



Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work.

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# Sexual Orientation & Immigration:

## THE BASICS



IMMIGRATION EQUALITY

A PUBLICATION BY LAMBDA LEGAL AND IMMIGRATION EQUALITY

**ALTHOUGH LGBT PEOPLE** are discriminated against in many ways, you can't legally be denied entry into the United States based on your sexual orientation. While immigration law doesn't recognize same-sex relationships (right now you can't sponsor or be sponsored by a same-sex partner for immigration), we're working to change that. If you are interested in immigrating to or visiting the United States, use this kit to learn about your basic options, then contact a good immigration attorney using the resources provided.

Photo courtesy of Corbis

## Sexual Orientation and Immigration

You cannot legally be denied entry into the United States based on your sexual orientation.

Immigration officials are not legally permitted to ask about your sexual orientation.



If an official asks about your sexual orientation, you can politely tell him or her that sexual orientation is not a ground for exclusion from the U.S.

If you tell an immigration official that you are in a long-term relationship with an American, you could be denied entry into the U.S.

Anytime you seek to enter the U.S. on a non-immigrant visa, you must prove to the immigration official that your intent is to remain in the U.S. temporarily. The immigration official begins with a presumption that you plan to stay here permanently, and you must prove to the official that this is not the case.

If questions regarding your sexual orientation were part of your interview, and you strongly believe that your sexual orientation alone was the ground for denial of a visa, contact a lawyer who specializes in immigration law.

## HIV and Immigration

U.S. immigration law prohibits people with HIV from entering the country, although some waivers of the HIV bar are available. For more information see "HIV & Immigration: The Basics." To obtain a free copy of this publication, contact Lambda Legal or Immigration Equality.

Photo courtesy of Corbis

## Immigrant Visas

To immigrate permanently to the United States, you must be sponsored by certain family members or an employer. You can also obtain legal permanent resident status through what is known as the green card lottery, in which you are selected in a random drawing for a visa. Asylees and refugees are also able to apply for legal permanent residence. Most categories of visas are available in limited numbers every year.

### VISA BASICS

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Gaining entry into the U.S. is a two-step process.

First you must apply for a visa, a stamp in your passport that allows you to board a plane or take other transportation to the U.S.

Second, a U.S. immigration official must admit you into the U.S. at an airport or at a border. A visa does not guarantee that you will be allowed to enter the U.S. — that permission is granted by U.S. immigration officials.

Citizens of certain countries (mostly in Western Europe) who want to visit the U.S. for a short period of time **and who can present a machine-readable passport** do not need a visa. These countries are known as visa-waiver countries. The U.S. began enforcing the machine-readable-passport requirement for citizens of visa-waiver countries on October 26, 2004. If you do not have a machine-readable passport, you will need a visa to enter the U.S., regardless of whether you are from a visa-waiver country.

For more information about whether your country is a visa-waiver country and what makes a passport machine readable, check with

The rules that govern whether you can apply for a green card from within the U.S. (“adjustment of status”) or whether you must apply from your home country (“consular processing”) are very complicated. You should consult with an experienced immigration attorney before beginning the application process.

## Family-Based Immigration

Because same-sex relationships aren’t recognized by the U.S. federal government, your same-sex partner cannot sponsor you for permanent resident status based on your relationship.

the U.S. consulate in your country or visit [http://www.travel.state.gov/visa/tempvisitors\\_novisa\\_waiver.html](http://www.travel.state.gov/visa/tempvisitors_novisa_waiver.html). Your country’s passport-issuing agency may be able to help you determine if your existing passport is machine readable or tell you how to apply for a new passport if necessary.

There are two types of visas: immigrant and nonimmigrant:

- ❑ An immigrant visa, also known as a green card, allows you to stay in the U.S. permanently (subject to certain conditions).
- ❑ A nonimmigrant visa allows you to stay in the U.S. for a limited period of time and for a specific reason (for example to attend school or to be a tourist).

The State Department is the U.S. government agency responsible for administering the laws and regulations for people who apply for visas from outside the U.S.

The Department of Homeland Security is the U.S. government agency responsible for administering laws and regulations regarding non-U.S. citizens entering and remaining in the U.S.

Even if you marry your same-sex partner in a country that recognizes same-sex marriages (for example, certain provinces in Canada) or if you have a marriage or civil union that is recognized in a U.S. state, the U.S. government will not recognize your marriage for immigration purposes.

Family-based immigration is very complicated and is based on a “preference-category” system.

Generally, the application for family-based immigration is a two-step process. First, your relative submits a petition (an I-130) on your behalf that establishes a relationship with you. You are then assigned a “priority date,” and depending on your preference category, you usually have to wait (sometimes for many years) before you can take the second step and apply for a green card.

An immediate relative of a U.S. citizen, defined as an opposite-sex spouse, a parent or an unmarried child (under the age of 21), can file for a green card at the same time he or she files the petition (I-130). Everyone else must wait for their priority date based on their preference category.

For a list of preference categories and priority dates visit [http://travel.state.gov/visa/frvi\\_bulletincurrent.html](http://travel.state.gov/visa/frvi_bulletincurrent.html).

In addition to the immediate relatives listed above, a family member can petition for an immigrant visa on your behalf if you are the adult son or daughter (over the age of 21) of a U.S. citizen. The waiting period is longer if you are married. A U.S. citizen can also petition for his or her brother or sister, but the waiting period is very long.

A legal permanent resident can petition for an opposite-sex spouse, a minor child (under the age of 21) or an unmarried adult son or daughter (over the age of 21). A legal permanent resident cannot petition for a married adult son or daughter or for a brother or sister.

In addition to establishing a family relationship, applicants for legal permanent residence must prove that they are “not likely to become a public charge” (meaning they won’t need government assistance) and must demonstrate that their sponsor can support them financially.

You will also need to have a routine medical examination. This exam includes a chest X-ray and a blood test that will reveal certain communicable diseases such as tuberculosis and HIV, which can be grounds for denial of your application.

If you have been in the U.S. without lawful status for more than six months and you leave, you will be barred from reentry for three years. If you have been in the U.S. without lawful status for more than one year and you leave, you will be barred from reentry for 10 years. So, even if you have an approved I-130 petition, it may not be possible for you to get your green card.

## Employment-Based Immigration

Employment-based immigration visas are divided into five “preferences.” Some of the preferences are further divided by categories.

All categories of employment-based immigration require a U.S. employer to sponsor you, unless you are considered a person of “extraordinary ability,” a “special immigrant” or an “investor.”

Eligibility for all of the preferences is contingent upon an employer’s ability to show that there are no U.S. workers available to fill the particular position. (The intent of this policy is to protect U.S. workers by ensuring that U.S. citizens have maximum access to the job market.)

To sponsor an individual for a green card, an employer needs to file an application for “labor certification” with the Department of Labor that demonstrates that there are no U.S. workers able, willing and qualified

to fill the position being offered.

The employer filing the petition must also be able to show that she or he has the financial ability to pay the offered wage and that the employee meets the minimum requirements to perform the job satisfactorily.

Once the labor certification is approved, it is submitted to the U.S. Citizenship and Immigration Services (USCIS).

After obtaining the approval from the USCIS, you must file an application to either “adjust” your status if you are already in the U.S. or to obtain an immigrant visa if you’re abroad.

Once this application is approved, you will become a permanent resident of the U.S.

## The Green Card Lottery

The green card lottery allows 50,000 qualified entrants the chance to be selected randomly for a green card. To be eligible, you must come from a country that has sent fewer than 50,000 immigrants to the U.S. in the past five years.

You don’t need to be present in the U.S. to apply for the green card lottery.

You must hold a high school diploma or its equivalent or you must have two years of work experience within the last five years in a job that requires at least two years of training and experience to perform.

Generally, people who are in the U.S. without lawful status will not be able to obtain legal permanent residence through the lottery.

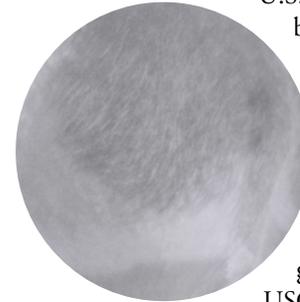
Beginning with the 2005 lottery, the State Department is using a computerized system for entrants.

## Same-Sex Couples and Immigration

U.S. immigration law does not recognize same-sex relationships, and, as a result, same-sex spouses or partners are not eligible for immigration benefits. You will not be able to sponsor your same-sex partner for immigration.

If you are a U.S. citizen or permanent resident, your partner must qualify for permanent residence through another category on his or her own.

If a lesbian or gay immigrant enters into a marriage with a person of the opposite sex in order to remain in the U.S., he or she risks deportation and the possibility of being barred from returning to the U.S. In addition, the person he or she married may be fined and sent to jail for committing fraud.



People who are contemplating such a marriage should also be aware that when a spouse submits a green card application for an immigrant spouse to whom he or she has been married for less than two years, the immigrant is only eligible for a “conditional green card.” The couple must return to the USCIS two years after the conditional green card is granted and demonstrate that the marriage is still viable.

Couples must prove to the USCIS that they live together, own property together and share their finances. The USCIS can call employers and visit the couple at home to investigate the validity of the marriage.

It’s not fair that same-sex couples have far fewer rights than opposite-sex couples. Same-sex couples can’t legally marry in the U.S. (except in Massachusetts), and U.S. citizens can’t sponsor their same-sex spouses

or partners for immigration. Many people are working to change these laws.

The Permanent Partners Immigration Act, a bill before the U.S. Congress, would give same-sex partners the same immigration rights as opposite-sex married couples. If passed, U.S. citizens and lawful permanent residents could sponsor their partners for immigration. For more information, see [www.immigrationequality.org/ppia.html](http://www.immigrationequality.org/ppia.html).

## Applying for Asylum

If you fear persecution in your home country because of your sexual orientation, you may be eligible for asylum in the U.S.

To claim asylum, you must be physically present in the U.S. or at an airport or a border crossing. Many applicants who seek asylum at an airport or a border crossing are detained (kept in prison) while their application is pending.

You must prove that you are unable or unwilling to return to your home country due to past persecution or well-founded fears of future persecution based on your sexual orientation. You can claim asylum on more than one ground at the same time, for example, fear of persecution because you are gay and HIV-positive.

You must be prepared to show that in your home country gay people are targeted as a group and subject to persecution. Persecution is different from discrimination. To find out more about what is considered persecution, consult an immigration lawyer familiar with sexual orientation issues. (See the resource listing at the end of this publication.)

You must file an application for asylum within one year of your last

entry into the U.S. or show an extraordinary reason for missing the deadline. The application is considered filed the date it is received by the USCIS. People with valid nonimmigrant status (like students) can file more than one year after their last entry, as long as they file within “a reasonable period of time” after their status expires.

### Undocumented Applicants

If you are undocumented, you can still apply for asylum. However, information that you provide on the asylum application will be used as evidence to begin removal (formerly known as “deportation”) proceedings or to establish that you can be removed if your application for asylum is denied.

If you are granted asylum, you can apply for legal permanent residence one year after your asylum approval. But there is currently a backlog of more than 10 years before these applications are granted.

Contact an immigration attorney with experience handling asylum cases to assist you.



## Becoming a U.S. Citizen

Be sure to speak with an immigration attorney before applying for citizenship. A couple of the issues you will discuss are any length of time you were outside the U.S. while a permanent resident or whether you have a criminal record.

File an application for naturalization (Form N-400) with the USCIS with photos, a copy of your green card and a filing fee.

After you submit your application, a naturalization interview will be scheduled with a USCIS officer.

You should begin collecting the following documents for your interview:

- five years of income taxes;
- your birth certificate;
- any documents showing a change in status after you became a permanent resident (for example, marriage or divorce papers); and
- for men, proof of registration for selective service (the military).

Most applicants (unless they are elderly and have been in the U.S. for a long time) must pass an English test and a civics test to naturalize. A waiver is available for these tests if your doctor can certify that you have a disability that prevents you from learning the information on the tests.

If you are approved to become a U.S. citizen (through naturalization), you will be

required to attend a swearing-in ceremony to complete the process. If you have obtained a medical waiver for the English and civics tests, it is important that your doctor state that you are competent to understand the oath of allegiance to the U.S.

Once you are a U.S. citizen, it can be much easier to sponsor family members (parents, children, siblings) to get their green card.

Photo courtesy of Corbis

## Resources

### Lambda Legal

120 Wall Street, Suite 1500  
New York, NY 10005  
212-809-8585  
www.lambdalegal.org  
legalhelpdesk@lambdalegal.org  
*Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work. During the Help Desk hours, Lambda Legal responds directly to members of our community who are seeking legal information and assistance with sexual orientation and HIV-related discrimination.*

### Immigration Equality

350 West 31st Street, Suite 505  
New York, NY 10001  
212-714-2904  
www.immigrationequality.org  
info@immigrationequality.org  
*Immigration Equality (formerly LGIRTF) addresses the widespread discriminatory impact of immigration laws on the lives of lesbian, gay, bisexual, transgender and HIV positive individuals through education outreach, advocacy and the maintenance of a nationwide resource and support network. Immigration Equality provides advice and technical assistance to LGBT and HIV-positive immigrants and their attorneys via email and telephone. Immigration Equality also operates a*

*pro bono asylum program for LGBT and HIV-positive asylum seekers.*

## EAST

### Center for Civil Rights Legal Clinic

1211 Chestnut Street, Suite 605  
Philadelphia, PA 19107  
215-731-1447  
www.center4civilrights.org  
c4crinfo@center4civilrights.org  
*Provides legal advice to LGBT communities in Pennsylvania. Direct representation for low-income LGBT clients.*

### Gay Men's Health Crisis

119 West 24 Street  
New York, NY 10011  
212-367-1000  
www.gmhc.org  
*Provides direct representation to HIV-positive residents of New York City in immigration matters.*

### Greater Boston Legal Services

197 Friend Street  
Boston, MA 02114  
617-371-1234 or 800-323-3205  
www.gbls.org  
*Immigration clinic that offers free and low-cost legal services.*

### HIV Law Project

161 William Street, 17th Floor  
New York, NY 10038  
212-577-3001  
www.hivlawproject.org  
*Provides direct representation to low-income, HIV-positive individuals who live in the Bronx or Manhattan, or who are homeless, in immigration matters.*

### International Gay and Lesbian Human Rights Commission

350 Fifth Avenue, 34th Floor  
New York, NY 10118  
212-216-1814  
www.iglhrc.org  
iglhrc@iglhrc.org  
*Provides support services to immigrants and their advocates.*

### Safe Horizon Immigration Law Project

2 Lafayette Street, 3rd Floor  
New York, NY 10038  
212-577-7700  
www.safehorizon.org  
info@safehorizon.org  
*Provides free and low-cost legal services to immigrants.*

## MIDWEST

### Illinois Coalition for Immigrant and Refugee Rights

36 South Wabash, Suite 1425  
Chicago, IL 60603  
312-332-7360  
www.icirr.org  
info@icirr.org  
*Provides information and referrals to appropriate legal services.*

### Legal Assistance Foundation of Metropolitan Chicago

111 West Jackson Boulevard  
Chicago, IL 60604  
312-341-1070  
www.lafchicago.org  
*Provides legal advocacy to low-income residents.*

### Midwest Immigrant and Human Rights Center

208 South LaSalle Street,  
Suite 1818  
Chicago, IL 60604  
312-660-1370  
www.heartland-alliance.org  
moreinfo@heartland-alliance.org  
*Provides immigration assistance, deportation defense and asylum representation to low-income immigrants.*

## SOUTH

### Florida Immigrant Advocacy Center

3000 Biscayne Boulevard, Suite 400  
Miami, FL 33137  
305-576-6273  
www.fiacfla.org  
*Provides free direct legal services.*

## SOUTH CENTRAL

### Human Rights Initiative of North Texas

2501 Oak Lawn Avenue, Suite 850  
Dallas, TX 75219  
214-855-0520  
www.hrionline.org  
hriinfo@hrionline.org  
*Provides free legal representation for those seeking asylum in the U.S. for various reasons, including sexual orientation. Must meet financial eligibility requirements.*

**Texas Human Rights Foundation**

3400 Montrose, Suite 207  
Houston, TX 77006  
713-522-0636  
www.thrf.org  
thrf@thrf.org

*Provides education and legal assistance to the LGBT community and people impacted by HIV.*

**WEST****ACLU of Southern California**

1616 West Beverly Boulevard  
Los Angeles, CA 90026  
213-977-9500  
www.aclu-sc.org

*Advocates for individual rights and equal justice, and against unwarranted government interference and abuse.*

**ACLU of Washington**

705 Second Avenue, Suite 300  
Seattle, WA 98104  
206-624-2184  
Complaint and Referral Line:  
206-624-2180  
www.aclu-wa.org

*Advocates for individual rights and equal justice, and against unwarranted government interference and abuse.*

**El Rescate Legal Services**

1313 West 8th Street, Suite 200  
Los Angeles, CA 90017  
213-387-3284  
www.elrescate.org

*Offers free legal representation and basic civil and immigration rights education.*

**Immigration Law Project**

Los Angeles Gay & Lesbian Center's  
Legal Clinic  
1625 North Schrader Boulevard  
Los Angeles, CA 90028-6213  
323-993-7670

www.laglc.org/section04/So402.htm  
*Offers immigration advice and advocacy. No direct legal service.*

**National Center for Lesbian Rights**

Immigration/Asylum Project  
870 Market Street, Suite 570  
San Francisco, CA 94102  
415-392-6257  
www.nclrights.org/projects/  
immigration.htm  
info@nclrights.org

*Provides support and information to LGBT immigrants. Offers a free legal clinic.*

**Northwest Immigrant Rights Project**

401 Second Avenue South, Suite 407  
Seattle, WA 98104  
206-464-1519 or 888-201-1012  
www.nwjustice.org  
njp@nwjustice.org

*Provides legal representation and community education to low-income refugees and immigrants.*

**IMMIGRATION EQUALITY****Immigration Equality**

350 West 31st Street, Suite 505  
New York, NY 10001  
212-714-2904  
info@immigrationequality.org

**Immigration Equality** (formerly

LGIRTF) addresses the widespread discriminatory impact of immigration laws on the lives of lesbian, gay, bisexual, transgender and HIV-positive individuals through education outreach, advocacy and the maintenance of a nationwide resource and support network.