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# U.S. IMMIGRATION BENEFITS FOR SAME SEX COUPLES: GREEN CARDS FOR GAY PARTNERS?

MARA SCHULZETENBERG

## I. INTRODUCTION

Until 1991, all United States immigration benefits were denied to gay and lesbian individuals. The Immigration and Naturalization Service ("INS") claimed that homosexuality was a condition resulting from "mental defect" and that homosexuals were "afflicted with psychopathic personalit[ies]."<sup>1</sup> In 1991, Congress enabled the United States to join the rest of the industrialized world by passing the Immigration Act of 1990, which removed the express bar on gay foreign visitors and immigrants.<sup>2</sup>

The INS and Department of State, the two agencies charged with overseeing immigration into the United States, no longer consider homosexual status itself a bar to immigration.<sup>3</sup> Indeed, in 1990, the Board of Immigration Appeals ("BIA") heard *Matter of Toboso-Alfonso* and upheld an immigration judge's determination that homosexuals constitute a particular social group and are therefore eligible for asylum in the United States.<sup>4</sup> In 1994, the Attorney General designated *Matter of Toboso-Alfonso* precedent "in all proceedings involving the same issue or issues."<sup>5</sup>

Despite such advances, U.S. immigration law does not recognize gay partnerships between United States citizens and foreign nationals. If a United States citizen and a foreign national of the opposite sex get married, that foreign national immediately becomes eligible to apply for a green card, or legal permanent resident status.<sup>6</sup> Same sex partners, however, "are viewed as 'strangers' before the law no matter how many years they have dedicated to

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1. See, e.g., *Matter of S*, 8 I. & N. Dec. 409 (BIA 1959).

2. Immigration Act of 1990, Pub. L. No. 101-649 (1990).

3. In fact, the INS Deputy Assistant Commissioner for Adjudications recently confirmed that gay partners of foreign nationals who are in the United States on temporary work visas may accompany their partners using a visitor visa that can be extended in increments of six months for as long as their partner's work visa is valid. See Noemi E. Masliah, William B. Schiller, and Sharon M. Dulberg, *Representing Lesbian, Gay, Bisexual and Transgender Clients*, 1999-2000 Immigration and Nationality Law Handbook (Am. Immigr. Laws. Ass'n).

4. 20 I. & N. Dec. 819, Interim Decision (BIA) 3222 (1990).

5. Att'y Gen. Ord. No. 1895-94 (June 19, 1994).

6. Immigration and Nationality Act § 201(b)[hereinafter I.N.A.], 8 U.S.C. 1151(b)(2)(A)(i) (2000); I.N.A. § 204(a); 8 U.S.C. 1154(a) (2000).

building a home and life together.”<sup>7</sup> Congress has repeatedly indicated that family unification is one of the most important goals of United States immigration law,<sup>8</sup> and approximately 75 percent of green cards are issued on family unity grounds.<sup>9</sup> But none of these goes to gay partners of United States citizens, leaving the relationships of these individuals, and the foreign nationals themselves, unrecognized by United States law.

In this Note, I will discuss the current U.S. immigration law regarding same sex partners. I will then compare the U.S. law with that of Canada and the United Kingdom, two countries with which the United States shares close historical, social, and cultural ties. Finally, I will recommend possible methods of changing the United States immigration laws to allow recognition of a gay American’s foreign national partner.

## II. THE UNITED STATES, THE I.N.A., AND *ADAMS V. HOWERTON*.

Pursuant to the Immigration and Nationality Act (“I.N.A.”), a foreign national who marries an American citizen of the opposite sex may apply immediately for a green card based on that marriage. I.N.A. § 201(a) establishes immigration quotas and a system of preferential admissions based upon the existence of certain family relationships.<sup>10</sup> Among other classes of individuals, immediate relatives of United States citizens are excluded from the quota limitations.<sup>11</sup> I.N.A. § 201(b) defines immediate relatives to include spouses but does not define the term “spouse.”<sup>12</sup> Section 101(a)(35), however, provides that “[t]he terms ‘spouse,’ ‘wife,’ or ‘husband’ do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.”<sup>13</sup>

Thus, it has been left to the courts to determine what a “spouse” is for purposes of the I.N.A. In *Adams v. Howerton*, a male

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7. Scott C. Titshaw, *U.S. Immigration Law: Denying the Value of Gay and Lesbian Families*, 28 HUM. RTS. 25, 25 (Winter 2001).

8. See *Regarding U.S. Immigration Policy: An Overview On Behalf of the American Immigration Lawyers Association, Before the Subcommittee on Immigration*, 107th Cong. (2001) (testimony of Warren R. Leiden).

9. Human Rights Campaign, *Permanent Partners Immigration Act: Quick Facts*, at [http://www.hrc.org/issues/federal\\_leg/ppia/quickfacts.asp](http://www.hrc.org/issues/federal_leg/ppia/quickfacts.asp) (last visited Oct. 31, 2001).

10. 8 U.S.C. § 1151(a) (2000).

11. *Id.*

12. 8 U.S.C. § 1151(b) (2000).

13. 8 U.S.C. § 1101(a)(35) (2000).

American citizen and a male alien obtained a marriage license and were "married" by a minister in Colorado.<sup>14</sup> Adams, the American, petitioned the INS for classification of Sullivan, his male partner, as an immediate relative of an American citizen, based upon Sullivan's status as Adams' spouse.<sup>15</sup> The couple brought suit challenging a BIA decision affirming denial of their petition.<sup>16</sup> The Court of Appeals for the Ninth Circuit held that a citizen's "spouse" within the meaning of the I.N.A. must be an individual of the opposite sex.<sup>17</sup> The Court also found that the statute so interpreted was not in violation of the Constitution.<sup>18</sup>

The Court began by acknowledging that case law interpreting the I.N.A. indicates that a "two-step analysis is necessary to determine whether a marriage will be recognized for immigration purposes."<sup>19</sup> First, the marriage must be valid under the law of the state where the marriage occurred.<sup>20</sup> Second, the state-approved marriage must qualify under the I.N.A. Both requirements must be met if a marriage is to be recognized for purposes of immigration into the United States.<sup>21</sup> The Court noted that it was unclear whether Colorado would recognize a homosexual marriage but reasoned that it was irrelevant, because even if the Adams-Sullivan marriage was valid under Colorado law, it was not valid under I.N.A. § 201(b).<sup>22</sup>

The Court analyzed this issue by focusing on the intent of Congress, stating that "the intent of Congress governs the conferral of spouse status under § 201(b), and a valid marriage is determinative only if Congress so intends."<sup>23</sup> The Court reasoned

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14. 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 111 (1982).

15. *Id.* at 1036.

16. *Id.*

17. *Id.* at 1040.

18. *Id.* at 1041-42.

19. *Adams*, 673 F.2d at 1037.

20. See *United States v. Sacco*, 428 F.2d 264, 268 (9th Cir. 1970), *cert. denied*, 400 U.S. 903 (1970) ("The general rule is that the validity of a marriage is determined by the law of the state where it took place."). This rule also holds true for marriages that take place in other countries. See also *Gee Chee On v. Brownell*, 253 F.2d 814 (1958) (holding that a marriage that had taken place in China according to Chinese custom was valid for purposes of United States immigration law, regardless of whether it conformed to American customs). It is unlikely, however, that the INS would recognize same sex marriages of citizens of the Netherlands who apply for marriage-based immigration benefits. When state law or foreign law offends federal public policy, courts have held that federal public policy prevails. See, e.g., *De Sylva v. Ballentine*, 351 U.S. 570, (1956); *Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204, (1946).

21. *Adams*, 673 F.2d at 1038.

22. *Id.* at 1039.

23. *Id.*

that when "a statute has been interpreted by the agency charged with its enforcement, we are ordinarily required to accord substantial deference to that construction, and should follow it 'unless there are compelling indications that it is wrong.'"<sup>24</sup> Accordingly, the Court was required to defer to the INS interpretation, which explicitly determined the term "spouse" to exclude homosexual partners. The Court, however, based its decision on the I.N.A. itself, finding that "[n]othing in the Act, the . . . amendments or the legislative history suggests that the reference to 'spouse' in § 201(b) was intended to include a spouse of the same sex as the citizen in question."<sup>25</sup>

The Court also recognized that it is a fundamental principle that the words of a statute will be interpreted according to their plain meaning when there is no indication that they should be interpreted otherwise.<sup>26</sup> Because the term "marriage" ordinarily refers to a relationship between a man and a woman, and the term "spouse" ordinarily refers to "one of the parties in a marital relationship so defined,"<sup>27</sup> and Congress indicated no intent to enlarge the ordinary meanings of these words, the Court reasoned that it had no authority to expand the meaning of the term "spouse" for immigration purposes.<sup>28</sup>

Adams and Sullivan contended that the law violated their right to equal protection because of its discriminatory effect upon them due to their sex and sexual orientation.<sup>29</sup> In addition, they argued that the law must be subject to strict scrutiny because it abridged their fundamental right to marry.<sup>30</sup> The Court cast aside these arguments, stating that "Congress has almost plenary power to admit or exclude aliens."<sup>31</sup> This absence of constitutional protection for aliens is necessary, the Court reasoned, because the "policies pertaining to the entry of aliens and their right to remain here are

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24. *Id.* at 1040 (citing *New York Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 421 (1973)).

25. *Id.*

26. *See, e.g., Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (holding that "absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive").

27. *Id.* A long line of cases establishes that the courts have consistently interpreted the term "marriage" in this manner. *See, e.g., Adams*, 673 F.2d at 1040 ("the Congress had in mind 'the common understanding of marriage' when it made provision for alien 'spouses' in the War Brides Act").

28. *Adams*, 673 F.2d at 1040.

29. *Id.* at 1041.

30. *Id.*

31. *Id.*

peculiarly concerned with the political conduct of government.”<sup>32</sup> Further, in its exercise of its power over immigration, Congress “regularly makes rules that would be unacceptable if applied to citizens.”<sup>33</sup> Therefore, when there is a rational basis for the immigration laws enacted by Congress, the courts must uphold them, even when such laws would be unconstitutional if applied to citizens of the United States.<sup>34</sup>

Some individuals have attempted to argue that congressional action to exclude certain aliens interferes with the constitutional rights of the American citizens who are on the other side of the relationships.<sup>35</sup> Such arguments have proved unsuccessful, and the Supreme Court has held that constitutional rights of American citizens do not outweigh substantial “foreign policy considerations affecting all citizens [that are the] weightiest considerations of national security.”<sup>36</sup>

*Kleindienst v. Mandel* extended this line of reasoning.<sup>37</sup> In this case, Ernest Mandel was a Belgian journalist who described himself as a “revolutionary Marxist,” although he asserted in his visa application that he was not a member of the Communist Party.<sup>38</sup> He had been invited by Stanford University to participate in a panel discussion, but the American Consul in Brussels refused to grant Mandel a visa on the basis of his involvement with “world communism.”<sup>39</sup>

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32. *Id.* at 1042 (quoting *Fiallo v. Bell*, 430 U.S. 787, 793 n.4 (1977) (quoting *Galvan v. Press*, 347 U.S. 522, 530-532 (1954))). Furthermore, “[t]here may be actions of the Congress with respect to aliens that are so essentially political in character as to be nonjusticiable.” *Fiallo*, 430 U.S. at 793.

33. *Adams*, 673 F.2d at 1042 (quoting *Fiallo*, 430 U.S. at 792) (quoting *Matthew v. Diaz*, 426 U.S. 67, 80 (1976)).

34. There may, however, be some limit to Congress’ power to regulate aliens. At least one court has indicated that it would not favor a statute that “treat[ed] similarly situated aliens disparately.” *Kahn v. INS*, 36 F.3d 1412 (9th Cir. 1994).

35. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

36. *Zemel v. Rusk*, 381 U.S. 1, 13, 16 (1965). In *Zemel*, the rights asserted were those of an American passport applicant after the Government refused to validate his American passport for travel to Cuba. The Supreme Court held that his right to travel and his right to inform himself about Cuba did not outweigh the need to enforce national security policy to protect all American citizens. *Id.* at 13.

37. *Kleindienst*, 408 U.S. 753 (1972).

38. *Id.* at 756.

39. *Id.* at 757. I.N.A. § 101(a)(40); 8 U.S.C. § 1101(a)(40) (2000) defines world communism as a “revolutionary movement, the purpose of which is to establish eventually a Communist totalitarian dictatorship in any or all the countries of the world through a medium of an internationally coordinated Communist political movement,” while § 212(a)(3)(D)(i) denies admission to individuals who advocate or publish the economic, international, and governmental doctrines of world communism. 8 U.S.C. § 1182(a)(3)(D)(i) (2000).

Plaintiffs argued that the decision interfered with the First and Fifth Amendment interests of those who would personally communicate with Mandel, because they were prevented "from hearing and meeting with Mandel in person for discussions."<sup>40</sup> The Court held that the implication of First Amendment rights was not dispositive under these circumstances, because "the power to exclude aliens is 'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers – a power to be exercised exclusively by the political branches of government . . .'"<sup>41</sup> Further, Mandel, an alien who was neither admitted to nor a resident of the United States, "had no constitutional right of entry to this country as a nonimmigrant or otherwise."<sup>42</sup>

Thus, the rule articulated in *Adams* remains the law, and the United States continues to discriminate more harshly against same sex couples in the area of immigration than in almost any other area of law.<sup>43</sup> This circumstance leaves bi-national same sex couples with several options, none of which allows the couple to live together permanently and legally in the United States. If the partners decide not to break the law, they have three options. First, the foreign national partner can attempt to qualify for a visa under another category such as employment or asylum. Because of the limits placed on these categories, however, success may be limited.<sup>44</sup> The partners may also choose to split up, or the United States citizen can "move abroad to live a life in exile with the foreign national partner"<sup>45</sup> in one of the countries that allow immigration for same sex couples.<sup>46</sup>

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40. *Kleindienst*, 408 U.S. at 760.

41. *Id.* at 765 (quoting Brief for Appellants 20 (No. 71-16)). The Court continued by stating that it has "without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden'" *Id.* at 966 (citing *Boutilier v. I.N.S.*, 387 U.S. 118, 123 (1967)).

42. *Id.* at 762.

43. *Titshaw*, *supra* note 7 at 25.

44. For example, to obtain an H-1B temporary employment visa, the alien must have at least a four-year college degree or the equivalent and the position being sought must require a four-year degree in the alien's field. Further, it is the U.S. employer offering the position who must file the H-1B petition. I.N.A. § 101(a)(15)(H)(i)(b); 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2000).

45. *Titshaw*, *supra* note 7, at 25.

46. Currently, countries that provide immigration benefits for same sex couples include Australia, Belgium, Canada, Denmark, Finland, France, Iceland, the Netherlands, New Zealand, Norway, South Africa, Sweden, and the United Kingdom. The Netherlands is currently the only country that offers full marriage benefits to same sex partners, thereby allowing complete immigration benefits for same sex foreign national partners of citizens of the Netherlands. See Partners Task Force for Gay & Lesbian Couples, *Immigration Roundup*,

If none of these legal options appeals to the partners, they can also choose to break the law, either by living "underground" or committing marriage fraud by having the foreign national partner marry a United States citizen of the opposite sex.<sup>47</sup> If such a fraud is discovered by the INS, the penalties can be severe and long-lasting. If outside the United States, the alien will be deemed permanently inadmissible because he or she engaged in "fraud or willful[] misrepresent[ation of] a material fact."<sup>48</sup> If within the United States, the alien may face a prison sentence of up to five years, while the American citizen spouse may face a \$250,000 fine.<sup>49</sup> Further, the marriage will be annulled and the alien will become deportable.<sup>50</sup>

It is clear that a gay American who wishes to live in the United States with his or her foreign national partner faces barriers that are normally impossible to overcome. To put the U.S. law and policy into perspective, it is instructive to examine the immigration laws of Canada and the United Kingdom.

### III. CANADA.

Immigration law in Canada is enabled by the Immigration Act of 1985, as amended,<sup>51</sup> and governed by the Immigration Regulations of 1978.<sup>52</sup> Until 1978, homosexuals, along with persons convicted of committing crimes of moral turpitude, prostitutes, and epileptics, were prohibited from entering Canada.<sup>53</sup> Even today, Canadian immigration regulations define "spouse" as someone of the opposite sex to whom an individual is joined in marriage.<sup>54</sup> Because of this traditional definition, same sex and common law spouses were unable to sponsor the other spouse for purposes of immigration.

Like the United States, Canada states that its greatest immigration priority is family reunification.<sup>55</sup> Therefore, in spite of the traditional definition of the term "spouse," other provisions of

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available at <http://www.buddybuddy.com/immigr.html> (last visited Oct. 24, 2002).

47. See Titshaw, *supra* note 7, at 25.

48. I.N.A. § 212(a)(6)(c)(i); 8 U.S.C. § 1182(a)(6)(C)(i) (2000).

49. I.N.A. § 275(c); 8 U.S.C. § 1325(c) (2000).

50. I.N.A. § 237(a)(1)(G)(i); 8 U.S.C. § 1227(a)(1)(G)(i) (2000).

51. Immigration Act, R.S.C., ch. 1-2 (1985) (Can.).

52. Immigration Regulations, 1978 (SOR/78-172).

53. *Id.*

54. Immigration Regulations, 1978 (SOR 78-172), R.2.(1).

55. See Minister of Public Works and Government Services Canada, *Building on a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation* (1998), available at <http://www.cic.gc.ca/english/pdf/pub/LR-eng.pdf>.



the Canadian immigration regulations, "including [Regulation] 11(3) and [Regulation] 2.1 may apply to applications involving same sex or common law couples."<sup>56</sup> Regulation 11(3) provides that a visa officer may use his or her discretion to "issue an immigrant visa to an immigrant . . . who does not meet the requirements [of any of the enumerated categories]."<sup>57</sup> Regulation 2.1 provides that the Minister of Immigration may "exempt any person from any regulation . . . or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of *compassionate or humanitarian considerations*."<sup>58</sup>

In 1994, the Canadian Immigration Service developed an alternative process for same sex and common law relationships, which was intended to provide such couples with the same benefits enjoyed by married heterosexual couples in the arena of marital sponsorship.<sup>59</sup> The new policy was set forth in a telex sent to all visa posts. This telex provided details regarding how the visa posts should implement Regulation 2.1, and how immigration officials should proceed in cases of visa applications of same sex and common law couples.<sup>60</sup>

The telex stated that visa posts "should accept those same sex or common law spouses that qualify under [the] normal selection system or where rule 11(3) is warranted if selection points do not reflect applicant's ability to successfully establish" eligibility under other categories.<sup>61</sup> If such options are not viable, visa posts should "review same sex or common law applications [for] humanitarian and compassionate grounds."<sup>62</sup> Such grounds "include the existence of a stable relationship with a Canadian citizen or permanent resident. Missions should recognize that undue hardship would often result from separating or continuing the separation of a bona fide same sex or common law couple."<sup>63</sup>

In determining whether "humanitarian and compassionate" factors are present, visa posts should "assess relationships to determine that they are bona fide (in terms of duration and stability

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56. Canadian Government Telex ORD0150 (June 3, 1994) [hereinafter Telex], available at <http://www.webimmigration.com/samesexmemo.html>.

57. Immigration Regulations, 1978 (SOR 78-172), Regulation 11(3).

58. Immigration Regulations, 1978 (SOR 78-172), Regulation 2.1, s.2. (emphasis added).

59. See *Da Silva v. Canada*, [2000] 152 F.T.R. 58.

60. Telex, *supra* note 54.

61. *Id.* at ¶ 5.

62. *Id.* at ¶ 6.

63. *Id.*

of relationship) and not entered into primarily for the purpose of gaining admission to Canada for one of the parties.”<sup>64</sup> Where “humanitarian and compassionate” factors are present and the alien is not otherwise excludable, the post should issue the immigrant visa.<sup>65</sup>

Finally, visa posts may use these regulations to “facilitate the admission of an otherwise unqualified applicant who is involved in a same sex or common law relationship with an individual who, in their own right, qualifies for immigration under any category.”<sup>66</sup> The first non-Canadian must qualify to enter Canada on its point system, and then that non-Canadian can sponsor his or her partner based on “humanitarian and compassionate” grounds.<sup>67</sup> This regulation makes Canada the only country that allows same sex couples to immigrate when neither party is a Canadian citizen or a permanent resident (“landed immigrant”) of Canada.

Countries that provide immigration benefits for same sex couples require some proof of the couple’s relationship, including evidence of living together for a certain period of time. Canada, however, does not require proof of cohabitation.<sup>68</sup> Instead, each case involving a same sex relationship is to be reviewed on its own individual merit, and visa officers are to consider “documentary evidence pertaining to the relationship such as joint bank accounts, joint real estate holdings, other joint property ownership, wills, insurance policies, letters from friends and family.”<sup>69</sup> The officer, however, is free to consider any evidence that he or she feels is relevant; the list is only to serve as a guideline.<sup>70</sup> Through such evidence, the couple must establish an interdependency that is equivalent to marriage. Similarly, while separation of the couple can be grounds for “humanitarian and compassionate” consideration, the couple must demonstrate that they “reside together in a genuine conjugal-like relationship.”<sup>71</sup>

In light of these provisions, the court system in Canada now has the responsibility of ensuring that same sex couples are not granted greater rights than heterosexual couples. The Trial Division of the Federal Court of Canada dealt with this issue in *Da Silva v.*

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64. *Id.* at ¶ 7.

65. *Id.*

66. *Id.* at ¶ 8.

67. *Id.*

68. *Id.*

69. *Rodriguez v. Minister of Citizenship and Immigration*, [2001] F.C. 414.

70. *Id.* at ¶ 14.

71. *Id.* (citing the IP-5 manual at §8.2, page 24).

Canada.<sup>72</sup> Da Silva, a Brazilian national, sought a stay of a deportation order against him on the ground that the visa officer who examined his visa application did not properly consider the facts of his same sex relationship.<sup>73</sup>

Da Silva had applied for a visa on two separate grounds, first as an independent applicant who intended to be employed as a cook, and second as the sponsoree of his male partner.<sup>74</sup> Da Silva's employment-based application failed due to his lack of experience in the specified occupation.<sup>75</sup> The immigration officer's letter of decision did not address the same sex spouse sponsorship ground, but it stated generally that Da Silva did not meet the requirements for immigration into Canada and was thus ineligible for a visa.<sup>76</sup>

The government argued that the visa officer considered the sponsorship aspect of the application and concluded that it was not a genuine relationship. The officer's computer notes indicated that she had inquired about the relationship, though Pelletier, J. indicated that he had "considerable misgivings about the treatment which the application received" because the officer did not "show an attentive inquiry into the issue."<sup>77</sup>

Da Silva further argued that he should be granted a stay of deportation on "irreparable harm" grounds.<sup>78</sup> The Court reasoned that there is significant authority indicating that

'mere' family separation does not qualify as irreparable harm. Yet, in the case of a same sex couple, where the only difference is the nature of the relationship, the irreparable harm criterion would, on the argument advanced, be assumed to be satisfied. The result would be inequality, not equality, of treatment, since members of a heterosexual marriage would be exposed to deportation while similarly circumstanced homosexual couples would not be. This cannot have been the intended result.<sup>79</sup>

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72. *Da Silva* [2000] 182 F.T.R. 58.

73. *Id.*

74. *Id.* at ¶ 3.

75. *Id.*

76. *Da Silva*, [2000] 182 F.T.R. 58 at ¶ 6.

77. *Id.* at ¶ 11. The case was not decided on this ground, however.

78. *Id.* at ¶ 11-12.

79. *Id.* at ¶ 16.

Da Silva's final argument was that he would be subjected to "undue hardship" if he and his partner were forced to separate.<sup>80</sup> The Court determined that this argument must also fail for the same reasons that Da Silva's "irreparable harm" argument failed, especially because the couple had voluntarily separated for two years before resuming their life together shortly before the trial.<sup>81</sup>

During his application interview, Da Silva did not exhibit any concern about being separated from his partner or indicate that he desired to stay in Canada to be with his partner.<sup>82</sup> Therefore, the Court agreed that there was no indication that any undue hardship would be suffered by Da Silva or his partner if they were involuntarily separated and Da Silva was not allowed to remain in Canada.<sup>83</sup>

This result demonstrates the Canadian court's desire to ensure equality for same sex and heterosexual couples. The Court recognized that gays and lesbians have historically been the target of discrimination, and that the courts should interpret the Canadian Constitution and statutes with "sufficient flexibility to ensure the 'unremitting protection' of equality rights in the years to come."<sup>84</sup> The Court indicates an understanding that the immigration law must be applied evenly across the board, and same sex couples should not receive greater rights than heterosexual married couples. Similarly, Canadian immigration law demonstrates Canada's desire to ensure that heterosexual couples should not receive greater rights than homosexual couples.

#### IV. THE UNITED KINGDOM.

Immigration law in the United Kingdom is governed by the Immigration Act of 1971.<sup>85</sup> The statute came into force on January 1, 1973 and has been amended and supplemented by the Immigration Act of 1988,<sup>86</sup> the Asylum and Immigration Appeals Act of 1993,<sup>87</sup> and the Asylum and Immigration Act of 1996.<sup>88</sup> Individuals who do not have the "right of abode" (i.e. British citizens and certain other individuals who possessed the right of abode

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80. *Id.* at ¶19.

81. *Da Silva*, [2000] 182 F.T.R. 58.

82. *Id.* at ¶6.

83. *Id.* at ¶19.

84. *Egan v. Canada*, [1993] 3 F.C. 401, 428.

85. Immigration Act, 1971. Royal assent Oct. 28, 1971.

86. Immigration Act, 1988. Royal assent May 10, 1988.

87. Asylum and Immigration Appeals Act, 1993. Royal assent July 1, 1993.

88. Asylum and Immigration Act, 1996. Royal assent July 31, 1996.

before 1983 and who are by law allowed to retain it for the rest of their lives) may enter and remain only by permission called "leave."<sup>89</sup>

To qualify for admission into the United Kingdom as a "spouse," an applicant must satisfy the following five criteria: 1) the sponsor must be present and settled in the United Kingdom, or is to be admitted for settlement at the same time as the applicant arrives in the United Kingdom; 2) the parties to the marriage must have met; 3) the marriage must be subsisting and each of the parties must intend to live permanently with the other as his/her spouse; 4) there must be adequate accommodation for the parties and any dependents without recourse to public funds in accommodation which they own or occupy exclusively; and 5) the parties must be able to maintain themselves without recourse to public funds.<sup>90</sup>

While British immigration law does not recognize same sex spouses, it does recognize "unmarried partners."<sup>91</sup> Such "unmarried partners" may enter the United Kingdom to join someone settled in the United Kingdom if he or she can satisfy six criteria: 1) any previous marriages or similar relationships in which either partner has been involved have permanently broken down; 2) the couple cannot marry each other under United Kingdom law (unless it is because of a blood relationship or age); 3) the couple has been living together as if married for at least two years; 4) they plan to live together permanently; 5) they both have enough money to support themselves and any dependents without help from public funds; and 6) the applicant has a valid entry clearance for entry into the United Kingdom as a same sex partner.<sup>92</sup>

To prove that the relationship exists, the application must be accompanied by evidence showing that the partners live together.<sup>93</sup> Such evidence normally consists of ten items of correspondence addressed jointly to the partners (five items from each of the past two years), and may be from utility companies, local authorities, government offices, banks, credit card statements, insurance certificates, or mortgage/rental agreements.<sup>94</sup> If the partners have not received any such correspondence that is addressed to them

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89. Immigration Rules (H C 395) ¶ 7, at <http://www.ind.homeoffice.gov.uk/default.asp?PageId=1002> (last visited Feb. 11, 2002).

90. Immigration Act, 1996, pt. 8, ¶ 281.

91. See Immigration Directorates' Instructions, ch. 8, § 7, Annex Z, *Common-Law and Same Sex Relationships (Unmarried Partners)* [hereinafter *Concession*], available at <http://www.gherson.com/news.php3?article=cohabupdate>.

92. See, e.g., *Regina v. An Imm. Officer Ex Parte*, 2000 WL 824112 at \*4, 5 (2000).

93. *Id.*

94. *Id.*

jointly, they may provide three or four items addressed to one of them, and one or two addressed to the other, as long as they show the same address.<sup>95</sup>

If the five criteria are satisfied, the non-British partner will be allowed to stay and work in the United Kingdom for two years.<sup>96</sup> At the end of that time, the unmarried partner can apply to remain in the United Kingdom permanently if the relationship has not dissolved and the couple plans to continue to live together permanently.<sup>97</sup>

Although these statutes and requirements establish that same sex partners are allowed to settle in the United Kingdom with their British partners, case law indicates that such partners are not recognized as “spouses” or “family members.”<sup>98</sup> As recent as January 2001, a London administrative court found this to be true, when Nigel McCollum applied to sponsor his partner, Renato Lozano.<sup>99</sup> The couple had been in a long-term, same sex relationship, and McCollum wished Lozano to live with him in the United Kingdom as his spouse or family member.<sup>100</sup> On December 1, 1998, Lozano applied for leave to enter the United Kingdom on the basis of his long-term relationship with McCollum.<sup>101</sup> The Secretary of State for the Home Department refused permission to Lozano on the grounds that the Immigration Rules did not entitle him to be treated as a spouse or family member.<sup>102</sup> McCollum challenged the refusal.<sup>103</sup>

The Court began its analysis by conceding that the Secretary of State had issued a policy statement on October 13, 1997 that addressed common law and same sex relationships.<sup>104</sup> That statement outlined the requirements that same sex partners must satisfy for the foreign national partner to gain leave to enter the

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95. Immigration And Nationality Directorate Home Office, Form Set(M), Version 04/2002 (Oct. 31, 2001), available at [http://www.ind.homeoffice.gov.uk/filestore1SET\\_M\\_%20version%2010.pdf](http://www.ind.homeoffice.gov.uk/filestore1SET_M_%20version%2010.pdf)

96. See Concession, *supra* note 91.

97. Immigration and Nationality Directorate, *Staying in the UK, Unmarried Partners*, available at <http://www.ind.homeoffice.gov.uk/default.asp?pageId=1438> (last visited Oct. 31, 2002).

98. See, e.g., *The Queen v. Sec’y of State for the Home Dep’t*, No. CO-569-1999, 2001 WL 98041 (Q.B. Jan. 24, 2001).

99. *Id.*

100. *Id.* at ¶1.

101. *Id.* at ¶2.

102. *Id.*

103. *Queen v. Secretary*, 2000 WL 98041 at ¶1.

104. *Id.* at ¶3.

United Kingdom.<sup>105</sup> At issue was the requirement that the applicant had not obtained entry clearance prior to McCollum's application to sponsor him as a same sex partner.<sup>106</sup> It was this omission that was the basis of the denial of his application.<sup>107</sup> While McCollum argued that European Community law supported the argument that Lozano should be treated as a spouse or family member, the Court found that because Lozano was not a national of any state in the EC, United Kingdom immigration law prevailed, and as such, he needed to obtain the necessary entry clearance.<sup>108</sup>

The Court, however, did not address a Crown Office List decision from June 2000 that held that there is no "useful purpose served by requiring the applicant to travel to [his country of nationality] and to participate in a purely bureaucratic procedure which can only have one outcome" [issuance of the entry clearance].<sup>109</sup> The Court further held that this principle applies only when 1) the applicant is currently in the United Kingdom, 2) the applicant would be bound to obtain entry clearance in his country of origin without the need for any enquiries [sic] in that country, and 3) returning to the country of origin to obtain the clearance would create substantial hardship to the applicant.<sup>110</sup>

Perhaps the cases can be reconciled by arguing that Lozano did not face substantial hardship in returning to his country of origin (Brazil) to apply for entry clearance. The Court did not address whether Lozano would face hardship, nor did it mention the 2000 decision. Regardless, it is clear that a British citizen or permanent resident does have the ability to sponsor his same sex foreign national partner for immigration benefits that are analogous to those of a heterosexual married couple, even though such partners are not considered "spouses" or "family members."<sup>111</sup>

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105. *Id.*

106. *Id.* at ¶4.

107. *Id.*

108. *Queen v. Secretary*, 2001 WL 98041 at ¶19.

109. *Regina*, 2000 WL 824112 at \*4.

110. *Id.*

111. The British courts generally agree that legislation would often "fail to cover the whole of the target intended to be protected if family were given a narrow or rigid meaning. Such a meaning would fail to reflect the diverse ways people, in a multi-cultural society, now live together in family units." *See, e.g., Fitzpatrick v. Sterling Hous. Ass'n Ltd.*, [2000] L.T.R. 44, 61 (1999).

## V. THE FUTURE OF BI-NATIONAL SAME SEX COUPLES IN THE UNITED STATES.

Since Congress passed the Immigration Act of 1990 and removed the express bar on gay foreign visitors and immigrants, the INS has made some important first steps in recognizing homosexual foreign nationals.<sup>112</sup> In 1993, the INS and Department of State began to recognize same sex relationships between foreign nationals by granting temporary B-2 visitor visas to partners of gay foreign nationals who are present in the United States.<sup>113</sup> In 1994, the Attorney General declared that the INS should consider homosexuals to be members of a particular class for purposes of asylum.<sup>114</sup> Despite these advances, however, the issue of same sex bi-national couples has not been addressed by the courts since *Adams*, and the INS and the Department of State continue to deny the foreign national same sex partners of American citizens the benefits available to opposite-sex foreign national spouses of American citizens.<sup>115</sup>

Some United States politicians and lawmakers believe that the general recognition of same sex relationships is necessary to protect constitutional rights and ensure equal protection for all United States citizens. For example, Vice President Gore supported providing benefits to same sex couples during his presidential campaign, although it is unclear whether he would have included immigration benefits in any reforms.<sup>116</sup>

Some activists have also attempted to force Congress to deal with the issue of same sex relationships in the immigration arena. In February 2001, Congressman Jerrold Nadler of New York, in cooperation with the Lesbian and Gay Immigration Task Force and at least 100 co-sponsors in the House of Representatives, attempted to recognize same sex "permanent partnerships" by introducing the Permanent Partners Immigration Act.<sup>117</sup> This Act would modify the I.N.A. to provide same sex partners of United States citizens and

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112. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5032 (1990).

113. As Titshaw notes, however, this development does not help the "derivative" partner remain in the United States or obtain a Green Card, and could even result in complications for the "derivative" partner if the other partner pursues a Green Card. Titshaw, *supra* note 7, at 26.

114. Att'y Gen. Order No. 1895-94 (June 19, 1994) (on file with author).

115. See, e.g., *Adams*, 673 F.2d 1036.

116. See, e.g., Christopher Heredia, *Not Everyone's For Gore*, S.F. CHRON., Nov. 3, 2000, at A3.

117. H.R. 690, 107th Cong. (2001) available at <http://www.thomas.loc.gov/cgi-bin/query/C?c107:/temp/~c107iULpBh> (last visited Mar. 28, 2002) [hereinafter Permanent Partners Immigration Act].



green card holders the ability to sponsor their permanent partners for residence in the United States.<sup>118</sup> Specifically, it would add the term "permanent partner" to the I.N.A.'s list of definitions of "family."<sup>119</sup> The Act defines a "permanent partner" to be

an individual 18 years of age or older who – (A) is in a committed, intimate relationship with another individual 18 years of age or older in which both parties intend a lifelong commitment; (B) is financially interdependent with that other individual; (C) is not married to or in a permanent partnership with anyone other than that other individual; (D) is unable to contract with that other individual a marriage cognizable under [the I.N.A.]; and (E) is not a first, second, or third degree blood relation of that other individual.<sup>120</sup>

If enacted, the Act would require same sex bi-national couples to satisfy the same requirements as bi-national married couples. Married couples, however, are required to submit a marriage certificate; the Act does not address what documentation would replace this document.<sup>121</sup> Perhaps the drafters meant to imply that gay couples would be judged by the same standard employed by the INS when evaluating common-law marriages between heterosexuals.<sup>122</sup> Without such a provision, it is unclear how a same sex couple could prove their permanent partnership, particularly to an agency that is opposed to recognizing this type of relationship. Further, it would be unfair to require heterosexual married couples to provide more evidence of their relationship than same sex couples.

To equalize the burdens imposed on same sex and heterosexual couples, the Act could be changed to require the type of documentation outlined by British law.<sup>123</sup> It may initially seem to be a greater burden on gay couples to provide evidence that spans two years while a heterosexual married couple need only provide a

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118. *Id.*

119. *Id.* at § 2.

120. *Id.*

121. *Id.*

122. Because of Congress' repeated expressions of its intent that immigration legislation is primarily to unite families, the Ninth Circuit reversed the Board of Immigration Appeals in *Kahn v. INS*, 36 F.3d 1412 (9th Cir. 1994), and held that common-law spouses are considered spouses for purposes of U.S. immigration law, regardless of the law of the state where the relationship subsists. The Court's discussion in *Kahn* indicated that the INS should evaluate common-marriages based on the totality of the circumstances surrounding the relationship.

123. See, e.g., *Regina*, 2000 WL 824112.

marriage certificate that might have been procured only a day before the filing of a sponsorship application. However, it is clear that the same sex couple would somehow need to demonstrate that their relationship resembles a marriage, and marriage certificates are unavailable to nearly all the world's gay couples.

Two years, however, may be an excessively long period of time. The understandable concern is that these couples would commit fraud by claiming to be involved in a permanent partnership for the purpose of obtaining immigration benefits, even if they did not intend the relationship to be permanent. An actual marriage certificate may seem to present a greater barrier to dissolving a relationship than mere words professing an intent to permanently remain in a relationship. Yet marriage certificates may not hold as much power as we would like to believe: 43 percent of first marriages in the United States end in divorce.<sup>124</sup> Furthermore, there is no evidence to support a claim that gay permanent partners would be more likely to perpetrate immigration fraud than heterosexual married couples.

To address the problem, we could adopt the model provided by the United Kingdom. Because this model is based on a rule with specific criteria, immigration officials could apply it objectively, and determinations would in no way depend upon the individual official's biases. However, the importance of the cohabitation requirement would likely be a barrier to many couples because the gay partners of American citizens often have no way to remain in the United States to cohabit for an extensive period of time.

A better solution would be the adoption of the Canadian model. Such a system would require that each marriage or permanent partner case be examined on its own merits, with no specific time requirement. Not only does Canada's system put all couples on equal footing (in theory, at least), it recognizes that same sex couples may find it difficult, if not impossible, to provide evidence that they have lived together because same sex partners cannot usually legally stay in each other's countries for extended periods of time.<sup>125</sup> The United States, for example, typically issues visitor visas that are valid for only six months.<sup>126</sup>

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124. See Gender Center, *Marriage, Divorce, and Remarriage in the United States*, at <http://www.gendercenter.org/mdr.htm> (last visited Mar. 28, 2002).

125. U.S. immigration law provides an illustrative example of this problem.

126. Typically, visitors enter the United States on B-2 visas, which are normally valid for six months. Gay partners of foreign nationals are now allowed, however, to renew their B-2 visas for the duration of their partner's temporary employment visa. See Masliah, *supra* note 3. It is a bitter irony that current immigration law allows the gay partners of foreign nationals to remain in the United States with their partners, while drastically limiting the

If the Canadian model is unacceptable to United States lawmakers and they feel that a cohabitation requirement is necessary, they should consider reducing the time limit to make it more analogous to the requirements set forth for heterosexual married couples. Perhaps they could devise a system whereby same sex couples would be held to the same standards as common-law spouses. Any time limit in this context, however, would be somewhat arbitrary. Further, Congress is unlikely to agree on whether to provide these benefits to same sex couples, much less agree on the amount of time such couples would have to prove they have been together.

Despite some indications of discussion in the political and legislative arenas, it is unlikely that United States immigration law will provide green card benefits to same sex bi-national couples anytime in the near future. Before Congress will amend the I.N.A. to provide such benefits for immigrant same sex couples, it will first need to recognize such rights for United States same sex couples. Although the Supreme Court has acknowledged that Congress' "plenary power" over the admission and exclusion of aliens, that power should not be so complete that aliens should be subjected to "different substantive rules from those applied to citizens."<sup>127</sup> Even U.S. citizens do not currently enjoy the ability to be a part of a same sex marriage.

Moreover, federal policy appears to be moving toward fortifying the current law, rather than progressing toward equalization. In 1996, President Clinton signed the Defense of Marriage Act, which defines "marriage" as a "legal union between one man and one woman as husband and wife" and a "spouse" as "a person of the opposite sex who is a husband or wife."<sup>128</sup> As a result, all federal agencies, including the INS, restrict all federal benefits and rights conferred by marriage to unions between a man and a woman and refuse to recognize same sex marriage.

Even a more liberal Supreme Court would probably have little power to change what Congress wishes to enforce in the immigration arena, due to the highly political nature of the issues involved. While some commentators argue that change should occur because current law treats members of same sex couples as second-class individuals, reality dictates that the fight for change promises to be an up-hill battle for some years to come. This is true even

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ability of gay partners of American citizens to remain here with their partners.

127. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 (1976).

128. Defense of Marriage Act, Pub. L. No. 104-199, 100 Stat. 2419 (codified as amended at 28 U.S.C. 115 §1738c (1996)).

though the refusal of the United States government to recognize same sex partnerships seems to fly in the face of our most valued notion that the United States is open and democratic, based on equality and freedom.

By refusing to grant benefits to same sex partners, current immigration law interferes with the “fundamental ‘freedom of personal choice in matters of marriage and family life’” that has long been recognized by the Supreme Court.<sup>129</sup> But the Court has solidly established that Congress has an almost unlimited power to the benefits of United States immigration law and who may receive them. Despite this rationale, refusing benefits to individuals based on their sexual orientation is plainly discrimination, and the “simple fact that the discrimination is set in immigration legislation cannot insulate from scrutiny the invidious abridgment of citizens’ fundamental interests.”<sup>130</sup>

National security is not at issue in this debate. Same sex partners are not more likely to be saboteurs of the United States than heterosexual spouses. Providing immigration benefits to same sex partners of U.S. citizens involves the Constitutional rights of the American partners, not the right of American citizens at large to the protection of American interests. Congress does not need unlimited power in this area.

Yet the majority of our leaders and lawmakers are firm in their conviction that gay relationships should not be considered equivalent to a marriage between a man and a woman. At play in the debate are complex values of religion, morality, and human nature.

The fortunes of each side will depend on luck and tactical skill. But the arguments over identity, family, and sex are likely to last for generations. The conflicts cut too deep to be wished out of existence by the Left, or solved by the defeatism of the Right. Far from being over, the culture wars have just begun.<sup>131</sup>

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129. *Fiallo v. Bell*, 430 U.S. 787, 810 (1977) (Marshall, J. dissenting).

130. *Id.* at 807.

131. Stanley Kurtz, *Push Pull*, 53 NAT'L REV., 32, 34 (2001).