



# LEGAL ACTION CENTER

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AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY<sup>1</sup>

June 13, 2011

## **Protecting and Preserving the Rights of LGBT Families: DOMA, *Dorman*, and Immigration Strategies**

By The Legal Action Center and Immigration Equality

### **Introduction**

Lesbian and gay noncitizens face serious impediments to obtaining legal immigration status through marriage. The Board of Immigration Appeals (BIA or Board) relies on Section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, which defines marriage as a union between one man and one woman, in determining whether a marriage is valid for immigration purposes. *See Matter of Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005). Pursuant to 8 C.F.R. § 103.37(g), all officers and employees of the Department of Homeland Security as well as immigration judges are bound by Board decisions and decisions of the Attorney General.<sup>2</sup> Accordingly, the immigration agencies bar lesbian and gay U.S. citizens and permanent residents from successfully petitioning for their spouses. Similarly, noncitizens are precluded from obtaining other immigration benefits or relief from removal – such as a waiver or cancellation of removal – based on a marriage involving a gay or lesbian couple.

In February 2011, the Obama Administration (through the Attorney General) announced that it would not defend Section 3 in federal court challenges.<sup>3</sup> Nonetheless, the Attorney General said that the Department of Justice would still “enforce” DOMA pending a legislative repeal of

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The LAC and Immigration Equality are grateful for the assistance of the National Immigration Project of the National Lawyers Guild and Lambda Legal.

<sup>2</sup> *See also* U.S. Citizenship and Immigration Service’s Adjudicator’s Field Manual § 21.3(a)(2)(I) (DOMA governs).

<sup>3</sup> *See* Letter from Eric H. Holder, Jr., Attorney General, to John H. Boehner, Speaker, U.S. House of Representative, Re: Defense of Marriage Act (Feb. 23, 2011) *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

DOMA<sup>4</sup> or a “final judicial decision.” Advocates are urging the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR) to adopt interim measures that would preserve the status quo until there is final resolution.<sup>5</sup> To date, these entities have not changed their policies. Significantly, however, the Attorney General remanded a case involving immigration relief based upon a civil union between two gay men to the BIA to determine “whether and how the constitutionality of DOMA is implicated.” *Matter of Dorman*, 25 I&N Dec. 485 (A.G. 2011).

Outside of the immigration context, there are several pending federal court cases challenging DOMA. The Gay & Lesbian Advocates & Defenders (GLAD) achieved the first victory, convincing the district court in Massachusetts that DOMA is unconstitutional; the case now is pending in the First Circuit and the U.S. House of Representatives has moved to intervene to defend DOMA.<sup>6</sup> See *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010), *appeal docketed*, No. 10-2207 (1st Cir. filed Oct. 18, 2010). There also are pending cases in the district courts in Connecticut, New York, and California, in which plaintiffs are represented by GLAD, ACLU’s Lesbian, Gay, Bisexual, and Transgender (LGBT) Project, Lambda Legal, and the Legal Aid Society-Employment Law Center, respectively. *Pedersen v. Office of Pers. Mgmt.*, No. 10-1750 (D. Conn. filed Nov. 9, 2010); *Windsor v. United States*, No. 10-8435 (S.D.N.Y. filed Nov. 9, 2010); *Golinski v. Office of Pers. Mgmt.*, No. 10-257 (N.D. Cal. filed Jan. 20, 2010); *Dragovich v. United States Dep’t of the Treasury*, No. 10-1564 (N.D. Cal. motion to dismiss denied Jan. 18, 2011). It is likely that the Supreme Court ultimately will decide one of these cases. Although none of these cases involves immigration benefits, the resolution of these cases will have a considerable – perhaps dispositive – impact on the application of DOMA in immigration cases.<sup>7</sup>

Undoubtedly, the law surrounding DOMA is in flux. This Practice Advisory provides ideas for attorneys representing noncitizens in removal proceedings whose cases are affected by DOMA. Such individuals may seek to have their cases closed, continued, or held in abeyance. In the

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<sup>4</sup> Legislation has been introduced that would repeal DOMA. See Respect for Marriage Act, H.R. 1116, 112th Cong. (2011); Respect for Marriage Act of 2011, S. 598, 112th Cong. (2011).

<sup>5</sup> As part of this effort, advocates have made a formal request by submitting letters to the Secretary of Homeland Security, Director of EOIR, and DOJ’s Office of Immigration Litigation. The letters are available at <http://www.americanimmigrationcouncil.org/sites/default/files/docs/DOMA-letters-4-6-2011.pdf>.

<sup>6</sup> Following the Attorney General’s announcement that it would no longer defend DOMA, Members of the House Bipartisan Legal Advisory Group voted along party lines to intervene in DOMA litigation. Congress has similarly intervened in other instances where an administration has declined to defend the constitutionality of a law. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>7</sup> It is important to understand that the successes to date in DOMA litigation have been the result of a carefully crafted and coordinated strategy. At this point, we are not advising anyone to bring a federal DOMA challenge without first coordinating with the groups litigating these cases.

alternative, noncitizens may take steps to resolve other, non-DOMA issues so that their cases can be fully developed pending final resolution of judicial and legislative challenges to DOMA. As discussed at the end of this Practice Advisory, lesbian and gay noncitizens who are not in removal proceedings generally are advised to postpone taking steps to obtain legal status based on their marriage.

### **Ways in Which DOMA May Be Implicated**

There are a number of immigration benefits and forms of relief from removal that depend on the existence of a valid marriage. Thus, the validity of a marriage can be an issue in an affirmative application for an immigration benefit filed with U.S. Citizenship and Immigration Services (USCIS) or in an application for relief from removal filed with an immigration judge (IJ). The following are examples of situations where section 3 of DOMA may be implicated.

- Adjustment of status based on a family-based visa petition
- Adjustment of status based on being a derivative of a beneficiary of a visa petition (family-based or employment-based)
- Cancellation of removal requiring a qualifying relative
- Waivers that require a qualifying relative (such as § 212(h) and § 212(i))
- Derivative beneficiary of an asylum application
- VAWA
- NACARA

### **Attorney General's Decision in *Matter of Dorman***

Mr. Dorman, a citizen of the U.K., entered into a New Jersey civil union with his U.S. citizen partner. An IJ found that he was removable because he overstayed his visa. Mr. Dorman applied for non-lawful permanent resident (LPR) cancellation of removal (INA § 240A(b)), but the IJ found him ineligible because he did not have a qualifying relative. As a result, the IJ did not schedule an individual hearing on the cancellation application and pretermitted his application. The Board affirmed the IJ's order, and Mr. Dorman subsequently filed a petition for review in the Third Circuit Court of Appeals.

On April 26, 2011 – before the Third Circuit could decide the petition for review – the Attorney General issued a precedent decision in *Matter of Dorman*, 25 I&N Dec. 485 (A.G. 2011). The Attorney General vacated the underlying removal order and remanded the case to the Board “to make such findings as may be necessary to determine whether and how the constitutionality of DOMA is implicated.”<sup>8</sup> Further, the Attorney General specified four questions for the Board to consider:

- (1) whether respondent's same-sex partnership or civil union qualifies him to be considered a “spouse” under New Jersey law;

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<sup>8</sup> Following the Attorney General's decision, the government filed an unopposed motion to dismiss the petition for review for lack of jurisdiction.

- (2) whether, absent the requirements of DOMA, respondent's same-sex partnership or civil union would qualify him to be considered a "spouse" under the Immigration and Nationality Act;
- (3) what, if any, impact the timing of respondent's civil union should have on his request for that discretionary relief; and
- (4) whether, if he had a "qualifying relative," the respondent would be able to satisfy the exceptional and unusual hardship requirement for cancellation of removal.

Importantly, the Attorney General indicated that the Board is not limited to addressing solely these issues.

These questions go to aspects of the case that were not developed factually and which do not necessarily require the Board to address the applicability of section 3 of DOMA.<sup>9</sup> As of the date of this Practice Advisory, the Board had not yet set a briefing schedule in *Matter of Dorman*. Given the Board's limited authority to make findings of fact,<sup>10</sup> it is quite possible – if not likely – that the Board will remand the case to the IJ for factfinding before addressing the Attorney General's questions. Thus, it may be over a year before the Board issues a decision.

Until the BIA issues a decision, it is unclear how it will answer these questions and what other questions it may find necessary to address. It also is unclear what direction it ultimately might provide to IJs about how to handle removal cases implicating DOMA pending a judicial resolution on the constitutionality of the law.

## **Steps to Take if Client Is in Removal Proceedings or Has a Final Order of Removal**

### ***Pending removal proceedings***

If you have a client in removal proceedings and DOMA is implicated in one of the ways described above, there are steps your client may take to try to protect himself or herself and preserve all issues pending a final judicial resolution of DOMA. Importantly, EOIR has said that although the President has instructed federal agencies to continue to enforce DOMA, "EOIR

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<sup>9</sup> The first question requires an analysis of state law. The second question asks the Board to analyze current law regarding the validity of a marriage (absent DOMA), and similarly the third question suggests that the Board should apply current standards with respect to marriages entered into during the course of removal proceedings (and the presumption that the marriage is not bona fide). Finally, the fourth question relates to the extreme hardship requirement for cancellation of removal.

<sup>10</sup> Pursuant to 8 C.F.R. § 1003.1(d)(3)(iv), "the Board will not engage in factfinding in the course of deciding appeals."

continues, where appropriate to exercise discretion in individual cases based on the unique factors presented by that particular case.”<sup>11</sup>

*I. Move for Administrative Closure, a Continuance, or to Hold the Case in Abeyance*

For most individuals with pending removal cases, the best course of action is for the immigration court or Board to administratively close or continue the removal case pending a judicial resolution or legislative repeal of DOMA or, at a minimum, the Board’s decision in *Matter of Dorman*. Administrative closure temporarily removes a case from an IJ calendar or from the Board’s docket. *Matter of Gutierrez-Lopez*, 21 I&N Dec. 479, 480 (BIA 1996).<sup>12</sup> Alternatively, an IJ may continue or adjourn a case until a later date “for good cause shown.” See 8 C.F.R. § 1003.29; *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009). In *Matter of Hashmi*, the Board set forth factors the IJ may consider in adjudicating a continuance motion to await the adjudication of a pending family-based visa petition.<sup>13</sup> Although one factor is whether the visa petition is prima facie approvable, importantly, these factors are not exclusive and the Board has advised IJs to “consider any other facts that [they] deem[] appropriate.” *Matter of Hashmi*, 24 I&N Dec. at 794. As discussed below, the unique posture of cases implicating DOMA is an appropriate factor the IJ should consider. Some individuals already have had success obtaining continuances.

If the case is on appeal at the Board, the Board also can hold the case in abeyance.<sup>14</sup> The Board has taken such actions in other similar situations. For example, in 2001, former INS issued a proposed rule that would amend the asylum regulations. Subsequently, the Attorney General vacated the Board’s decision in *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999; A.G. 2001) (a case

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<sup>11</sup> Letter from Juan P. Osuna, Director, Executive Office for Immigration Review, to Crystal Williams, American Immigration Lawyers Association (June 6, 2011) *available at* <http://www.legalactioncenter.org/sites/default/files/docs/lac/Osuna-AILA-6-6-2011.pdf>.

<sup>12</sup> Although “[a] case may not be administratively closed if opposed by either of the parties,” *Matter of Gutierrez-Lopez*, 21 I&N Dec. at 480, the Board has ordered supplemental briefing on whether it should reconsider this policy. See *Matter of Huerta-Soto*, A093 219 001 (BIA supplemental briefing ordered May 9, 2011). Thus, if DHS opposes administrative closure, you may want to request it nonetheless and note that the issue is pending before the BIA.

<sup>13</sup> The factors are: (1) the DHS response to the motion; (2) whether the underlying visa petition is prima facie approvable; (3) the noncitizen’s statutory eligibility for adjustment of status; (4) whether the respondent’s application for adjustment merits a favorable exercise of discretion; and (5) the reason for the continuance and other procedural factors. *Matter of Hashmi*, 24 I&N Dec. at 790.

<sup>14</sup> Although the Board “does not normally entertain motions to hold cases in abeyance while other matters are pending (e.g., waiting for a visa petition to become current, waiting for a criminal conviction to be overturned),” the Practice Manual leaves open the possibility that certain cases warrant such action. Board of Immigration Appeals Practice Manual, § 5.9(i) *available at* <http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap5.pdf>. Importantly, the basis of the motion described here is distinguishable from the examples provided in the manual.

addressing asylum eligibility for an applicant who was a victim of domestic violence) and directed the Board to stay the case pending issuance of a final asylum rule. The Board not only stayed R-A-'s case, but also stayed a number of similar cases.<sup>15</sup>

The following are some of the reasons why administrative closure or a continuance is appropriate and may be included in a motion to the IJ or Board:

- The law surrounding DOMA is developing. As discussed in the introduction to this Practice Advisory, the Attorney General has opined that Section 3 of DOMA is unconstitutional. He also has directed the Board to address a variety of issues in a case potentially implicating DOMA, *see Matter of Dorman*. Furthermore, there are several pending federal court cases raising the constitutionality of DOMA.
- Currently, there is no Board precedent addressing DOMA with respect to a state-sanctioned relationship between a U.S. citizen and a gay or lesbian noncitizen. By issuing a precedent decision directing the Board to consider a wide variety of factual and legal issues, *see Matter of Dorman*, it seems likely that the Attorney General intended for the Board's resolution of the case to serve as a blueprint for deciding other immigration cases involving DOMA issues (not only cases involving cancellation of removal). As such, it is very likely that the Board's decision in *Matter of Dorman* will affect how the IJ or Board will decide the case.
- Given the current state of the law, administrative closure or a continuance serves the interest of judicial economy.

In addition, it is helpful to highlight the favorable and unique equities in your client's case. You also may want to contact the DHS trial attorney to ask if the government will join, consent to, or not oppose your motion. See the discussion below about prosecutorial discretion.

2. *Request a merits hearing or remand for findings regarding non-DOMA aspects of the case.*

If the IJ declines to close or continue the case, an alternative course of action is to ask the IJ to resolve all aspects of the case before rendering a decision. If the case is pending at the Board, you can ask the Board to remand the case to the IJ for a hearing on any unresolved issues.<sup>16</sup>

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<sup>15</sup> The Attorney General acknowledged this policy of staying cases in a 2008 order lifting the stay in light of other developments. *See Matter of R-A-*, A073753922 (A.G. Sept. 25, 2008) available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/AG-CertificationRemand-9-29-2008.pdf>.

<sup>16</sup> Because the Board cannot engage in factfinding, "[a] party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If further factfinding is needed in a particular case, the Board may remand the proceedings to the immigration judge...." 8 C.F.R. § 1003.1(d)(3)(iv). A motion to remand generally must comply with the substantive requirements for a motion to reopen. *See Matter of Coelho*, 20 I&N Dec.

The Attorney General's decision in *Matter of Dorman* supports such a request, as the Attorney General has directed the Board to dispose of all issues in the case. In *Dorman*, which involves cancellation of removal, the Board (and likely the IJ on remand) will address the hardship requirement and the existence of a qualifying relative (but for DOMA). Thus, the Attorney General's questions provide a roadmap for cancellation cases. In other cases, the issues the IJ and Board should address may be somewhat different. For example, for adjustment of status cases, the IJ should address such issues as whether the marriage is bona fide, whether the applicant has shown that he or she is not likely to become a public charge, whether any other grounds of inadmissibility are at issue and if so, whether the person qualifies and warrants a waiver in the exercise of discretion.

### ***Final Order of Removal***

#### *1. Petition for Review at the Court of Appeals*

If you have a client with a petition for review pending at the court of appeals, and DOMA is implicated in one of the ways described above, please contact the American Immigration Council's Legal Action Center ([clearinghouse@immcouncil.org](mailto:clearinghouse@immcouncil.org)). In collaboration with other national organizations, we are tracking other federal court litigation on DOMA and are available to help strategize on options for such cases.

In light of recent developments, petitioners may seek remand to the Board. Given that the Attorney General has directed the BIA to consider, in the first instance, whether and how the constitutionality of DOMA is implicated in *Dorman*, remand is appropriate. See *INS v. Ventura*, 537 U.S. 12, 16 (2002) (finding that remand is appropriate "for decision of a matter that statutes place primarily in agency hands"). The courts of appeals have a track record of remanding petitions for review in light of intervening Attorney General or Board precedents. The Department of Justice, Office of Immigration Litigation, may even support or join in a remand motion.

#### *2. No Pending Petition for Review*

If you have a client with a final order of removal, but there is no pending petition for review, please contact the American Immigration Council's Legal Action Center ([clearinghouse@immcouncil.org](mailto:clearinghouse@immcouncil.org)). The Legal Action Center and our colleague organizations are available to help strategize on options for final order cases. Some clients may want to consider filing a motion to reopen in light of recent developments on DOMA. In most cases, it probably is not advisable to do so given that the law is not settled. However, there may be situations where an individual may decide that filing a motion is appropriate (e.g., client faces imminent removal or client is still within 90 day statutory period for reopening). In addition, as discussed below, it may be advisable to ask DHS to exercise prosecutorial discretion.

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464, 471 (BIA 1992); see also 8 C.F.R. §§ 1003.23(b)(3) (setting forth substantive requirements for motion to reopen).

## **Prosecutorial Discretion**

“Prosecutorial discretion” is the authority of a law enforcement agency or officer charged with enforcing a law to decide whether to enforce the law in a particular case. A law enforcement officer who decides *not* to enforce the law against a person has *favorably* exercised prosecutorial discretion. Examples of the favorable exercise of prosecutorial discretion in the immigration context include granting a stay of removal; deciding not to issue a Notice to Appear or canceling it before it is filed with the immigration court; or declining to appeal a favorable IJ decision. Particularly relevant here, DHS attorneys have authority to exercise prosecutorial discretion to agree to join or oppose a motion (including a motion to continue, a motion to remand, or a motion to hold the case in abeyance). DHS also has discretion to grant deferred action in cases with strong humanitarian factors. There are strong arguments that DHS should not allow spouses of U.S. citizens to be removed from the United States based on a law that the Administration has determined is unconstitutional.

The American Immigration Council’s Practice Advisory on prosecutorial discretion discusses the options described above (as well as others), lays out the factors DHS considers in deciding whether to favorably exercise prosecutorial discretion, and offers suggestions for how to go about seeking a favorable exercise of discretion. *See Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client* (Nov. 30, 2010) available at <http://www.legalactioncenter.org/sites/default/files/ProsecutorialDiscretion-11-30-10.pdf>. In addition, Penn State Law’s Center for Immigrants’ Rights, in collaboration with Maggio + Kattar and Duane Morris LLP, issued a toolkit for seeking deferred action. *See Private Bills and Deferred Action Toolkit* available at [http://law.psu.edu/news/immigration\\_toolkit](http://law.psu.edu/news/immigration_toolkit).

## **Affirmative Applications with USCIS**

Noncitizens who are not in removal proceedings generally should be advised to postpone taking steps to obtain legal status based on a marriage involving a gay or lesbian couple. Given that the Attorney General has said he will continue to “enforce” DOMA and that to date, DHS has not adopted a policy of holding cases (such as visa petitions and adjustment applications) in abeyance, it generally is not advisable to file a petition or application. Likewise, it generally is not advisable to file a lawsuit challenging a denied immigration benefit, particularly without coordinating with other LGBT and immigrant rights litigators who have developed and continue to develop litigation strategies for challenging DOMA. Read more about who should and should not marry now and when it may make sense to take affirmative steps to file applications with USCIS in the Immigration Equality/AILA practice alert, *What Does the Department of Justice Defense of Marriage Act (DOMA) Announcement Mean for Immigration Cases?*, available at <http://www.aila.org/content/default.aspx?docid=34986>

If you have a pending administrative appeal of a denied application or have filed or are planning to file a suit in district court, please contact the American Immigration Council’s Legal Action Center at [clearinghouse@immcouncil.org](mailto:clearinghouse@immcouncil.org).