*, 206 F.3d 253, 262–64 (2d Cir. 2000) (holding the petitioner’s possession of stolen bus transfers was a crime involving moral turpitude because knowledge was an element of the crime, and “neither the seriousness of a criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude”). For more background on the concept of moral turpitude, see Amy Wolper, Note, *Unconstitutional and Unnecessary: A Cost/Benefit Analysis of “Crimes Involving Moral Turpitude” in the Immigration and Nationality Act*, 31 CARDOZO L. REV. 1907, 1910–13 (2010) (arguing “the costs of vague language in the context of deportation of criminal aliens outweigh the benefits of using [crimes involving moral turpitude] in the INA”).

<sup>74</sup> Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM. & MARY L. REV. 163, 194 (2008).

<sup>75</sup> See NAT’L INST. ON DRUG ABUSE, NAT’L INSTS. OF HEALTH, 2 MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE, 1975–2004; COLLEGE STUDENTS AND ADULTS AGES 19–45, at 30 (2005), available at [http://www.monitoringthefuture.org/pubs/monographs/vol2\\_2004.pdf](http://www.monitoringthefuture.org/pubs/monographs/vol2_2004.pdf) [<http://perma.cc/9ZAR-4KED>] (eighty-one percent of adults with a high school education had tried marijuana by the time they turned forty-five and seventy-one percent had tried an illicit drug other than marijuana).

<sup>76</sup> Morawetz, *supra* note 74, at 195.

<sup>77</sup> See *id.* (where similar statistics for other countries “are available, the numbers also show widespread lifetime use. In Canada, 45 percent of adults report lifetime use of marijuana, with the lifetime figures being higher for younger cohorts than for older cohorts”).

<sup>78</sup> See Eileen P. Lynskey, Comment, *Immigration Marriage Fraud Amendments of 1986: Till Congress Do Us Part*, 41 U. MIAMI L. REV. 1087, 1093 (1987).

determining the bona fides of a marriage are largely discretionary and decided on a case-by-case basis by USCIS immigration officers.<sup>79</sup>

If USCIS denies a spousal visa petition that was filed within the United States, the petitioner may appeal the decision before the Board of Immigration Appeals (BIA).<sup>80</sup> If the BIA affirms the denial, the petitioner can then file an appeal in the federal district court. However, judicial review of BIA decisions is “exceedingly deferential,” and federal courts will only reverse a BIA decision if it is “‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’ or ‘unsupported by substantial evidence.’”<sup>81</sup>

Petitioners’ remedies are even more limited if a U.S. consular office denies their application. A consular office’s decision to deny a visa is generally not subject to judicial review.<sup>82</sup> Thus, if a spousal petition is denied abroad, the petitioner will not have additional options outside the administrative office itself.<sup>83</sup>

#### *E. Same-Sex Marriage and Immigration*

Prior to *Windsor*, immigration law did not recognize same-sex marriage as “valid” under the INA. Before DOMA created a statutory bar to recognizing same-sex marriages as “valid,” the Ninth Circuit’s decision in the 1982 case *Adams v. Howerton* created a judicial bar.<sup>84</sup> In *Adams*, a binational same-sex couple was legally married in Colorado, and the U.S.-citizen husband immediately petitioned for classification of his alien husband as an immediate relative of an American citizen based on his

---

<sup>79</sup> Blas, 15 I. & N. Dec. 626, 628 (B.I.A. 1974); see also Kikuyo Matsumoto-Power, *Aliens, Resident Aliens, and U.S. Citizens in the Never-Never Land of the Immigration and Nationality Act*, 15 U. HAW. L. REV. 61, 69 (1993).

<sup>80</sup> 8 C.F.R. §§ 204.2(a)(3), 1003.1(b)(5) (2014).

<sup>81</sup> *Diaz v. U.S. Citizenship & Immigration Servs.*, 499 F. App’x 853, 854 (11th Cir. 2012) (quoting *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996); *Administrative Procedure Act*, 5 U.S.C. § 706(2)(A), (E) (2012)).

<sup>82</sup> *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (“Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”); see also *Mostofi v. Napolitano*, 841 F. Supp. 2d 208, 209–10 (D.D.C. 2012) (granting a motion to dismiss a challenge to a denial of a spousal visa at a consular office based on doctrine of consular nonreviewability).

<sup>83</sup> DHS does not annually report statistics of the number of spousal visa petitions denied at consular offices. However, in 2013, foreign offices granted 205,435 immediate family immigrant visas. BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, REPORT OF THE VISA OFFICE 2013 tbl.1, available at <http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2013AnnualReport/FY13AnnualReport-TableI.pdf> [<http://perma.cc/89CE-LCMF>].

<sup>84</sup> 673 F.2d 1036, 1043 (9th Cir. 1982).

spousal status.<sup>85</sup> After the petition was denied, the citizen petitioner appealed.<sup>86</sup>

The court announced a two-step test for determining whether the marriage would be recognized for immigration purposes: (1) the marriage must be valid in the place where the marriage was celebrated (which in this case was Colorado) and (2) the marriage must qualify under the INA.<sup>87</sup> The court decided it was unclear whether same-sex marriage was valid under Colorado law,<sup>88</sup> but nevertheless affirmed the denial under the second prong of the test.<sup>89</sup>

To determine whether the marriage was valid under the INA, the court analyzed the meaning of the word “spouse” as used in INA section 201(b), the provision defining immediate family members excluded from immigration quotas.<sup>90</sup> The court noted that, although the word “spouse” was not explicitly defined in the INA, the ordinary meaning of “spouse” contemplates a party to a legal union between a man and a woman.<sup>91</sup> Because Congress had not indicated intent to alter the ordinary meaning of the term, the court concluded the INA definition of spouse did not include parties to a homosexual marriage.<sup>92</sup>

Eventually, Congress decided to make the definition of “spouse” and “marriage” explicit with DOMA. Section 3 of DOMA provided:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.<sup>93</sup>

Because the INA is a federal statute, DOMA created an explicit statutory barrier to same-sex couples seeking immigration benefits under the Act.

---

<sup>85</sup> *Id.* at 1038.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1039. The Ninth Circuit consulted Colorado law for the validity of the marriage because the marriage was celebrated in Colorado. Had the marriage occurred abroad, the court would have considered the laws of the country in which it was celebrated. *See, e.g.*, *Ma*, 15 I. & N. Dec. 70, 71 (B.I.A. 1974) (marriage celebrated in Korea was valid for immigration purposes because it was legal under Korean law).

<sup>89</sup> *Adams*, 673 F.2d at 1039.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 1040.

<sup>92</sup> *Id.* While the *Adams* court also cited other common canons of statutory interpretation to bolster its holding, it primarily relied upon the ordinary meaning of the word “spouse.”

<sup>93</sup> 1 U.S.C. § 7 (2012), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013).

Amidst a backdrop of growing support for the marriage equality movement, the Supreme Court decided to review a challenge to the constitutionality of DOMA section 3 in *Windsor*.<sup>94</sup> Edith Windsor challenged DOMA when she was unable to file for a federal estate tax exemption for surviving spouses after her wife passed away because DOMA precluded federal tax laws from recognizing her same-sex marriage.<sup>95</sup> The Court struck down section 3 of DOMA as a violation of the equal protection and due process principles incorporated in the Fifth Amendment.<sup>96</sup>

Although not an immigration case, *Windsor* has had a direct impact on the immigration benefits available to same-sex couples. Under DOMA, same-sex marriage could not meet the second prong of the *Adams* test because a same-sex marriage could never be valid under the INA. However, when the Court declared DOMA unconstitutional, it removed the statutory bar.<sup>97</sup> Shortly after *Windsor* was decided, the Secretary of Homeland Security issued a statement explaining that she had “directed 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>98</sup> USCIS has already begun implementing this new post-DOMA policy. USCIS now explicitly allows same-sex couples to apply for marriage-based immigration benefits.<sup>99</sup>

Since the *Windsor* decision, the BIA has only heard one case regarding the validity of a same-sex marriage for immigration purposes: *Matter of Zeleniak*.<sup>100</sup> In *Matter of Zeleniak*, the BIA noted the Supreme

---

<sup>94</sup> 133 S. Ct. 2675.

<sup>95</sup> *Id.* at 2682.

<sup>96</sup> *Id.* at 2695–96.

<sup>97</sup> The Supreme Court explicitly acknowledged how DOMA impacted many other areas of federal law in *Windsor*:

DOMA writes inequality into the entire United States Code. The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans’ benefits.

*Id.* at 2694.

<sup>98</sup> Napolitano Statement, *supra* note 7.

<sup>99</sup> Same-Sex Marriages, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/family/same-sex-marriages> [<http://perma.cc/TMT9-9Y2T>].

<sup>100</sup> 26 I. & N. Dec. 158 (B.I.A. 2013). [Editor’s Note: Subsequent to *Zeleniak*, an unpublished opinion relating to same-sex marriage and DOMA was released, *Matter of Lopez-Rivera*, in which the respondent requested the BIA reopen removal proceedings for his same-sex spouse based on a pending family-based I-130 visa petition. The respondent had married his spouse post-*Windsor* and *Zeleniak*. The board denied the motion to reopen, stating the motion had been untimely filed and there must also be “clear and convincing evidence that their marriage is bona fide” in addition to a marriage certificate



Court had “removed section 3 of the DOMA as an impediment to the recognition of lawful same-sex marriages and spouses if the marriage is valid under the laws of the State where it was celebrated.”<sup>101</sup> Thus, the BIA held that because the same-sex marriage was valid under the laws of Vermont, the place where it was celebrated, the marriage was valid for immigration purposes.<sup>102</sup>

The *Windsor* decision has had a profound impact on the immigration system.<sup>103</sup> Same-sex couples can now qualify for marriage-based immigration benefits as long as they can prove their marriage is bona fide and legal in the place where it was celebrated. However, proving the bona fides of a same-sex marriage may be problematic.

## II. SAME-SEX COUPLES AND MARRIAGE BONA FIDES: PROBLEMS OF PROOF AND PREJUDICE

The current spousal visa procedures disadvantage nontraditional couples. The existing procedures consider public indicia of a traditional, American relationship as proof that a marriage is bona fide. As a result, cultural differences and unconventional relationships can trigger marriage fraud suspicion and removal proceedings. No recorded cases of same-sex couples facing these types of issues exist yet given that the Supreme Court decided *Windsor* in July 2013. However, problems that nontraditional heterosexual couples have experienced with the existing spousal visa procedures foreshadow the amplified problems same-sex couples will face in the future.

As quintessentially “nontraditional,” same-sex couples will experience amplified problems proving their marriages are bona fide. Although *Windsor* opened the door for same-sex couples to obtain spousal visas, proving a couple married in good faith may be even more challenging for same-sex couples than for heterosexual couples because they will often have less external proof of their relationships. Further, because same-sex couples face widespread prejudice based on their relationships, they will encounter additional unique systemic barriers.

---

and pending I-130 visa petition. Lopez-Rivera, A089 235 276, 2014 WL 347695, at \*1 (B.I.A. Jan. 3, 2014)].

<sup>101</sup> *Id.* at 159.

<sup>102</sup> *Id.* at 160.

<sup>103</sup> The BIA explicitly noted its ruling, in light of *Windsor*, applied to many different provisions of the INA, including but not limited to provisions regarding 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. *Id.* at 159.

Section A of this Part will discuss how the existing spousal visa procedures have posed challenges to nontraditional heterosexual couples. Section B will demonstrate the existing prejudice against homosexuality in the immigration system and the difficulties of proving sexual orientation through extrinsic evidence by reviewing LGBT asylum cases. Section C will then explain the analogous challenges same-sex couples will face in the context of petitioning for spousal visas.

*A. Existing Procedural Challenges for Nontraditional  
Heterosexual Couples*

Marriages that differ from the American norm can trigger marriage fraud suspicion. For example, a USCIS agency worksheet identifies the following factors as red flags for marriage fraud: “[u]nusual or large age discrepancy between spouses,” “[u]nusual associations between family members,” “[u]nusual cultural differences,” “[l]ow employment/financial status of petitioner,” “[u]nusual number of children and large discrepancy in age,” and “[u]nusual marriage history.”<sup>104</sup> In the words of New York immigration lawyer Daniel Lundy, the worksheet factors “pretty much invite racial profiling and other stereotyping.”<sup>105</sup> Indeed, the worksheet does not define what qualifies as “unusual” or “large,” which means immigration officers likely make such determinations based on their own conceptions of what is “normal.”

Similarly, USCIS becomes suspicious if a couple cannot corroborate the bona fides of the relationship through third-party affidavits, photos, joint assets and finances, or even social media activity.<sup>106</sup> However, this assumes that all married couples reflect a traditional American family archetype, where a couple is open about their marriage with friends and

---

<sup>104</sup> U.S. CITIZENSHIP & IMMIGRATION SERVS., FRAUD REFERRAL WORKSHEET 2 (Sept. 30, 2004) [hereinafter FRAUD REFERRAL WORKSHEET], available at [http://graphics8.nytimes.com/packages/pdf/nyregion/USCIS\\_Fraud\\_Referral\\_Sheet.pdf](http://graphics8.nytimes.com/packages/pdf/nyregion/USCIS_Fraud_Referral_Sheet.pdf) [<http://perma.cc/8WET-MTKH>].

<sup>105</sup> Nina Bernstein, *Do You Take This Immigrant?*, N.Y. TIMES, June 11, 2010, at MB1.

<sup>106</sup> See 8 C.F.R. § 216.4(a)(5) (2014); see also Laura L. Lichter, *Litigating the Denial of a Marriage-Based Immigrant Petition Part I: Creating a Strategic Record*, in 11-09 IMMIGR. BRIEFINGS 1, 3 (2011) (noting courts afford “significant weight” to “a letter or statement from the petitioner’s parents (or other family members) acknowledging the relationship. In one of the most common profiles of a ‘sham marriage,’ the parties are presumed to have hidden the relationship from family and close friends.”); U.S. CITIZENSHIP & IMMIGRATION SERVS., SOCIAL NETWORKING SITES AND THEIR IMPORTANCE TO FDNS 1 (2008), available at [https://www.eff.org/files/filenode/social\\_network/DHS\\_CustomsImmigration\\_SocialNetworking.pdf](https://www.eff.org/files/filenode/social_network/DHS_CustomsImmigration_SocialNetworking.pdf) [<https://perma.cc/A5UQ-4X9C>] (“[S]ocial networking gives FDNS an opportunity to reveal fraud by browsing these sites to see if petitioners and beneficiaries are in a valid relationship or are attempting to deceive [USCIS] about their relationship. Once a user posts online, they create a public record and timeline of their activities. In essence, using MySpace and other like sites is akin to doing an unannounced cyber ‘site-visit’ on . . . petitioners and beneficiaries.”).

family, documents it with photos, and always chooses to commingle finances.<sup>107</sup>

Not all couples fit this mold. For example, a 2010 *New York Times* article detailed the plight of a couple who have been married since 1993, filed three spousal visa petitions, attended five marriage interviews, and have been repeatedly denied.<sup>108</sup> USCIS provided different reasons for each denial, including that their joint bank accounts showed low balances and their answers to questions contained small discrepancies, such as their rent being “[a]bout \$700” compared to “\$677.17.”<sup>109</sup> USCIS denied one of their later petitions, apparently concerned by the husband’s lack of knowledge about his in-laws. However, the *New York Times* reporter found an explanation for this lack of knowledge in her investigation: the in-laws disliked the husband and did not talk to him.<sup>110</sup>

While this example may seem extreme, common behaviors can trigger suspicion. For example, many couples choose to keep their financial and legal affairs separate,<sup>111</sup> and many young or poor couples lack joint documentation and commingled assets.<sup>112</sup> Thus, USCIS’s list of marriage fraud red flags target and disadvantage couples that do not fit the traditional American family archetype.

These outdated “red flags,” coupled with the vast discretion afforded to immigration officers and courts in the visa petition review process, raise concerns of discrimination toward nontraditional couples. The BIA’s decision in *Blas* demonstrates this concern. In *Blas*, the majority upheld an immigration judge’s denial of Blas’s petition for permanent residence based on marriage to a U.S. citizen.<sup>113</sup> In affirming, the BIA was very deferential to the immigration judge’s findings, noting “[e]very adjudication [of this kind] must be on a case-by-case basis. Were we to

---

<sup>107</sup> See Chetrit, *supra* note 9, at 723 (“The law’s insistence on adhering to a family archetype based on antiquated norms severely prejudices and disadvantages all who fall outside of the traditional structure.”). For example, USCIS suspected a couple of marriage fraud simply because their lifestyle did not comport with the immigration officer’s lifestyle: the couple did not celebrate the same holidays, the wife had children from a previous marriage, and the husband did not know where the washing machine was located because he did not go in that part of their home. Soloway Interview, *supra* note 21.

<sup>108</sup> Nina Bernstein, *Wed in 1993, but Stuck in Immigration Limbo*, N.Y. TIMES, June 13, 2010, <http://www.nytimes.com/2010/06/14/nyregion/14marriage.html?pagewanted=all> [<http://perma.cc/35VP-A566>].

<sup>109</sup> *Id.*

<sup>110</sup> The wife’s sister explained, “I can’t stand him . . . . They have a marriage, I know that. He probably got the questions wrong because he’s an idiot.” *Id.*

<sup>111</sup> Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1654 (1991).

<sup>112</sup> Bernstein, *supra* note 105.

<sup>113</sup> 15 I. & N. Dec. 626, 626–27 (B.I.A. 1974).

promulgate overly strict guidelines, we would, in effect, infringe upon the immigration judge's discretionary authority."<sup>114</sup>

The immigration judge determined Blas's marriage was fraudulent based on one explicit finding. Blas left the Philippines while he was still married and obtained a divorce after arriving in the United States, which indicated his second marriage was solely to evade immigration laws.<sup>115</sup> In reaching this conclusion, the immigration judge commented that this case was similar to many other cases the judge had seen in which aliens from the Philippines had "proceed[ed] in a similar fashion, abandoning their families and causing tribulations to their dependents."<sup>116</sup>

The majority opinion claimed that despite the immigration judge's commentary on his previous experience with Filipino immigrants, the BIA reached its current decision on the specific facts of the case, not generalizations about Filipino immigrants.<sup>117</sup> However, when considering the entirety of the record, at least one BIA judge thought the immigration judge's "discretion" seemed more like discrimination.

In his dissent, Chairman Roberts claimed the immigration judge had relied on broad stereotypes about immigrants from the Philippines committing marriage fraud to reach his decision.<sup>118</sup> Chairman Roberts specifically noted the record was ambiguous and did not support the immigration judge's claims.<sup>119</sup> First, the immigration judge had not developed certain important facts in the record, such as how and why Blas's first marriage ended.<sup>120</sup> Second, Chairman Roberts noted the immigration judge did not seem to consider certain facts in the record that weighed in Blas's favor.<sup>121</sup> For example, the record indicated Blas and his first wife had marital problems and that he was unable to obtain a divorce until he arrived in the United States because there was no divorce in the Philippines at the time.<sup>122</sup>

Chairman Roberts also cited the immigration judge's past decisions to support his claim. The same immigration judge had previously made

---

<sup>114</sup> *Id.* at 628.

<sup>115</sup> *Id.* at 627–28.

<sup>116</sup> *Id.* at 628.

<sup>117</sup> *Id.* (explaining, "no decision should ever rest, or even give the slightest appearance of resting, upon generalizations derived from evaluations of the actions of members of any group of aliens").

<sup>118</sup> *Id.* at 634 (Roberts, Chairman, dissenting) (explaining, "[i]t seems to me that the immigration judge . . . improperly gave weight to his experiences in other cases involving Filipinos in arriving at his findings with respect to the respondent").

<sup>119</sup> *Id.* at 632–33.

<sup>120</sup> *Id.* at 632.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 631.

generalized statements about Filipino immigrants in other cases. In another case involving a Filipino immigrant, the judge denied the immigrant's claim, explaining, "[b]y now, everyone dealing with such matters is aware that aliens from the Philippines will engage in any fraud to get here and will do anything to stay."<sup>123</sup>

Chairman Roberts's dissent illuminates one of the many concerns about immigration law: the BIA may be too deferential to immigration judges' findings. In lieu of objective standards, the INA gives immigration judges extreme administrative discretion over marriage petitions.<sup>124</sup> In the absence of objective standards and stringent appellate review, immigration judges can base decisions based on unfettered, subjective notions:

An intolerant immigration judge could deny relief to aliens whose cultural patterns, moral standards, or life style differed from his own. A hostile or xenophobic judge could [deny relief to] aliens he personally considered offensive without articulating the actual basis for his decision.<sup>125</sup>

Thus, binational couples' only form of relief from discriminatory procedures could be discriminatory review.<sup>126</sup>

Conversely, it is possible that the majority was correct. Maybe the immigration judge made a superfluous observation about his recent experiences with cases involving Filipino immigrants, but based his decision on the facts of Blas's case. This ambiguity, however, is precisely the problem. Because immigration judges have so much discretion and are subject to deferential review, implicit biases can masquerade as discretion, and the BIA may be unwilling or unable to adequately safeguard against it.

In more recent years, federal judges have expressed similar concerns about the immigration review process. For example, in the 2005 case *Benslimane v. Gonzales*, the noncitizen petitioner married a U.S. citizen while illegally living in the United States on an expired visa.<sup>127</sup> He and his wife jointly filed an I-130 petition (requesting permanent residency based on his marriage) and an I-485 petition for adjustment of status (requesting adjustment of illegal status based on his marriage).<sup>128</sup> USCIS scheduled the interview for the I-485 petition for twenty-six months after it was filed.<sup>129</sup>

---

<sup>123</sup> *Id.* at 633 (quoting *Matter of Macapinlac*, file A-18989654 (unreported)).

<sup>124</sup> *Id.* at 634–35.

<sup>125</sup> *Id.* at 635.

<sup>126</sup> See *infra* notes 126–30 and accompanying text.

<sup>127</sup> 430 F.3d 828, 830 (7th Cir. 2005).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

A different agency within the Department of Homeland Security was handling the removal proceedings, and continued with these proceedings even though USCIS had not yet considered the bona fides of the marriage.<sup>130</sup> The petitioner explained this, and filed for a continuance of the removal proceedings until USCIS finished processing his I-130 application, which formed the basis of his adjustment of status claim.<sup>131</sup> However, the immigration judge denied the request and ordered the petitioner removed.<sup>132</sup> The BIA affirmed the decision without mentioning the fact that the petitioner had filed for adjustment of status long before the immigration judge ordered him removed.<sup>133</sup>

The Seventh Circuit reversed this decision. In the opinion, Judge Posner openly criticized the BIA and immigration judges.<sup>134</sup> Judge Posner then listed many recent cases in which federal circuit courts have sharply critiqued the immigration judges and the BIA for reaching conclusions that were “totally unsupported by the record,” defied “the elementary principles of administrative law, the rules of logic, and common sense,” and were “skewed by prejudice, personal speculation, bias, and conjecture.”<sup>135</sup> Thus, Posner concluded, “adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.”<sup>136</sup>

In 2006, Transactional Records Access Clearinghouse (TRAC)<sup>137</sup> quantified claims of biased decisionmaking by immigration judges.<sup>138</sup> The study examined thousands of asylum cases to determine whether results varied based on which immigration judge heard the case.<sup>139</sup> The results showed significant variation among immigration judges.<sup>140</sup> The *New York Times* reported the “findings seemed to call into question the government’s

<sup>130</sup> *Id.* at 831.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 829 (noting the court’s “criticisms of the Board and of the immigration judges have frequently been severe”).

<sup>135</sup> *Id.* (quoting *Soumahoro v. Gonzales*, 415 F.3d 732, 738 (7th Cir. 2005) (per curiam); *Niam v. Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2003); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005)).

<sup>136</sup> *Id.* at 830.

<sup>137</sup> TRAC is a research organization connected to Syracuse University. Rachel L. Swarns, *Study Finds Disparities In Judges’ Asylum Rulings*, N.Y. TIMES, July 31, 2006, at A5.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* For example, the study found that “[o]ne judge in Miami denied 96.7 percent of the asylum cases before him in which the petitioner had a lawyer. It was the highest denial rate in the nation between the beginning of the fiscal year 2000 and the first few months of fiscal year 2005 . . . . In contrast, a New York judge granted asylum in all but 9.8 percent of such cases.” *Id.*

‘commitment to providing a uniform application of the nation’s immigration laws in all cases.’”<sup>141</sup> Commentators have offered multiple explanations for the variations, including overburdened dockets, cultural misunderstandings, and even explicit biases towards certain groups.<sup>142</sup>

While not all immigration judges make these types of mistakes, these cases and the TRAC study show stereotyping may sometimes continue after the USCIS interview and into the immigration court system.

### *B. Homosexuality, Systemic Bias, and Unique Problems of Proof*

In addition to facing the same judge implicit biases and problems of proof other nontraditional applicants face, binational homosexual couples also may face unique hurdles. Because same-sex couples have only recently been eligible to receive marriage-based immigration benefits, there is not yet much evidence of same-sex couples receiving discriminatory treatment in this process. However, immigration judges’ treatment of sexual minorities in asylum cases reveals implicit biases and misunderstandings of homosexuality that may pose similar problems in the marriage petition process. Cases where petitioners have been afraid to return to their home countries and filed for asylum in the United States based on their sexual minority status exemplify these problems.

Many countries consider homosexuality a crime or moral taboo, so homosexual foreign nationals often apply for asylum in the United States. To qualify for asylum based on homosexuality, petitioners must demonstrate (1) they are homosexual, and (2) they have a reasonable fear of past or future persecution based on their status of being homosexual.<sup>143</sup> To evaluate these claims, courts consider the petitioner’s credibility and the extent to which the petitioner can corroborate her fear of persecution based on sexual orientation through extrinsic evidence.<sup>144</sup> The petitioner’s own witness testimony is often not sufficient.<sup>145</sup> Instead, courts often require documentary, third-party evidence to meet the corroboration requirement.<sup>146</sup>

However, petitioners often have trouble finding external proof of both the fact that they are homosexual and that this status provides a credible

---

<sup>141</sup> *Id.* (quoting David Burnham, co-director of TRAC).

<sup>142</sup> See, e.g., Lindsey R. Vaala, Note, *Bias on the Bench: Raising the Bar for U.S. Immigration Judges to Ensure Equality for Asylum Seekers*, 49 WM. & MARY L. REV. 1011, 1041 (2007).

<sup>143</sup> See Melanie A. Conroy, *Real Bias: How REAL ID’s Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants*, 24 BERKELEY J. GENDER L. & JUST. 1, 8 (2009).

<sup>144</sup> *Id.* at 8–10.

<sup>145</sup> *Id.* See also *supra* text accompanying notes 124–43.

<sup>146</sup> Conroy, *supra* note 143, at 10.

fear of persecution.<sup>147</sup> As one scholar notes, the practical effect of such a requirement often places petitioners in a dangerous catch-22 situation:

In sexual minority-based claims, closetedness can be necessary for survival—both for the social group and the applicant. At the same time, applicants must explain how they are sufficiently socially visible to be targeted as members of the group in question. In this manner, sexual minority cases involve competing and contrary dynamics that are difficult to demonstrate with extrinsic evidence beyond broad reports on the country conditions for similarly-situated individuals.<sup>148</sup>

Further, these concerns do not always disappear once a petitioner reaches the United States. Many homosexual asylum-seekers have not come out to their families in their home countries because of “shame, deeply rooted social taboos, or fear for their physical safety. Therefore, they often continue to live a life of secrecy once they reach the United States.”<sup>149</sup>

When trying to prove their sexual orientation, often the only proof petitioners have is their own testimony, which may not be enough. For example, in *Eke v. Mukasey*, the Seventh Circuit upheld a denial of the petitioner’s asylum claim due to his inability to corroborate his testimony that he was homosexual.<sup>150</sup> This was despite the fact that the petitioner testified that he “tried to keep his sexual orientation a secret” until his wife discovered him with his lover while in his home country.<sup>151</sup> Specifically, the court noted that the petitioner did not provide supporting witnesses, photos, or affidavits to support his claim that he was in a homosexual relationship.<sup>152</sup>

Given this frequent lack of extrinsic proof, petitioners must rely on their credibility to convince a court to grant an asylum claim. Central to a credibility evaluation is whether the petitioner’s status as a homosexual is socially visible, such that persecutors would plausibly target the petitioner based on this status.<sup>153</sup> However, in assessing a petitioner’s credibility, courts have problematically relied on American cultural stereotypes about

---

<sup>147</sup> See *id.* at 7–8 (“Although ‘[a]sylum seekers almost by definition will arrive without corroboration,’ nearly all courts, except for the Seventh and Ninth Circuits, demanded that applicants produce all reasonably-expected corroborating evidence.” (citation omitted) (quoting Virgil Wiebe et al., *Asking for a Note from Your Torturer: Corroboration and Authentication Requirements in Asylum, Withholding and Torture Convention Claims*, in 01-10 IMMIGR. BRIEFINGS 1, 3 (2001))).

<sup>148</sup> *Id.* at 8.

<sup>149</sup> *Id.* at 14.

<sup>150</sup> 512 F.3d 372, 375, 381 (7th Cir. 2008).

<sup>151</sup> *Id.* at 375–76.

<sup>152</sup> *Id.* at 381.

<sup>153</sup> Conroy, *supra* note 143, at 15.



and personal biases towards homosexuality.<sup>154</sup> For example, courts have denied homosexuality-based asylum claims because the petitioners do not seem “‘gay enough’ according to ‘stereotypical physically “feminine” characteristics [employed] as indicators of homosexual identity’ in American culture.”<sup>155</sup>

The asylum cases demonstrate the multiple problems that immigration law poses to sexual minorities. Immigration law poses these problems because (1) it provides broad rules and ill-defined standards, which allow officials to decide whether to grant immigration benefits based on whether a petitioner conforms to a particular cultural expectation, and (2) it does not adequately account for practical problems of proving homosexuality, particularly when an individual is closeted.

### C. *Same Problems of Prejudice and Proof, New Context*

Immigration law already makes it difficult for nontraditional couples to navigate the marriage petition process. Because USCIS evaluates the bona fides of a marriage based on traditional American marriages, unconventional relationships can trigger marriage fraud “red flags.” Further, because immigration officers and judges are afforded vast discretion in this area, it can be difficult for reviewing courts to determine whether they reached their decisions on the facts of the case, cultural misunderstanding, or implicit bias. Finally, while there is not yet much evidence of same-sex couples facing similar difficulties in the marriage petition process, treatment of homosexuality in the asylum context indicates same-sex couples may face unique hurdles in the marriage petition process as well.

Same-sex couples will have more difficulty proving their marriage is bona fide because they may (1) lack sufficient evidence of their relationship and (2) face global and systemic prejudice. First, evidence of joint assets and liabilities are often not available to same-sex couples. For example, prior to *Windsor*, married same-sex couples were unable to file joint federal taxes unless they followed a burdensome, complicated procedure.<sup>156</sup> Additionally, even without the barrier of DOMA, couples living in states that do not allow same-sex marriage likely will be unable to

---

<sup>154</sup> See, e.g., *id.* at 13 (“[C]redibility most penalizes those who do not fit within normative male, heterosexual, American cultural expectations for testimonial behavior. Overly subjective components of the credibility determination invite bias . . .”).

<sup>155</sup> *Id.* at 16 (quoting Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 L. & SEXUALITY: A REV. LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 135, 156 (2006)).

<sup>156</sup> 133 S. Ct. 2675, 2694 (2013) (citing State of Vermont Dep’t of Taxes Technical Bulletin TB–55, 2010 Vt. Tax LEXIS 6 (Oct. 7, 2010)).

file state taxes jointly.<sup>157</sup> Even without an institutional barrier, some couples may choose not to commingle finances for fear of facing discrimination because there is currently no federal law that prohibits employment or housing discrimination because of sexual orientation.<sup>158</sup>

Second, the bona fide marriage requirement will be problematic for many same-sex couples because it uses public indicia of a relationship as a proxy for its bona fide nature. However, like many asylum-seekers, foreign nationals from countries where homosexuality is not considered a moral or cultural norm may have taken measures to hide evidence of their relationships out of fear of being rejected by their families, persecuted, or faced with possible criminal penalties.<sup>159</sup> Thus, the couple may have trouble finding third parties to corroborate the validity of their marriage or providing photos of themselves with friends and family or their wedding ceremony.

Third, same-sex couples may be more likely to demonstrate certain “red flags” to USCIS based on both trends within the LGBT community and recent legal changes. For example, studies have shown that on average, age discrepancies between homosexual male partners tend to be larger than between heterosexual partners.<sup>160</sup> Thus, USCIS might disproportionately flag homosexual couples as suspicious even though there could be another reason for the above-average age discrepancy.<sup>161</sup>

Further, many states are just recently legalizing same-sex marriage,<sup>162</sup> and many couples purposely waited to get married until the Court declared DOMA unconstitutional.<sup>163</sup> Thus, even if USCIS approves an initial petition, many same-sex couples will be subject to the two-year conditional residence period due to the recency of their marriages.<sup>164</sup> This conditional

---

<sup>157</sup> Same-sex couples living in states that do not recognize same-sex marriage will have more difficulty providing evidence of bona fides, such as insurance-beneficiary documentation or jointly filed taxes. Because these states do not recognize the couple as married, the couple will not be able to share these basic elements of a marriage. Mark J. Shmueli & Tina R. Goel, *The Post-DOMA Immigration Law Landscape*, 60 *FED. LAW.*, 15, 17 (2013); see also Neilson et al., *supra* note 15, at 6.

<sup>158</sup> See Neilson et al., *supra* note 15, at 6.

<sup>159</sup> See *id.*

<sup>160</sup> Lawrence A. Kurdek, *Lesbian and Gay Couples*, in *LESBIAN, GAY, AND BISEXUAL IDENTITIES OVER THE LIFESPAN: PSYCHOLOGICAL PERSPECTIVES* 243, 246 (Anthony R. D’Augelli & Charlotte J. Patterson eds., 1995).

<sup>161</sup> As discussed in Part II *supra*, “[u]nusual or large” discrepancies in age between spouses is an indicator of marriage fraud. FRAUD REFERRAL WORKSHEET, *supra* note 104, at 2.

<sup>162</sup> See, e.g., *Gay Weddings: Couples Waiting to Marry Until Marriage Equality Achieved in Home States*, HUFFINGTON POST (May 29, 2013, 5:53 PM), [http://www.huffingtonpost.com/2013/05/29/gay-weddings\\_n\\_3354783.html](http://www.huffingtonpost.com/2013/05/29/gay-weddings_n_3354783.html) [<http://perma.cc/4FU9-K4NZ>].

<sup>163</sup> See, e.g., *id.*

<sup>164</sup> 8 U.S.C. § 1186a(a)(1), (c)(3)(B) (2012).

period always makes the process more difficult for petitioners because it requires at least one interview with USCIS, in which the immigration officer has discretion to evaluate whether the marriage is “bona fide” based on discretionary factors that invite bias.<sup>165</sup>

Additionally, consular processing for inadmissibility waivers will pose a significant challenge to many same-sex couples. As discussed in Part I *supra*, current immigration laws require inadmissible noncitizen spouses to return to their home country and apply for a spousal visa and inadmissibility waiver through a consular office.<sup>166</sup> However, many countries do not tolerate homosexuality, forcing sexual minorities to keep their sexual orientation secret. By forcing noncitizen spouses to return to their home countries to file for an inadmissibility waiver and spousal visa petition, current immigration law essentially requires foreign nationals to come out to the officials at the consular office in their home countries.<sup>167</sup>

Further, because consular decisions are generally not reviewable, petitioners will not have any recourse if a particular consular officer denies their petition.<sup>168</sup> Thus, for many couples, the benefit of obtaining legal status may not be worth the safety risk of returning to a home country where homosexuality is not tolerated.<sup>169</sup>

---

<sup>165</sup> These factors included “[u]nusual or large age discrepancy between spouses,” “[u]nusual associations between family members,” “[u]nusual cultural differences,” “[l]ow employment/financial status of petitioner,” “[u]nusual number of children and large discrepancy in age,” and “[u]nusual marriage history.” FRAUD REFERRAL WORKSHEET, *supra* note 104, at 2.

<sup>166</sup> Waiver of certain grounds of inadmissibility, 8 C.F.R. § 212.7 (2014); *see also* Provisional Unlawful Presence Waivers, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/family/family-us-citizens/provisional-waiver/provisional-unlawful-presence-waivers> [<http://perma.cc/K3TN-TZRR>] (“Under current law, immediate relatives of U.S. citizens who are not eligible to adjust status in the United States must travel abroad and obtain an immigrant visa.”).

<sup>167</sup> Practitioners indicate this will likely be the biggest problem binational same-sex couples face in the future. Soloway Interview, *supra* note 21; Interview with Karen Zwick, Attorney, Nat’l Immigrant Justice Ctr., in Chi., Ill. (Nov. 1, 2013) [hereinafter Zwick Interview]. Because consular officers are foreign nationals who work for the U.S. government, petitioners may be more fearful that the officers share the home country’s views on homosexuality. Scholars have already noted consular officers often deny petitions based on racial or economic stereotypes, so it is reasonable to predict that consular officers may deny petitions based on sexuality stereotypes. *See, e.g.*, Donald S. Dobkin, *Challenging the Doctrine of Consular Nonreviewability in Immigration Cases*, 24 GEO. IMMIGR. L.J. 113, 118–19 (2010) (discussing how consular officers frequently abuse their power and defy the State Department’s visa adjudication guidelines).

<sup>168</sup> *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (“Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”); *see also* *Mostofi v. Napolitano*, 841 F. Supp. 2d 208, 209–10 (D.D.C. 2012) (granting motion to dismiss challenge to denial of a spousal visa at a consular office based on doctrine of consular nonreviewability).

<sup>169</sup> One practitioner has already encountered this problem with multiple clients. For example, one client would have qualified for immigration marriage benefits, but would have had to return to Russia to file an inadmissibility waiver for entering the country illegally. The client said he would rather forgo legal status than risk returning to Russia. Soloway Interview, *supra* note 21.

## III. PROPOSED SOLUTIONS

The marriage-based visa petition process disadvantages all nontraditional couples. Because indicators for a “bona fide” marriage are largely based on American cultural expectations, couples that fall outside the norm may disproportionately trigger marriage fraud suspicions. Same-sex couples are quintessentially nontraditional. Systemic barriers and prejudices have prevented many same-sex couples from having traditional proof of a bona fide marriage. Further, immigration officials and judges may be unaware of these limitations, and thus treat them as indicators of marriage fraud. While there is not yet proof of this, asylum cases based on homosexuality indicate immigration officials and judges may be unfamiliar with the unique problems this group faces. Finally, because homosexuals face global prejudice, the consular processing requirements could place them in unsafe situations.

To correct these problems, USCIS should (1) provide sensitivity training to its immigration officers and judges, (2) adopt more objective standards for denying a marriage-based petition, (3) allow third-party-country consular processing in certain situations, and (4) expand the availability of provisional unlawful presence waivers to other nondangerous immediate family members.

First, USCIS should provide sensitivity training to its immigration officers and judges, with a special focus on potential problems of proof same-sex binational couples may face.<sup>170</sup> Immigration officers should be aware that there are often alternative explanations for a same-sex couple’s lack of documentation or third-party affidavits.<sup>171</sup> Educating immigration officers and judges about these unique problems would allow them to ask more tailored questions to balance the government’s interest in screening for fraud with the petitioner’s interest in obtaining immigration benefits. This approach would also more effectively achieve the purpose behind granting legal immigration status based on marriage: family reunification.<sup>172</sup>

However, sensitivity training may not go far enough. The nebulous standards for evaluating whether a marriage is bona fide, coupled with the vast discretion afforded to both immigration officers and judges, create an

---

<sup>170</sup> Practitioner Karen Zwick noted that although the Asylum division of USCIS received training on LGBT issues, USCIS still has not received comprehensive LGBT training. Zwick Interview, *supra* note 167.

<sup>171</sup> Such as a fear of being “outed,” for example.

<sup>172</sup> See 8 U.S.C. § 1159(c) (2012); *see also* Abrams, *supra* note 1, at 1638 (“Immigration law uses marriage as a category for assigning immigration status and does this as part of an explicit policy goal of family unification.”).

environment that fosters stereotyping and subconscious biases.<sup>173</sup> To combat these issues, USCIS should adopt more objective standards in determining what constitutes a bona fide marriage.

However, opponents may argue this would actually be harmful to noncitizen petitioners. Creating an objective checklist of requirements for having a bona fide marriage may inhibit immigration officers' and judges' ability to consider the facts of each petitioner's situation.<sup>174</sup> Further, if the objective standards mirror traditional family archetypes, such standards would institutionalize existing problems with the system.

To address these concerns, the standards should be objective for denying a marriage-based petition for permanent residence, but allow flexibility in the determination of what factors render the marriage bona fide.<sup>175</sup> This would protect against discriminatory stereotyping constituting the underlying basis for a denial, while still allowing officers and judges the ability to consider nontraditional evidence of a bona fide marriage. For example, USCIS should not be able to deny a petition relying solely on a couple's separate finances or a lack of third-party affidavits. However, USCIS should retain its flexibility to consider nontraditional evidence of a bona fide marriage. For example, if a couple's only external "proof" of their relationship were their exchanged love letters, e-mails, or cell phone bills showing how frequently they speak to each other, USCIS should be able to consider this. To further determine the types of evidence that same-sex couples would be better able to provide, USCIS could also consider holding a focus group or inviting public comments about this issue from interested parties.

Additionally, USCIS should allow LGBT petitioners seeking an inadmissibility waiver to apply for consular processing through a third-

---

<sup>173</sup> While the Marriage Fraud Amendments of 1986 changed the procedures for applying for a spousal visa, they did not create a concrete definition of or standard for a bona fide marriage. See Chetrit, *supra* note 9, at 732–33 (“The broad discretion afforded USCIS officers combined with a lack of guidance has led to ‘ad hoc determinations based on their own subjective views of a valid marriage.’” (quoting Matsumoto-Power, *supra* note 79, at 69)).

<sup>174</sup> See, e.g., Blas, 15 I. & N. Dec. 626, 628 (B.I.A. 1974) (“We are quite aware of the difficulties which confront immigration judges in matters of this kind. As in all other matters which involve the exercise of administrative discretion, the immigration judge’s decision will depend, and must be based, on the facts of the particular case. . . . Thus, the guidelines which we adopted have of necessity been general, and not specific.”).

<sup>175</sup> Some may argue this policy would lead to an increase in immigration-based marriage fraud. However, this fear is rooted in speculation rather than fact. At the time Congress passed the IMFA, INS had never determined the exact number of known cases of immigration marriage fraud. Jones, *supra* note 46, at 699. USCIS does not post statistics on marriage fraud, so the exact number is still unknown.

party country.<sup>176</sup> This solution would allow petitioners to travel to a neutral country to petition for an inadmissibility waiver without the same fear of being “outed” at home.<sup>177</sup> However, this solution would still maintain the policy behind the current system of requiring inadmissible aliens to remain outside the United States until deemed eligible for entry. As petitioners bear the travel and filing expenses of consular processing, an option to change the location to a different office should not impose greater costs to the government.<sup>178</sup>

However, this could potentially lead to “consular office” shopping, where petitioners may deliberately choose the offices in the most convenient location (i.e., Canada) or offices they perceive as more likely to give a favorable result.<sup>179</sup> This could create a disproportionate administrative burden on certain “desirable” offices, adding to the existing substantial bureaucratic backlog of application processing.

A simple solution to this concern would be to require petitioners to show a credible safety-related reason why they would like to change consular offices, including why the chosen alternative office alleviates the safety concern. However, the burden of proof should be less stringent than the current asylum corroboration standards to avoid further problems of proof and costly administrative reviews. Unlike asylum cases, which require petitioners to show they are homosexual and individually have a reasonable fear of persecution based on their status as a homosexual, to qualify for third-party consular processing,<sup>180</sup> USCIS should only require a showing that the petitioner’s home country persecutes homosexuality generally. This would not be burdensome because the State Department

---

<sup>176</sup> Immigration attorney and LGBT rights advocate Lavi Soloway indicated this solution would be an easy fix to the biggest challenge same-sex couples will face in a post-DOMA legal landscape. Soloway Interview, *supra* note 21.

<sup>177</sup> See *supra* notes 166–67 and accompanying text.

<sup>178</sup> See, e.g., Donald Kerwin, *How Our Immigration Laws Divide, Impoverish, and Undermine American Families*, 76 INTERPRETER RELEASES 1213, 1225 (1999) (returning to a home country to apply for an inadmissibility waiver through consular processing “can . . . financially burden families, forcing them to maintain two households and to incur substantial travel expenses”).

<sup>179</sup> Under the current rules, petitioners already engage in consular-officer shopping:

Within a single visa section of [a] . . . consulate abroad, consular officers sometimes establish reputations for either leniency or harshness. Applicants therefore attempt to learn which officers are more apt to issue visas, and try to . . . set things up for processing by a relatively lenient officer. Rules providing for greater uniformity or consistency among officers would be a check on this localized version of visa shopping.

James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1, 10 (1991). Thus, there is reason to believe this practice would extend to consular offices if given the opportunity.

<sup>180</sup> To qualify for asylum based on homosexuality, petitioners must demonstrate (1) they are homosexual and (2) they have a reasonable fear of past or future persecution based on their status of being homosexual. See Conroy, *supra* note 143, at 8.

already publishes human rights reports about foreign countries that note any existing anti-LGBT policies.<sup>181</sup>

However, filing in a third-party country with which the noncitizen has no ties may also be problematic in a more practical sense. As discussed in Part I, processing waiver applications can often take over a year, during which time the noncitizen spouse must remain in that country.<sup>182</sup> Giving noncitizens a choice between returning to a home country where they may be in danger because of their sexuality and going to a neutral foreign country alone for up to a year may still just be offering a chance to choose the lesser evil.

Thus, the Department of Homeland Security (DHS) should also expand the scope of the 2013 regulation that allows immediate family members to apply for a provisional unlawful presence waiver while in the United States to other categories of inadmissibility. Currently, the regulation only applies to those who are inadmissible solely due to unlawful U.S. presence.<sup>183</sup> However, DHS should expand the regulation to apply to other grounds of inadmissibility that are equally nonthreatening, such as simple drug possession or nonrepeat petty theft.<sup>184</sup> For these nondangerous individuals, the policy goal of keeping families together should outweigh the government's interest in public safety. Congress has already expressed a strong policy interest in family reunification by providing substantial immigration benefits for immediate family members that are unavailable to other groups of immigrants. Further, Congress has already indicated the benefits of family unity may outweigh the government's interest in public safety in certain situations. For example, the INA allows the Attorney General to waive certain criminal inadmissibility grounds that do not pose a serious threat to public safety in order "to assure family unity."<sup>185</sup> Immigrants who have committed isolated, nonviolent misdemeanors likely do not pose a serious threat to public safety. Thus, allowing these individuals to at least remain in the country while petitioning for a marriage-based visa would comport with the policy choice Congress already made in the INA. Further, this would not be an extreme measure: USCIS could still end up denying their petitions and

---

<sup>181</sup> See, e.g., BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, CHINA (INCLUDES TIBET, HONG KONG, AND MACAU) 2012 HUMAN RIGHTS REPORT, in COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2012, at 69 (2012), available at <http://www.state.gov/documents/organization/204405.pdf> [<http://perma.cc/4LDR-PWK2>].

<sup>182</sup> Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 Fed. Reg. 536, 536 (Jan. 3, 2013) (to be codified at 8 C.F.R. pts. 103 & 212).

<sup>183</sup> *Id.*

<sup>184</sup> See *supra* text accompanying notes 72–73.

<sup>185</sup> See 8 U.S.C. § 1159(c) (2012).

deporting them if necessary. However, this would at least ensure families could stay together until USCIS had the opportunity to review the merits of their claims.

CONCLUSION

While declaring DOMA unconstitutional was a victory for binational same-sex couples, the current state of immigration law still leaves them disadvantaged. To correct this disadvantage, USCIS should implement practical changes to the spousal visa petition process that recognize the global prejudice homosexual couples face and account for unique problems of proof imposed by historical, systemic barriers.