National Center for TRANSGENDER EQUALITY

IMMIGRATION EQUALITY

April 27, 2012

Office of Public Engagement
United States Citizenship and Immigration Services
20 Massachusetts Ave. NW
Washington, DC 20529

Via e-mail: opefeedback@uscis.dhs.gov

Re: PM-602-0061, Adjudication of Immigration Benefits for Transgender Individuals; Addition of Adjudicator's Field Manual (AFM) Subchapter 10.22 and Revisions to AFM Subchapter 21.3 (AFM Update AD 12-02)

Introduction

We submit these comments in response to the interim Policy Memorandum by United States Citizenship and Immigration Services (USCIS's) and accompanying amendments to the Adjudicator's Field Manual (AFM). On the whole, we strongly commend the changes you have made to the AFM and believe the revisions will result in more consistent adjudications with more just results.

The undersigned organizations work with and on behalf of transgender individuals and their families and have been concerned by the lack of clarity in USCIS rules for correcting gender markers on identity documents. We have also been concerned that the prior version of the AFM improperly summarized the holding of *Matter of Lovo-Lara* 23 I&N Dec. 746 (BIA 2005), adding a requirement for the transgender spouse to have undergone sex reassignment surgery, which went beyond the holding of the Board of Immigration Appeals (BIA).

Identity Documents

We applaud your decision to clarify the requirements for correcting gender markers on identity documents. The revisions to the AFM bring USCIS policy in line with the Department of State's Foreign Affairs Manual on revising gender markers on U.S. passports. (*See* 7 FAM 1300 Appendix M). We agree that allowing a licensed physician to submit a medical certification of the applicant's change in gender rather than forcing USCIS officers to try to determine what level of medical proof is necessary to change a gender marker is a vast improvement in policy. We also commend USCIS for following the World Professional Association for Transgender Health guidelines and not requiring any particular surgery or other transition-related medical treatment in order for a physician to certify the applicant's gender.

We do have one concern in this section which we feel may confuse officers as to what language the medical certification should contain. On page 4, the interim memo states:

> Proof of sex reassignment surgery is not required to issue the requested document in the new gender and evidence of such surgery will not be requested. If such surgery has taken place, a statement to that effect in the medical certification is sufficient to establish the fact. USCIS will not ask for records relating to any such surgery.

While we believe this paragraph provides important guidance to USCIS adjudicators, we believe that the statement that if "such surgery has taken place, a statement to that effect in the medical certification is sufficient to establish the fact" is potentially confusing. We note that the revised AFM's procedure for documenting gender transition is based on the State Department's procedure for amending U.S. passports and consular reports of birth abroad. The State Department procedure, however, specifically does not contemplate the inclusion of information about specific, individual medical treatments in a physician's certification. Some medical providers may of course choose to provide more detail than is required or requested, but passport agents are not instructed to expect such details. For USCIS adjudicators, the instruction that a statement regarding surgical treatment "is sufficient to establish the fact," even though such information is not required, may make it unclear whether certifications that do not reflect such specifics should be treated differently. To ensure clear and consistent implementation, we suggest omitting this sentence from the final memo.

We also suggest that, both for ease of reference and because some readers will access the AFM through hard copy rather than on the internet, that full citations be included in the footnotes rather than, or in addition to, internet links.[1]

Marriage-based applications

We also generally support your approach to marriage-based petitions. We agree that the proper approach, and the one laid out under *Lovo-Lara* and other BIA precedent, is to look to the law of the state where the marriage was performed to determine its validity. We particularly applaud the removal of the requirement that the transgender spouse "had in fact undergone sex reassignment surgery," which was not part of the *Lovo-Lara* holding. Likewise we are pleased that you have clarified that petitioners for fiancé/e visas will either receive an approval notice or receive a notice of intent to deny allowing them the possibility to submit evidence that the marriage would be valid in their jurisdiction or allowing them to provide an affidavit attesting that the marriage will take place in another jurisdiction. Furthermore we agree with your decision not to attempt to include an exhaustive list of jurisdictions that have decisional law on marriage cases since the legal landscape is changing in this area.

Our primary concern with the marriage section of the revised AFM is the language of footnote 4. We are pleased that you have clarified that if a marriage is different-sex when entered into, and a marriage-based petition is filed fewer than two years after the marriage is entered into, the subsequent transition of one of the spouses does not preclude removing the condition on the green card and granting the foreign spouse a permanent green card. We agree that this is the correct interpretation of the law and are happy that this issue is specifically addressed in the new AFM.

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[1] For example, a full citation for footnote 3 would be: American Medical Association. Res. 122; A-08, Removing Barriers to Care for Transgender Patients (2008), http://www.ama-assn.org/ama1/pub/upload/mm/16/a08_hod_resolutions.pdf. The current citation is to a secondary website which reproduces the resolution rather than to the AMA's own website.

We are concerned though with the last sentence of footnote 4, "The same does not hold true, however, for 319(a) adjudications which require that the marriage continues to be valid." Absent additional context, we are concerned that this statement could be read to suggest that a spouse's gender transition subsequent to a valid marriage could affect the marriage's continuing validity, such that, he or she cannot naturalize in three years under INA 319(a) rather than in five years. We therefore urge you to explicitly affirm the established principle that gender transition does not invalidate a marriage that was otherwise lawful at its inception. The federal Defense of Marriage Act has no applicability to such marriages, and there is no state law precedent for retroactively invalidating a marriage that was valid at the time it was entered into. We urge USCIS to follow the "Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace" issued by the Office of Personnel Management (OPM).[2] The OPM Guidance correctly looks to the validity of the marriage at the time it was entered into for the purpose of spousal insurance coverage and states, "If the employees in transition are validly married at the time of the transition, the transition does not affect the validity of that marriage, and spousal coverage should be extended or continued even though the employee in transition has a new name and gender." *Id.* Other federal agencies, including the Social Security Administration, have followed this approach in administering marriage-related benefits. We believe that the AFM should remove the last sentence of footnote 4 and add a sentence on page 5 following "The individual may also show, in an appropriate case, that the law barring a legal change of gender for purposes of marriage has changed and that the marriage is valid under current law." The new sentence should parallel the OPM guidance and state, "If a marriage was valid for immigration purposes when celebrated, the validity of the marriage is unaffected by a spouse's subsequent gender transition." There is simply no reason to deny the spouse of a U.S. citizen the benefits of 319(a) solely because he or she transitions subsequent to entering into a valid marriage.[3]

Conclusion

We appreciate the opportunity to comment on these revisions to the AFM. Again, we believe that the new version of the AFM has clarified ambiguities and will allow transgender individuals to obtain identity documents that more accurately reflect their gender and which will promote the value of family unity that is at the heart of U.S. immigration law.

Sincerely,

Immigration Equality
National Center for Transgender Equality
American Civil Liberties Union
Gay and Lesbian Advocates and Defenders
Heartland Alliance's National Immigrant Justice Center
Lambda Legal
National Gay and Lesbian Task Force

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[2] "Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace" available at http://www.opm.gov/diversity/Transgender/Guidance.asp .

[3] Courts have found the purpose of INA 319(a) to be either the "Congressional expectation that a non-citizen spouse who lived in close association with a citizen spouse for three years would more speedily absorb the basic concepts of citizenship than one not so situated." *Petition of Kostas*, 169 F.Supp. 77, 78 (D. Del. 1958) or "preservation of the family unit." *In re Olan*, 257 F.Supp. 884, 891 (S.D. Cal. 1966). With either rationale, a spouse who continues to be lawfully married under state law should continue to be eligible for marriage-based immigration benefits based on the lawful marriage.

National Center for Lesbian Rights
Sylvia Rivera Law Project
Transgender Law Center
Women's Refugee Commission