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POTENTIAL IMMIGRATION IMPLICATIONS FOR SAME-SEX COUPLES OF JUSTICE DEPARTMENT'S ANNOUNCEMENT REGARDING DOMA SECTION 3

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By David A. Isaacson

The Justice Department announced Wednesday, that, based in part on the recommendation of Attorney General Eric Holder, President Obama has determined that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional, and will no longer defend it in court. This is because, facing litigation within the jurisdiction of a circuit court of appeals (the Second Circuit) that has never ruled on the appropriate standard of review to be applied to laws concerning sexual orientation, the Administration determined that a heightened standard of review is appropriate, and that Section 3 of DOMA cannot withstand review under such a standard (although the Justice Department had previously argued that Section 3 could survive the looser rational-basis test applicable under the precedent of some courts of appeals). The announcement is available online at http://www.justice.gov/opa/pr/2011/February/11-ag-222.html, and a related letter sent by Attorney General Holder to Speaker of the House John Boehner is available at http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. The announcement states, however, that Section 3 of DOMA will remain in effect until either it is repealed or "there is a final judicial finding that strikes it down," and until such time "the Executive Branch will continue to enforce the law." The letter to Speaker Boehner states even more specifically that "the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality."

Section 3 of DOMA, 1 U.S.C. § 7, provides that for purposes of federal law, "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." Among other consequences under federal law, this means, according to the consistent interpretation of USCIS and the former INS, that a same-sex spouse cannot be granted immigration benefits by virtue of his or her marriage to a U.S. citizen or lawful permanent resident. This aspect of DOMA, as interpreted in a 2003 memorandum by William Yates of USCIS, was discussed in a March 2004 web article by Cyrus D. Mehta (http://blog.cyrusmehta.com/News.aspx?MainIdx=ocyrus200591724845&Month=&Source=Zoom&Page=1&Year=All&From=Menu&SubIdx=964).

The recent Administration announcement suggests that, following successful litigation, same-sex spouses whose marriages are recognized by their state of residence may find themselves able to seek immigration benefits based on their marriages, although this will for the moment not be possible without litigation given the Administration's position that Section 3 of DOMA will continue to be enforced until a court declares it unconstitutional. Litigation is not certain to succeed, however, because Congress or individual members of Congress may intervene to defend the constitutionality of DOMA. Indeed, one of the purposes of the statutory provision, 28 U.S.C. § 530D, that required Attorney General Holder's notification to Speaker Boehner was to enable such defense by a House of Congress or individual members, and the Attorney General said of the pending challenges to Section 3 of DOMA in his letter that Justice Department attorneys "will also notify the courts of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases." Moreover, there is some risk that any challenge to Section 3 of DOMA could be less likely to succeed in the immigration context than in other contexts, given the "plenary power" doctrine and the history of judicial deference to Congress in this context – as in *Fiallo v. Bell*, 430 U.S. 787 (1977), where the Supreme Court upheld a provision of the INA that discriminated against illegitimate children – although it is also possible that Section 3 of DOMA will be voided in all contexts by a judicial holding that it is, as a general matter, unconstitutional.

Given the uncertainty regarding the timing and nature of final judicial action on this subject, it would be extremely risky for same-sex married couples to

affirmatively seek immigration benefits in reliance on this announcement. It could even be quite risky for same-sex couples to marry in reliance on the announcement, if the current status of one of the spouses depends on showing a foreign residence and no intent to abandon it (such as with a B-1/B-2 visitor or F-1 student). This risk and others were discussed in more detail in a July 8, 2010 advisory from Gay and Lesbian Advocates and Defenders (GLAD) following their victory in a district court case challenging Section 3 of DOMA, http://www.immigrationequality.org/template.php?pageid=1115.

Same-sex spouses of U.S. citizens or lawful permanent residents who are already in removal proceedings, however, should consider seeking adjustment of status under INA § 245 based on an I-130 petition filed by their spouse if they are otherwise eligible for that relief, and/or cancellation of removal under INA § 240A(b) based on the hardship to their spouse if they were to be removed if they are otherwise eligible, and preserving the issue for judicial review. Similarly, same-sex couples who are not yet married could consider moving to a state that recognizes same-sex marriages if they do not reside in one already, entering into a state-recognized marriage, and seeking adjustment of status or cancellation of removal for the non-U.S.-citizen spouse based on that marriage—bearing in mind that like any other marriage, a same-sex marriage could only be a basis for immigration benefits if it were established to the satisfaction of the immigration authorities that such a marriage was bona fide, that is, was truly meant to establish a shared life together rather than being done purely for immigration purposes, and that in the case of adjustment of status based on a marriage entered into while one spouse is in removal proceedings, INA sections 204(g) and 245(e) would require a showing by clear and convincing evidence that the marriage was not entered into for immigration purposes. The concerns raised by GLAD in its previous advisory continue to apply, however, and it is therefore this author's view that the preferable course in cases where removal proceedings have not already been commenced would generally be to await further developments before filing any petition or application based on a same-sex marriage.