

## **PRACTICE POINTER: PROSECUTORIAL DISCRETION & LGBT FAMILIES**

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The past year has been an eventful one for lesbian, gay, bisexual, and transgender (LGBT) immigrant families (AILA Doc. No. [05051961](#)).<sup>1</sup> On February 23, 2011, Attorney General Eric Holder announced that the Department of Justice would no longer defend the so-called Defense of Marriage Act (DOMA) in federal court challenges to its constitutionality (AILA Doc. No. 11032830).<sup>2</sup> At the same time, however, Attorney General Holder made it clear that the Administration would continue to *enforce* DOMA. Because DOMA only allows the federal government to recognize a marriage between a man and a woman, the government's continued enforcement of DOMA has resulted in United States Citizenship and Immigration Services (USCIS) continuing to deny I-130 visa petitions filed by U.S. citizens on behalf of their lesbian or gay spouses (AILA Doc. Nos. [11070861](#), [11062433](#), & [12011867](#)).<sup>3</sup>

In April 2011, Attorney General Holder took the unusual step of issuing a precedential decision in *Matter of Dorman* (AILA Doc. No. 11050565).<sup>4</sup> In that case, the Attorney General certified four questions for the Board of Immigration Appeals to decide concerning the eligibility for cancellation of removal of an Irish citizen in a New Jersey civil union with a U.S. citizen.<sup>5</sup>

Subsequently, the Department of Homeland Security (DHS) issued several memoranda and related documents describing its goal of prioritizing the enforcement and removal of certain

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<sup>1</sup> This advisory specifically addresses lesbian and gay relationships. The relationships that transgender individuals enter into may be seen by DHS as different sex or same-sex depending on a complicated set of rules. For more information, see *Immigration Law and the Transgender Client* <http://www.immigrationequality.org/issues/law-library/trans-manual/> & *Matter of Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005), *BIA Rules that Marriage between Transsexual and Member of Opposite Sex May Be Basis for Benefits*, AILA Doc. No. 05051961, <http://www.aila.org/content/default.aspx?docid=16461>. This advisory uses the terms "LGBT" and "lesbian and gay" interchangeably in that the issues discussed herein are only relevant to bisexual and transgender individuals insofar as they are in relationships which DHS considers to be lesbian or gay.

<sup>2</sup> *Attorney General Statement and Letter on Litigation Involving DOMA*, AILA Doc. No. 11032830, <http://www.aila.org/content/default.aspx?docid=34956>

<sup>3</sup> Immigration Equality and AILA have advocated for USCIS to hold these applications in abeyance pending a final judicial decision on the constitutionality of DOMA or its repeal; to date USCIS has stated that it will not issue a blanket abeyance policy. See *AILA/USCIS Field Operations Liaison Q&As (5/20/11)*, AILA Doc. No. 11070861, <http://www.aila.org/content/default.aspx?docid=36103>; *DHS Responds to AILA Regarding Treatment of Cases Impacted by DOMA*, AILA Doc. No. 11062433, <http://www.aila.org/content/default.aspx?docid=35991>; *VSC Stakeholder Meeting Minutes (11/7/11)*, AILA Doc. No. 12011867, <http://www.aila.org/content/default.aspx?bc=1016|6715|6721|6723|38234>

<sup>4</sup> *Matter of Dorman*, 25 I&N Dec. 485 (A.G. 2011); *AG Exercises Review Authority in DOMA Case*, AILA Doc. No. 11050565, <http://www.aila.org/content/default.aspx?docid=35302>

<sup>5</sup> See the American Immigration Council and Immigration Equality's practice advisory, *Protecting and Preserving the Rights of LGBT Families: DOMA, Dorman, and Immigration Strategies*, for suggestions on how *Dorman* may be helpful to LGBT families, available at <http://www.legalactioncenter.org/sites/default/files/DOMA-Removal-Proceedings-6-13-2011.pdf>

categories of non-citizens (criminals; security threats; egregious immigration violators), while exercising prosecutorial discretion in favor of non-citizens who do not fall within these “high” priorities and who have favorable equities (AILA Doc. Nos. [11061734](#), [11081834](#), [1111762](#) & [1111761](#)).<sup>6</sup> This practice advisory focuses on prosecutorial discretion issues which are unique to LGBT immigrant families. It assumes a basic understanding of prosecutorial discretion. Practitioners are strongly encouraged to read the American Immigration Council’s prior practice advisories on prosecutorial discretion and to visit the American Immigration Lawyers Association (AILA) website for comprehensive information on DHS’s prosecutorial discretion initiative (AILA Doc. Nos. [10113063](#), [11090130](#) & [11120971](#)).<sup>7</sup>

The DHS memoranda and initiatives on prosecutorial discretion have been implemented favorably in a number of cases involving gay or lesbian spouses or partners of U.S. citizens because, for the limited purpose of prosecutorial discretion, DHS recognizes these relationships as a favorable factor. The memo dated June 17, 2011, by Immigration and Customs Enforcement (ICE) Director, John Morton, identifies “the person's ties and contributions to the community, including family relationships” as a favorable factor.<sup>8</sup> In August 2011, high-ranking DHS officials participated in several community forums and phone calls in which they clearly indicated that, for purposes of exercising prosecutorial discretion, ICE would include lesbian and gay family ties within its definition of family relationships.<sup>9</sup> In November 2011, ICE issued [further guidance](#) on prosecutorial discretion, listing as a favorable factor for ICE attorneys to

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<sup>6</sup> *ICE Memo on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities*, AILA Doc. No. 11061734, <http://www.aila.org/content/default.aspx?docid=35942>; *DHS Letter to Senators Regarding Prosecutorial Discretion*, AILA Doc. No. 11081834, <http://www.aila.org/content/default.aspx?docid=36684>; *Guidance to ICE Attorneys Reviewing Cases before EOIR*, AILA Doc. No. 1111762, <http://www.aila.org/content/default.aspx?docid=37681> & *Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review*, <http://www.immigrationequality.org/wp-content/uploads/2011/11/Guidance-to-ICE-Attorneys-November-17-2011.pdf>; *ICE Memo on Prosecutorial Discretion Case Review Process*, AILA Doc. No. 1111761, <http://www.aila.org/content/default.aspx?docid=37680> & *Case-by-Case Review of Incoming and Certain Pending Cases*, <http://www.immigrationequality.org/wp-content/uploads/2011/11/Case-Review-Memo-Nov-17-2011.pdf>

<sup>7</sup> *Prosecutorial Discretion: How to Advocate for Your Client*, (AILA Doc. No. 10113063), <http://www.legalactioncenter.org/sites/default/files/ProsecutorialDiscretion-11-30-10.pdf>; *DHS Review of Low Priority Cases for Prosecutorial Discretion*, (AILA Doc. No. 11090130), <http://www.legalactioncenter.org/sites/default/files/docs/DHS%20Review%20of%20Low%20Priority%20Cases%209-1-11.pdf>; & [www.aila.org/pd](http://www.aila.org/pd)

<sup>8</sup> *ICE Memo on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities*, AILA Doc. No. 11061734, <http://www.aila.org/content/default.aspx?docid=35942>; This is a separate category from “whether the person has a U.S. citizen or permanent resident spouse, child, or parent,” another favorable factor listed in the Morton memo, and thus presumably is intended to encompass a broader spectrum of family relationships than marriages that the government is permitted to recognize under DOMA.

<sup>9</sup> “And it [exercising favorable discretion] includes gay and lesbian foreign nationals whose spouses are U.S. citizens or permanent legal residents.” “The Administration Gets Its Priorities Right on Deportation,” *Washington Post* editorial, published August 18, 2011, available at [http://www.washingtonpost.com/opinions/the-administration-gets-its-priorities-right-on-deportation/2011/08/18/gIQAkhlQJ\\_story.html](http://www.washingtonpost.com/opinions/the-administration-gets-its-priorities-right-on-deportation/2011/08/18/gIQAkhlQJ_story.html). See also “Fewer Youths to Be Deported in New Policy” by Robert Pear, *New York Times*, August 18, 2011, available at [http://www.nytimes.com/2011/08/19/us/19immig.html?\\_r=2&pagewanted=all](http://www.nytimes.com/2011/08/19/us/19immig.html?_r=2&pagewanted=all), and “Fed Deportation Decision May Benefit SF Gay Couple” by Carolyn Lochhead, *San Francisco Chronicle*, August 20, 2011, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/08/20/MNTN1KPJ57.DTL>

consider “an alien...who has very long-term presence in the United States, has an immediate family member who is a United States citizen, and has established compelling ties and made compelling contributions to the United States” (AILA Doc. No. 1111762).<sup>10</sup> While ICE could have chosen the term “immediate relative,” which is narrowly defined under immigration law to include spouses,<sup>11</sup> minor children and parents of U.S. citizens, ICE instead chose the broader term “immediate family members,”<sup>12</sup> which is not limited to a spouse, child, or parent. By using this broader term, ICE has allowed its attorneys to be inclusive in considering family ties and to weigh lesbian and gay relationships with U.S. citizens and lawful permanent residents as a positive factor in exercising discretion.

As with any family tie, simply having the relationship is not sufficient to warrant discretion, but it is a strong positive factor to be considered in cases that do not fall within DHS’s high priority categories. Since these prosecutorial discretion policies were articulated, there have been numerous media reports of ICE exercising favorable discretion and agreeing to close removal proceedings of non-citizens who are in committed relationships with U.S. citizens.<sup>13</sup> Additionally, immigration judges have also exercised discretion and agreed to long continuances in cases involving lesbian and gay relationships with U.S. citizens or legal permanent residents.<sup>14</sup>

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<sup>10</sup> *Guidance to ICE Attorneys Reviewing Cases before EOIR*, AILA Doc. No. 1111762, <http://www.aila.org/content/default.aspx?docid=37681> & *Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review*, <http://www.immigrationequality.org/wp-content/uploads/2011/11/Guidance-to-ICE-Attorneys-November-17-2011.pdf>

<sup>11</sup> Again because DHS takes the position that DOMA prevents it from granting benefits based on marriages between two men or two women, an “immediate relative” definition in these guidelines would have specifically excluded same-sex relationships.

<sup>12</sup> Indeed, the only other context the authors are aware of where U.S. immigration law has used the term “immediate family member” is in issuing derivative diplomatic visas to G and A visa holders. In this context, the term “immediate family member” is specifically intended to be inclusive of lesbian and gay couples, as long as the relationship is recognized as “immediate family” by the sending diplomatic country. See 22 CFR §41.21, available at <http://www.uscis.gov/ilink/docView/22CFR/HTML/22CFR/0-0-0-1/0-0-0-500/0-0-0-681.html>.

<sup>13</sup> See Kirk Semple, “U.S. Drops Deportation Proceedings Against Immigrant in Same-Sex Marriage,” *N.Y. Times*, June 29, 2011, available at <http://www.nytimes.com/2011/06/30/us/30immig.html>; Phil Reese, “ICE Drops Deportation Proceedings Against Married Lesbian Couple in New York,” *Washington Blade*, December 6, 2011, <http://www.washingtonblade.com/2011/12/06/i-c-e-drops-deportation-proceedings-against-married-lesbian-couple-in-new-york/>; Andrew Harmon, “Officials Agree to Close Deportation Case Involving Gay Binational Couple,” *The Advocate*, December 16, 2011, available at [http://www.advocate.com/News/Daily\\_News/2011/12/16/Officials\\_Agree\\_to\\_Close\\_Deportation\\_Case\\_Involving\\_Gay\\_Binational\\_Couple/](http://www.advocate.com/News/Daily_News/2011/12/16/Officials_Agree_to_Close_Deportation_Case_Involving_Gay_Binational_Couple/).

<sup>14</sup> While the memos and guidance concerning prosecutorial discretion do not directly affect decisions by immigration judges who are not employed by DHS and not “prosecuting” cases, the cultural shift concerning discretion within the immigration system has clearly influenced some judges as well. See Chris Geidner, “‘Interest of Justice’ Leads Immigration Judge To Reopen Case, Ask About ‘Same-Sex Spouses’ and Visas,” *Metroweekly*, July 5, 2011, available at <http://metroweekly.com/poliglot/2011/07/interest-of-justice-leads-immi.html>; Dan Schreiber, “Case of Gay Couple Facing Deportation Gets Two-Year Delay,” *San Francisco Examiner*, July 13, 2011, available at <http://www.sfoxaminer.com/local/2011/07/case-gay-couple-facing-deportation-gets-two-year-delay#ixzz1S5wYtkbB>.

## **Steps that Practitioners Should Take to Protect LGBT Clients**

### ***Determine if Your Client Has a Relationship with a U.S. Citizen***

Until now, being in a committed lesbian or gay relationship with a U.S. citizen or lawful permanent resident (LPR) has not been a helpful fact for foreign nationals.<sup>15</sup> Indeed, one of the harshest ironies of U.S. immigration law for LGBT immigrants and their families is that revealing a lesbian or gay relationship with a U.S. citizen could result in the denial of a nonimmigrant visa application because of perceived “immigrant intent,” while at the same time, the relationship could not be recognized as the basis for an immigrant visa.

In light of changes in the law and procedures that have occurred this year, however, it is vital for immigration practitioners to ask their clients about U.S. citizen and LPR “family ties,” including lesbian or gay relationships. If your client is seeking asylum based on sexual orientation, you should certainly inquire about whether he or she is in a committed relationship with a U.S. citizen or LPR, as such a relationship could have substantive and evidentiary importance to the asylum claim and requests for prosecutorial discretion. Generally, even if your client does not immediately disclose any information about being LGBT, asking questions about sexual orientation and relationship status should become a standard part of your firm’s intake form.

### ***Prove the Bona Fides of Your Client’s Relationship***

If you are seeking prosecutorial discretion based on your client’s lesbian or gay family relationship, you should provide as much documentation of the family relationship as possible. Nothing in the prosecutorial discretion memoranda indicates that the couple has to be legally married, but if the couple is married or has otherwise solemnized their relationship under state or local law or the law of another country, this can be one piece of evidence to show the couple’s commitment to one another. Some couples will live in states where formalizing their relationship is not an option. Whether or not the couple is married, in a domestic partnership, or in a civil union, you should provide evidence of the bona fides of their relationship, similar to that of a marriage-based petition. This evidence could include: proof of raising children together; proof of co-habitation; proof of intermingling of finances; proof of ties to extended family; etc. Even compelling proof beyond examples listed in the policy memoranda, such as other family members’ military service or other service or ties to the U.S., could prove probative.

### ***Include as Many Positive Equities as Possible***

While the “immediate family member” may be your client’s strongest equity, it is important to be familiar with the contents of all of the prosecutorial discretion memoranda and to provide supporting evidence of any favorable equities which may exist. For example, in addition to

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<sup>15</sup> While the June 17, 2011, ICE memo references USC and LPR family ties, the November guidance only mentions immediate family of USCs. Anecdotal evidence suggests that LPR family ties may be considered in a prosecutorial discretion analysis, and such relationships should be highlighted in any prosecutorial discretion requests.

being in a relationship with a U.S. citizen or LPR, which is consistent with the June 17, 2011, memorandum, your client could, among other things, be the primary caretaker for a minor or a seriously ill relative; be over the age of 65; have strong community ties through volunteer work; be from a country to which it would be dangerous for him or her to return; or, fall within DREAM Act criteria to satisfy any of the other favorable factors listed in the memoranda. As DHS has not agreed to prosecutorial discretion for any class of respondents as a whole, practitioners must be prepared to highlight any and all merits and compelling factors of individual cases. You may only receive one shot at obtaining prosecutorial discretion, so it is important to highlight every relevant factor and provide evidence in its support. It is also important to highlight what type of relief your client may pursue, such as asylum or Cancellation of Removal, should prosecutorial discretion not be granted.

### ***Put Your Request in Writing***

If your client is in removal proceedings, the request for administrative closure should be made to the ICE attorney assigned to the case. Baltimore and Denver were part of a [pilot project](#) which ended in mid-January in which an interagency committee reviewed all open removal cases (AILA Doc. No. 11120971).<sup>16</sup> Whether you practice in a city where interagency review has commenced or elsewhere, your chances of winning discretionary relief for your client are better if you make a written request and clearly organize all of the evidence in your client's favor. Although there is no formal appeal of a denial, if the request is denied by local counsel, you should request review by going up the ICE chain of command, first to local supervisors, then regional supervisors, and finally to ICE headquarters for very compelling cases. If you have a case which you believe merits prosecutorial discretion and these steps have been unsuccessful, please contact [Immigration Equality](#) or your [local AILA chapter](#), as many AILA chapters have been actively engaged in liaison with their ICE offices and have additional information on local procedures for requesting prosecutorial discretion.<sup>17</sup>

### ***Consider Media and Congressional Attention***

Having press coverage of the strong equities on behalf of a foreign national and the injustice of possible removal may assist in the push for prosecutorial discretion. Likewise, U.S. Representatives and Senators may be willing to speak out on behalf of a constituent family and/or write a letter of support to accompany your request for prosecutorial discretion. Please contact Immigration Equality if you are working with a couple whom you think would benefit from press coverage or Congressional intervention.

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<sup>16</sup> See AILA Doc. No. 11120971, [www.aila.org/pd](http://www.aila.org/pd) & Julia Preston, "In Deportation Policy Test, 1 in 6 Offered Reprieve," *N.Y. Times*, January 19, 2012, available at [http://www.nytimes.com/2012/01/20/us/in-test-of-deportation-policy-1-in-6-offered-reprieve.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2012/01/20/us/in-test-of-deportation-policy-1-in-6-offered-reprieve.html?_r=1&pagewanted=all)

<sup>17</sup> [www.immigrationequality.org](http://www.immigrationequality.org); [www.aila.org/chapters](http://www.aila.org/chapters)

### *Special Considerations for Asylum Applicants*

Although the memoranda specify that prosecutorial discretion may be exercised at any time throughout proceedings or before the initiation of proceedings, to date most of the emphasis has been on administratively closing cases that have been filed with the immigration court.

Anecdotal evidence suggests that, to date, ICE attorneys have offered prosecutorial discretion in pending cases before any forms of relief are adjudicated at an individual hearing. Many LGBT individuals from non-Western countries have viable asylum claims, and the “take it or leave it” offers have put attorneys and their clients in the very difficult position of deciding whether to pursue permanent relief with the possibility of removal if unsuccessful or accepting an offer of administrative closure while foregoing (or at least delaying) the chance for permanent relief.

We are advocating with DHS that it should consider case closure “in the alternative,” if asylum or related forms of relief are denied after an individual hearing. We do not know whether DHS will agree to this, but we are encouraging practitioners to at least ask for prosecutorial discretion “in the alternative,” if they will be going forward with asylum claims as a way to potentially prevent the removal of individuals who fall within the discretionary criteria but who choose to seek permanent relief.

### *Conclusion*

Every day LGBT immigrant families suffer the consequences of the United States’ unfair laws that do not permit U.S. citizens and legal permanent residents to petition for lawful permanent residence for their lesbian or gay spouses or partners. The Administration has taken some important steps toward equality for LGBT immigrant families, but until there is full equality under the law, many of these families continue to live with the daily fear of forced separation. DHS’s willingness to consider LGBT family ties in its exercise of prosecutorial discretion is an important step forward in preventing unfair separations, and it is incumbent upon practitioners to advocate for this relief on their clients’ behalves.