

INTERIM MEMO FOR COMMENT

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This memo is in effect until further notice.



U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000
**U.S. Citizenship
and Immigration
Services**

April 10, 2012

PM-602-0061

Policy Memorandum

SUBJECT: 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 AD12-02)

Purpose

This Policy Memorandum (PM) and accompanying revisions to the AFM articulate USCIS policy regarding assigning appropriate gender designations on documents issued to transgender individuals and the adjudication of benefits applications involving the marriage of transgender individuals. The memorandum supersedes the following: *Memorandum for Regional Directors et al, Adjudication of Petitions and Applications Filed by or on Behalf of, or Document Requests by, Transsexual Individuals* (April 16, 2004); and *Adjudication of Petitions and Applications Filed by or on Behalf of Transsexual Individuals* (January 14, 2009).

Scope

Unless specifically exempted herein, this PM applies to and binds all USCIS employees.

Authority

Section 103(a) Immigration and Nationality Act; 8 CFR 103.1; Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); *Matter of Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005).

Background

The *Memorandum for Regional Directors et al, Adjudication of Petitions and Applications Filed by or on Behalf of, or Document Requests by, Transsexual Individuals* (April 16, 2004) had been previously superseded, in part, with respect to issues of marriage by the memorandum on *Adjudication of Petitions and Applications Filed by or on Behalf of Transsexual Individuals* (January 14, 2009). The policy with respect to other documents was never updated, however. To clarify and unify the standards being applied to document issuance, as well as eligibility for benefits based upon marriage, the entire memo is now superseded and replaced with more comprehensive guidance on the same topics.

In 2005, the Board of Immigration Appeals (Board) issued the precedent decision *Matter of Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005). The case involved a petitioner born in North Carolina who underwent sex reassignment surgery and then amended her birth certificate, reflecting her

transition from male to female. Subsequently, she married her husband in North Carolina and filed an I-130 petition on his behalf. The Board noted that North Carolina law does not permit individuals of the same gender to marry each other. The petitioner legally amended her birth certificate to reflect her change in gender designation, and the evidence the petitioner submitted to the Board included her amended birth certificate. Consequently, the Board found North Carolina considered the petitioner to be female under its laws and deemed her marriage to the beneficiary to be a valid heterosexual marriage. Although evidence of sex reassignment surgery was submitted in the *Lovo-Lara* case, the Board's decision does not require submission of evidence of surgery in order to establish a valid heterosexual marriage. Rather, the reasoning underlying the Board's decision suggests that the federal government should defer to how the state/local jurisdiction in which a claimed marriage takes place recognizes a legal change in gender for purposes of heterosexual marriage.

In 2009, USCIS issued guidance to the field to implement *Lovo-Lara*. This guidance required, in the case of a spousal Form I-130 or I-129F involving the claimed marriage between two persons of the same birth sex, the submission of evidence showing that one of the individuals had in fact undergone sex reassignment surgery to show a change of gender. Not all states or foreign jurisdictions that recognize a legal change of gender require the completion of gender reassignment surgery before an individual can legally change his or her gender. For this reason, USCIS is superseding previous guidance relating to transgender individuals to reflect the broader range of clinical treatments that can result in a legal change of gender under the law of the relevant jurisdiction.

Policy

USCIS officers will follow the policy stated in the Adjudicator's Field Manual, as amended by this PM, in adjudicating petitions or applications filed by or on behalf of transgender individuals.

Implementation

The *Adjudicator's Field Manual* (AFM) is amended as follows:

1. A new Chapter 10.22 is added to read as follows:

Chapter 10 An Overview of the Adjudication Process

* * * * *

10.22 Document Issuance Involving Status and Identity for Transgender Individuals

USCIS issues a variety of documents that show identity and immigration status in the United States. These include, but are not limited to, Employment Authorization Documents, Refugee Travel Documents, Permanent Resident Cards, and Naturalization Certificates. Applicants who claim to have changed their gender may seek issuance of these types of documents reflecting the new gender. While some of these documents indicate the individual's gender, and the applicant's gender may sometimes have bearing on underlying issues of eligibility for

immigration benefits (such as an approval of a Petition for Alien Relative, derivative spouse status, or marriage to a U.S. citizen for section 319(a) naturalization), the purpose of the document itself is to document the individual's identity and immigration status. Therefore, USCIS will issue an initial or amended document reflecting the individual's post-transition gender if the individual presents the following:

- An amended birth certificate, passport, or court order recognizing the new gender; or
- Medical certification of the change in gender from a *licensed* physician (a Doctor of Medicine (M.D.) or Doctor of Osteopathy (D.O.)). This is based on standards¹ and recommendations² of the World Professional Association for Transgender Health who are recognized as the authority in this field by the American Medical Association.³ Medical certification of gender transition received from a *licensed* physician (an M.D. or D.O.) is sufficient documentation, alone, of gender change. Additional information about medical certifications:
 - For the purposes of this chapter, only an M.D. or a D.O. qualifies as a licensed physician. Officers may accept medical certifications from any number of specialties as well as from general practitioners.
 - Statements from persons who are not licensed physicians, such as psychologists, physician assistants, nurse practitioners, social workers, health practitioners, chiropractors, *are not acceptable*.
 - The medical certification should include the following information:
 - Physician's full name;
 - Medical license or certificate number;
 - Issuing state, country, or other jurisdiction of medical license/certificate;
 - Drug Enforcement Administration registration number assigned to the doctor or comparable foreign registration number, if applicable;
 - Address and telephone number of the physician;
 - Language stating that the individual has had appropriate clinical treatment for gender transition to the new gender (male or female);
 - Language stating that he/she *has either treated* the applicant in relation to the applicant's change in gender *or has reviewed and evaluated the medical history of the applicant in relation to the applicant's change in gender* and that he/she has a doctor/patient relationship with the applicant; and
- The applicant must submit evidence that any name change was completed according to the relevant state or foreign law;
- The applicant may also be asked to submit acceptable evidence of identity in the new gender, if available. State law and foreign laws vary as to whether a driver's license or other form of government issued identity document may be issued reflecting a gender change. If evidence of change of gender in the identity documents is not obtainable because of state, local or foreign requirements, the document may still be issued in the new gender based on the medical certification; and

¹ [Standards of Care, 7th Version](#)

² [Identity Recognition Statement](#)

³ http://www.tgender.net/taw/ama_resolutions.pdf

- A recent facial photograph that reflects a good likeness of, and satisfactorily identifies the applicant must be submitted. The photograph must agree with the submitted identification evidence and reflect the applicant's current and true appearance. This can be submitted with the application or provided through biometrics collection at an ASC.

NOTE: 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.

As in all adjudications, if an officer finds significant substantive discrepancies, has reason to question the accuracy or authenticity of documents submitted, or finds other indicators of fraud, the case may be referred to FDNS in accordance with current national and local policies.

2. Chapter 21.3(a)(2)(J) is amended to read as follows.

21.3 Petition for Spouse.

(a) Petition by Citizen or LPR for a Spouse.

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(2) Adjudicative issues.

* * * * *

(J) Transgender issues and marriage.

Benefits based upon marriage may be approved on the basis of a marriage between a transgender individual and an individual of the other gender if the Petitioner/Applicant establishes 1) the transgender individual has legally changed his or her gender and *subsequently*⁴ married an individual of the other gender, 2) the marriage is recognized as a heterosexual marriage under the law where the marriage took place (*Matter of Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005)), and 3) the law where the marriage took place does not bar a marriage between a transgender individual and an individual of the other gender.

While a timely registered heterosexual marriage certificate from the appropriate civil authority is prima facie evidence of the validity of a marriage, when an officer determines, based on the

⁴ Note that subsequent marriage is at issue when looking at an initial marriage based benefit. For an individual who transitioned gender subsequent to a grant of conditional permanent residence, adjudication of a Petition to Remove the Conditions on Residence does not require the validity of the marriage at the time of filing or adjudication, rather the adjudication is dependent upon whether the marriage was valid and bona fide at inception and time of obtaining conditional permanent residence. The same does not hold true, however, for 319(a) adjudications which require that the marriage continues to be valid.

record or through interview or other means, that a party to a petition has changed gender, the officer must ascertain that the marriage is a valid heterosexual marriage under the laws of the jurisdiction in which it was contracted.

The validity of the marriage must be established by the preponderance of the evidence. As with most administrative immigration proceedings, the petitioner bears the "preponderance of the evidence" burden. Thus, even if there is some doubt, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). As such, officers should be satisfied that this burden is met if the marriage is recognized in the jurisdiction in which it was contracted as a heterosexual marriage. USCIS will presume the validity of the marriage involving a transgender individual in the absence of jurisdictional law and/or precedent that would place the validity of such marriage in doubt. Only in jurisdictions where a specific law or precedent either prohibits or sets specific requirements for a legal change of gender for purposes of that jurisdiction's marriage laws is the individual required to demonstrate that he or she has met the specific requirements needed to establish the legal change of gender and the validity of the marriage. 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.

Where an individual claims to have legally changed his or her gender, USCIS will recognize that such individual's gender changed based upon the following documentation:

- Amended birth certificate; or
- Other official recognition of new gender, such as a passport, court order, certificate of naturalization or citizenship, or driver's license (note that some jurisdictions may have a lower threshold for issuing a driver's license than to establish a legal change of gender for purposes of the marriage laws, and USCIS would require additional evidence that the individual met the threshold for marriage, if applicable); or
- Medical certification of the change in gender from a *licensed* physician (a Doctor of Medicine (M.D.) or Doctor of Osteopathy (D.O.)). This is based on standards⁵ and recommendations⁶ of the World Professional Association for Transgender Health, who are recognized as the authority in this field by the American Medical Association.⁷ Medical certification of gender transition received from a *licensed* physician (an M.D. or D.O.) is sufficient documentation, alone, of gender change. If the physician certifies the gender transition, USCIS will not "go behind" the certificate by asking for specific information about the individual's treatment. Additional information about medical certifications:
 - For the purposes of this chapter only an M.D. or a D.O. qualifies as a licensed physician. Officers may accept medical certifications from any number of specialties as well as from general practitioners.

⁵ [Standards of Care, 7th Version](#)

⁶ [Identity Recognition Statement](#)

⁷ http://www.tgender.net/taw/ama_resolutions.pdf

- Statements from persons who are not licensed physicians, such as psychologists, physician assistants, nurse practitioners, social workers, health practitioners, chiropractors, *are not acceptable*.
- The medical certification should include the following information:
 - Physician's full name;
 - Medical license or certificate number;
 - Issuing state, country, or other jurisdiction of medical license/certificate;
 - Drug Enforcement Administration registration number assigned to the doctor or comparable foreign registration number, if applicable;
 - Address and telephone number of the physician;
 - Language stating that the individual has had appropriate clinical treatment for gender transition to the new gender (male or female);
 - Language stating that he/she *has either treated* the applicant in relation to the applicant's change in gender *or has reviewed and evaluated the medical history of the applicant in relation to the applicant's change in gender* and that he/she has a doctor/patient relationship with the applicant

Sex reassignment surgery is *not* required in order for USCIS to approve a Form I-130 to establish a legal change of gender unless the law of the place of marriage clearly requires sex reassignment surgery in order to accomplish a change in legal gender. The *fact* of sex reassignment surgery, however, would generally be reflected in the medical certification. USCIS will not ask for records relating to any such surgery.

These documents are listed in order of evidentiary preference. Officers must recognize, however, that the personal circumstances and jurisdictions involved in an individual's case will affect availability of specific types of documentation. As evidence of the new gender, officers should treat an amended birth certificate as carrying the same weight as USCIS would normally give to other timely registered primary evidence.

This guidance also applies to the adjudication of all immigration benefits based upon marriage, including but not limited to a Petition for Alien Fiancé(e). In the case of a proposed marriage involving a transgender individual, the petition may be approved assuming the same conditions are met for legal gender change and validity of the marriage as described above. If the record indicates the parties' specific intent to marry in a jurisdiction where the marriage would not be valid, the officer will issue an intent to deny in which the petitioner is informed that the marriage would not be valid for immigration purposes and why. USCIS will provide the petitioner the opportunity to submit evidence that USCIS's interpretation of the jurisdiction's law and/or precedent is incorrect or provide an affidavit attesting that the intended marriage will take place in a jurisdiction where the marriage will be valid for immigration purposes.

The same principles for determining the validity of a marriage involving a transgender individual for a spousal Petition for Alien Relative apply to those who may derive an immigrant or nonimmigrant benefit by virtue of a spousal relationship.

If an officer has questions about the validity of a marriage involving a transgender individual, the officer should contact local USCIS counsel.

As in all adjudications, if an officer finds significant substantive discrepancies, has reason to question the accuracy or authenticity of documents submitted, or finds other indicators of fraud, the case may be referred to FDNS in accordance with current national and local policies.

3. The AFM Transmittal Memorandum button is revising by adding, in numerical order, a new entry to read:

AD 12-02
04/10/2012

Chapter 10.22;
Chapter
21.3(a)(2)(J)

Provides guidance on the adjudication of applications and petitions for immigration benefits filed by or in behalf of transgendered individuals.

Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Field Operations Directorate or the Service Center Operations Directorate *and* the Office of Chief Counsel and Office of Policy and Strategy.