

Client Alert

Recognition of marriage for same-sex couples in immigration proceedings

June 18, 2013

Summary: The Act of May 17, 2013 modifies the civil code section 143 to read: "Marriage is contracted by two persons of opposite sex or the same sex." France joins the few countries that have legalized marriage between same sex (Belgium, Spain, Canada, some states in the United States and Brazil, the Netherlands, Sweden, New Zealand, South Africa, Mexico (Federal District), Argentina, Norway, Denmark, Portugal, Iceland and Uruguay). Henceforth, in France, the marriage will give rise to the same rights in French immigration procedures, whether the spouses are of different sex or the same sex.

I - General provisions relating to marriage from the law of 17 May 2013, conflict of laws and consular marriage

The Civil Code now recognizes that marriage as between persons of opposite or the same sex. Article 202-1 of the Civil Code provides that the conditions for marriage are governed by the personal law of each spouse but then Article 202-2 provides that two persons of the same sex can marry when the personal law or the law of the state of residence of one spouse permits. This arrangement allows the avoidance of the application of the personal law of one spouse prohibiting marriage between persons of the same sex when the marriage took place on the territory of a state recognizing marriage between persons of the same sex.

The above implies, for the Constitutional Council, that two foreigners of the same sex can marry when one of them resides or is domiciled in France. However, this rule will not apply to nationals of countries with which France is bound by bilateral agreements (Poland, Algeria, Tunisia, Morocco, republics of the former Yugoslavia, Cambodia and Laos), which provide that the law governing conditions for marriage is the personal law. The marriage, however, may take place in a non-prohibitive state having no bilateral agreement with the country of the spouses.

It is to be noted that, foreign national may frequently find themselves in situations where their marriages in France will not be recognized by their countries of origin unless such countries would have adopted legislation similar to the new French legislation.

The consular marriage between same sex French nationals would not raise an issue. However, the consular marriage between French and foreign national may be more complex in consular posts in prohibiting countries (which are in majority). In such case, the Civil Code provides that marriage may take place in France.

The law of 17 May 2013 also provides that marriages between same-sex couples, validly celebrated abroad, at a time when the French law forbade may be recognized retroactively.

II - The impact on French immigration rights of foreign nationals moving to France

Marriage now carries the same effects, rights and obligations whether between persons of different sex or the same sex.

- Derivative residency and work rights known as “accompanying family rights” will be applicable to married foreign workers under Inter-Company Transfer, EU Blue Card or Skills and Talents status, regardless of the sexual identity of the spouses when the marriage is celebrated in France or recognized by France (marriage between two foreigners) on the basis of the new provisions of the Civil Code and Article L313-11-3 CESEDA.

- The same sex marriage between foreign national and French national is will allow the issuance of visa and residence permit to the foreign national as the spouse of French national, on the basis of the Civil Code and Article L313-11-4 CESEDA.

- The marriage between of a third country foreign national in European Union with a European citizen is expected to allow the issuance of a residence permit as a European spouse under Articles L121-3 to L121-5 CESEDA.

Recognition of marriage for same-sex couples could also give rise to new legal actions when a decision refusing stay maybe considered as disproportionate interference with rights to private and family life, under Article 8 of the European Convention on Human Rights.

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