



NEW YORK
CITY BAR

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**REPORT ON LEGISLATION BY THE
COMMITTEE ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER RIGHTS**

**H.R 1024
S.424**

**Representative Nadler
Senator Leahy**

To amend the Immigration and Nationality Act to eliminate discrimination in the immigration laws by permitting permanent partners of United States citizens and lawful permanent residents to obtain lawful permanent resident status in the same manner as spouses of citizens and lawful permanent residents and to penalize immigration fraud in connection with permanent partnerships.

Uniting American Families Act of 2009

THIS BILL IS APPROVED WITH MODIFICATIONS RECOMMENDED

A. Introduction

The Lesbian, Gay, Bisexual and Transgender Rights Committee (the “Committee”) of the New York City Bar Association supports the Uniting American Families Act of 2009 (“UAFA” or the “Bill”). The Bill would permit U.S. citizens and legal residents in same-sex relationships to sponsor their partners for immigration purposes. The UAFA is consistent with a fundamental principle of U.S. immigration law: family unification.

Enactment of the UAFA would add the United States to the list of at least nineteen countries that provide immigration benefits to same-sex couples, including Australia, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Iceland, Israel, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, Switzerland, and the United Kingdom. Nonetheless, given substantial changes in the legal background since a version of the Bill was first introduced in 2000, and evidence of inconsistent judicial decision making, we urge that the Bill be updated to recognize, for immigration purposes, same-sex marriages and their equivalents licensed under the laws of non-federal jurisdictions.

B. History of the Bill

UAFA was introduced in the House of Representatives as H.R. 1024, by Representative Jerrold Nadler (D-NY), and in the Senate as S.424, by Senator Patrick Leahy (D-VT), on February 12, 2009. On March 16, 2009, the House bill was referred to the House Committee on the Judiciary, which referred the Bill to the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law. The Senate bill was read twice and referred

to the Senate Committee on the Judiciary. As of May 28, 2009, the Bill has 102 co-sponsors in the House, and 17 co-sponsors in the Senate.

On May 22, 2009, Senator Leahy convened a Congressional hearing on UAFA for June 3, 2009. We submit this report in support of these hearings to demonstrate the importance of UAFA and equal immigration rights, particularly for residents and citizens of New York City. UAFA is the most recent reincarnation of the Permanent Partners Immigration Act of 2000, Permanent Partners Immigration Act of 2001, Permanent Partners Immigration Act of 2003, Uniting American Families Act (also referred to as the Permanent Partners Immigration Act of 2005) and Uniting American Families Act of 2007.

C. Immigration Inequality Harms Families

Based on an analysis of 2000 U.S. Census data by UCLA's Williams Institute, the U.S. has 35,820 bi-national same-sex couples, with 46% of those couples raising children under 18 in their homes. According to the Williams Institute, if the Bill were to pass and same-sex couples behaved in the same manner as their married counterparts, approximately 8,500 same-sex couples would seek immigration rights for the non-citizen partner.¹

Without legal recognition under immigration law, these couples are at risk for disruption to their lives unimaginable to opposite-sex married couples. The following real-life stories from New York City illustrate the harm that the inability to sponsor one's same-sex partner for immigration purposes has caused to the partners and the community.

- An American citizen resident of Sunnyside, Queens met her Irish citizen same-sex partner while they were both students at Yale University. They chose to remain in the United States, and expended thousands of dollars on immigration visa fees, attorney fees, and accommodation and travel to and from Ireland in order to secure a multitude of visas. This took a toll both on their wallets and on their well-being. The Irish citizen partner was also severely limited in the work she could perform under these visa programs, and, thus, could not reach her full employment potential while here in the U.S.
- A Manhattan, New York resident and American citizen fell in love with a Macedonian citizen and planned to move to Europe so that they could be together. When he then fell ill and needed a hip replacement due to degenerative arthritis, that move had to be canceled, as his health insurance would not cover such an operation overseas. They spent months trying to find a mechanism for his partner, who had a law degree from the University of Macedonia, to join him in the U.S. This effort came to no avail and this Manhattan resident faced recovery from his operation alone without the person he loved nearby.

¹ Gary J. Gates, "Bi-National Same-Sex Unmarried Partners in Census 2000: A demographic portrait" (October 1, 2005). The Williams Institute. Paper gates_3, http://repositories.cdlib.org/uclalaw/williams/gates_3 <visited June 1, 2009>.

- An American citizen and Brooklyn, New York resident had been with her Korean citizen partner for over a year. Several months into their relationship, she learned that her partner had overstayed her six-month visa in order to stay close to her mother here in the U.S., who was estranged from her father and living on her own. This Brooklyn resident believed she could sponsor her partner to stay in this country legally, so that their relationship could continue and the partner could continue to take care of her mother. But, even had the couple married, this would not have been possible.
- A Long Island resident and American citizen fell in love with a Spanish citizen in 2004, and in 2006, they were legally married in Spain. This New York resident's parents were very elderly, and he had to stay in the U.S. to take care of them, rather than live in Spain, where he and his partner would enjoy full legal immigration rights. Instead, this couple expended thousands of dollars in the hopes that the Spanish partner could eventually enter into an American university to study for a degree he had already earned in Spain, just so they could be together.²

Without the UAFA, thousands of people's lives will continue to be disrupted by the constant search for a way to live in the United States with their permanent partners. Couples will spend vast amounts of time and energy navigating the harrowing and complicated immigration system. For these couples, who are committed to sharing their lives together, UAFA would be a solution.

D. The Bill's Impact on Family Unification

The Bill applies similar standards to same-sex couples in "permanent partnerships" that the U.S. applies to opposite-sex married couples where one member is seeking to bring a foreign partner into the country. Under current U.S. immigration law, the Immigration and Nationality Act (the "INA"), a U.S. citizen or permanent resident may petition his/her opposite-sex spouse for legal status in the United States. However, the INA does not recognize same-sex relationships, and this discriminatory practice often forces the couple to separate or move abroad in order to stay together. Therefore, enactment of the Bill would fulfill the promise of family unification in the U.S. immigration system, and be a significant step towards the recognition of marital rights for same-sex couples, by bringing them parity with opposite-sex married couples in this context.

The UAFA does not add same-sex couples to the category of "spouse" in the INA. Instead, it recognizes a new category of relationship, "permanent partnership," under the INA. The standards of proof and the procedures governing adjudication would be identical to the INA's current "immediate relative" category, absent the marriage certificate. Specifically, the beneficiary would need to prove (the "Permanent Partner Checklist") that he/she is:

² See also Andrew Jacobs, "Gay Couples Split by Immigration Law; Under 1996 Act, Personal Commitments Are Not Recognized," *New York Times* (Mar. 23, 1999), available at <http://www.nytimes.com/1999/03/23/nyregion/gay-couples-split-immigration-law-under-1996-act-personal-commitments-are-not.html> <visited June 1, 2009>.

- At least 18 years of age;
- In an intimate relationship with the sponsoring adult U.S. citizen or legal permanent resident in which both parties intend a lifelong commitment;
- Financially interdependent with that person;
- Not married or in a permanent partnership with anyone other than that person; and
- Unable to contract, with that person, a marriage that is recognized under the INA.³

The Bill strikes a balance between protecting families and preventing fraud. To ensure that the foreign national does not become a public charge, the U.S. citizen partner would need to commit, through an affidavit of support, to support the foreign national for ten years, even if the partnership dissolves.

E. Updating the Bill for the 21st Century Recognition Landscape

The Bill would mark an advance in the rights of bi-national same-sex couples, but it should be updated to reflect recent developments in the law of same-sex relationships around the world. The Bill's Permanent Partner Checklist comes from the Permanent Partners Immigration Act of 2000,⁴ which addressed a vastly different legal landscape. In 2000, Vermont was the only U.S. state with a marriage equivalent, civil unions.⁵ No international jurisdiction offered marriage, and only a few jurisdictions offered marriage equivalents to same-sex couples.⁶ Thus, in 2000, a legal test that gave substantial weight to marriage or equivalents, such as civil unions or California-style strong domestic partnerships ("MOEs"), had less practical importance than the kind of facts-and-circumstances test that the INA already applied to "immediate relatives." In 2009, ten states plus the District of Columbia,⁷ and 29 international jurisdictions (including the vast majority of Western Europe and South America) have MOEs,⁸ meaning that for millions of same-sex couples worldwide, it is no more difficult to acquire government-authorized MOE status than it is for opposite-sex couples to marry.

Under ordinary circumstances, American law does not judge the quality of a marriage. Instead, because of the serious and binding nature of the legal responsibilities, it assumes that

³ HR 1024 Sec. 2, proposed new 8 USC 1101(a)(52)(A)-(E).

⁴ HR 3650 106th Cong. 2d Session, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_bills&docid=f:h3650ih.txt.pdf <visited June 1, 2009>.

⁵ National Lesbian & Gay Task Force, *Relationship Recognition for Same-Sex Couples in the U.S.* [map], available at http://www.thetaskforce.org/downloads/reports/issue_maps/relationship_recognition_05_09.pdf <visited June 1, 2009>.

⁶ See Human Rights Watch & Immigration Equality, *Family, Unvalued: Discrimination, Denial, and the Fate of Binational Same-Sex Couples under U.S. Law*, Appendix B: Countries Protecting Same-Sex Couples' Immigration Rights, pp. 160 et seq. (2006), available at <http://www.immigrationequality.org/uploadedfiles/FamilyUnvalued.pdf> <visited June 1, 2009>.

⁷ Op cit. National Lesbian & Gay Task Force, *Relationship Recognition for Same-Sex Couples in the U.S.* [map].

⁸ Marriage Law Foundation, *International Survey of Legal Recognition of Same-Sex Couples* (2009), available at <http://marriagelawfoundation.org/publications/International.pdf>. See also *World homosexuality laws*, http://en.wikipedia.org/wiki/File:World_homosexuality_laws.svg <visited June 1, 2009>.

couples will bear the risk of policing themselves so that they do not enter into impulsive marriages that exist in name only. The same is true of virtually all of the 39 jurisdictions that offer MOEs to same-sex couples.

The Bill, because it was drafted in an era when MOEs were rare, gives no deference to MOEs. Thus, the Bill requires same-sex couples who have entered into MOEs to submit to an additional level of proof not required of their opposite-sex married counterparts. Even if a same-sex couple in a long-term relationship has entered into a MOE, the non-US national will not have immigration rights unless they can prove that they meet the criteria of the Permanent Partner Checklist to the satisfaction of an immigration law judge. In contrast, an opposite-sex married couple need not prove their compliance with the checklist because their marriage alone presumptively suffices, subject to immigration law's anti-marriage fraud provisions.

Unfortunately, in the case of an intimate spousal relationship, many of the long-time tests used to determine whether someone is an "immediate relative" will not easily fit. We would hope that the terms "committed" and "intimate" will not result in intrusive explorations of a couple's sexual history. Same-sex spouses, like opposite-sex ones, have varied financial arrangements -- one may contribute disproportionately, or they may keep their financial affairs separate -- yet under the Bill, some same-sex couples in MOEs could be denied immigration recognition as inadequately "financially interdependent." It is also puzzling that the Bill bars first cousins from its benefits, when opposite-sex first cousins may marry in virtually all U.S. states.

The ambiguous standards of the Permanent Partner Checklist are a particular concern because U.S. immigration judges' decisions are given great deference on review. There is strong empirical evidence of vast discrepancies in asylum decisions based on individual immigration judges' gender and work histories, as well as on the quality of an applicant's legal representation.⁹ In addition, there is empirical evidence of discrimination against lesbians and gays in the immigration system and the judicial system as a whole.¹⁰

Thus, the Bill expressly disadvantages same-sex couples with MOEs as compared to opposite-sex married couples, and then bases immigration decisions on a Permanent Partner Checklist interpreted by judges who do not follow common standards, some of whom may be biased against same-sex couples, and who are subject to only limited appellate review. Although the Bill would produce an improvement, the lack of standards will leave many bi-national same-sex couples in MOEs as unwilling participants in an expensive and often heartbreaking lottery for legal immigration status.

⁹ Jaya Ramji-Nogales *et al.*, "Refugee Roulette: Disparities in Asylum Adjudication" 60 *Stan. L. Rev.* 295 (2007); Margaret H. Taylor, "Refugee Roulette in an Administrative Law Context: The Deja vu of Decisional Disparities in Agency Adjudication," 60 *Stan. L. Rev.* 475 (2007). There is also evidence that the selection process for immigration judges has affected results, Charlie Savage, "Vetted Judges More Likely to Reject Asylum Bids," *New York Times* (Aug. 24, 2008), available at <http://www.nytimes.com/2008/08/24/washington/24judges.html> <visited June 1, 2009>.

¹⁰ Deborah A. Morgan, NLGLA Michael Greenberg Writing Competition, "Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases," 15 *Law & Sex.* 135 (2006) (anecdotal evidence of anti-gay discrimination in asylum cases); Todd Brower, "Of Courts and Closets: A Doctrinal and Empirical Analysis of Lesbian and Gay Identity in the Courts," 38 *San Diego L. Rev.* 565 (2001).

The proposed Bill modifications do not require repeal of the Defense of Marriage Act (“DOMA”). The New York City Bar has long opposed DOMA,¹¹ and continues to strongly oppose it, but DOMA is not controlling here. DOMA’s federal clause, 1 USC §7 (1996), provides:

In determining the meaning of any Act of Congress, ... the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

DOMA does not bar recognition of non-marriage MOEs, such as civil unions or strong domestic partnerships, and Congress can apply the Bill to marriages as well. Many U.S. states that have mini-DOMAs barring marriage nonetheless provide at least limited recognition to civil unions and strong domestic partnerships entered into in other jurisdictions. Nor would the proposed Bill modifications have any effect on DOMA’s state clause, 28 USC §1738B (1996), which addresses only state powers to grant or withhold recognition of same-sex marriages under their own laws. If Congress was unwilling to extend recognition under the Bill to same-sex marriages because of DOMA concerns, marriages could nonetheless be considered under the Bill’s Permanent Partner Checklist, as they would in the Bill’s current form.

F. Conclusion

The Committee supports the Bill, and urges that it be modified to recognize couples if they have entered into an MOE, subject to immigration law’s standard anti-marriage fraud provisions. An MOE requires a substantial commitment from the couple and provides a bright-line test for the immigration courts. Any regulations issued under the Bill, if it becomes law, should set forth clear standards for factual tests.

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¹¹ See New York City Bar, “A Recommendation against the Passing of HR 3396; S. 1740,” 51 *The Record* 654 (1996).