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AMERICAN BAR ASSOCIATION

**SECTION OF INDIVIDUAL RIGHTS & RESPONSIBILITIES
COMMISSION ON IMMIGRATION**

FAMILY LAW SECTION

COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

BAR ASSOCIATION OF SAN FRANCISCO

BEVERLY HILLS BAR ASSOCIATION

LOS ANGELES COUNTY BAR ASSOCIATION

RECOMMENDATION

1 RESOLVED, That the American Bar Association supports the enactment of
2 legislation and the implementation of public policy to enable a United States citizen or
3 lawful permanent resident who: (1) shares a committed, intimate relationship with
4 another adult individual of the same-sex; (2) is not married to or in any other legally-
5 recognized partnership with anyone other than that individual; and (3) is unable to enter
6 into a marriage with that other individual that is cognizable under the Immigration and
7 Nationality Act, to sponsor that individual for permanent residence in the United States.

REPORT

Introduction

The ABA has long sought improvements in the application and administration of immigration and asylum law. Family unification is an express and central goal of immigration policy in the United States and has been for more than fifty years.¹ Currently, however, this principle does not protect the families U.S. citizens and permanent residents form with same-sex partners who are foreign nationals. U.S. policy allows foreign spouses and fiancé(e)s to immigrate and live with their U.S. partners. But it does not allow U.S. citizens and permanent residents to sponsor their same-sex partners for residence in the U.S. As a result, thousands of lesbian and gay bi-national couples and their children are kept apart, driven abroad, or forced to live in fear of being separated.

This policy damages not only those families, but U.S. society generally. Data from the 2000 U.S. Census reported 35,820 same-sex bi-national couples live together in the U.S. Because current law and policy prevents overseas same-sex partners from immigrating to the U.S., many of these bi-national couples are forced to leave this country, depriving our nation of the economic, cultural, social and other contributions these individuals could make here.

This proposed resolution addresses this inequity by supporting the enactment of legislation and the implementation of public policy that enables a U.S. citizen or lawful permanent resident who shares a mutual, interdependent, committed relationship with a non-citizen of the same sex to sponsor that person for permanent residence in the United States.

Background

Exclusion under United States Law

Most Americans may take it for granted that if they fall in love with a foreigner, they will be able to maintain their relationship and live together in the United States. American citizens and lawful permanent residents in most circumstances are allowed to sponsor a family member for residency, subject to established rules and procedures that filter out engagements and marriages that are not *bona fide*. However, the definition of “family member” in immigration law currently does not include a same-sex permanent partner of a U.S. citizen or lawful permanent resident. Additionally, the federal Defense of Marriage Act, enacted in 1996, defines marriage for all federal purposes as the union of one man and one woman.² Accordingly, American citizens and lawful permanent residents are

¹ President George W. Bush has stated that our immigration system should “recognize the importance of families and . . . help to strengthen them.” See <http://www.immigration.gov/graphics/bushlett.htm> .

² Because the federal Defense of Marriage Act (DOMA), Pub. L. No. 104-199, provides that marriage is only the union of one man and one woman for all federal purposes, it makes clear that, even if a marriage

denied the ability to sponsor their same-sex partners for residency in the U.S. -- even if they have been together for decades, even if their relationship is incontrovertible and public, even if they have married or formalized their partnership in a place where that is possible -- as can a member of a different-sex couple. Countless gay and lesbian Americans and their children suffer prolonged or even permanent separation because the law does not recognize their relationship for immigration purposes.

Until 1991, gay and lesbian foreigners were excludable from the U.S. solely on the basis of their sexual orientation.³ While that *per se* exclusion has been repealed, same-sex binational couples still face substantial discrimination because a U.S. citizen or lawful permanent resident cannot sponsor his or her same-sex partner for residency in the U.S. This inability of same-sex partners to access immigration status on an equal basis with that available to different-sex spouses and other family members is contrary to the ABA's longstanding opposition to discrimination based upon sexual orientation.⁴

While Connecticut, Massachusetts, Belgium, the Netherlands, Canada, Spain and South Africa now permit same-sex couples to marry, and several additional jurisdictions recognize civil unions or domestic partnerships, couples legally joined in these jurisdictions are not recognized as spouses for purposes of U.S. immigration law.⁵ In fact, legally marrying in another country such as Belgium, Canada, or the Netherlands may actually impede a same-sex couple's ability to remain together in the United States, even when one of the spouses is an American citizen.⁶ Same-sex partners therefore are ineligible to access immigration opportunities that are routinely extended to fiancés and married spouses, regardless of the depth of their love and the permanency of their commitment to one another.

between two people of the same sex is valid under the law of a state or foreign country in which the marriage occurs, it will not be considered valid for purposes of federal law, including immigration law.

³ The Immigration Act of 1917 (Pub. L. No. 64-301, §3, 39 Stat. 874, 875) (repealed 1952), excluded homosexuals as persons of psychopathic inferiority. Subsequent statutory language in §212(a)(4) of the Immigration and Nationality Act of 1952 sought to exclude homosexuals as persons having a "psychopathic personality" or "mental defect." H.R. Rep. No. 1365, 82d Cong., 2d Sess., 1952 U.S.C.C.A.N. 1701. Following a federal appellate court ruling that the term "psychopathic personality" was unconstitutionally vague as applied to homosexuals, *Fleuti v. Rosenberg*, 302 F.2d 652 (9th Cir. 1962), *vacated on other grounds*, 374 U.S. 449 (1963), Congress amended the Act in 1965 to add the term "sexual deviation" to reaffirm the homosexual exclusion. H.R. Rep. No. 745, 89th Cong., 1st Sess. 16 (1965); S. Rep. No. 748, 89th Cong., 1st Sess. 19 (1965), reprinted in 1965 U.S.C.C.A.N. 3328, 3337. The exclusion stood until its repeal by the Immigration Act of 1990.

⁴ *See infra*, pp. 4-5.

⁵ As noted above, the federal DOMA makes clear that marriages between two people of the same sex are not considered valid for purposes of federal law, including immigration law.

⁶ Indeed, since a requirement for obtaining a non-immigrant visa (such as a student or tourist visa) is a demonstrable lack of intent to remain permanently in the United States, any evidence of a relationship as a permanent partner of a United States citizen or permanent resident -- including a marriage or civil union or other legal partnership -- can be and has been used to deny a non-citizen partner's entry into or continued stay in the United States. *See* "Important Information for Binational couples contemplating same-sex marriage in Canada," Lesbian and Gay Immigration Rights Task Force Q&A Paper (June 18, 2003).

The Law in Other Countries

At least nineteen countries recognize same-sex couples for immigration purposes, affording rights that are the same as or similar to those afforded to different-sex couples. They are Australia, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Iceland, Israel, New Zealand, the Netherlands, Norway, Portugal, South Africa, Spain, Sweden, Switzerland, and the United Kingdom. At least thirteen of these countries – Belgium, Canada, Denmark, Finland, France, Germany, Iceland, the Netherlands, Norway, South Africa, Spain, Sweden, and the United Kingdom – grant immigration benefits to same-sex couples as part of a broader policy of partnership recognition, whether through marriage or similar institutions. The other jurisdictions have granted same-sex couples immigration rights even without establishing a comprehensive partnership scheme, let alone the right to marry.⁷

The Impact on Couples and their Children

Numerous media reports have recounted the inequity faced by same-sex partners and their children seeking to maintain their lives together in America.⁸ For example, Bill Deitsch met his partner, a German native, when the latter visited the United States in 1995. To maintain the relationship, Deitsch's partner periodically visited the United States on tourist visas, which eventually became hard to obtain. His partner then enrolled in a college and obtained a student visa, but that visa expired and, eight years after the couple met, Deitsch's partner was ordered to leave the country. Deitsch moved to Germany to preserve the partnership.⁹

The current law also imposes severe harms on the children of binational same-sex couples. For example, Mark Himes and his French partner adopted two children – John and Claire Marie. Because Mark's partner was in the last year of a six-year work visa, the couple and their two children were forced to live in a constant state of legal limbo, never knowing whether they would be able to stay together as an intact family. As John explained: "We live year by year with no real plans for the future." Forcing children to live under such circumstances, never knowing whether their

⁷ See HUMAN RIGHTS WATCH & IMMIGRATION EQUALITY, FAMILY, UNVALUED: DISCRIMINATION, DENIAL, AND THE FATE OF BINATIONAL SAME-SEX COUPLES UNDER U.S. LAW (2006) (hereinafter HUMAN RIGHTS WATCH et al.), Appendix B.

⁸ See, e.g., Joe Dignan, *Going to Germany for Love*, Gay City News, Jan. 1-7, 2004, at http://www.gaycitynews.com/gcn_301/goingtogermany.html; Rona Marech, *Professional gay couples move north*, San Francisco Chronicle, Mar. 17, 2004, at <http://www.detnews.com/2004/nation/0403/17/a12-94341.htm>; Jose Antonio Vargas, *Gay lives in limbo: U.S. immigration laws leave binational couples in the lurch*, San Francisco Chronicle, Jan. 11, 2004, at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/01/11/BAGF447TDC1.DTL>; Danielle Belopotosky, *Love's boundaries: a new immigration battle*, Columbia News Service, Feb. 28, 2003, at <http://www.jrn.columbia.edu/studentwork/cns/2003-02-28/81.asp>.

⁹ See Dignan, *supra*.

family will be suddenly broken apart, is clearly inconsistent with the goal of family unity and stability.

Many other sad stories have been documented of a U.S. citizen reluctantly moving abroad when a longtime partner's visa expires.¹⁰ Many couples rest their hopes on the uncertain availability of visas.¹¹ Others are forced to live apart for months or years at a time, or live together in the U.S. under constant fear of deportation.¹² Non-resident partners who could be sponsored for U.S. residency, offer their job skills to U.S. employers, become taxpayers, and contribute to society – as non-resident partners in different-sex relationships are able to do -- are excluded from these opportunities simply because their relationship is between individuals of the same-sex.

Relevant Legislation

Legislation seeking to enable a U.S. citizen or lawful permanent resident to sponsor his or her same-sex partner for permanent residence in the United States was first introduced in 2000. The current version of this legislation, introduced by Senate Judiciary Committee Chairman Patrick Leahy (D-VT) and House Constitution Subcommittee Chairman Jerrold Nadler (D-NY), is known as the Uniting American Families Act (UAFAs).¹³ When the UAFAs was last introduced in 2007, it had 118 cosponsors in the House of Representatives and it had 18 cosponsors in the Senate. Organizational supporters of the UAFAs include, among others: Amnesty International, the American Immigration Lawyers Association, Human Rights Watch, Legal Momentum, the Mexican American Legal Defense and Education Fund, the National Asian Pacific American Legal Consortium, and the National Immigration Forum.

Relevant ABA Policy

The ABA has adopted many policies in the area of immigration law and sexual orientation discrimination. The proposed resolution is consistent with and supported by these prior policies.

¹⁰ See Marech, *supra*. See also HUMAN RIGHTS WATCH et al., *supra*.

¹¹ See, e.g., Lesbian and Gay Immigration Rights Task Force Status Report, 2002 No. 2 at 5; Belopotosky, *supra*; HUMAN RIGHTS WATCH et al., *supra*.

¹² See HUMAN RIGHTS WATCH et al., *supra*; Dignan, *supra*.

¹³ The bill that was introduced in 2000 was referred to as the Permanent Partners Immigration Act.

In 1983, the House of Delegates adopted a policy urging that existing laws and procedures for admission of aliens should be reformed to ensure increased economic and cultural benefits to the United States from such admission. In 1989, the House of Delegates adopted a policy supporting amendments to the Immigration and Nationality Act of 1952, as previously amended, in order to further reform the basis upon which foreign nationals may seek lawful permanent resident status in the United States on a humane and equitable basis that reflects the historic emphasis on both family reunification and the economic and cultural interests of the United States, including increased visa numbers for family-related preferences.¹⁴

The ABA also has adopted numerous policies that oppose discrimination based upon sexual orientation and recognize the importance of providing committed same-sex couples and their families with basic legal protections to help those families stay together. In 1989, for example, the House adopted a policy urging federal, state, and local governments to enact legislation prohibiting discrimination on the basis of sexual orientation in employment, housing, and public accommodations.¹⁵ In 1999, the House adopted a policy supporting the enactment of laws and public policy providing that sexual orientation shall not be a bar to adoption of a child when the adoption is determined to be in the best interests of the child. The House adopted a policy in 1995 supporting laws and policies that prohibit the denial of child custody and visitation on the basis of sexual orientation. In 2002, the House adopted a policy urging federal, state, territorial, and local governments to enact legislation, promulgate regulations, or take other necessary action to ensure that an unmarried surviving partner who shared a mutual interdependent committed relationship with a victim of terrorism or other crime can qualify for victim compensation and assistance funds provided by that government to eligible spouses. In 2003, the House adopted a policy supporting state and territorial laws and court decisions that permit the establishment of legal parent-child relationships through joint adoptions and second parent adoptions by unmarried persons who are functioning as a child's parents when such adoptions are in the best interests of the child. The ABA has not taken a position with respect to marriage rights for same-sex couples. However, in 2004 the ABA adopted a resolution opposing any federal enactment that would restrict the ability of a state to prescribe the qualifications for civil marriage or to determine when effect should be given to a civil marriage validly contracted in another jurisdiction.

¹⁴ American Immigration Lawyers Association Report No. 2.

¹⁵ In addition to the 1989 policy, the House of Delegates approved a policy in 1987 condemning crimes of violence based on prejudice against a victim's race, religion, sexual orientation, or minority status. In 1990, the House adopted Canon 3B(5) of the Canons of Judicial Conduct, which prohibits bias by judges on the basis of, among other things, sexual orientation. The following year, the House adopted a policy proposing a study of prejudice in the federal judicial system based on sexual orientation, among other grounds.

These numerous, relevant ABA policies reflect the determination that sexual orientation is not, by itself, a legitimate basis for discrimination, particularly when the basic needs of families headed by same-sex couples are concerned.

The Proposed Resolution

The proposed resolution builds upon existing ABA policies by seeking to ensure that same-sex permanent partners of U.S. citizens and lawful permanent residents have access to immigration status on an equivalent basis to married different-sex couples.

The policy would not prevent the government from requiring that unmarried partners meet the standard eligibility criteria that are imposed upon spouses and fiancés (for example, that the foreign partner is not a first, second, or third degree blood relation of the citizen partner, and that neither member of the couple is married to or in any other legally-recognized intimate partnership with anyone other than the other member of the couple). Moreover, the proposal allows the government to require the same stringency of proof against fraud that is applied to different-sex married couples, and requires the couple to demonstrate that they are in a committed relationship.

Conclusion

Central to this nation's long history of immigration law and policy is ensuring that Americans and their loved ones are able to stay together in the U.S. The current failure to recognize same-sex permanent partnerships for immigration purposes is cruel and unnecessary, and such critical protections should be available to help same-sex partners maintain their commitment to one another on an equal basis with different-sex spouses.

Respectfully Submitted,

Neal R. Sonnett, Chair
Section of Individual Rights and Responsibilities

Mark D. Agrast, Chair
Commission on Immigration
February 2009

GENERAL INFORMATION FORM

Submitting Entities: Section of Individual Rights and Responsibilities
Commission on Immigration

Submitted by: Neal R. Sonnett, Chair
Section of Individual Rights and Responsibilities

Mark D. Agrast
Chair, Commission on Immigration
Delegate, Section of Individual Rights and Responsibilities

1. **Summary of Recommendation**

The Recommendation supports the enactment of legislation and the implementation of public policy to enable a United States citizen or lawful permanent resident who: (1) shares a committed, intimate relationship with another adult individual of the same-sex; (2) is not married to or in any other legally-recognized partnership with anyone other than that individual; and (3) is unable to enter into a marriage with that other individual that is cognizable under the Immigration and Nationality Act, to sponsor that individual for permanent residence in the United States.

2. **Approval by Submitting Entity**

The Council of the Section of Individual Rights and Responsibilities approved the filing of this Report with Recommendation on October 24, 2008, during its fall meeting in Washington, D. C.

The Commission on Immigration approved the filing of this Report with Recommendation on October 31, 2008, during its fall meeting in La Hoya, Calif.

3. **Has This or a Similar Recommendation Been Submitted to the House of Delegates Board of Governors Previously?**

No.

4. What Existing Association Policies Are Relevant to This Recommendation and Would They Be Affected by Its Adoption?

The ABA has adopted many policies in the area of immigration law and sexual orientation discrimination. The proposed resolution is consistent with and supported by these prior policies.

In 1983, the House of Delegates adopted a policy urging that existing laws and procedures for admission of aliens should be reformed to ensure increased economic and cultural benefits to the United States from such admission. In 1989, the House of Delegates adopted a policy supporting amendments to the Immigration and Nationality Act of 1952, as previously amended, in order to further reform the basis upon which foreign nationals may seek lawful permanent resident status in the United States on a humane and equitable basis that reflects the historic emphasis on both family reunification and the economic and cultural interests of the United States, including increased visa numbers for family-related preferences.

The ABA also has adopted numerous policies that oppose discrimination based upon sexual orientation and recognize the importance of providing committed same-sex couples and their families with basic legal protections to help those families stay together. In 1989, the House adopted a policy urging federal, state, and local governments to enact legislation prohibiting discrimination on the basis of sexual orientation in employment, housing, and public accommodations. In 1999, the House adopted a policy supporting the enactment of laws and public policy providing that sexual orientation shall not be a bar to adoption of a child when the adoption is determined to be in the best interests of the child. The House adopted a policy in 1995 supporting laws and policies that prohibit the denial of child custody and visitation on the basis of sexual orientation. In 2002, the House adopted a policy urging federal, state, territorial, and local governments to enact legislation, promulgate regulations, or take other necessary action to ensure that an unmarried surviving partner who shared a mutual interdependent committed relationship with a victim of terrorism or other crime can qualify for victim compensation and assistance funds provided by that government to eligible spouses. In 2003, the House adopted a policy supporting state and territorial laws and court decisions that permit the establishment of legal parent-child relationships through joint adoptions and second parent adoptions by unmarried persons who are functioning as a child's parents when such adoptions are in the best interests of the child. The ABA has not taken a position with respect to marriage rights for same-sex couples. However, in 2004 the ABA adopted a resolution opposing any federal enactment that would restrict the ability of a state to prescribe the qualifications for civil marriage or to determine when effect should be given to a civil marriage validly contracted in another jurisdiction.

These ABA policies reflect the determination that sexual orientation is not, by itself, a legitimate basis for discrimination, particularly when the basic needs of families headed by same-sex couples are concerned.

5. What Urgency Exists That Requires Action at This Meeting of the House?

Until 1991, gay and lesbian foreigners were excludable from the U.S. solely on the basis of their sexual orientation. While that *per se* exclusion has been repealed, same-sex binational couples still face substantial discrimination, because a U.S. citizen or lawful permanent resident cannot sponsor his or her same-sex partner for residency in the U.S. This inability of same-sex partners to access immigration status on an equal basis with that available to different-sex spouses and other family members is contrary to the ABA's longstanding opposition to discrimination based upon sexual orientation. Adoption of the proposed resolution will enable the ABA to speak definitively on an issue with considerable implications for the civil rights of thousands of same-sex couples, their children and families.

6. Status of Legislation

Legislation seeking to enable a U.S. citizen or lawful permanent resident to sponsor his or her same-sex partner for permanent residence in the United States was first introduced in 2000. The current version of this legislation, introduced by Senate Judiciary Committee Chairman Patrick Leahy (D-VT) and House Constitution Subcommittee Chairman Jerrold Nadler (D-NY), is known as the Uniting American Families Act (UAFSA). When the UAFSA was last introduced in 2007, it had 118 cosponsors in the House of Representatives and it had 18 cosponsors in the Senate. Organizational supporters of the UAFSA include, among others: Amnesty International, the American Immigration Lawyers Association, Human Rights Watch, Legal Momentum, the Mexican American Legal Defense and Education Fund, the National Asian Pacific American Legal Consortium, and the National Immigration Forum.

7. Cost to the Association (both direct and indirect costs)

Adoption of this recommendation would result only in minor indirect costs associated with Governmental Affairs and Section staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

8. Disclosure of Interest

There are no known conflicts of interest.

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9. Referrals

This Report with Recommendation will be circulated to all Sections and Divisions, and other ABA entities and affiliated organizations that may have an interest in the subject matter.

10. Contact Persons (prior to meeting)

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11. Contact Person (who will present the report to the House)**Mark D. Agrast**

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EXECUTIVE SUMMARY

a) Summary of the recommendation:

The Recommendation supports the enactment of legislation and the implementation of public policy to enable a United States citizen or lawful permanent resident who: (1) shares a committed, intimate relationship with another adult individual of the same-sex; (2) is not married to or in any other legally-recognized partnership with anyone other than that individual; and (3) is unable to enter into a marriage with that other individual that is cognizable under the Immigration and Nationality Act, to sponsor that individual for permanent residence in the United States.

b) Summary of the issue which the recommendation addresses:

The ABA has long sought improvements in the application and administration of immigration and asylum law. Family unification is an express and central goal of immigration policy in the United States and has been for more than fifty years. Currently, however, this principle does not protect the families U.S. citizens and permanent residents form with same-sex partners who are foreign nationals. U.S. policy allows foreign spouses and fiancé(e)s to immigrate and live with their U.S. partners. But it does not allow U.S. citizens and permanent residents to sponsor their same-sex partners for residence in the U.S. As a result, thousands of lesbian and gay bi-national couples and their children are kept apart, driven abroad, or forced to live in fear of being separated.

This policy damages not only those families, but U.S. society generally. Data from the 2000 U.S. Census reported 35,820 same-sex bi-national couples live together in the U.S. Because current law and policy prevents overseas same-sex partners from immigrating to the U.S., many of these bi-national couples are forced to leave this country, depriving our nation of the economic, cultural, social and other contributions these individuals could make here.

c) Explanation of how the proposed policy position will address the issue:

This proposed resolution addresses this inequity by supporting the enactment of legislation and the implementation of public policy that enables a U.S. citizen or lawful permanent resident who shares a mutual, interdependent, committed relationship with a non-citizen of the same sex to sponsor that person for permanent residence in the United States.

d) Summary of any minority views or opposition which have been identified:

No minority views or opposition have been identified.