

# RE: IMMIGRATION SERVICE AND PERMANENT PARTNERS

By David S. Bloomfield

Immigration law is one area where “permanent partners” is a term unknown. The law does not accord a status to other than “spouse” or blood relative of the applicant. However, that fact should not imply that there are no alternatives. While the letter and/or the enforcement of immigration laws may seem out of touch with the times, they are a reflection of current attitudes. Thus, the official position is that a marriage between a man and a woman is the only marriage that immigration officials will accept.

However, there are ways to unite permanent partners in the United States under current law. Although not common, I am aware of a couple that had been married in the United States. According to the birth certificates of the respective partners, the marriage was between a man and a woman. The partner listed as a male on the birth certificate had had a gender change but the home country of the non-citizen would not change the birth certificate. The Immigration Service rigidly accepts the gender listed on a birth certificate. As a result Immigration recognized the marriage as between a man and a woman and after some legal prodding allowed the couple to be in the United States as man and wife although it was obvious even to a casual observer that it was a union between two women. While this example is unusual, it shows what can be done by means of some interesting lawyering.

The more common attempt to bring together permanent partners would be through one of several employment bases. In immigration law there are three general ways to become a permanent resident of the United States. The first is family basis as noted above. The second is where employment is sponsored by an employer because the employer requires the particular skills of the non-citizen. The employment basis is the next most common way to obtain residence status although the process is typically much longer and more difficult than the family basis. The employer is required to be the party who files on behalf of the non-citizen and to follow a long, tortuous Byzantine procedure. At the end of the tunnel is permanent residency and the sponsored individual can stay and live with whomever s/he desires.

Another way to gain residency for a non-citizen in a same sex marriage is illustrated by the case of an alien who had graduated in accounting from a local university. The new accountant met and became committed to another of the same gender. Both took the same surname by filing in Probate Court to show their commitment to each other. In order to remain in the country, the accountant had to qualify on a new basis because student status was about to expire.

Immigration law permits a non-citizen after graduation to obtain one year of Optional Practical Training (OPT). Thereafter, a non-citizen with a college degree may be eligible for a temporary work visa while pursuing a permanent residency visa. This whole process from graduation to permanent residency consumes three to five years. The accountant lived with the partner who found the non-citizen a sponsor for employment as an accountant. Thus, though the accountant is not recognized as a family member of the partner, for almost four years the two have been able to remain together.

The third and perhaps most precarious of means to obtain permanent residency (often nicknamed a “green card” which of course hasn’t been green for years) is through asylum. Just recently in immigration law has “homosexuality” been considered a “social class.” This is important because asylum is only available to one who has a well-founded fear of persecution as a member of a protected class. The most obvious historical protected classes would be those threatened because of race, religion, political opinion and nationality. Recently, membership in a particular social group has been added as a class, i.e. one who suffers persecution because of immutable characteristics having to do with sexual orientation. Examples are from the death squads in Brazil that target homosexuals to the former Soviet states that outlaw homosexuality as a crime. The problem with the standards for asylum as opposed to refugee status is that the President, with the concurrence of the Congress, designates countries and numbers for refugee status. Refugee designation does not set forth particular social groups such as gypsies, victims of female genital mutilation (FGM), forced sterilization victims or victims of slavery. With asylum one must demonstrate that the non-citizens have been or will be singled out for persecution and the persecutor is the government or someone the government cannot or will not control. The victim bears the burden of proof until the victim can prove past persecution, at which point the burden of proof shifts to the U.S. government. However, this procedure will change dramatically now that the Real ID has become law. The burden of proof will become more onerous and asylum will be infinitely harder to prove and the attendant ability to live with permanent partners may become much more difficult than it already is.

As these examples illustrate, a reading of the immigration laws seems to preclude the ability of a non-heterosexual partner to obtain legal status. However, with planning there are ways to bring permanent partners together under the immigration laws today.

To paraphrase Winston Churchill, our immigration laws may be pretty bad but they are generally ahead of whatever is in second place . . . at the moment.



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