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IMMIGRATION BENEFITS FOR SAME-SEX SPOUSES AND DOMESTIC PARTNERS: A COUNTRY-BY-COUNTRY OVERVIEW

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This article provides an overview of immigration benefits available for same-sex spouses and/or domestic partners in fifteen countries. The article is limited to immigration-related issues and does not cover the situation of lesbian, gay, bisexual, or transgender individuals in each country more generally.

Belgium

Belgium legalized same-sex marriage in 2003. Belgium family reunification rules apply equally to all couples without regard to the gender of the two individuals.

Spouses of third-country business migrants in Belgium may accompany and live with their spouses, provided that both spouses are older than twenty-one years, or, if they were already married before the arrival of the business migrant, older than eighteen years. Unmarried partners of third-country business migrants with a "registered" partnership considered equivalent to a Belgian marriage will be treated the same (only "registered" partnerships performed in Denmark, Finland, Germany, Iceland, Norway, Sweden, and the United Kingdom qualify).

Belgium's family reunification rules also provide for unmarried "non-registered" partners and common-law spouses, and apply without regard to the gender of the two individuals. Specifically, unmarried, "non-registered" partners and common-law spouses of third-country business migrants from outside the European Union/European Economic Area may accompany and live with their significant others in Belgium, provided that:

- they are not involved in a marriage or partnership with any other person;
- they sign a registered partnership together in Belgium;
- they are able to demonstrate that they have a long-lasting and stable relationship with one another, established by furnishing evidence of prior legal cohabitation (at least one uninterrupted year, in Belgium or abroad); or the existence of either a bona fide relationship (the partners prove that they

have known one another for at least two years, have had frequent contact (by phone, mail, or e-mail), have met at least three times over the last two years, and these meetings covered at least forty-five days in total), or that they have a common child; and

- they are older than twenty-one years or, if they have already cohabited at least one year before the arrival of the business migrant in Belgium, older than eighteen years.

Brazil

On February 18, 2014, effective as of March 20, 2014, the National Council of Immigration published Normative Resolution No. 108, changing the rules for granting visas for dependents (the so-called “family reunion visa”), and cancelling NRs 36 and 77, which until now regulated the subject.

The main changes introduced were with respect to visas for common-law partners (irrespective of gender), which may now be applied for directly at the Brazilian consulate abroad or at the Federal Police in Brazil, without the need to go through the National Council of Immigration. This rule now applies to all types of family reunion visas and irrespective of whether they are on a temporary or permanent basis.

Another main change is that when there is no official document issued by the government/court attesting to the existence of the common-law partnership, this may now be proven through one of the following documents, rather than two as were required before: (i) evidence of dependence issued by a tax authority or by a department corresponding to the Brazilian Federal Revenue Service; (ii) a certificate of religious marriage; (iii) testamental provisions registered at a Brazilian Notary or at the competent foreign authority, proving the existence of the partnership; (iv) a life insurance policy or health plan, in which one of the parties appears as establisher of the insurance/plan and the other party as beneficiary; (v) a deed of purchase and sale of real estate, duly registered in the Property Registration Office, in which both parties appear as owners, or a rental agreement in which both parties appear as lessees; or (vi) a joint bank account.

Also, a foreign birth certificate of a common child of the partners is now accepted as proof of a common-law partnership. If there is a common Brazilian child, then the visa to be applied for is a permanent visa based on a Brazilian child rather than a visa based on the common-law partners. The acceptance of the health plan as proof of the common-law partnership is another change introduced by NR-108.

There is no citizenship requirement to get married in Brazil.

Canada

<u>Immigration Benefits for Same-Sex Spouses and Partners</u>

Since the entry into force of Canada's Immigration and Refugee Protection Act (IRPA) in 2002, replacing the Immigration Act, 1976, same-sex rights have become enshrined in Canadian immigration law.

Same-sex marriages are recognized for Canadian immigration purposes in any jurisdiction where they are currently legal. Canadian marriage laws have been gender-neutral since 2005. In addition, Canadian citizens and permanent residents may sponsor their spouses, common-law partners, and conjugal partners, as applicable, for the family-class permanent immigration category without regard to the gender of that spouse, common-law partner, or conjugal partner. Applicants in the economic-class immigration category can include their same-sex spouses or common-law partners as dependents in their applications regardless of gender. Also, spouses and common-law partners of a Canadian work permit or study permit holders may apply for an open work permit irrespective of whether they are in a same-sex or different-sex relationship, subject to certain conditions.

Immigration Benefits for Domestic Partners

In Canadian immigration law, domestic partners are known as "common-law partners." A "common-law partner" is defined in subsection 1(1) of the Immigration and Refugee Protection Regulations as an individual cohabiting with a person in a conjugal relationship for at least one year. For Canadian immigration purposes, common-law relationships are considered to be marriage-like relationships characterized by mutual commitment, exclusivity, and interdependence.

Common-law relationships must be factually demonstrated to Citizenship and Immigration Canada (CIC) based on documents proving cohabitation for a continuous period of at least one year and documents proving interdependence, such as documentation regarding joint ownership of property, joint travel, or photographs of the couple. Conjugal partners are recognized as common-law partners in Canadian immigration law where, due to very exceptional circumstances such as persecution, they have been precluded from cohabiting together for a period of at least one year.

As with married spouses, common-law partners may sponsor their common-law partners and include their common-law partners as dependents on other permanent immigration applications. Similarly, common-law partners are eligible for open spousal work permits subject to certain conditions, provided that they submit sufficient evidence to substantiate their common-law relationship. Common-law partners enjoy equal rights as married spouses pursuant to Canadian immigration law but are subject to a higher evidentiary burden in terms of proving their relationship to CIC.

China

China does not recognize marriages, partnerships, or relationships between two individuals of the same sex for immigration purposes. There is currently no way around these restrictions.

France

General provisions relating to marriage from the law of May 17, 2013, conflict of laws, and consular marriage. France's Civil Code now recognizes both same-sex and different-sex marriages. Article 202-1 of the Civil Code provides that the personal law of each spouse governs the conditions for marriage, but then Article

202-2 provides that two persons of the same sex can marry when the personal law or the law of the state of residence of one spouse permits. This arrangement allows avoidance of the application of the personal law of one spouse prohibiting marriage between persons of the same sex when the marriage took place in the territory of a state recognizing marriage between persons of the same sex.

The above implies, for the Constitutional Council, that two foreigners of the same sex can marry when one of them resides or is domiciled in France. However, this rule does not apply to nationals of countries with which France is bound by bilateral agreements (Poland, Algeria, Tunisia, Morocco, republics of the former Yugoslavia, Cambodia, and Laos), which provide that the law governing conditions for marriage is the personal law. The marriage, however, may take place in a non-prohibitive state having no bilateral agreement with the country of the spouses.

Foreign nationals frequently may find themselves in situations where their countries of origin do not recognize their marriages in France unless those countries have adopted legislation similar to the new French legislation.

A consular marriage between same-sex French nationals does not raise issues. However, a consular marriage between a French national and a foreign national may be more complex in consular posts in prohibiting countries (which are in the majority). In such case, the Civil Code provides that the marriage may take place in France.

The law of May 17, 2013, also provides that marriages between same-sex couples may be recognized retroactively if they were validly celebrated abroad at a time when French law forbade such marriages.

<u>The impact on French immigration rights of foreign nationals moving to France</u>. Marriage now carries the same effects, rights, and obligations whether between persons of different sex or the same sex.

- Derivative residency and work rights known as "accompanying family rights" are applicable to married foreign workers under Inter-Company Transfer, EU Blue Card, or Skills and Talents status, regardless of the gender identity of the spouses when the marriage is celebrated in France or recognized by France (marriage between two foreigners) on the basis of the new provisions of the Civil Code and Article L313-11-3 CESEDA.

- A same-sex marriage between a foreign national and a French national will allow the issuance of a visa and residence permit to the foreign national as the spouse of a French national, on the basis of the Civil Code and Article L313-11-4 CESEDA.

- The marriage between a third-country foreign national in the European Union with a European citizen is expected to allow the issuance of a residence permit as a European spouse under Articles L121-3 to L121-5 CESEDA.

Recognition of marriage for same-sex couples could also give rise to new legal actions when a decision refusing stay may be considered as disproportionate

interference with rights to private and family life, under Article 8 of the European Convention on Human Rights.

Domestic partners, however, will not enjoy the same immigration rights as same-sex married couples. Even domestic partners who contract the French form of domestic partnership agreement (PACS) will not qualify for "accompanying family rights."

Hong Kong S.A.R.

Hong Kong does not recognize marriages or partnerships between two individuals of the same sex for immigration purposes. Accordingly, such a partner of a person holding permanent resident status or an employment visa cannot be granted dependent status.

However, the Hong Kong Immigration Department does have a policy of exercising discretion for those living in a relationship akin to marriage and will grant an extended visitor's visa to the partner of a person who is granted an employment visa. The person seeking such status must demonstrate that he or she has the financial means to support himself/herself or that the partner can support and provide accommodation to him or her and that a pre-existing relationship of some time has existed. The holder of this extended visitor's visa cannot work, so in practice, very few applications are lodged for extended visitor status.

India

Indian law does not recognize same-sex marriages and considers gay sex a criminal offense. No provisions in Indian law provide for immigration benefits to same-sex spouses or partners. Section 377 of the Indian Penal Code (IPC), an archaic law, was introduced in 1861 during British rule in India. It criminalized "carnal intercourse against the order of nature with any man, woman or animal" with a maximum sentence of life imprisonment.

The struggle to strike down section 377 of the IPC as unconstitutional has been a long one, spearheaded by activists from non-governmental organizations (NGOs) fighting for the rights of the lesbian, gay, bisexual, and transgender (LGBT) community. On July 2, 2009, a historic judgment decriminalizing homosexuality was passed by the Delhi High Court in favor of Naz Foundation, an NGO working in the fields of HIV/AIDS intervention and prevention and for the rights of the LGBT community. An appeal was filed challenging this decision in the Supreme Court of India. On December 11, 2013, the Supreme Court reversed the decision of the Delhi High Court, thereby criminalizing homosexual intercourse between consenting adults. The Supreme Court shifted the onus onto Parliament to decide whether to repeal the provision, arguing that the courts could not make such decisions under the existing laws. The Supreme Court further observed that there was "no constitutional infirmity" in the section 377 law. This judgment has sparked widespread condemnation throughout India and internationally, and has been criticized as regressive.

However, there have been isolated incidents and trends worth reporting. In November 2013, a senior Indian Foreign Service officer was demoted from her post in the Ministry of External Affairs (MEA) passport and visa division for refusing a visa

for the same-sex spouse of a U.S. diplomat. She refused the visa on the ground that same-sex marriages are not legal in India and the diplomat's spouse could not therefore be granted a diplomatic visa and recognized as a "spouse" in India. A senior official in the MEA's American division suggested that although there is no rule in India allowing visas for gay couples, the diplomat's partner could be given a visa as a family member as it had been done in the past. On the other hand, in light of India's opposition to the arrest of its Deputy Consul General in New York, one politician from the Bhartiya Janata Party has suggested that the same-sex spouses or partners of U.S. diplomats be prosecuted under section 377 as a retaliatory measure.

Until recently, Indian law did not recognize relationships between domestic, live-in (opposite-sex) partners. On June 17, 2013, the Madras High Court held that for a valid marriage, all customary rights need not be followed and subsequently solemnized. As long as the couple is not disqualified by law from marrying each other, and a third party's rights are not affected, the couple can be declared to be spouses by the court. This declaration would be on the basis of whether they have had a sexual relationship. The court held that if a woman age 18 and above, and a man age 21 and above, have a sexual relationship, they will be treated as husband and wife, especially if the woman becomes pregnant. Even if the woman does not become pregnant, if there is "strong documentary evidence to show existence of such relationship," they will still be termed "husband" and "wife." However, this ruling only applies to the state of Tamil Nadu and cannot be enforced elsewhere in India.

In a recent judgment of November 26, 2013, the Supreme Court of India dealt with the issue of live-in relationships, but that was within the purview of the Domestic Violence Act 2005 (DV Act, 2005). The Supreme Court held that a "live-in relationship" would not amount to a "relationship in the nature of marriage" falling within the definition of "domestic relationship" under Section 2(f) of the DV Act, 2005 if the woman in such a relationship knew that her male partner was already married. All live-in relationships are not relationships in the nature of marriage, but they can still come within the ambit of the DV Act, 2005. The judgment was delivered by a Division Bench of Justices KS Radhakrishnan and Pinaki Chandra Ghose in an appeal filed by Indra Sarma (Appellant) against the decision of the Karnataka High Court. This ruling only applies to domestic partners of the opposite sex, not to same-sex partners, in view of the recent decision of the Supreme Court in the Suresh Kumar Koushal case.

As these issues are very recent and path-breaking in Indian law, there has been no recognition thus far of same-sex partnerships or domestic relationships with respect to Indian immigration. The Indian government filed a review petition in the Supreme Court on December 20, 2013, challenging the earlier judgment upholding section 377, stating, "Section 377 IPC, insofar as it criminalizes consensual sexual acts in private, falls [afoul] of the principles of equality and liberty enshrined in our Constitution." Following the government’s review petition, Naz Foundation also filed a review petition in the Supreme Court challenging its decision. On January 28, 2014, however, the Supreme Court dismissed the petitions seeking review.

Italy

A same-sex spouse of a European Union (EU) national may apply for a five-year permit to stay in Italy, provided the marriage was entered into in a country where same-sex marriages are validly performed. Italian immigration offices are now increasingly approving these applications. Same-sex marriage is not legal in Italy.

Domestic partnerships are not recognized by Italian law and the immigration system does not provide any option for them.

Japan

Japan does not recognize marriages, partnerships, or relationships between two individuals of the same sex for immigration purposes. The same-sex spouse or partner can try to apply for a dependent visa and the case will be referred to the Ministry of Foreign Affairs in Japan, which can grant the visa, but the chances of a visa being approved on that basis are extremely low.

Mexico

On December 21, 2009, the legislative assembly in Mexico City, D.F., legalized same-sex marriage and accorded adoption rights to same-sex parents. It was the first city in Mexico and in Latin America to legalize same-sex marriages. These reforms in the capital's civil law have spread to other entities in Mexico.

The Migration Act of November 2012 established regulations for domestic partners to obtain Mexican visas on the basis of their bonds with Mexicans or foreign residents in Mexico.

The requirements for domestic partner visas in Mexico are similar to those for different-sex married couples, but with more stringent requirements. While same-sex married couples are treated as domestic partners for Mexican immigration purposes, same-sex unmarried couples will only qualify if they have proof of their partnership in the country of origin.

Netherlands

In the Netherlands, there is no legal difference between a same-sex marriage and a different-sex marriage.

Unmarried partners, regardless of gender, fulfill the criteria for family reunification if they both prove, by official (and legalized) documents, that they are unmarried. In addition, they must prove that they have a long-lasting and stable relationship. This means that the relationship has to be comparable to a marriage. To prove the existence of such a relationship, the partners must complete and sign two forms, the so-called relationship statement and a questionnaire that asks questions like how they met, how long they have been in the relationship, and whether their family members have been informed about their relationship. The legislation does not define a minimum period of time the relationship must have existed.

For marriages and “registered” partnerships (similar to “registered” partnerships in Belgium, discussed above), the criteria for family reunification are very similar. Married couples or registered partners have to prove their marriage or registered partnership with official (and legalized) documents.

The minimum age to apply is twenty-one years, and the person who applies for reunification with his or her partner or spouse must earn at least the minimum wage.

Peru

Peru does not recognize marriages, partnerships, or relationships between two individuals of the same sex for immigration purposes. Only marriages according to Peruvian civil law and related regulations are recognized for purposes of obtaining resident visas through family-based proceedings.

Russia

Russia does not recognize marriages, partnerships, or relationships between two individuals of the same sex for immigration purposes.

South Africa

South African immigration law gives effect to the requirement of its Constitution that a person may not be discriminated against on the basis of his or her sexual orientation. That protection applies whether the person is a foreign national or a South African citizen.

The term "spouse," for purposes of South African immigration law, describes a person who is in a spousal relationship, be he or she in a marriage, a civil union, or an informal life partnership. Legislation does require, however, that any previous marriage or civil union must have been lawfully terminated. The relationship must be monogamous.

The foreign spouse of a South African citizen is eligible to apply to the Department of Home Affairs for a temporary residence permit to accompany his or her South African spouse in South Africa. These "relative's permits" are usually issued for about two years at a time. A relative's permit may be extended (from within the country), upon application, so long as the relationship still exists. Once the spousal relationship is five years old, the foreign spouse may apply for permanent residence on the basis of the relationship.

If the foreign spouse has obtained an offer of employment, he or she may apply to have the permit amended to allow him or her to take up that employment.

When a foreign national is moving to South Africa for some lawful purpose, he or she may bring a spouse or partner regardless of that spouse or partner’s gender. The "accompanying spouse" must (principally) prove that the spousal relationship exists. Unfortunately, the "dispensation" allowing a foreign spouse to take up employment in South Africa applies only to the spouses of South African citizens.

United States

On June 26, 2013, the U.S. Supreme Court struck down Section 3 of the Defense of Marriage Act (DOMA). DOMA defined "marriage" for federal law purposes as between "one man and one woman" and "spouse" as either a husband or wife "of the opposite sex." As a result of the Supreme Court's decision, same-sex spouses of U.S. citizens and permanent residents are now treated the same as different-sex spouses at the federal level, and may apply for green cards based on their marriages. Absent fraud or a particular public policy consideration, and as long as the marriage was valid where and when performed, the marriage is valid for U.S. immigration purposes. Moreover, U.S. immigration officials have been directed to recognize a validly performed same-sex marriage regardless of any anti-marriage equality law or constitutional amendment in a couple's state of residence (or intended residence) in the United States.

As of press time, same-sex marriages are legally performed in eighteen states and the District of Columbia. The states include California, Connecticut, Delaware, Hawaii, Illinois (starting June 2014), Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Utah (from December 20, 2013, to January 6, 2014, only) Vermont, and Washington.

Outside of the United States, same-sex marriages are validly performed in sixteen countries: the Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal, Iceland, Argentina, Denmark, Brazil, France, Uruguay, New Zealand, the United Kingdom (effective later this year in England, Wales, and Scotland only), and in Mexico City, D.F.

Overall, U.S. immigration authorities are treating all married couples equally in both the immigrant and nonimmigrant contexts, albeit not without a few growing pains along the way. For example, while U.S. Customs and Border Protection (CBP) honors visas issued by the U.S. Department of State (DOS) to same-sex spouses of principal nonimmigrant workers (e.g., an H-4 visa as the spouse of an H-1B nonimmigrant worker), CBP officers are refusing to issue derivate nonimmigrant status to Canadian citizens applying for admission to the United States (Canadians generally do not require visas) as the same-sex spouse of a principal nonimmigrant, and have confirmed that they will not do so without "additional guidance."

Importantly, however, civil unions, domestic partnerships, and other forms of relationship recognition short of marriage are not accorded the same familial status as marriage under U.S. immigration law. DOS will issue a B-1/2 visa to a "cohabitating partner" of a principal nonimmigrant visa holder, but these will only allow the "cohabitating partner" to obtain a six- to twelve-month stay upon entry, whereas the principal nonimmigrant may be on temporary assignment to the United States for several years at a time.

Details with respect to immigrant and nonimmigrant visas are summarized below.

<u>Immigrant visas:</u>

Same-sex spouses are recognized for immigration purposes, provided the marriage was recognized by the state where it was performed. If the party resides in a state

that does not recognize the marriage, but it was valid where performed, it will be recognized for immigration purposes. This is a dramatic turnaround from the position taken before June 2013 and results from administrative application of the Supreme Court's decision in *Windsor v. United States,* 570 U.S. 12 (2013). Practitioners report that qualifying same-sex cases are being adjudicated for immigration benefits professionally.

Same-sex partners or those in a domestic relationship enjoy no immigrant visa benefits. However, they may be able to visit under a B-2 visa for an extended period. If one partner is a U.S. citizen or permanent resident, this would raise the issue of whether the non-U.S. partner is a bona fide nonimmigrant. This might be overcome where the U.S. partner can show that he or she is only in the U.S. temporarily or travels frequently.

Nonimmigrant visas:

Nonimmigrant options for partners who are not legally married:

Same-sex or different-sex partners who are not legally married, whether or not they are in a legally recognized domestic partnership, may qualify for a B-2 visitor's visa to accompany a nonimmigrant partner, provided they can demonstrate the normally required intent not to immigrate or overstay in the United States. The primary purpose of coming to the United States must be to accompany the significant other who has already demonstrated nonimmigrant intent in obtaining his or her own visa, whether it be as a visitor, student, temporary worker, or other nonimmigrant classification. In making the assessment, U.S. immigration authorities will consider the current circumstances and prospects in the home country upon return, as well as the strength of his or her relationship with the "principal" alien and the principal's own ties abroad.

The principal applicant may be exempt from having to document nonimmigrant intent under an H or L visa or from having to document a residence abroad under an A, E, G, I, O, or R visa classification. The accompanying B-2 visitor partner, however, must show nonimmigrant intent and a residence abroad, whether it is his or her own address or that of a relative or friend.

Nonimmigrant options for same-sex spouses:

Same-sex spouses or partners may enjoy the full benefits of a K-1 fiancé(e) visa or as a derivative of other visa classifications such as B-2 visitor or H-4 spouse of temporary worker. They face the issue of immigrant intent much the same as a domestic partner. As with immigrant marriages, the marriage must have been recognized in the jurisdiction where performed. Whether it is recognized in the jurisdiction where the party resides is not determinative.

United Kingdom

In the United Kingdom (UK), a law legalizing same-sex marriage in England, Wales, and Scotland was passed in 2013. Northern Ireland does not permit same-sex marriage. In 2004, same-sex civil partnerships were legalized in all of the UK with the passage of the Civil Partnership Act.

For the purposes of entering or remaining in the UK, unmarried and same-sex partners of persons present and settled in the UK who are subject to immigration control (i.e., nationals not from the European Economic Area or Switzerland) enjoy the same benefits as married heterosexual partners. Although the general requirements and process of applying are the same as with heterosexual partners, there are minor differences concerning the documentary evidence that must be produced to demonstrate the legitimacy of the relationship.

To qualify, applicants must:

- be age 18 or older;
- have lived together with their partner in a relationship akin to marriage for at least the previous two years;
- meet or exceed level A1 of the common European Framework of Reference for English language or be exempt;
- not be in any other marriage or partnership;
- not be related by blood to the partner;
- have sufficient accommodation and maintenance without recourse to public funds;
- intend to live together permanently; and
- not fail for refusal under the general grounds for refusal to the UK.