

1. "Tips for Legal Advocates Working with Lesbian, Gay, Bisexual & Transgender Clients" by the National Center for Lesbian Rights, California Rural Legal Assistance and Legal Services for Children
2. "Top 6 Tips for Lawyers Working with Transgender Clients and Co-Workers" by the Transgender Law Center
3. Resource List: Asylum Claims Based on Sexual Orientation or Gender
4. "Immigration Basics: Thorny Issues in LGBT/H Asylum Cases," excerpt from Immigration Equality Asylum Manual
5. "Working with LGBT/H Asylum Seekers," excerpt from Immigration Equality Asylum Manual
6. *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA)
7. "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity." November 21, 2008.
8. "Policy Update: The Harm of the Defense of Marriage Act (DOMA) in an Immigration Context." "Immigrant Legal Resource Center. September 2011.
9. "Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act." February 23, 2011.
10. "Practice Advisory: Protecting and Preserving the Rights of LGBT Families: DOMA, *Dorman*, and Immigration Strategies." American Immigration Council Legal Action Center. June 13, 2011.
11. USCIS Memorandum, "Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children." Donald Neufeld. September 4, 2009. Please review this document in the context of the discussion presented in Webinar 2, "Marriage-Based Immigration and LGBT Couples." For the latest news from USCIS regarding surviving spouses of U.S. Citizens, please refer to USCIS Memo "Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act." December 16, 2010.
12. USCIS Memorandum, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens." John Morton. June 17, 2011.
13. USCIS Interoffice Memorandum, "Adjudication of Petitions and Applications Filed by or on Behalf of, or Document Requests by, Transsexual Individuals." William R. Yates. April 16, 2004.
14. USCIS Interoffice Memorandum, "Adjudication of Petitions and Applications Filed by or on Behalf of, or Document Requests by, Transsexual Individuals. Revisions to *Adjudicator's Field Manual* (AFM) Subchapter 21.3 (AFM Update AD09-03)." Don Neufeld. January 14, 2009.
15. Case of *In re Jose Mauricio LOVO-Lara*, 23 I&N Dec. 746 (BIA 2005)
16. Practice Advisory, "What Does the Department of Justice Defense of Marriage Act (DOMA) Announcement Mean for Immigration Cases?" By Victoria Neilson, Legal Director of Immigration Equality, in conjunction with the American Immigration Lawyer's Association.



NATIONAL CENTER FOR LESBIAN RIGHTS



## Tips for Legal Advocates Working with Lesbian, Gay, Bisexual, & Transgender Clients

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1. **Become comfortable with the issues.** Historically, society has been intolerant of lesbian, gay, bisexual, and transgender (LGBT) people and these negative attitudes may affect how we think about LGBT people. It is important for advocates to understand LGBT people and the issues they face. One can become a compassionate advocate by building relationships with local LGBT organizations and activists, attending trainings, visiting educational websites, and reading articles and books or watching movies with positive portrayals of LGBT people.
2. **Make your office space friendly to LGBT people.** Often, LGBT people will assume that a lawyer's office is unfriendly to LGBT people until he or she receives a clear indication otherwise. Use visual cues to indicate that your office is a safe and welcoming space for LGBT people. Put up posters or stickers that have positive messages about LGBT people and make sure your resource display includes materials specifically for LGBT people. When possible, hire LGBT people as staff members in your organization.
3. **With all clients, use language that does not implicitly assume the client's sexual orientation or gender.** Using inclusive language that does not assume the gender of your client or your client's significant other sends a message that it is safe for your client to talk to you about his or her sexual orientation or gender identity. It is important to use this inclusive language with all clients, not just the ones who you think may be LGBT. For example, ask "are you in a relationship?" instead of "do you have a boyfriend?"
4. **Be aware of assumptions you may have based on a client's sexual orientation or gender identity.** We all make assumptions about others based on our own background and experience. The important thing is to be aware so that you do not unconsciously make decisions based on your assumptions about people who are LGBT rather than on your client's unique situation. For example, a gay male client does not necessarily appreciate sexual advances from other male coworkers, and he may have a sexual harassment claim.
5. **Use the name and pronoun that conforms to the client's gender identity consistently in all your interactions with the client, as well as in all correspondence and court documents.** It is important to be respectful of your client's gender identity by using the name and pronoun that he or she prefers and by asking co-workers, opposing counsel, judges, and court staff to do so. If you are unsure what name or pronoun to use, ask. Court documents may need a footnote explaining that you will use to the client's current name and gender.
6. **An LGBT client's legal problems may not be directly related to his or her sexual orientation or gender identity.** LGBT clients face the same types of legal problems that non-LGBT clients face. An LGBT client's legal problems will not inevitably involve sexual orientation or gender identity discrimination. For example, an LGBT client may come to the legal aid office because his or her landlord has failed to fix an unsafe condition, and that failure may be unrelated to the client's sexual orientation or gender identity.
7. **Be prepared to address hostile attitudes and irrelevant arguments.** An LGBT client may face hostility from the legal system, even if the case does not relate directly to his or her sexual orientation or gender identity. For example, in a custody case between different-sex parents where one parent is LGBT, the other parent may argue that the LGBT parent shouldn't have custody because of his or her sexual orientation or gender identity.
8. **Reach out to LGBT organizations and attorneys who have experience working with LGBT legal issues.** The laws affecting LGBT people are complicated and constantly changing. Organizations and attorneys experienced with LGBT legal issues can help you identify the most effective strategies and may be able to provide legal research and information on these issues.



NATIONAL CENTER FOR LESBIAN RIGHTS



## Low-Income Lesbian, Gay, Bisexual, & Transgender Families

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Because children with same-sex parents often do not have a legal relationship to at least one of their parents, they can be denied government benefits or can end up in foster care if their legal parent dies or is incarcerated. For example, when 10-year-old A.W.'s non-biological mother became disabled, he was unable to get Social Security benefits because the Social Security Administration refused to recognize her as a legal parent. After A.W. found free legal help, he appealed and began receiving the benefits he needed.

Many people have heard the myth that all gay people are affluent. In fact, poverty is at least as prevalent in LGBT families as it is in the general population. On average, same-sex couples make less than married couples, are less likely to own a home, and are less likely to have a college degree.

**Same-sex couples are raising children.** Same-sex couples live in virtually every county in the United States, and 39% of same-sex couples in the United States are raising children under the age of 18.

### **Same-sex parents have fewer economic resources.**

- Same-sex parents earn on average almost \$11,000 less than different-sex married parents.
- 64% of same-sex parents own their homes while 76% of married different-sex parents own their homes.
- 23% of same-sex parents have a college degree, compared to 30% of married different-sex parents.

### **Same-sex parents of color are more likely to be raising children.**

- Black same-sex couples across the nation are twice as likely to be raising children as white same-sex couples.
- 70% of Latino/a and 55% of Asian/Pacific Islander same-sex couples in California are raising children.

**PROYECTO PODEROSO** is expanding civil rights enforcement on behalf of low-income LGBT people in rural California. The project is a joint effort by California Rural Legal Assistance and the National Center for Lesbian Rights. For more information, contact California Rural Legal Assistance's Salinas office at 831.757.5221.

**THE NATIONAL CENTER FOR LESBIAN RIGHTS** is a national legal organization committed to advancing the civil and human rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. [www.nclrights.org](http://www.nclrights.org)

**THE NATIONAL CENTER FOR LESBIAN RIGHTS FAMILY PROTECTION PROJECT** helps low-income LGBT parents find free and low-cost family law services and provides training and assistance to attorneys representing low-income LGBT parents. For more information about representing LGBT low-income families or for information about trainings, contact: Cathy Sakimura, Equal Justice Works Fellow, National Center for Lesbian Rights, 870 Market Street, Suite 370, San Francisco, CA 94102, 415.365.1329, [csakimura@nclrights.org](mailto:csakimura@nclrights.org).

Since 1965, **CALIFORNIA RURAL LEGAL ASSISTANCE** has advocated on behalf of the state's farmworkers and rural poor. CRLA provides direct legal services, community education, and advocacy. There are 21 CRLA offices from Marysville in Northern California to El Centro on the US-Mexican border.



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870 MARKET STREET, SUITE 400  
SAN FRANCISCO, CA 94102

(415) 865-0176  
(415) 777-5565 (FAX)

WWW.TRANSGENDERLAWCENTER.ORG  
INFO@TRANSGENDERLAWCENTER.ORG

## Top 6 Tips for Lawyers Working with Transgender Clients and Co-Workers

### Clients

Transgender clients are not fundamentally different than non-transgender clients. They have the same need for resolution, respect, effective representation, and returned phone calls. Most often, the unique challenges they face originate from discomfort or disinterest on the part of others. For some transgender people, previous experience with discrimination may lead them to be wary about opening up to a lawyer. This barrier may be something you will need to overcome in order to provide effective representation. Here are some things to keep in mind when representing a transgender client:

- 1. It isn't always about a person's transgender status.** Sometimes the legal challenge facing a transgender person is unrelated to their gender identity. It is important not to focus so narrowly on the fact that a person is transgender that you end up making that characteristic more important than the actual reason the person is seeking your services. It is important that you help your client focus on the real issue and steer them away from focusing on their gender identity if that is not the core legal issue.
  - 2. Be aware of assumptions you are making about a person's gender.** It is very common to assume that you know a person's gender or gender identity based on sex stereotypes. In most cases, you will "guess" correctly. However, some people's gender or gender identity is not immediately evident, or is different than what you would assume or expect. Transgender people in particular may not conform to narrow gender stereotypes. If you are unsure what a person's gender identity is, ask them (privately, if possible) what name and pronouns they would like you to use, and how they would like to be addressed.
  - 3. Reach out to attorneys who have experience working with transgender issues.** Because so many legal issues concerning transgender people are issues of first impression or are still being developed, it's important that you connect with knowledgeable attorneys as you begin to frame your legal arguments. In other cases, there may be an established approach to recurring issues, but one that is not well known outside of the community of advocates who specialize in transgender issues. Avoid becoming a well-intentioned attorney who creates bad law because they don't fully understand the issues.
  - 4. Use the correct name and pronoun in all correspondence, court papers, and settlement agreements.** Except in extremely rare circumstances, it is very important that you use the name and pronoun that corresponds to a person's gender identity (for example, use male pronouns if your client has transitioned from female to male). In addition, your client may
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choose to use a name that is gender-neutral or associated with the gender that is the opposite from the pronouns he or she prefers. It is important to be aware of and respect this decision. Also, it may be necessary to footnote the person's prior name in a document, or to clarify in an initial letter that the recipient of the letter may know your client by their prior name or gender but that you will be referring to the client by their current name and gender. It is also important that you respectfully urge opposing counsel, court staff, and judicial officers to do the same.

**5. Make sure your office has transgender-friendly policies.** Your intake forms should account for a person having an AKA and should encourage or allow people to identify their sex based on their current gender identity. Your restrooms should be accessible to people based on their gender identity (as opposed to their birth sex or genital anatomy). Where possible, it is always a good idea to have a gender neutral restroom option available. However, use of a gender-neutral bathroom should be an option for anyone who wishes to use it; a transgender employee should not be forced to use a gender-neutral bathroom, and forcing the person to do so may be unlawful. Finally, your co-workers should be trained in basic transgender cultural competency including understanding preferred name and pronoun usage.

#### **6. Offer Inclusive Health Insurance**

Many health insurance policies specifically exclude coverage for transition-related health care. These exclusions often prevent transgender employees from obtaining medically necessary care such as hormone replacement therapy. Exclusions may even jeopardize a transgender employee's ability to get care for a procedure that has nothing to do with their transition. More and more employers are recognizing this inequality in the workplace and entering into health insurance contracts that do not exclude transition-related care. Advocate for your employer to become one of them.

### **Co-Workers**

Transgender people are employed in every industry and profession throughout the country. As a community, however, transgender people face enormous amounts of employment discrimination leading to high rates of unemployment and underemployment. Ensuring that your workplace is one in which all employees can fully participate is vital to combating discrimination and providing competent services to transgender clients. Here are some ways to ensure that transgender co-workers feel welcome.

- 1. Create meaningful and enforceable non-discrimination policies.** It is important to have a general statement of non-discrimination that includes transgender people. It is even more helpful to provide specific guidelines explaining what non-discrimination means in this context. Such guidelines would include information about the need to use a person's correct name and pronoun, restroom accessibility, and confidentiality.
- 2. Have staff trainings.** Whether you know that you have a transgender employee on staff or not, it is important to have staff trainings on the issue. Some transgender employees may not be "out" about their transgender status and may have transitioned years before coming to the

company. In addition, while most staff want to be supportive of transgender co-workers, many will need guidance on how to do so. Trainings are a much more effective way of creating a respectful environment than simply relying on written policies.

- 3. Respect confidentiality and privacy.** It is almost never necessary to disclose a person's transgender status to clients or other co-workers. In addition, it is never appropriate to do so without permission from your transgender co-worker. Also, it is also generally inappropriate to ask co-worker questions about their private medical history or treatment. Such inquiries may violate HIPAA privacy rules. If you have information about the health care that someone has accessed as part of their transition, do not freely share it with anyone else unless your transgender co-worker has given you permission to do so.
- 4. Help co-workers who are having trouble with another employee's transition.** It is vitally important that co-workers assist and support one another in respecting a transgender co-worker's gender identity. When a transgender person transitions on the job, it can sometimes be difficult for co-workers to remember to use the correct name and pronoun. If you hear a co-worker using the wrong name or pronoun, talk to them about it. It is likely just an unintentional slip and they will appreciate the reminder. However, if you hear co-workers making inappropriate comments about a transgender co-worker's appearance or medical history, it is important to intervene in a respectful and constructive way. In most cases, co-workers genuinely want to be accepting and supportive of transgender co-workers and may simply not be fully aware of how to do so.
- 5. Don't assume that a transgender co-worker either knows about all transgender issues or wants to work on transgender cases.** While some transgender employees may have a special interest in working on or discussing transgender-related issues, others may not. If you have an employee whom you know to be transgender, make sure that you aren't expecting them to have all of the answers or to do your research for you. Expecting a transgender person to be the company's expert on all things transgender is both an unfair burden on that person and can inadvertently serve to tokenize them within the company.

#### **Resources:**

*Representing Transsexual Clients*

[http://www.nclrights.org/site/DocServer/Proyecto\\_Poderoso\\_Flyer\\_cd.pdf?docID=2321](http://www.nclrights.org/site/DocServer/Proyecto_Poderoso_Flyer_cd.pdf?docID=2321)

*State of Transgender California*

[http://www.transgenderlawcenter.org/pdf/StateTransCA\\_report\\_2009Print.pdf](http://www.transgenderlawcenter.org/pdf/StateTransCA_report_2009Print.pdf)

*California Transgender Law 101: A Practice Guide for Attorneys and Advocates*

[http://transgenderlawcenter.org/pdf/ca\\_trans\\_law\\_101.pdf](http://transgenderlawcenter.org/pdf/ca_trans_law_101.pdf)

*Advancements in State and Federal Employment Law in Regards to Transgender Employees*

<http://transgenderlawcenter.org/pdf/AdvancInStateAndFedLawReCATransEmployees.pdf>

# Asylum Claims Based on Sexual Orientation or Gender Identity

## Resource List

1. ILRC's Asylum Manual, available at [www.ilrc.org](http://www.ilrc.org)
2. Immigration Equality's Asylum Manual, available at [www.immigrationequality.org](http://www.immigrationequality.org) (see Chapters 11 and 13 included in your materials as excerpts)
3. Immigration Law and the Transgender Client, Presented by Immigration Equality and the Transgender Law Center and available at [www.aila.org](http://www.aila.org)
4. Asylum Law.org, [www.asylumlaw.org](http://www.asylumlaw.org) page on "Sexual Minorities and HIV Status." This website provides extensive country conditions resources and links to helpful organizations and websites.
  - a. You may also contact Dusty Araujo at Heartland Alliance [DAraujo@heartlandalliance.org](mailto:DAraujo@heartlandalliance.org)
5. Center for Gender and Refugee Studies at <http://cgrs.uchastings.edu>. CGRS' area of expertise is in the area of asylum law, including claims based on particular social group, such as gender-based, gang-based and sexual orientation-based claims.
6. Advocates for Informed Choice, [www.aiclegal.org](http://www.aiclegal.org). AIC Legal specializes on advocacy on behalf of persons with intersex conditions or differences of sex development (DSD).
7. Immigrant Law Center of Minnesota, <http://www.ilcm.org/>. ILCM's area of expertise covers asylum claims based on membership in a particular social group.

<http://www.immigrationequality.org/issues/law-library/lgbth-asylum-manual/thorny-issues/#>

## 11. Immigration Basics: Thorny Issues in LGBT/H Asylum Cases

Some asylum applications are relatively straightforward. The applicant is filing within one year of his last arrival in the United States, he has severe past persecution with documentation to corroborate the abuse, and he has never done anything wrong in the United States or in his native country. Cases such as this are relatively easy to work on, and with careful preparation have a strong chance of winning.

Often, however, clients are not so perfect. When asylum applications include facts which seem to undermine the claim, it is important to address these facts head on. Asylum Officers, Judges, and ICE attorneys will be looking for these issues and will confront your client with them. It is therefore best to have the applicant raise difficult issues first so that he can fully explain the circumstances of the bad fact. There are some issues in particular which arise frequently in LGBT/H asylum issues which require extra thought and preparation.

### 11.1 Marriage

It is essential to remember in preparing a sexual orientation-based asylum claim, that the first element which must be proven to the adjudicator is that the applicant really is lesbian or gay. This can be accomplished by including affidavits, letters and/or testimony from current and/or past romantic partners. Proof of sexual orientation can also be bolstered by including evidence that the applicant is involved in LGBT organizations. And, of course, the applicant's detailed and compelling written and oral testimony about romantic feelings are crucial.

But what if the applicant was or is married? Will this be fatal to a sexual orientation-based asylum application? The answer, as with most asylum issues, is, it depends. It is important when preparing the case to realize that this will be a significant issue and to prepare the client to talk about the marriage honestly.

#### 11.1.1 Marriage in the Home Country

In many cases an asylum applicant will have married in her own country because her family forced her into the marriage, because she was hoping the marriage would work and she could "cure" her sexual orientation, or because she believed the marriage would provide her with a "cover" which would allow her to continue to seek same sex relationships with other women. In situations where the applicant tried to be married and the marriage failed because of the applicant's sexual orientation, the marriage (and possible divorce) itself can become part of the evidence of the applicant's sexual orientation. It is important, if possible, to corroborate the failure of the marriage, whether this is through a letter from the (ex)spouse, a letter from a friend or family member in whom the applicant confided, or a letter from a therapist who tried to help save the marriage.

The longer the marriage lasted, and the deeper the commitment appeared to be, for example, if the couple had children, the more in depth the explanation the applicant should be prepared to give. Expert testimony from a psychiatrist or psychologist can be essential to a case where the applicant appeared to lead a heterosexual life in the past. It is important to remember that the asylum adjudicator is probably heterosexual and may need to be educated about the complex psychological components that make up a person's sexual orientation.

### **11.1.2 Marriage in the United States**

If the applicant married a person of the opposite sex in the United States, he will be facing an even more difficult obstacle in his asylum application. It is possible that the applicant married an opposite sex spouse in the United States for the same reasons he might have done so in his own country: the hope of "overcoming" his gay feelings or the hope that he could appease his family. Of course, without the extreme societal pressures which may come to bear on the applicant in his own country, it is more difficult to explain why he would feel the need to marry in the United States where, at least in theory, gay people are free to pursue relationships with members of the same sex. In a situation where the applicant marries in the United States, it will be essential to have a mental health expert testify about the coming out process and the applicant's motivations for entering into the marriage.

An even more difficult situation arises when the applicant married a U.S. citizen or legal permanent resident for the purpose of obtaining a "green card" without truly intending the marriage to be bona fide. In dealing with this situation it is important to remember, first, that an asylum applicant must be truthful at all times. There is no more serious wrong an applicant for immigration status can commit than to intentionally fabricate information in an asylum application, so if the applicant never intended the marriage to be real, he must be truthful about this. Admitting that the applicant committed immigration fraud will probably mean that the applicant will be ineligible for asylum and will instead be focusing on his application for withholding of removal. In addition to meeting the elements of a the refugee definition, a successful asylum application requires a "favorable exercise of discretion" (SeeSection# 3.4) and it is unlikely that an adjudicator will exercise this discretion if the applicant admits to having committed immigration fraud.

The other danger with admitting that the applicant previously submitted a fraudulent application is that the adjudicator may find that if the applicant lied to the government in the past in an effort to receive an immigration benefit, he may be doing so again with the current asylum application. It is important to work closely with a client in this difficult situation to make sure that he testifies with complete candor about the marriage and his motivations for entering into it so that the adjudicator believes his current testimony. It is also important to focus on corroborating the applicant's homosexual sexual orientation, as well as to provide other evidence of the applicant's good moral character so that the adjudicator can see that the fraudulent marriage was an aberration borne out of desperation rather than that the applicant is generally untrustworthy.

## **11.2 Bisexual Claims**

One reason that an applicant may be married now or may have married in the past, may be that she identifies as bisexual rather than homosexual. There are no precedential asylum claims recognizing bisexuals as a particular social group. As with any other asylum claim, whether or not the claim of a bisexual applicant will succeed will be very dependent on the particular facts of the case.

If the applicant suffered past persecution because of bisexuality, there is a rebuttable presumption that she will suffer future persecution. If she is currently married to a man who would return with her to her country if she is removed, this change in circumstances may be sufficient for ICE to rebut the presumption of future persecution. On the other hand, if the applicant was known to have had same sex relationships in her country, and will be presumed to be a lesbian

and face future persecution as a result, she could argue that the fact that she has had some relationships with men would not protect her from the abuse she would face in the future.

Asylum adjudicators often want the issues in cases to be black and white. It is not hard to imagine an asylum adjudicator taking the position that if the applicant is attracted to both sexes, she should simply “choose” to be with members of the opposite sex to avoid future persecution. In a case which is based on bisexual identity, it will be very important to include the testimony of a mental health expert who can describe for the adjudicator that bisexual individuals do not “choose” whether to fall in love with men or women any more so than anyone else “chooses” whom they fall in love with.

### **11.3 The Applicant Does not “Look Gay”**

While it is always necessary for an asylum applicant to prove that he actually is a member of the particular social group of homosexuals, it is especially important to focus on this element of the case if the applicant does not fit the stereotype of an “effeminate gay man” or a “masculine lesbian woman.” Every adjudicator approaches an asylum application with his or her own biases. If the applicant “looks gay” to the adjudicator based on whatever stereotypes or “gaydar” the adjudicator brings to the interview or hearing, it is probably more likely that the applicant will win the case. There are several reasons for this.

First, most LGBT applicants cannot prove their membership in a particular group as clearly as other asylum applicants can prove, for example, their affiliation with a political party or their ethnic group. Asylum adjudicators are often fearful that an applicant has completely fabricated his claim simply to remain in the United States. If, on a gut level, the adjudicator believes the applicant is gay or lesbian, it is much more likely that the adjudicator will believe other aspects of the case.

Second, even if the adjudicator does believe that the applicant is homosexual, the adjudicator will also question how the applicant’s government or other members of society will know the applicant’s sexual orientation such that he will be likely to suffer harm in his country. If the applicant is a “flaming queen” it may be easier for the adjudicator to picture the applicant being gay bashed on the street or abused by policemen than if the applicant looks like a professional athlete. If the adjudicator can’t tell that the applicant is gay, the adjudicator may question how the applicant’s countrymen could tell.

This is precisely the issue in the *Soto-Vega v. Ashcroft*,<sup>1</sup> a case which is currently pending in the Ninth Circuit. In *Soto-Vega*, the Immigration Judge found that although the applicant had suffered past persecution both by the police and the public in his native Mexico, the applicant did not “look gay” to the Judge, so he did not believe the applicant would suffer future persecution. The BIA affirmed the Judge’s ruling without opinion, and the case is now in federal court. Of course, having found past persecution, the applicant was entitled to a presumption of future persecution which the Judge’s own informal observations should not have rebutted. The other important lesson from *Soto-Vega*, however, is how important it is to develop the record (which fortunately *Soto-Vega*’s attorneys did) regarding the applicant’s sexual orientation. In *Soto-Vega* a witness who was an expert on country conditions in Mexico for LGBT individuals, testified that according to cultural markers in Mexico, *Soto-Vega* was obviously recognizable as a gay man. This testimony in the record is a crucial part of *Soto-Vega*’s appeal.

In cases where the applicant does not fit the U.S. stereotype of gay man or lesbian woman, the applicant’s representative must make sure that the record contains as much corroborating evidence as possible that the applicant really is homosexual. (See Section # 20.2.1). The applicant must also be prepared to prove that she would be recognized as a homosexual person in her country and would face persecution as a result. Obviously, if she has

already been persecuted in the past, this should be compelling evidence both that she was previously recognized as a lesbian and that her sexual orientation would be known in her country if she returns. Testimony from a country conditions expert that the applicant “looks homosexual” according to the cultural norms of her country can also be very important to the success of the case. It is also important to include other evidence of how the applicant’s sexual orientation would become known. For example, in many cultures it is unheard of for a 30 year old man to be unmarried. In other societies the fact that two adults of the same gender are living in the same household would immediately subject them to scrutiny from their neighbors and the government. It is essential to get this evidence into the record, both through country condition reports and expert testimony.

## 11.4 Multiple Return Trips to Country of Origin

The classic factual scenario for an asylum seeker is that the applicant suffers some terrible incident of persecution in his country, flees his country as soon thereafter as possible, and seeks asylum in the United States shortly after arriving here. Cases with this fact pattern are certainly not uncommon, but frequently the realities of asylum seekers’ lives don’t fit so neatly with this paradigm.

Often LGBT/H individuals have no idea that their sexual orientation, transgender identity or HIV-positive status could be grounds for seeking asylum in the United States. Thus many LGBT/H individuals who visit the United States are careful to return to their countries before their authorized stay expires so that they won’t lose the ability to return to the United States in the future. This is often especially true for individuals who are HIV-positive and visiting the United States regularly to obtain medication that is unavailable in their home countries.

If the applicant has returned to his home country after leaving the United States, the adjudicator will certainly want to know why the applicant fears for his safety in returning now when he returned of his own volition in the past. In many cases there was one final incident that occurred to the applicant or to someone the applicant knows which made the applicant realize once and for all that it would be unsafe to remain in his country. The representative should always discuss with the client what compelled him to flee to the United States permanently this last time.

The Ninth Circuit has recently addressed the issue of return trips to the home country after having been persecuted and reiterated that that Circuit has “never held that the existence of return trips standing alone can rebut th[e] presumption [of future persecution.]”<sup>2</sup> In *Boer-Sedano*, the applicant was a gay man with AIDS from Mexico who had suffered past sexual and physical abuse by a police officer because of his sexual orientation. The Court found that Boer-Sedano’s several return trips to Mexico to gather enough income to relocate permanently in the United States did not render him ineligible for asylum.

As with most issues in asylum cases, whether or not an applicant’s return trips to his country of origin are fatal to his asylum application will depend on the specific facts of the case. It is important for the representative to explore this topic fully with the client and prepare the applicant to explain the reason for the trips to the adjudicator. The applicant should also be prepared to explain (and if possible corroborate) any ways in which he modified his behavior while back in his country. For example, if he remained in his country for a brief time, he avoided gay meeting places and he rarely left his home, these facts may help an adjudicator understand why the applicant was able to escape harm on the trip home.

Be careful, however, that these facts don’t backfire into an adjudicator determining that if the applicant does not “flaunt” his homosexuality, he can avoid harm in his country. The applicant (and representative) should be prepared to argue that it is one thing to spend a couple of weeks avoiding the public eye and potential harm, but it is quite another thing to be forced into a life of celibacy to survive. In another recent 9th Circuit case, *Karouni v. Gonzales*,

the Court addressed this issue, finding that it was unacceptable to saddle Karouni, a gay, HIV-positive man from Lebanon, with the “Hobson’s choice of returning to Lebanon and either (1) facing persecution for engaging in future homosexual acts of (2) living a life of celibacy.”<sup>3</sup> Thus the applicant should be able to explain why he would fear having to live in his country again, including his fear of persecution if he had a romantic partner or tried to find a romantic partner, even if he was able to escape harm on a brief visit.

Likewise, HIV-positive applicant may be able to demonstrate that they avoided harm on a brief trip to their home country by bringing enough medication to last for the trip. The applicant could argue that by avoiding seeking medical care (something that would be impossible to do if he returned to his country permanently) he was able to conceal his HIV-positive status.

## 11.5 Criminal Issues

The interplay between criminal law and immigration law is one of the most complicated areas in the complicated area of immigration law. As such, it is generally beyond the scope of this manual. However, anyone who is representing an asylum seeker must know a few basics about how criminal convictions can affect eligibility for asylum and withholding of removal. Applicants who meet the heightened standard for relief under the Convention against Torture cannot be removed to the country where they would face torture regardless of their criminal history in the United States, though they can face indefinite detention here if they are deemed to be a threat to the community.

The asylum applicant must answer questions on the I-589 about criminal convictions and arrests, so the representative must impress upon the applicant the importance of discussing past criminal activity openly. All asylum applicants are fingerprinted multiple times during the application process, and if the applicant was arrested in the United States, it is extremely unlikely that DHS would not know about the arrest.

Applicants for both asylum and withholding are considered statutorily ineligible if they have been convicted of a “particularly serious crime.” For purposes of asylum applications, any conviction for an aggravated felony<sup>4</sup> will render the applicant statutorily ineligible.<sup>5</sup> For purposes of withholding of removal, if the applicant has been convicted of one or more aggravated felonies for which the aggregate term(s) of imprisonment are five years or more, he will be statutorily ineligible for having committed a “particularly serious crime.”<sup>6</sup> Even if the applicant’s aggregate prison term was under five years, the adjudicator can still make an individualized inquiry as to whether or not the conviction rose to the level of a “particularly serious crime” to determine whether or not the applicant is statutorily eligible.

Even if the applicant’s conviction was for a crime that did not rise to the level of an aggravated felony, the conviction can lead to the denial of an asylum application. The leading case on determining whether or not a criminal conviction is a “particularly serious crime” is *Matter of Frentescu*.<sup>7</sup> Additionally, to qualify for asylum, an applicant must merit a favorable exercise of discretion. Thus, even if an asylum applicant’s conviction is not found to be a “particularly serious crime” and does not render him statutorily ineligible for asylum, an adjudicator may still deny the application on discretionary grounds. If the applicant committed a crime, it will be crucial to the case for the applicant to fully explain the circumstances of the conviction and (if possible) to express remorse and demonstrate rehabilitation. If the applicant committed a “serious nonpolitical crime” in her own country or any other country outside the United States, she is also statutorily ineligible for asylum or withholding.<sup>8</sup> Again, it is important to question the applicant thoroughly about any criminal activity before she arrived in the United States. In many cases, the applicant may have faced arrest or conviction because of her sexual orientation. If the applicant is being prosecuted for engaging in a protected activity, such as having private, consensual sexual relations, such an arrest would not render the applicant ineligible for asylum and would actually be an important part of her claim.

## 11.6 Prior Government Employment

Another issue which a representative should explore with the applicant is whether or not he was employed by the government in his country of origin. In the classic paradigm of an asylum case, where an applicant was a political activist against a dictatorial government, it was reasonable to conclude that employment by that same government would undermine the claim. In most LGBT/H asylum cases, the primary problem that applicants have experienced from the government has been abuse by the police or military, or failure by the police to protect against harm from private individuals. Given this fact pattern, employment as a government clerk or the like should not render an applicant ineligible for asylum, but it may still be an issue which an adjudicator pursues. After all, if the applicant's claim is that the entire country is intolerant of sexual minorities, and sexual minorities face abuse and discrimination, why would the government hire a gay person? If the answer to this question is that the applicant kept his sexual orientation hidden from his employer, then an adjudicator might reasonably question how the police, individuals on the street, or other potential persecutors would be aware that the applicant was gay when those as close to him as his employer remained unaware. Again, the answers to these questions will be specific to the facts of the case, but it is an issue which the representative must prepare the applicant to discuss with the adjudicator.

## 11.7 Visa Waiver Program

If an applicant entered the United States without a visa under the Visa Waiver Program (VWP),<sup>9</sup> she is not entitled to an interview with an Asylum Officer. Instead, her application will be heard by an Immigration Judge in asylum only removal proceedings.<sup>10</sup> Most entrants under the VWP, a program which allows foreign nationals from low risk visa violating countries to enter the United States for up to 90 days without first applying for a tourist visa, come from Western Europe and would therefore not be seeking asylum in the United States. The issue does arise at times, however, when the applicant has dual citizenship with a VWP country and enters the United States using the passport of the VWP country. Also, while Argentina has been removed from the VWP list, there are Argentine nationals who entered the United States under the VWP as it existed several years ago who may wish to seek asylum because of their sexual orientation.

## 11.8 Dual Nationality

If an asylum applicant has dual nationality, that is she is a citizen of more than one country and has the legal right to reside in and enjoy full citizenship rights in both countries, this can be a reason to deny the asylum application. The principle behind asylum applications in the United States is not that the application is a way to choose to live legally in the United States but rather that it is an application of last resort to avoid persecution. Thus, if the applicant has a safe alternative in another country, the United States can remove the applicant to that country. Therefore if an applicant is a dual citizen of Venezuela and Spain, it will be very difficult to win an asylum case in the United States since Spain now grants greater rights to gay and lesbian citizens than the United States does. On the other hand, if the applicant is a dual citizen of Venezuela and Colombia, the applicant may be able to prevail on an application based on persecution in Venezuela, but will also have to prove, through country conditions documentation, that Colombia is also an unsafe country for LGBT/H people.

This Manual is intended to provide information to attorneys and accredited representatives. It is not intended as legal advice. Asylum seekers should speak with qualified attorneys before applying.

Notes:

1. See <http://www.lambdalegal.org/cgi-bin/iowa/cases/record?record=213> ↩

2. *Boer-Sedano v. Gonzalez*, 418 F.3d 1082, 1091 (9th Cir. 2005). ↩
3. *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005). ↩
4. For a definition of aggravated felonies see § 101(a)(43). Aggravated felonies include but are not limited to: murder; rape; drug trafficking; certain firearms offenses; money laundering or crimes of fraud for amounts over \$10,000; crimes of violence for which the term of imprisonment is at least one year; theft or burglary for which the term of imprisonment is at least one year; child pornography offenses; racketeering and gambling certain prostitution offenses; and certain alien smuggling offenses. INA §101(a)(43). It is important to understand that even crimes which are not considered felonies under state law can be considered aggravated felonies for immigration purposes. ↩
5. INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158 (b)(2)(B)(i) (2005). ↩
6. INA § 241(b)(3)(B), 8 U.S.C. § 1231 (b)(3)(B) (2005). ↩
7. 18 I. & N. Dec. 244 (BIA 1982). ↩
8. INA § 208(b)(2)(A)(iii), 8 U.S.C. § 1158 (b)(2)(A)(iii) (2005) and §241(b)(3)(B)(iii), 8 U.S.C. § 1231 (b)(3)(B)(iii) (2005). ↩
9. For more information on the VWP see [http://travel.state.gov/visa/temp/without/without\\_1990.html](http://travel.state.gov/visa/temp/without/without_1990.html). ↩
10. 8 C.F.R. § 217.4(a)(1) (2005). ↩

<http://www.immigrationequality.org/issues/law-library/lgbth-asylum-manual/thorny-issues/#>

<http://www.immigrationequality.org/issues/law-library/lgbth-asylum-manual/working-with-lgbth-asylum-seekers/>

## 13. Working with LGBT/H Asylum Seekers

If this is your first case working with a lesbian, gay, bisexual, transgender and/or HIV-positive client, you may be unsure of what questions are appropriate to ask and which are not.

The basic rule, as with all aspects of asylum cases, is to be respectful, non-judgmental, and, for the most part, limit your questioning to issues that are relevant to the development of the case. If you are LGBT/H yourself, you may want to disclose this to your client if you believe this will make him feel more comfortable. On the other hand, you may feel comfortable not disclosing personal details of your life to your client. There is no right or wrong approach, but the more comfortable you feel with your client, the more comfortable you will make him feel to open up about the basis of his claim.

Remember that sexual orientation, gender identity and HIV status are all separate issues. An applicant may have claims based on more than one of these issues simultaneously, but you should treat each issue separately. Do not make assumptions. Just because an applicant is HIV-positive, doesn't mean that he's gay. Just because an applicant is transgender, doesn't mean that her romantic relationships are with men.

### 13.1 Working with Lesbian, Gay and Bisexual Clients

It is important to understand that every client is different. Some clients will be very open about their sexual orientation, while others may feel very reticent to talk about an aspect of their identity that they perceive to be a "problem." Follow your client's lead, make her feel comfortable, and understand that it will take time and several meetings before she begins to reveal information about her case.

It is often a good idea to use the same language that the client uses to describe herself. Thus if your client refers to herself as a "lesbian," you can ask her, "When did you first realize that you were a lesbian?" If she uses the word "gay," use the word "gay." If your client calls herself a lesbian, it is best not to refer to her as "homosexual" because this word often has negative clinical connotations.

Remember clients who come from different cultures which are not as open about sexual orientation issues may not use the same terms to talk about their sexuality. Thus, you may ask your client, "When did you come out as a lesbian?" and she may now know what this means. Use your common sense and don't leap to conclusions because your client expresses her sexuality in a way that's different from you (even if you are LGBT/H yourself).

If your client is bisexual, explore what this means to her. Sometimes clients from very homophobic cultures will self-identify as bisexual rather than homosexual even though they don't really have any interest in the opposite sex,

because bisexuality seems less taboo than homosexuality. On the other hand, if your client has only had relationships with members of the opposite sex, and is not sure if she will ever act upon her attraction to women, it may be impossible to prove that she is a member of the particular social group of bisexuals. See Section # 11.2 for more information about bisexual claims.

» *Practice pointer: Avoid the terms “sexual preference” and “lifestyle.” “Sexual preference” sounds like the client’s orientation is not immutable, like she may “prefer” women to men, but that it is something which could, perhaps be changed. Likewise, “lifestyle” sounds like a choice. Deciding to live in a fancy apartment in Manhattan versus renting a more reasonable priced outer borough apartment is a “lifestyle” choice; falling in love with someone of the same sex is not.*

## 13.2 Working with Transgender Clients

If you have never worked with a transgender client before, remember the basic rules, be respectful and non-judgmental. The term “transgender” can have different meanings to different people. For some, being transgender simply means not conforming to rigid gender norms, and thus some people, for example very butch lesbians, or effeminate gay men may identify as transgender although they do not believe that their bodies do not match their gender identity.

For others, the term “transgender” means that the individual feels that the anatomical sex with which she was born does not match her gender identity. Transgender people who feel this way often take medical steps to make their anatomy match their gender identity.

Transgender people often refer to the anatomical sex which was assigned to them at birth as their “birth sex.” The process of taking medical steps, such as hormone therapy, electrolysis, and/or surgery, to give an outward appearance that matches gender identity, is often called “transitioning.” When referring to a client’s gender or sex after transitioning, the phrase “corrected gender” or “corrected sex” is often used.

When working on the asylum claim with your client, you’ll want to ask her about any problems she had as a child. Maybe she was perceived as particularly effeminate and suffered mistreatment as a result. You’ll want to find out when she first realized that she was transgender and when she began living as a female. You can also ask whether she’s taken any medical steps to transition and whether she has any plans in the future to transition further.

Remember, most transgender people never have genital reassignment surgery. Surgery is expensive and rarely covered by health insurance. For transgender men (F→M) the surgical techniques are not as advanced as they are for transgender women. Gender identity is comprised of much more than just anatomy, and some transgender people never choose to undergo any medical steps to transition.

Also, remember that being “transgender” is not a third category of gender; transgender people, like non-transgender people, are either male or female. Don’t refer to your client as a “transgender” person; refer to her as a transgender woman.

It is also important to understand that gender identity and sexual orientation are different aspects of a person’s identity. Transgender individuals, like non-transgender individuals may consider themselves heterosexual, homosexual, or bisexual. Don’t make assumptions about your client’s sexual orientation based upon her gender identity. On the other hand, remember that even if your client identifies as heterosexual, he may be perceived as homosexual in his country and may fear persecution on this basis. For example, if an F→M transgender man had a

relationship with a woman in his country in the past, people in his community may have considered the relationship lesbian, even if the applicant and his partner viewed the relationship as heterosexual.

### **13.3 Working with HIV-Positive Clients**

If your client's case is based in whole or in part on his HIV-positive status, you'll need to get some information about his health. Remember HIV and AIDS are not synonymous; HIV is the virus which leads to AIDS. Your client can be HIV-positive without having full-blown AIDS. It is only after an individual has suffered an AIDS-defining symptom, or had his CD4 cell count fall below 200, that he is given an AIDS diagnosis. Once a person is diagnosed with AIDS, he will always be considered to have AIDS even if his CD4 cells rise and/or his symptoms go away. You should be prepared to educate the adjudicator about the difference between being HIV-positive and having AIDS. For information about AIDS-defining symptoms, see [www.health.state.ny.us/diseases/aids/facts/questions/appendix.htm](http://www.health.state.ny.us/diseases/aids/facts/questions/appendix.htm). You should find out when your client was diagnosed with HIV as this will generally be relevant to the case. Sometimes a recent HIV diagnosis can be used as an exception to the one year filing deadline. On the other hand, if your client was diagnosed with HIV in his own country, it will be important to elicit whatever information you can about problems he experienced as a result of his HIV.

How your client contracted HIV is generally not relevant to the case. Unless your client believes that he contracted HIV as a result of the persecution he suffered (for example being raped) there's probably no reason to question your client about how he may have been infected with HIV.

You should make sure that your client is currently receiving medical care, and if he is not, you should try to find an appropriate referral for him to do so. As the attorney in your client's asylum case, it is generally not appropriate for you to give your client medical advice, or to counsel him about HIV transmission. If you believe your client is not getting appropriate medical treatment or is engaging in unsafe behavior, you should refer him to an appropriate medical/social service professional. The non-profit organization which referred you the case should be able to provide you with referrals.

You should talk with your client about any medical problems he's had as a result of his HIV, whether he's ever been hospitalized, and what medications, if any, he is currently taking. You should get a letter from his medical and/or social service professional detailing the course of his illness, what medications he is currently taking, and what would happen if the medications were no longer available.

Some states, such as New York, have very strict laws about revealing confidential HIV information. Before a medical or social service professional can speak with you about a case, your client will have to sign a specific HIV release form. Although attorneys are not strictly required to have a client sign such a release before disclosing his HIV information (for example to CIS), it is best practice to have your client sign the form. The form is available at [www.health.state.ny.us/forms/doh-2557.pdf](http://www.health.state.ny.us/forms/doh-2557.pdf).

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<http://www.immigrationequality.org/issues/law-library/lgbth-asylum-manual/working-with-lgbth-asylum-seekers/>

**MATTER OF TOBOSO-ALFONSO**

In Exclusion Proceedings

A-23220644

*Decided by Board March 12, 1990<sup>(1)</sup>*

An applicant, who had the status of being a homosexual, both established his membership in a particular social group in Cuba and demonstrated that his freedom was threatened within the meaning of section 243(h)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h)(1) (1990), on account of his membership in that group.

**EXCLUDABLE:** Act of 1952—Sec. 212(a)(9) [8 U.S.C. § 1182(a)(9)]—Crime involving moral turpitude

Sec. 212(a)(20) [8 U.S.C. § 1182(a)(20)]—No valid immigrant visa

Sec. 212(a)(23) [8 U.S.C. § 1182(a)(23)]—Convicted of controlled substance violation

**ON BEHALF OF APPLICANT:**

Harry A. Loftus, Esquire  
602 Sawyer, Suite 201  
Houston, Texas 77007

**ON BEHALF OF SERVICE:**

Patricia A. Cole  
General Attorney

**BY:** Milhollan, Chairman; Dunne and Heilman, Board Members. Dissenting Opinion: Vacca, Board Member. Concurring in the Dissenting Opinion: Morris, Board Member.

In a decision dated February 3, 1986, the immigration judge found the applicant excludable under sections 212(a)(9), (20), and (23) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9), (20), and (23), denied his request for asylum, pursuant to section 208(a) of the Act, 8 U.S.C. § 1158(a), but granted his application for withholding of deportation to Cuba under section 243(h) of the Act, 8 U.S.C.

<sup>1</sup>As noted, this case was decided by the Board on March 12, 1990. By Attorney General Order No. 1895-94, dated June 19, 1994, the Attorney General ordered: "I hereby designate the decision of the Board of Immigration Appeals in *In re: Fidel Toboso-Alfonso* (A23 220 644) (March 12, 1990) as precedent in all proceedings involving the same issue or issues."

Interim Decision #3222

§ 1253(h). The Immigration and Naturalization Service has appealed this decision. The appeal will be dismissed.

The applicant is a 40-year-old native and citizen of Cuba who was paroled into the United States in June of 1980, as part of the Mariel boat lift. In 1985 his parole was terminated. He was placed in exclusion proceedings and appeared before an immigration judge in Houston, Texas. The applicant conceded his excludability and applied for asylum and withholding of deportation to Cuba.

The immigration judge ultimately concluded that the applicant was statutorily eligible for asylum and withholding of deportation as a member of a particular social group who fears persecution by the Cuban Government. He denied the applicant's request for asylum in the exercise of discretion, but granted him withholding of deportation.

The Service contends that the applicant did not meet his burden of proof, that the evidence presented was inadequate to prove the existence of a particular social group or a clear probability of persecution in Cuba, and that he was ineligible for withholding in view of his conviction for possession of cocaine. As the applicant did not appeal from the immigration judge's decision, the only issues now before us pertain to the immigration judge's grant of withholding of deportation to Cuba to this alien.

An alien who seeks withholding of deportation from any country must show that his "life or freedom would be threatened in such a country on account of race, religion, nationality, membership in a particular social group, or political opinion." Section 243(h)(1) of the Act. In order to make such a showing, the alien must establish a "clear probability" of persecution on account of one of the enumerated grounds. *INS v. Stevic*, 467 U.S. 407 (1984). This "clear probability" standard requires a showing that it is more likely than not that an alien would be subject to persecution. Unless an alien is barred from relief under the provisions of section 243(h)(2), once he establishes that he qualifies for withholding of deportation, it must be granted and he cannot be returned to the country where he would face persecution. He can, however, be sent to another country under certain circumstances.

In the instant case, the applicant asserts that he is a homosexual who has been persecuted in Cuba and would be persecuted again on account of that status should he return to his homeland. He submits that homosexuals form a particular social group in Cuba and suffer persecution by the government as a result of that status.

The applicant testified that there is a municipal office within the Cuban Government which registers and maintains files on all homosexuals. He stated that his file was opened in 1967, and every 2 or 3 months for 13 years he received a notice to appear for a hearing. The notice, the applicant explained, was a sheet of paper, "it says Fidel

Armando Toboso, homosexual and the date I have to appear." Each hearing consisted of a physical examination followed by questions concerning the applicant's sex life and sexual partners. While he indicated the "examination" was "primarily a health examination," he stated that on many occasions he would be detained in the police station for 3 or 4 days without being charged, and for no apparent reason. He testified that it was a criminal offense in Cuba simply to be a homosexual. The government's actions against him were not in response to specific conduct on his part (e.g., for engaging in homosexual acts); rather, they resulted simply from his status as a homosexual. He further testified that on one occasion when he had missed work, he was sent to a forced labor camp for 60 days as punishment because he was a homosexual (i.e., had he not been a homosexual he would not have been so punished).

The applicant stated that at the time of the Mariel boat lift, the Union of Communist Youth received permission to hold a demonstration against homosexuals at the factory where he worked. Several of the members got on top of a table and screamed that all homosexuals should leave—should go to the United States. He testified that on that same day there was a sheet of paper tacked to the door of his home which stated that he should report to "the public order." The applicant presented himself at the police station in the town of "Guines" where he was informed by the chief of police that he could spend 4 years in the penitentiary for being a homosexual, or leave Cuba for the United States. He was given a week to decide and decided to leave rather than be jailed.

The applicant further testified that the day he left his town, the neighbors threw eggs and tomatoes at him. He claims that the situation was so grave that the authorities were forced to reschedule his departure time from the afternoon to 2:00 a.m., in order to quell the protesting residents.

In addition to the applicant's testimony, he supplemented the record with the following information: several articles describing "Improper Conduct," a film which centers on the testimony of 28 Cuban refugees and recounts the human rights violations, including incarceration in forced labor camps known as "Military Units to Aid Production," suffered by Cubans whom the Government considers to be dissidents or "antisocial," particularly male homosexuals; a newspaper article entitled, "Gay Cubans Survive Torture and Imprisonment," in which Cuban homosexuals in the United States, most of whom were part of the Mariel boat lift, describe their treatment by the Cuban Government, including repeated detentions, incarcerations, and physical beatings; and, Amnesty International's Report for 1985 which describes the political situation in Cuba.

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The immigration judge found the "applicant's testimony to be credible and worthy of belief, and, if anything, perceive[d] that he was restrained in his testimony as to the difficulty of his life during the years that he lived in Cuba." The immigration judge further concluded that the applicant had been persecuted in Cuba and that he has a well-founded fear of continued persecution in that country. He found that this persecution resulted from the applicant's membership in a particular social group, namely homosexuals. The immigration judge denied the applicant's asylum application in the exercise of discretion because of the nature of the applicant's criminal record in the United States. However, as the immigration judge found that the applicant's crimes did not bring him within the scope of section 243(h)(2)(B), he granted his application for withholding of deportation to Cuba.

The Immigration and Naturalization Service appeals from the grant of withholding of deportation to Cuba to the applicant, arguing that homosexuals were not a particular social group contemplated under the Act, that the applicant has not presented adequate evidence to show either a well-founded fear or a clear probability of persecution, and that the applicant is ineligible for relief under section 243(h) of the Act because of his conviction for possession of cocaine.

We do not find that the Service has presented persuasive arguments on which to reverse the immigration judge's finding that the applicant established his membership in a particular social group in Cuba. The Service argues that "socially deviated behavior, i.e. homosexual activity is not a basis for finding a social group within the contemplation of the Act" and that such a conclusion "would be tantamount to awarding discretionary relief to those involved in behavior that is not only socially deviant in nature, but in violation of the laws or regulations of the country as well." The applicant's testimony and evidence, however, do not reflect that it was specific activity that resulted in the governmental actions against him in Cuba, it was his having the status of being a homosexual. Further, the immigration judge's initial finding that a particular social group existed in Cuba was not "tantamount to awarding discretionary relief" to that group. Individuals in a particular social group are not eligible for relief based on that fact alone, among other showings they must establish facts demonstrating that members of the group are persecuted, have a well-founded fear of persecution, or that their life or freedom would be threatened because of that status.

We principally note regarding this issue, however, that the Service has not challenged the immigration judge's finding that homosexuality is an "immutable" characteristic. Nor is there any evidence or argument that, once registered by the Cuban government as a homosexual, that characterization is subject to change. This being the

case, we do not find the Service's challenge to the immigration judge's finding that this applicant was a member of a particular social group in Cuba adequately supported by the arguments set forth on appeal.

The next issue is whether the immigration judge erred in finding that the applicant had established that his life or freedom would be threatened in Cuba. The immigration judge not only found the applicant's testimony regarding the events in Cuba credible, but concluded that, if anything, he was "restrained in his testimony as to the difficulty of his life during the years that he lived in Cuba." In this regard, he noted that the applicant simply took as a matter of course that he "would be frequently detained for days [by government officials] while being subjected to verbal and physical abusive treatment." The applicant's testimony that simply because of his status as a homosexual he was advised by his government to leave the country or face incarceration for a period of 4 years is not contested. There is no evidence or allegation that this "choice" he was given resulted from any specific acts on his part or that the government did not intend to jail him if he failed to leave. The record indicates that rather than a penalty for misconduct, this action resulted from the government's desire that all homosexuals be forced to leave their homeland. This is not simply a case involving the enforcement of laws against particular homosexual acts, nor is this simply a case of assertion of "gay rights." Particularly in view of the final governmental threat that precipitated the applicant's departure from Cuba, we agree with the immigration judge's finding that the applicant's freedom was and is threatened within the contemplation of section 243(h)(1).

The final issue regarding his application for withholding of deportation to Cuba is whether he is ineligible for this relief under the provisions of section 243(h)(2)(B). Although we do not minimize the seriousness of the offenses for which this applicant was convicted, they are not "particularly serious crimes" as contemplated by section 243(h)(2)(B) of the Act, and the applicant is not barred from withholding of deportation. See *Matter of Garcia-Garrocho*, 19 I&N Dec. 423 (BIA 1986); *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1984). The applicant's drug conviction was for simple possession of cocaine and the Service agrees with the immigration judge's conclusion that the burglary offense was not a particularly serious crime within the scope of section 243(h)(2)(B).

In view of the mandatory nature of section 243(h), the immigration judge's grant of withholding of deportation to Cuba to the applicant will stand and the following order will be entered.

**ORDER:** The Service's appeal is dismissed.

*DISSENTING OPINION:* Fred W. Vacca, Board Member

I respectfully dissent.

As the majority correctly states, the sole matter before us on appeal is whether the applicant has demonstrated his eligibility for withholding of deportation to Cuba under the provisions of section 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h). To be eligible for withholding of deportation, the applicant must show that his "life or freedom would be threatened in such a country on account of race, religion, nationality, membership in a particular social group, or political opinion." Section 243(h)(1) of the Act. In order to make such a showing, he must establish a "clear probability" of persecution on account of one of these enumerated grounds. *INS v. Stevic*, 467 U.S. 407 (1984). This "clear probability" standard requires a showing that it is more likely than not that an alien would be subject to persecution.

On this record, I do not find that the applicant has shown a "clear probability" that his life or freedom would be threatened on account of one or more of the aforementioned grounds if he returns to Cuba. Accordingly, I would dismiss the appeal for this reason and order his exclusion and deportation to his country of nationality.

There are two principal factual aspects of the applicant's claim that he will likely be subject to persecution if returned to Cuba. The first relates to his treatment by the Cuban authorities from the time he was registered by the Government as a practicing homosexual in 1967 until 1980. The second relates specifically to the threat that was made to him in 1980—at the time of the "Marielito" exodus—to leave Cuba or be jailed for 4 years.

The applicant testified that he has been a practicing homosexual since he was 9 years old. The government apparently became aware of this fact in 1967 as he was put on a government register that year. He stated that he was never actually incarcerated because of his homosexuality. As a homosexual, however, he was called in and questioned by the authorities with some regularity. He testified that he was detained for several days "a whole bunch of times" as a result of "many investigations" because the authorities "said we knew everything ... homosexuals knew ... who was stealing and the assaults and everything." When asked whether the government examinations were primarily health examinations, the applicant responded: "Yes, and mostly ... so there wouldn't be any kind of disease or sickness." One specific incident the applicant referred to as occurring during this period was the subject of contradictory testimony. On one hand, he testified that he worked at a textile factory and that "no homosexuals could work there." Yet, when he violated a regulation about missing work for 3 days without a doctor's certificate, he stated that he was

sent to a work camp for 60 days because he was a homosexual. He testified that "if a woman missed out three days of work, and they didn't have anything like that against her, nothing would happen to her."<sup>1</sup>

The applicant testified in a general manner that some homosexuals were imprisoned or sent to work camps in Cuba and that a friend "got five years for what is called being a dangerous person." He noted that homosexuality was a criminal offense in Cuba.

I do not find this testimony regarding the circumstances of the applicant's previous experiences in Cuba as a known practicing homosexual to be such as to indicate a "clear probability" that his life or freedom would be threatened if he were to return to that country. There are apparently Cuban criminal laws regarding homosexuality.<sup>2</sup> The applicant himself characterized his experiences with the authorities as part of either investigations or health examinations. He did not describe these incidents as his being "incarcerated" because he was a homosexual. The United States Supreme Court has in fact found that state criminal sodomy laws do not violate the fundamental rights of homosexuals. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Considering the applicant's own characterization of the events, these experiences appear related to the investigation of criminal activities and the control of health matters rather than persecution of the applicant. The applicant presented some general background materials regarding the treatment of homosexuals (much of which relates to a documentary film describing "events of the middle and late sixties and early seventies"). The 1985 Amnesty International Report introduced by the applicant makes no reference to the treatment of homosexuals whatsoever. Particularly under such circumstances, I find the applicant's situation best evaluated in light of his own experiences over his 13 years as a known homosexual in Cuba.

The second aspect of the applicant's case, which I consider within the total factual context he has presented, is his testimony that in 1980 he was told by the authorities he would be jailed for 4 years if he did not leave the country. In my view, this threat must be evaluated in the context of the time and situation in which it was made. During the massive exodus of Cubans from Mariel in the spring of 1980, some departures were entirely voluntary, some coerced. Fidel Castro used

<sup>1</sup> He further testified in this regard that when he missed work "one would always try to justify with the doctor or something, but in that case, . . . I wasn't able to justify." The date of this incident was never made entirely clear. In his testimony, he stated that it occurred "around 1975." However, this was apparently the incident he referred to on his asylum application as occurring in 1977 and involving 90 days imprisonment.

<sup>2</sup> No evidence was presented as to the specifics of Cuban criminal law in this regard.

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the plight of the "Marielitos" as an opportunity to rid Cuba of many who were deemed undesirable by his government, including criminals and homosexuals. In view of his prior experiences, it is clear that the purpose of the particular threat to the applicant was to get him to leave the country. If he were to return to Cuba today with the permission of the Cuban authorities, has he demonstrated a "clear probability" that the threat made in 1980 has relevance? For reasons discussed in *Matter of Barrera*, 19 I&N Dec. 837 (BIA 1989), I would find that such is not the case. The Cuban government has agreed to the return of those who departed (many with "encouragement" or coercion) in 1980 and has given diplomatic assurances of "no reprisal" to those who are returned. As I view the threat to the applicant in 1980 as principally motivated to coerce his departure, I do not find that he has demonstrated a "clear probability" that has meaning today, particularly when viewed in the context of his experiences over the years from 1967 to 1980.

As I do not find that the applicant has adequately established that his "life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion," I would sustain the Service appeal in this regard and order the applicant excluded and deported from the United States.

***CONCURRING IN THE DISSENTING OPINION:*** James P. Morris, Board Member

I concur in the foregoing dissenting opinion.



**UNHCR GUIDANCE NOTE ON REFUGEE CLAIMS  
RELATING TO SEXUAL ORIENTATION AND  
GENDER IDENTITY**

**United Nations High Commissioner for Refugees (UNHCR)  
Protection Policy and Legal Advice Section  
Division of International Protection Services  
Geneva  
21 November 2008**

### **Note**

The Office of the United Nations High Commissioner for Refugees (UNHCR) issues Guidance Notes on thematic legal issues pursuant to its mandate, as contained in the 1950 *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the 1951 *Convention relating to the Status of Refugees* and Article II of its 1967 *Protocol*.

Through analyzing international legal principles, jurisprudence and other relevant materials, these Guidance Notes seek to clarify applicable law and legal standards with the aim of providing guidance in the particular thematic area concerned. The ultimate purpose is to enhance the delivery of protection to refugees and asylum-seekers through adherence to international standards in refugee protection.

When related to refugee status determination, the Guidance Notes supplement and should be read in conjunction with the relevant Guidelines on International Protection. The Guidance Notes are developed to respond to emerging operational needs and legal issues and do not necessarily follow the same extensive drafting process as the Guidelines on International Protection.

The Guidance Notes are in the public domain and are available on Refworld, <http://www.refworld.org>. Any questions relating to specific aspects of this Note should be addressed to the Protection Policy and Legal Advice Section (PPLAS) of the Division of International Protection Services, UNHCR, Geneva.

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## I. INTRODUCTION

1. This Note provides guidance in respect of refugee claims related to sexual orientation and gender identity. The persecution of people because of their sexual orientation and gender identity is not a new phenomenon. It is only in more recent years that a growing number of asylum claims has been made by lesbian, gay, bisexual and transgender (“LGBT”) individuals. This has necessitated greater awareness among decision-makers of the specific experiences of LGBT asylum-seekers and a deeper examination of the legal questions involved.

2. In recent years, both national judicial decision-making and academic writing have seen substantial progress in the analysis and interpretation of the concepts of sexual orientation and gender identity in the refugee law context. These developments have run parallel to, and indeed drawn upon, a growing jurisprudence and legal developments at the international (through the UN human rights treaty monitoring bodies, for example) and regional level.<sup>1</sup> While this continues to be an evolving area of refugee law, this Note will, *inter alia*, focus on legislative developments, examine international jurisprudence in the refugee context, analyze persecution and persecutory practices as well as build on some of the positive practices developed by States in their asylum decisions. The Note supplements and should be read in conjunction with UNHCR’s *Guidelines on Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*,<sup>2</sup> which remain applicable to LGBT asylum claims made by both men and women.

3. LGBT individuals may be subjected by State authorities, their families or communities to physical, sexual and verbal abuse and discrimination, because of who they are or who they are perceived to be. This might be because of prevailing cultural and social norms, which result in intolerance and prejudice, or because of national laws, which reflect these attitudes. Where such acts of abuse and discrimination go unpunished and/or where LGBT orientation is criminalized,<sup>3</sup> such individuals may, if they seek asylum on these

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<sup>1</sup> For an overview of jurisprudence and doctrine relating to the rights of LGBT persons, including human rights violations on grounds of sexual orientation, see International Commission of Jurists (ICJ), *Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine of the United Nations Human Rights System*, 3rd updated edition, 2007, available at [http://www.icj.org/IMG/UN\\_References.pdf](http://www.icj.org/IMG/UN_References.pdf); ICJ, *Sexual Orientation and Gender Identity in Human Rights Law: Jurisprudential, Legislative and Doctrinal References from the Council of Europe and the European Union*, October 2007, available at [http://www.icj.org/IMG/European\\_Compilation-web.pdf](http://www.icj.org/IMG/European_Compilation-web.pdf); and ICJ, *Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine of the Inter-American System*, July 2007, available at [http://www.icj.org/IMG/Inter-American\\_References.pdf](http://www.icj.org/IMG/Inter-American_References.pdf).

<sup>2</sup> UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/01, 7 May 2002, available at <http://www.unhcr.org/refworld/docid/3d36f1c64.html> (hereafter: “UNHCR Guidelines on Gender-Related Persecution”).

<sup>3</sup> More than 80 States have laws prohibiting or regulating sexual acts performed by consenting adults of the same sex, often referred to as “sodomy laws”. Some proscribe specific sexual acts regardless of sexual orientation and gender identity, while others prohibit a range of same-sex sexual activities. At least seven States maintain the death penalty for such acts. For further information on such laws, see International Gay and Lesbian Human Rights Commission (<http://www.iglhrc.org/site/iglhrc/>) and SodomyLaws.org (<http://www.sodomylaws.org/>).

grounds, fall within the refugee definition of the 1951 Convention relating to the Status of Refugees (“1951 Convention”).

4. A common element in the experience of many LGBT applicants is having to keep aspects and sometimes large parts of their lives secret. This may be in response to societal pressure, explicit or implicit hostility and discrimination, and/or criminal sanctions. The consequence is that they often have limited evidence to establish their LGBT identity or may not be able to demonstrate past persecution, in particular where they were not living openly as LGBT in the country of origin.

5. According to the 2007 *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*<sup>4</sup> (“Yogyakarta Principles”), “sexual orientation” refers to a person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender, or more than one gender. “Gender identity” refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body, and other expressions of gender, including dress, speech and mannerisms.<sup>5</sup> Courts in various jurisdictions have likewise affirmed that sexual orientation relates not just to conduct or a series of sexual acts, but equally to a person’s identity and how he or she seeks to express it.<sup>6</sup>

6. For the purposes of this Note, the term “LGBT” is used in preference to “homosexuals” as this term tends to make lesbians invisible, does not encompass bisexuals and transgender people and may be considered offensive by many gays and lesbians. Although the term “gay” or “gay people” is sometimes used to describe both men and women whose enduring physical, romantic, and emotional attractions are to persons of the same sex, in this Note preference is given to the use of “gay” to refer to men, while “lesbian” refers to women. “Bisexual” is used to describe a person who is physically, romantically, and emotionally attracted to men and women. While there is no universally accepted definition of “transgender”, in this Note the term refers to men and women whose gender identity does not align to their assigned sex. Transgender does not imply any specific form of sexual orientation and may include transsexuals and cross-dressers. They could identify as female-to-male or male-to-female, and may or may not have undergone surgery and/or hormonal therapy.<sup>7</sup>

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<sup>4</sup> *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, March 2007, available at [http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf) (hereafter: “Yogyakarta Principles”). The Principles were developed by the ICJ and the International Service for Human Rights, and were unanimously adopted during an expert meeting in Yogyakarta, Indonesia, 6–9 November 2006.

<sup>5</sup> See Preamble, and Recitals 4 and 5 of the Yogyakarta Principles, above footnote 4.

<sup>6</sup> Persecution can be perpetrated against an individual as much for the fact of being LGBT, as for acts associated with the status. If harsh punishment is attracted by the latter, “it is scarcely possible that homosexuals are otherwise treated with dignity and respect”; see, *Refugee Appeal No. 74665*, 7 July 2004 (New Zealand Refugee Status Appeals Authority, (RSAA)), paras. 27, 129, available at <http://www.unhcr.org/refworld/docid/42234ca54.html>. See also *Nasser Mustapha Karouni v. Alberto Gonzales, Attorney General*, No. 02-72651, 399 F.3d 1163 (2005), 7 March 2005 (US Court of Appeals, Ninth Circuit), at III[6], available at <http://www.unhcr.org/refworld/docid/4721b5c32.html>; *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs*; *Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs* [2003] HCA 71, 9 December 2003 (High Court of Australia), para. 81, available at <http://www.unhcr.org/refworld/docid/3fd9eca84.html>.

<sup>7</sup> For further definitions, see, for instance, Gay & Lesbian Alliance Against Defamation, *Media Reference Guide*, 7<sup>th</sup> edition, May 2007, available at [http://www.glaad.org/media/guide/GLAAD\\_MediaRefGuide](http://www.glaad.org/media/guide/GLAAD_MediaRefGuide).

## II. SUBSTANTIVE ANALYSIS

### A. BACKGROUND

7. An applicant's sexual orientation can be relevant to a refugee claim where he or she fears persecutory harm on account of his or her actual or perceived sexual orientation, which does not, or is seen not to, conform to prevailing political, cultural or social norms.<sup>8</sup> The refugee definition applies to all persons without distinction as to sex, age, sexual orientation, gender identity, marital or family status, or any other status or characteristics. Some States have chosen to include specific references to sexual orientation in the refugee definition in domestic legislation.<sup>9</sup>

8. Sexual orientation is a fundamental part of human identity, as are those five characteristics of human identity that form the basis of the refugee definition: race, religion, nationality, membership of a particular social group and political opinion.<sup>10</sup> Claims relating to sexual orientation and gender identity are primarily recognized under the 1951 Convention ground of membership of a particular social group, but may also be linked to other grounds, notably political opinion and religion, depending on the circumstances. This has been affirmed by courts and tribunals in various jurisdictions, including Australia, Canada, France, Germany, New Zealand, Sweden, the United Kingdom and the United States.<sup>11</sup>

9. Although freedom of sexual orientation is not explicitly recognized as an international human right, it is now well established that LGBT persons are entitled to all human rights on an equal basis with others. The Preamble to the 1951 Convention reiterates the principle that "human beings shall enjoy fundamental rights and freedoms without discrimination". The principle of non-discrimination is also enshrined in Articles 2(1) and 26 of the *International Covenant on Civil and Political Rights* ("ICCPR"), and in Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights* ("ICESCR").<sup>12</sup>

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[7thEdition.pdf](#); Merriam-Webster OnLine Dictionary, available at <http://www.merriam-webster.com/dictionary>.

<sup>8</sup> See *UNHCR Guidelines on Gender-Related Persecution*, above footnote 2, paras. 6–7. See also UNHCR, *Advisory Opinion by UNHCR to the Tokyo Bar Association Regarding Refugee Claims Based on Sexual Orientation*, 3 September 2004, para. 3, available at <http://www.unhcr.org/refworld/docid/4551c0d04.html> (hereafter: "*UNHCR Advisory Opinion to the Tokyo Bar Association*").

<sup>9</sup> See, for instance, Sweden, *Aliens Act (SFS 2005:716)*, Chapter 4, Section 1, available at <http://www.unhcr.org/refworld/docid/3ae6b50a1c.html>. See also Migrationsverket (Swedish Migration Board), *Guidelines for Investigation and Evaluation of Asylum Cases in which Persecution Based on Given Sexual Orientation is Cited as a Ground*, 28 January 2002, available at <http://www.unhcr.org/refworld/docid/3f8c1af44.html>.

<sup>10</sup> As defined in Article 1A(2) of the *Convention relating to the Status of Refugees*, 28 July 1951, available at <http://www.unhcr.org/refworld/docid/3be01b964.html> (hereafter: "1951 Convention").

<sup>11</sup> For a more detailed discussion of national case law, see below Section C. CONVENTION GROUNDS.

<sup>12</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, available at <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>, and UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, available at <http://www.unhcr.org/refworld/docid/3ae6b36c0.html>. The non-discrimination provisions on account of "sex" or "other status" in the ICCPR and ICESCR, as well as in Article 2 of the *Convention on the Rights of the Child* (available at <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>), are to be taken as including sexual orientation, as affirmed by the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child. The same interpretation has been adopted by the European Court of Human Rights (ECtHR) in relation to Article 14 (Prohibition of discrimination) of the *European Convention for the Protection of Human Rights and Fundamental*

The Yogyakarta Principles reflect binding international legal standards with regard to sexual orientation which are derived from key human rights instruments.<sup>13</sup>

## B. WELL-FOUNDED FEAR OF PERSECUTION

10. Persecution can be considered to involve serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm, as assessed in light of the opinions, feelings and psychological make-up of the applicant.<sup>14</sup> Developments in international human rights law can help decision-makers determine the persecutory nature of the various forms of harm that a person may experience on account of his or her sexual orientation.<sup>15</sup> A pattern of harassment and discrimination could, on cumulative grounds, reach the threshold of persecution. While the element of discrimination is often central to claims made by LGBT persons, they also frequently reveal experiences of serious physical and, in particular, sexual violence. Each of the incidents of harm must be assessed in a holistic manner. They must be evaluated in light of the prevailing situation and attitudes with regard to sexual orientation and gender identity in the country of origin.

11. International and regional jurisprudence and legal doctrine affirm that discrimination on account of a person's sexual orientation is prohibited.<sup>16</sup> Discriminatory measures may be enforced through law and/or through societal practice, and could have a range of harmful outcomes. Discrimination will amount to persecution where such measures, individually or cumulatively, lead to consequences of a substantially prejudicial

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*Freedoms* (hereafter: "ECHR") (available at <http://www.unhcr.org/refworld/docid/3ae6b3b04.html>). See also, *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 30 June 1993 (Supreme Court of Canada), available at <http://www.unhcr.org/refworld/docid/3ae6b673c.html>, drawing on the Preamble to the 1951 Convention; *Islam (A.P.) v. Secretary of State for the Home Department; R. v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)* [1999] UKHL 20, 25 March 1999 (United Kingdom House of Lords), available at <http://www.unhcr.org/refworld/docid/3dec8abe4.html>.

<sup>13</sup> See Yogyakarta Principles, above footnote 4. For regional instruments specifically addressing sexual orientation, see Organization of American States, "Human Rights, Sexual Orientation, and Gender Identity," AG/Res. 2435 (XXXVIII-O/08), 3 June 2008, available at [http://www.oas.org/dil/AGRES\\_2435.doc](http://www.oas.org/dil/AGRES_2435.doc); European Parliament, *Resolution of 26 April 2007 on Homophobia in Europe*, Resolution P6\_TA(2007)0167, 26 April 2007 available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0167+0+DOC+XML+V0//EN>. See also Article 7(g) of the Council of Europe, Parliamentary Assembly, *Recommendation I470 (2000), Situation of Gays and Lesbians and their Partners in Respect of Asylum and Immigration in the Member States of the Council of Europe*, 30 June 2000, available at <http://www.unhcr.org/refworld/docid/3dde404c6.html>, which urges Member States *inter alia* to "co-operate more closely with UNHCR and national non-governmental organisations, promote the networking of their activities, and urge them to systematically monitor the observance of the immigration and asylum rights of gays and lesbians".

<sup>14</sup> See, for instance, *HS (Homosexuals: Minors, Risk on Return) Iran v. Secretary of State for the Home Department* [2005] UKAIT 00120, 4 August 2005 (UK Asylum and Immigration Tribunal (AIT)), available at <http://www.unhcr.org/refworld/docid/47fdafe0.html>, regarding the impact of the persecutory acts on the individual.

<sup>15</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1979, re-edited January 1992, available at <http://www.unhcr.org/refworld/docid/3ae6b3314.html> (hereafter "UNHCR Handbook"), paras. 42, 60. See also, for instance, *Refugee Appeal No. 76152*, 8 January 2008 (New Zealand RSAA), para. 34, available at <http://www.unhcr.org/refworld/docid/47bd93cf2.html>; *Refugee Appeal No. 74665*, above footnote 6, paras. 81–123.

<sup>16</sup> For an overview, see the compilations produced by the ICJ, above footnote 1. See also Michael O'Flaherty and John Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles", *Human Rights Law Review*, Vol. 8, No. 2 (2008), pp. 207–48, available at <http://hrlr.oxfordjournals.org/cgi/reprint/8/2/207>.

nature for the person concerned. This may be the case, for instance, where a LGBT person is consistently denied access to normally available services, be they in his or her private life or workplace, such as education, welfare, health, and the judiciary.<sup>17</sup> As noted in the UNHCR *Handbook*:

Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution, if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his [or her] future existence.<sup>18</sup>

12. Being compelled to forsake or conceal one's sexual orientation and gender identity, where this is instigated or condoned by the State, may amount to persecution.<sup>19</sup> LGBT persons who live in fear of being publicly identified will often conceal their sexual orientation as a result in order to avoid the severe consequences of such exposure, including the risk of incurring harsh criminal penalties, arbitrary house raids, dismissal from employment and societal disapproval. Such actions can not only be considered discriminatory and as violating the right to privacy, but also as infringing the right to freedom of opinion and expression. As interpreted by the Yogyakarta Principles:

Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.<sup>20</sup>

13. LGBT persons may be unable to forge meaningful relationships, be forced into arranged marriages or experience extreme pressure to marry. They might fear that a failure to marry will ultimately mark them out as LGBT in the public eye. Social, cultural and other restrictions which require them to marry persons of the opposite sex can have the effect of violating the right to marry with full and free consent, and the right to respect for private life.<sup>21</sup> Such community pressure could escalate beyond general societal expectations

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<sup>17</sup> See, for instance, *Decision No. MA6-01580*, 12 January 2007 (Immigration and Refugee Board (IRB) of Canada), available at <http://www.unhcr.org/refworld/docid/482457202.html>; *HS (Homosexuals: Minors, Risk on Return) Iran*, above footnote 14, para. 147.

<sup>18</sup> UNHCR *Handbook*, above footnote 15, paras. 54–55. See also *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, 1998 (12) BCLR 1517 (CC), 9 October 1998 (Constitutional Court of South Africa), para. 113, available at <http://www.unhcr.org/refworld/docid/48246cf72.html>.

<sup>19</sup> See, for instance, *RRT Case No. 071818233* [2008] RRTA 62, 15 February 2008 (Refugee Review Tribunal (RRT) of Australia), available at <http://www.unhcr.org/refworld/docid/484552e22.html>.

<sup>20</sup> Yogyakarta Principles, above footnote 4, the right to freedom of opinion and expression (Principle 19). Requiring a person to conceal his or her sexual orientation or identity would also violate the right to the universal enjoyment of human rights (Principle 1), the right to equality and non-discrimination (Principle 2), the right to recognition before the law (Principle 3), and the right to participate in public life (Principle 25). See also, *Smith and Grady v. United Kingdom*, Applications Nos. 33985/96 and 33986/96, 27 September 1999 (ECtHR), available at <http://www.unhcr.org/refworld/docid/47fdfac80.html>, where the Court noted that it “would not rule out that the silence imposed on the applicants as regards their sexual orientation, together with the consequent and constant need for vigilance, discretion and secrecy in that respect with colleagues, friends and acquaintances as a result of the chilling effect of the Ministry of Defence policy, could constitute an interference with their freedom of expression” (para. 127).

<sup>21</sup> See Article 23(3) of the ICCPR, above footnote 12: “No marriage shall be entered into without the free and full consent of the intending spouses”. See also UN General Assembly, *Convention on the Elimination of Discrimination Against Women*, 18 December 1979, available at <http://www.unhcr.org/refworld/docid/3b00f2244.html>. Article 16 of the Convention stipulates, *inter alia*, that State Parties shall ensure (b) “The same right freely to choose a spouse and to enter into marriage only with their free and full consent.” See also Article 12 of the ECHR, above footnote 12: “Men and women of

and reach the threshold of persecution, bearing in mind that LGBT persons may experience such pressures differently from heterosexuals.<sup>22</sup>

14. Claims made by LGBT persons often reveal exposure to physical and sexual violence, extended periods of detention, medical abuse, threat of execution and honour killing. These are all acts of harm and mistreatment so serious in nature that they would, generally, reach the threshold of persecution within the meaning of the 1951 Convention. Severe forms of family and community violence, rape and other forms of sexual assault, particularly if occurring in detention settings, would fall within the definition of torture.<sup>23</sup> Such acts violate the right to life, liberty and security of person, and the right not to be subjected to torture, cruel, inhumane or degrading treatment, as contained in various international human right instruments. LGBT persons could also experience lesser forms of physical and psychological harm, including harassment, threats of harm, vilification, intimidation, and psychological violence that can rise to the level of persecution, depending on the individual circumstances of the case and the impact on the particular applicant.

15. While the violence and human rights abuses faced by LGBT persons have many common elements, it is also necessary to distinguish among them. Lesbian women often experience harm as a result of the inter-relation of their sexual orientation and gender, since women's position in society is generally less powerful than that of men.<sup>24</sup> Lesbians are even more likely than gay men to feel obliged to conform outwardly to family and social expectations, for instance, by marrying someone of the opposite sex. In societies where women are regarded primarily as the wives (of men) and mothers, lesbians may be isolated and invisible. They are generally at a higher risk of harm at the hands of non-State actors than are gay men, including as a result of retaliatory violence by former partners or husbands. They often have lesser access to informal protection systems, including organized venues of support in the country of origin.

16. Transgender persons, as even a smaller group, will often have distinct experiences of persecution. These could, for example, relate to accessing health care or due to an increased risk of exposure to harm if their gender identity is not legally recognized (where, for instance, they are not able to change their name and sex in the civil registry). Such exposure could, for instance, be prompted where a transgender individual is asked by the authorities to produce identity documents and his or her physical appearance does not correspond to the sex as indicated in the documents. Someone who is seeking to change or

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marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

<sup>22</sup> See, for instance, *SZANS v. Minister for Immigration* [2004] FMCA 445, 13 August 2004 (Federal Magistrates' Court of Australia), available at <http://www.austlii.edu.au/au/cases/cth/FMCA/2004/445.html>

<sup>23</sup> See, for instance, *HS (Homosexuals: Minors, Risk on Return) Iran*, above footnote 14, paras. 57, 134. See also UN Human Rights Council, “*Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural rights, including the Right to Development, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*”, A/HRC/7/3, 15 January 2008, paras. 34–49, available at <http://www.unhcr.org/refworld/docid/47c2c5452.html>.

<sup>24</sup> See *Amare v. Secretary of State for the Home Department* [2005] EWCA Civ 1600, 20 December 2005 (England and Wales Court of Appeal), where the Court noted (although dismissing the appeal on other grounds), that the “combination of discrimination against women and discrimination against homosexuals is an especially poisonous mix liable to give rise to the risk of persecution”, para. 17, available at <http://www.unhcr.org/refworld/docid/47fdfb5b0.html>. See also, *RRT Case No. 071862642* [2008] RRTA 40, 19 February 2008 (RRT of Australia), available at <http://www.unhcr.org/refworld/docid/4811a7192.html>.

has changed his or her sex may particularly be perceived as challenging prevailing conceptions of gender roles.

#### **i. Laws criminalizing homosexual conduct**

17. Criminal laws prohibiting same-sex consensual relations between adults have been found to be both discriminatory and to constitute a violation of the right to privacy.<sup>25</sup> The very existence of such laws, irrespective of whether they are enforced and the severity of the penalties they impose, may have far-reaching effects on LGBT persons' enjoyment of their fundamental human rights.<sup>26</sup> Even where homosexual practices are not criminalized by specific provisions, others directed at homosexual sex such as those proscribing "carnal acts against the order of nature" and other crimes, such as "undermining public morality" or "immoral gratification of sexual desires", may be relevant for the assessment of the claim.<sup>27</sup>

18. A law can be considered as persecutory *per se*, for instance, where it reflects social or cultural norms which are not in conformity with international human rights standards. The applicant, however, still has to show that he or she has a well-founded fear of being persecuted as a result of that law. Penal prosecution, under a law which *per se* is not inherently persecutory or discriminatory, may in itself amount to persecution, for instance, if applied to particular groups only or, if it is arbitrary or unlawfully executed.<sup>28</sup>

19. Where harsh punishments are imposed that do not conform to international human rights standards, such as the death penalty or severe corporal punishment, including flogging, their persecutory character is particularly evident.<sup>29</sup> A substantive body of international and national jurisprudence affirms that consensual homosexual conduct is not to be criminalized.<sup>30</sup> In some circumstances, one cannot exclude that even relatively lenient

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<sup>25</sup> See *Toonen v. Australia*, CCPR/C/50/D/488/1992, 4 April 1994 (Human Rights Committee), paras. 8.6–8.7, available at <http://www.unhcr.org/refworld/docid/48298b8d2.html>. Finding a violation of Article 17 of the ICCPR, the Committee noted that while the applicant had not yet been prosecuted under the Tasmanian Criminal Code, the "criminalization of homosexuality in private has not permitted him to expose openly his sexuality and to publicize his views of reform of the relevant laws on sexual matters", and that the relevant sections of the Criminal Code interfered with the author's privacy, "even if these provisions have not been enforced for a decade". See also, *Dudgeon v. United Kingdom*, Application No. 7525/76, 22 October 1981 (ECtHR), available at <http://www.unhcr.org/refworld/docid/47fdaf7d.html>.

<sup>26</sup> See, further, *Case of Norris v. Ireland*, Application No. 10581/83, 26 October 1988 (ECtHR), para. 38, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=10581/83&sessionId=12354864&skin=hudoc-en>.

<sup>27</sup> See for instance, *RRT Case No. 071862642*, above footnote 24. The applicant was found to be in need of international protection even in the absence of a specific law criminalizing homosexual acts in the country of origin.

<sup>28</sup> See further UNHCR *Handbook*, above footnote 15, paras. 57, 59; *UNHCR Guidelines on Gender-Related Persecution*, above footnote 2, para. 10; *UNHCR Advisory Opinion to the Tokyo Bar Association*, above footnote 8, paras. 4, 10.

<sup>29</sup> See further, *UNHCR Guidelines on Gender-Related Persecution*, above footnote 2, para. 12. See also, Yogyakarta Principles, above footnote 4, the right to life (Principle 4): "Everyone has the right to life. No one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity. The death penalty shall not be imposed on any person on the basis of consensual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity", requiring States, *inter alia*, to "repeal all forms of crime that the purpose or effect of prohibiting consensual sexual activity among persons of the same sex who are over the age of consent and, until such provisions are repealed, never impose the death penalty on any person convicted under them" (Principle 4.A).

<sup>30</sup> See, for instance, *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, above footnote 18. The Court found that the common law offence of sodomy was repugnant to constitutional provisions which prohibited discrimination on grounds of sexual orientation, and noted that

punishment can be considered disproportionate and persecutory. A too narrow focus on the severity of the penalty could in effect reinforce the misperception that being LGBT constitutes a crime.<sup>31</sup>

20. An applicant may exceptionally be able to demonstrate a well-founded fear of persecution even if a law criminalizing LGBT is no longer enforced, where the existence of that law has the effect of creating an intolerable predicament for him or her. Such laws, although no longer systematically enforced, can also be used by the authorities for extortionary purposes, or be enforced in an unofficial manner which does not lead to recorded prosecutions, such as through police inflicted violence or extra-legal detention.<sup>32</sup>

21. What is material to a refugee status determination is whether there is a real risk of harm should the applicant have to return to the country of origin. Persecution may be found even where there is no conclusive country of origin information to evidence that laws criminalizing homosexual conduct are actually enforced. This can be the case if a State seeks to disguise its penalization of LGBT persons from the outside world, for example, by prosecuting them instead for crimes of rape, child molestation or drug-related crimes which he or she is alleged to have committed. A high burden of proof for the crimes, including strict evidentiary requirements, should also not be taken as an indication of a lesser possibility of enforcement but needs to be read in its religious and societal context. A pervading and/or generalized climate of homophobia in the country of origin (for example, where the government displays its disapproval through harsh anti-homosexual rhetoric, where LGBT persons are repressed and surveilled by their families or neighbours, or the media uses derogatory stereotypes to describe them) can be considered an indication that LGBT persons are being persecuted.<sup>33</sup>

22. It should furthermore be noted that criminal sanctions for homosexual activity also impede the access of LGBT persons to State protection. For example, a LGBT person who has been exposed to violence may hesitate to approach the police for protection because he or she may be regarded as an offender instead of a victim. An applicant could therefore also establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable to protect him or her effectively against such harm.<sup>34</sup> It should also be noted that where an individual is seeking asylum in a country where same sex relations are criminalized, such laws can impede his or her access to asylum procedures or deter the person from presenting his or her LGBT

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“conduct that deviates from some publicly established norm is usually only punishable when it is violent, dishonest, treacherous or in some other way disturbing of the public peace or provocative of injury. In the case of male homosexuality however, the perceived deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than because of its proven harm” (para. 108).

<sup>31</sup> Some jurisdictions, while admitting that “there is no easy formulation” hold that the criminalization of homosexual conduct is persecutory only if “accompanied by penal sanctions of severity which are in fact in force”. See, for instance, *Refugee Appeal No. 74665*, above footnote 6, para. 103; *Refugee Appeal No. 76152*, above footnote 15, para. 34.

<sup>32</sup> See, for instance, *Decision VA5-02751*, 16 February 2007 (IRB of Canada), available at <http://www.unhcr.org/refworld/docid/48245a5f2.html>; *Refugee Appeal No. 76152*, above footnote 15, para. 50.

<sup>33</sup> See, for instance, European Parliament, *Resolution of 13 March 2008 on the Case of the Iranian Citizen Sayyed Mehdi Kazemi*, PA\_TA-PROV(2008)0107, 13 March 2008, available at <http://www.unhcr.org/refworld/docid/47da75002.html>.

<sup>34</sup> See further below Sub-section B iv. Agents of persecution. See also, *UNHCR Guidelines on Gender-Related Persecution*, above footnote 2, para. 17. See also, *Décision M. OI, No. 543182*, 31 May 2006 (Commission des Recours des Réfugiés (CRR), France), where the Commission found that although laws criminalizing homosexual activity had been repealed, cultural norms still led to persecution.

experiences as part of the claim to refugee status. In such situations, it may be necessary for UNHCR to become directly involved in the case.

## ii. Fear of future persecution

23. LGBT applicants who have concealed their sexual orientation in the country of origin might not have experienced harm in the past sufficient to amount to persecution. It is possible that their conduct was not a voluntary choice and was modified precisely to avoid the threat of being persecuted. As noted by the High Court of Australia: “it is the *threat* of serious harm with its menacing implications that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly.”<sup>35</sup> Additionally, LGBT persons, who have left their country of origin for a reason other than their sexual orientation and/or have “come out”<sup>36</sup> after arrival in the country of asylum, could qualify for refugee status if they can demonstrate a well-founded fear of *future* persecution.<sup>37</sup>

24. As with claims based on political opinion, an applicant claiming a fear of being persecuted on account of his or her sexual orientation need not show that the authorities knew about his or her sexual orientation before he or she left the country of origin. The well-foundedness of the fear will in such cases be based on the assessment of the consequences that an applicant with a certain sexual orientation would have to face if he or she returned.<sup>38</sup> Moreover, the fact that a LGBT applicant has never actually been prosecuted for his or her homosexual conduct does not prevent him or her from having a well-founded fear of being persecuted.<sup>39</sup>

## iii. Avoiding persecution

25. A person cannot be expected or required by the State to change or conceal his or her identity in order to avoid persecution. As affirmed by numerous jurisdictions, persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action.<sup>40</sup> Just as a claim based on political opinion or nationality would not be dismissed on grounds that the applicant could avoid the anticipated harm by changing or concealing his or her beliefs or identity, applications based on sexual orientation and gender identity should not be rejected merely on such grounds.<sup>41</sup> As noted by the Immigration and Refugee Board of Canada:

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<sup>35</sup> *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, above footnote 6, para. 43.

<sup>36</sup> For the purposes of this Note, the term “come out” refers to the process in which an individual acknowledges and accepts his or her own sexual and gender identity and feels able to inform others about it.

<sup>37</sup> UNHCR *Handbook*, above footnote 15: “Fear refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution” (para. 45).

<sup>38</sup> *Ibid.*, para. 83.

<sup>39</sup> *UNHCR Advisory Opinion to the Tokyo Bar Association*, above footnote 8, para. 12.

<sup>40</sup> See, for instance, *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, above footnote 6, paras. 34–60; *Refugee Appeal No. 74665*, above footnote 6, paras. 114, 126–127; *Nasser Mustapha Karouni, Petitioner, v. Alberto Gonzales, Attorney General*, above footnote 6; *DW (Homosexual Men – Persecution – Sufficiency of Protection) Jamaica v. Secretary of State for the Home Department* CG [2005] UKAIT 00168, 28 November 2005 (UK AIT), para. 78, available at <http://www.unhcr.org/refworld/docid/46836aa80.html>.

<sup>41</sup> *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, above footnote 6, para. 41: “It would undermine the object of the Convention if the signatory countries required them to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give

Into the equation must be added the claimant's new found freedom of expression in Canada and his desire to live openly in Sri Lanka as he does here in Canada [...]. We do not tell claimants that they have a right to practise their religion so long as they hide it. A hidden right is not a right.<sup>42</sup>

26. The question to be considered is whether the applicant has a well-founded fear of being persecuted, rather than whether he or she could live in the country of origin without attracting adverse consequences.<sup>43</sup> This requires an objective examination of how the applicant may be treated if he or she were returned to that country. Hence, it is not relevant whether the applicant's conduct with regard to his or her sexual orientation is viewed as "reasonable" or "necessary". There is no duty to be "discreet" or to take certain steps to avoid persecution, such as living a life of isolation, or refraining from having intimate relationships. A requirement for discretion would furthermore imply that a person's sexual orientation is confined to a mere sexual act, thereby overlooking a range of behaviours and everyday activities otherwise affected by that person's sexual orientation and gender identity.<sup>44</sup> It would, in fact, amount to requiring the "same submissive and compliant behaviour, the same denial of a fundamental human right, which the agent of persecution seeks to achieve by persecutory conduct".<sup>45</sup> As stated by the New Zealand Refugee Status Appeal Authority:

Understanding the predicament of "being persecuted" as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection means that the refugee definition is to be approached not from the perspective of what the refugee claimant can do to avoid being persecuted, but from the perspective of the fundamental human right in jeopardy and the resulting harm.<sup>46</sup>

#### iv. Agents of persecution

27. Persecution may be perpetrated either by (i) State actors, for example, through the criminalization of consensual sexual relations between persons of the same sex, through physical or sexual violence, or degrading treatment inflicted by those under their direct control, or by (ii) non-State (private) actors. A refugee claim can, thus, be established where the State is unwilling or unable to protect against violations committed by State or non-State actors. Instances where a State's inaction may be persecutory include failure of the police to respond to requests for assistance and refusal by the authorities to investigate, prosecute or punish individuals inflicting harm on LGBT persons. Non-State actors, whether family members, neighbours, strangers or work colleagues, can either be directly involved in persecutory acts, including through physical abuse and forced marriage, or indirectly by exposing the individual concerned to harm, for example, by reporting his or her conduct or sexual orientation to the authorities.

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them protection under the Convention." See also with regard to the concealment of ethnicity, *HYSI v. Secretary of State for the Home Department* [2005] EWCA Civ 711, 15 June 2005 (England and Wales Court of Appeal), paras. 32–34, 37, available at <http://www.unhcr.org/refworld/docid/43fc2eac24.html>.

<sup>42</sup> *Decision VA5-02751*, above footnote 32. See also, *Decision No. IV/IE06244/81*, 26 April 1983 (Administrative Court (Verwaltungsgericht) Wiesbaden, Germany).

<sup>43</sup> See, for instance, *MN (Findings on sexuality), Kenya v. Secretary of State for the Home Department* [2005] UK IAT 00021, 28 January 2005 (UK Immigration Appeal Tribunal (IAT)), paras. 21–23, 25, available at <http://www.unhcr.org/refworld/docid/47a7081cd.html>.

<sup>44</sup> See *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, above footnote 6, paras. 40–45; and *Wang v. Minister for Immigration & Multicultural Affairs* [2000] FCA 1599, 10 November 2000 (Federal Court of Australia), paras. 91, 99, available at <http://www.unhcr.org/refworld/docid/47fdfb330.html>.

<sup>45</sup> See *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, above footnote 18, para. 130.

<sup>46</sup> *Refugee Appeal No. 74665*, above footnote 6, para. 114.

**v. The causal link (“for reasons of”)**

28. As with other types of refugee claims, the well-founded fear of persecution must be related to one or more of the five grounds listed in the 1951 Convention refugee definition. The Convention ground must be a relevant contributing factor though it not need be shown to be the direct or main cause.<sup>47</sup> The focus is on the reasons for the applicant’s predicament, rather than on the mind-set of the perpetrator. State and non-State agents of persecution may inflict harm on LGBT persons with the intention of “curing” or “treating” them, for instance, through what is, however, effectively medical abuse or forced marriage. In this context, “it is important to recall that nowhere in the drafting history of the 1951 Convention is it suggested that the motive or intent of the persecutor was ever to be considered as a *controlling* factor in either the definition or the determination of refugee status”.<sup>48</sup> Thus, the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor, if the applicant experiences the abuse as harm.<sup>49</sup>

**C. CONVENTION GROUNDS**

29. The Convention grounds contained in the refugee definition are not mutually exclusive and may overlap. As such, the transgression of social or religious norms, including by expressing one’s sexual orientation or identity, may be analyzed in terms of political opinion, religion or membership of a particular social group. This opinion, belief or membership may also be imputed or attributed to the applicant by the State or the non-State agent of persecution.<sup>50</sup>

30. For the purposes of the 1951 Convention, the term “political opinion” should be broadly interpreted to incorporate any opinion on any matter in which the machinery of State, society, or policy may be engaged. This may include opinions on sexual orientation and gender identity, particularly in countries where sexual orientation (other than heterosexuality) is viewed as contrary to the core of the country policy.<sup>51</sup>

31. Religion may be a relevant 1951 Convention ground where the attitude of religious authorities towards LGBT people is hostile or discriminatory or where being LGBT is seen as an affront to religious beliefs in a given society. Where someone has a well-founded fear

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<sup>47</sup> See *UNHCR Guidelines on Gender-Related Persecution*, above footnote 2, para. 20. See also, UNHCR, *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/02, 7 May 2002, paras. 20–23, available at <http://www.unhcr.org/refworld/docid/3d36f23f4.html> (hereafter: “*UNHCR Guidelines on Membership of a Particular Social Group*”). See also, for instance, *Refugee Appeal No. 74665*, above footnote 6, para. 132.

<sup>48</sup> See UNHCR, *UNHCR Note on Refugee Claims Based on Coercive Family Planning Laws or Policies*, August 2005, para. 26, available at <http://www.unhcr.org/refworld/docid/4301a9184.html>.

<sup>49</sup> See further, *RRT Case No. 061020474* [2007] RRTA 25, 7 February 2007 (RRT of Australia), available at <http://www.unhcr.org/refworld/docid/47a707d82.html>; *Pitcherskaia v. Immigration and Naturalization Service*, No. 95-70887, 24 June 1997 (US Court of Appeals, Ninth Circuit), para. 20, available at <http://www.unhcr.org/refworld/docid/4152e0fb26.html>.

<sup>50</sup> *UNHCR Advisory Opinion to the Tokyo Bar Association*, above footnote 8, para. 5. See also *Kwasi Amanfi v. John Ashcroft, Attorney General of United States*, A01-4477 and 02-1541, 328 F.3d 719, 16 May 2003 (US Court of Appeals, Third Circuit), available at <http://www.unhcr.org/refworld/docid/47fdfb2c1a.html>, where the Court recognized persecution on account of imputed membership in a particular social group (i.e. homosexuals), even if the applicant was not gay. See also *DW (Homosexual Men – Persecution – Sufficiency of Protection) Jamaica*, above footnote 40, para. 71.

<sup>51</sup> See further *UNHCR Advisory Opinion to the Tokyo Bar Association*, above footnote 8, para. 6.

of persecution because he or she is seen as not conforming to the interpretation given to a particular religious belief, a link to that ground may be established.

32. Claims relating to sexual orientation have most often been considered within the “membership of a particular social group” ground.<sup>52</sup> Many jurisdictions have recognized that homosexuals (gays and lesbians) may constitute a particular social group.<sup>53</sup> While claims relating to bisexuals and transgender people have been less common, such groups may also constitute a particular social group.<sup>54</sup> It has furthermore been well established that sexual orientation can be viewed as either an innate and unchangeable characteristic, or as a characteristic that is so fundamental to human dignity that the person should not be compelled to forsake it.<sup>55</sup> Requiring a person to conceal his or her sexual orientation and thereby to give up those characteristics, contradicts the very notion of “particular social group” as one of the protected grounds in the 1951 Convention.<sup>56</sup>

#### D. INTERNAL FLIGHT / RELOCATION ALTERNATIVE

33. As homophobia, whether expressed through laws or people’s attitudes and behaviour, often tends to exist nationwide rather than merely being localized, internal flight alternatives cannot normally be considered as applicable in claims related to sexual orientation and gender identity. Any suggested place of relocation would have to be carefully assessed and must be both “relevant” and “reasonable”.<sup>57</sup> Internal flight is

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<sup>52</sup> See European Union, *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, 19 May 2004, Art. 10(1)(d), available at <http://www.unhcr.org/refworld/docid/4157e75e4.html>.

<sup>53</sup> See, for instance, *Matter of Toboso-Alfonso*, 20 I& N. Dec 819, 12 March 1990 (US Board of Immigration Appeals), available at <http://www.unhcr.org/refworld/docid/3ae6b6b84.html>; Toboso was designated “as precedent in all proceedings involving the same issue or issues”, Attorney General’s Order No. 1895-94, 19 June 1994. *Canada (Attorney General) v. Ward*, above footnote 12; *Re GJ, Refugee Appeal No. 1312/93*, 30 August 1995 (New Zealand RSAA), available at <http://www.unhcr.org/refworld/docid/3ae6b6938.html>; *Islam v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah*, above footnote 12; *Singh v. Minister for Immigration and Multicultural Affairs* [2001] FCA 1653, 27 November 2001 (Federal Court of Australia), available at <http://www.unhcr.org/refworld/docid/47fd33d.html>; *HS (Homosexuals: Minors, Risk on Return) Iran*, above footnote 14, para. 146.

<sup>54</sup> See *Decision Ourbih No. 269875*, 15 May 1998 (CRR, France), finding that transsexuals may constitute a particular social group. This position was affirmed in *Decision M. MB, No. 496775*, 15 February 2004 (CRR, France). See further, *Geovanni Hernandez-Montiel v. Immigration and Naturalization Service*, 225 F.3d 1084 (9th Cir. 2000), 24 August 2000 (US Court of Appeals, Ninth Circuit), available at <http://www.unhcr.org/refworld/docid/3ba9c1119.html>, where the Court recognized that “gay men with female sexual identities” constituted a particular social group.

<sup>55</sup> See, *UNHCR Guidelines on Membership of a Particular Social Group*, above footnote 47, para. 6. See also, *Geovanni Hernandez-Montiel v. Immigration and Naturalization Service*, above footnote 54, where the Court noted that “the sexual identities [of homosexuals] are so fundamental to their human identities that they should not be required to change them” (p. 10483). See also, *Refugee Appeal No. 74665*, above footnote 6. The Authority recognized that there is a “broad consensus that all five Convention grounds refer to characteristics which are either beyond the power of the individual to change, or so fundamental to individual identity or conscience that they ought not be required to be changed” (para. 81).

<sup>56</sup> See, *Refugee Appeal No. 74665*, above footnote 6. The Authority recognized that there is a “broad consensus that all five Convention grounds refer to characteristics which are either beyond the power of the individual to change, or so fundamental to individual identity or conscience that they ought not be required to be changed” (para. 81). See also, Sub-section B (iii) Avoiding persecution, above paras. 25–26.

<sup>57</sup> See UNHCR, *Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/03/04, 23 July 2003, para. 7, available at <http://www.unhcr.org/refworld/docid/3f2791a44.html> (hereafter: “UNHCR Guidelines on Internal Flight or Relocation Alternative”). See

normally not considered relevant where the State is the agent of persecution, unless the State's authority is limited to certain parts of the country. A law of general application, such as a penal code criminalizing homosexual conduct, which is enforceable in the place of persecution, would normally also be enforceable in a proposed place of relocation.

34. Where a non-State actor is the persecutor, it can often be assumed that if the State is not willing or able to protect in one part of the country, it will not be willing or able to do so in any other part.<sup>58</sup> Applicants cannot be expected to suppress their sexual orientation or gender identity in the internal flight area, or required to depend on anonymity to avoid the reach of the agent of persecution. While a major or capital city in some cases may offer a more tolerant and anonymous environment, the place of relocation must be more than a "safe haven". The applicant must also be able to access a minimum level of political, civil and socio-economic rights.<sup>59</sup> Thus, he or she must be able to access State protection in a genuine and meaningful way. The existence of LGBT related Non Governmental Organizations does not in itself provide protection from persecution.

#### **E. BURDEN OF PROOF AND CREDIBILITY (ASSESSMENT)<sup>60</sup>**

35. Self-identification as LGBT should be taken as an indication of the individual's sexual orientation. While some applicants will be able to provide proof of their LGBT status, for instance through witness statements, photographs or other documentary evidence, they do not need to document activities in the country of origin indicating their different sexual orientation or gender identity. Where the applicant is unable to provide evidence as to his or her sexual orientation and/or there is a lack of sufficiently specific country of origin information the decision-maker will have to rely on that person's testimony alone. As the UNHCR Handbook has noted "if the applicant's account appears credible, he [or she] should unless there are good reasons to the contrary, be given the benefit of the doubt."<sup>61</sup> In the same vein, the United Kingdom Asylum and Immigration Tribunal stated: "[T]here is the full, consistent detail and the plausible noting of small points, unlikely to be observed or recounted by a person who had not had the experiences described."<sup>62</sup>

36. In the assessment of LGBT claims, stereotypical images of LGBT persons must be avoided, such as expecting a particular "flamboyant" or feminine demeanour in gay men, or "butch" or masculine appearance in lesbian women. Similarly, a person should not

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for instance, also, *RRT Case No. 061020474*, above footnote 49, noting that "indeed the situation outside the capital city is likely to be even less favourable to her".

<sup>58</sup> *Decision VAO-01624 & VAO-01625*, 8 March 2001 (IRB of Canada), available at <http://www.unhcr.org/refworld/docid/48246f092.html>, which states: "Claimant's former husband and his agents would seek them [the claimant and her partner] out wherever they went because he would not tolerate the mother of his child living in a lesbian relationship anywhere" (p. 6). See also, *UNHCR Guidelines on Internal Flight or Relocation Alternative*, above footnote 57, para 15.

<sup>59</sup> *UNHCR Guidelines on Internal Flight or Relocation Alternative*, above footnote 57, para. 19; see also *Decision MA6-01580*, 12 January 2007 (IRB of Canada), available at <http://www.unhcr.org/refworld/docid/482457202.html>, which states that "[i]n this case the claimant was not living in a provincial town but in [...] the most tolerant city in the country according to the documentary evidence [...] homophobia is still common and although positive measures exist, they are [...] ineffective" (pp. 4 and 5).

<sup>60</sup> This section should be read in conjunction with *UNHCR Guidelines on Gender-related Persecution*, above footnote 2, Section III: Procedural Issues.

<sup>61</sup> *UNHCR Handbook*, above footnote 15, para. 196. See also, *Nasser Mustapha Karouni, Petitioner, v. Alberto Gonzales, Attorney General, Respondent*, above footnote 176, at para. 7: "The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."

<sup>62</sup> *HS (Homosexuals: Minors, Risk on Return) Iran*, above footnote 14, para. 128.

automatically be considered heterosexual merely because he or she is, or has been, married, has children, or dresses in conformity with prevailing social codes. Enquiries as to the applicant's realization and experience of sexual identity rather than a detailed questioning of sexual acts may more accurately assist in assessing the applicant's credibility.

37. It is important that LGBT applicants are interviewed by trained officials who are well informed about the specific problems LGBT persons face. The same applies for interpreters present at the interview. Relevant ways to increase officials' awareness, include short targeted training sessions, mainstreaming of issues relating to sexual orientation and gender identity into the induction of new staff and training of existing staff, ensuring awareness of websites with expertise on LGBT issues, as well as the development of guidance relating to appropriate enquiries and interview techniques to use during the different stages of the asylum procedure.

38. The fact that an applicant has not had any significant relationship(s) in the country of origin or in the country of asylum does not necessarily mean that he or she is not LGBT. It may, rather, be an indication that he or she has been seeking to avoid harm as explained above in paragraphs 23-26. The applicant will not always know that sexual orientation can constitute a basis for refugee status or can be reluctant to talk about such intimate matters, particularly where his or her sexual orientation would be the cause of shame or taboo in the country of origin. As a result, he or she may at first not feel confident to speak freely or to give an accurate account of his or her case. Even where the initial submission for asylum contains false statements, or where the application is not submitted until some time has passed after the arrival to the country of asylum, the applicant can still be able to establish a credible claim.<sup>63</sup>

## F. SUR PLACE CLAIMS

39. A *sur place* claim for refugee status may arise as a consequence of events which have occurred in the applicant's country of origin since his or her departure, or as a consequence of the applicant's activities since leaving his or her country of origin.<sup>64</sup> This may be the case where the applicant has "come out" after arrival in the country of asylum, and/or where his or her LGBT status or views on sexual orientation have been publicly expressed, for instance by taking part in advocacy campaigns, demonstrations and other human rights activism on behalf of LGBT persons.<sup>65</sup> In such cases, particular credibility concerns may arise, and an in-depth examination of the circumstances and genuineness of the applicant's sexual orientation will be necessary.

40. Even where public exposure of an applicant's LGBT status is the result of "self-serving" activities, he or she may nonetheless have a well-founded fear of persecution on return or may otherwise be in need of international protection.<sup>66</sup> Consideration should

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<sup>63</sup> See, UNHCR *Handbook*, above footnote 15, para. 198. See also, *Refugee Appeal No. 74665*, above footnote 6. The applicant's "[a]ccident story was a pretext to mask that which he believed he could not reveal, namely his sexual orientation [...] His misguided persistence with the original false claim has not deflected a finding that he is an otherwise credible witness" (para. 22).

<sup>64</sup> See UNHCR *Handbook*, above footnote 15, paras. 94–96. See also, *Refugee Appeal No. 75576*, 21 December 2006 (New Zealand RSAA), para. 78, available at <http://www.unhcr.org/refworld/docid/477cfbc8d.html>, regarding the situation of homosexuals in Iran and change of circumstances.

<sup>65</sup> See further, *UNHCR Advisory Opinion to the Tokyo Bar Association*, above footnote 8, para. 12.

<sup>66</sup> See by analogy, *UNHCR Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, HCR/GIP/04/06, 28 April 2004, paras. 34–36, available at <http://www.unhcr.org/refworld/>

therefore be given to whether the applicant's sexual orientation/gender identity may come to the attention of the authorities in country of origin, and to the ensuing risk of persecution.<sup>67</sup> A careful assessment of all the circumstances, including the extent to which the activities were self-serving, the nature of the harm feared, and the degree of risk, is necessary.<sup>68</sup>

### III. CONCLUSION

41. International and national developments in sexual orientation case law clearly show that LGBT persons may be recognized as a "particular social group" and, as such, are entitled to protection under the 1951 Convention. These developments, however, also indicate that ill-treatment of persons due to their sexual orientation and gender identity continues to be seen as a highly personal or hidden form of persecution. As a result, LGBT persons who seek asylum have on occasion been expected by adjudicators to avoid persecution by concealing their sexual orientation, while similar expectations are not applied to the same extent in claims concerning political opinion or religious belief. It is, thus, essential that assessments of claims based on sexual orientation and/or gender identity be conducted in a sensitive and appropriate manner by decision-makers specifically trained on these issues. Given the difficulties of providing proof in sexual orientation claims, the assessment of such claims often rests on the credibility of the applicant. In these circumstances, decision-makers must lean towards giving the applicant the benefit of the doubt.

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[docid/4090f9794.html](http://www.unhcr.org/refworld/docid/4090f9794.html); *Refugee Appeal No. 75139*, 18 November 2004 (New Zealand RSAA), paras. 8, 35, available at <http://www.unhcr.org/refworld/docid/467908082.html>.

<sup>67</sup> See, *Regeringsbeslut 11:6*, Document No. 1926, 28 May 1998 (Swedish Government, Foreign Ministry (Regeringen, Utrikesdepartementet)), where it was determined that with the wide attention the applicant's case had received both in Sweden and abroad and the involvement by different organisations, it could not be excluded that the applicant was at risk of attracting the particular interest of the Iranian authorities.

<sup>68</sup> For further jurisprudence on *sur place* claims, see for instance, *Danian v. Secretary of State for the Home Department*, CO/30274/97, 9 June 1998 (UK IAT), available at <http://www.unhcr.org/refworld/docid/3ae6b6b92c.html>; and *Ghasemian v. Canada (Minister of Citizenship and Immigration)* [2003] FCJ No. 1591; 2003 FC 1266, 30 October 2003 (Federal Court of Canada), available at <http://www.unhcr.org/refworld/docid/412f420b4.html>.



## POLICY UPDATE: THE HARM OF THE DEFENSE OF MARRIAGE ACT (DOMA) IN AN IMMIGRATION CONTEX

The question of how the right to a lawful marriage affects gay and lesbian Americans and their foreign spouses has often been overlooked in the larger debate about marriage equality. Thanks to the work of a community of advocates dedicated to justice for bi-national couples, this issue will not remain unaddressed and in a void. Because immigration law is federal law, it follows the federal definition of “marriage” provided by the Defense of Marriage Act (“DOMA”) for purposes of issuing immigration benefits to the foreign spouses of U.S. citizens and lawful permanent residents. Section 3 of DOMA defines “marriage” as “only a legal union between one man and one woman as husband and wife;” and it defines “spouse” as “only . . . a person of the opposite sex who is a husband or a wife.”<sup>1</sup>

Therefore, until federal law changes to recognize marriages, civil unions and/or long-term partnerships between two persons of the same sex, such couples will not be able to file marriage-based petitions for immigration benefits.<sup>2</sup> This is so even for couples who are legally married in either one of the six US states



or the District of Columbia or the ten countries worldwide where same-sex marriage is recognized.<sup>3</sup> Consequently, approximately 26,000 bi-national same-sex couples in the United States are currently being forced either to find some other way for the foreign spouse to come to or remain lawfully in the U.S. or, when that is not possible, to resort to one of a few painful and inhumane options.<sup>4</sup> Some couples are being forced to live outside the U.S. against their will, essentially an unofficial forced exile for thousands of

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<sup>1</sup> DOMA § 3(a), 110 Stat. at 2419 (codified at [1 U.S.C. § 7 \(2000\)](#)).

<sup>2</sup> Nor will gay or lesbian immigrants be able to apply for any immigration relief based on marriage, such as VWA self-petitions, cancellation of removal, waivers of inadmissibility and other such benefits.

<sup>3</sup> Same-sex marriage is legally performed in the states of Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont and in Argentina, Belgium, Canada, Iceland, The Netherlands, Norway, Portugal, Spain, South Africa and Sweden. In addition, this is also true in Mexico City, Mexico.

<sup>4</sup> This number was taken from the Williams Institute’s written testimony to Congress on July 20, 2011 for the Hearing on “S.598, The Respect for Marriage Act: Assessing the Impact of DOMA on American Families.”

U.S. citizens. Others are subjected to living with one spouse living in the shadows of illegality, without the ability to obtain lawful employment to support their families, in constant fear of being caught and deported. Others still are forced to separate. These options demonstrate how the unequal protection of the law results in grave harm and gross injustice for thousands of bi-national couples and their families.

One of the ways advocates have fought to secure equal protection under immigration law for same-sex bi-national couples has been to push for the passage of the Uniting American Families Act ("UAFAs"), which would grant gay and lesbian citizens and lawful permanent residents the right to petition their long-term partners for immigration purposes regardless of DOMA.<sup>5</sup> However, its reach as far as advancing LGBT civil rights would be limited to immigration and would not involve the fundamental question of the right to marriage. Thanks to the success of LGBT rights advocates in spotlighting the issue of gay marriage through the larger fight against DOMA, immigrant advocates have been provided with a context for raising questions about the Obama Administration's willingness and likelihood to defend and protect same-sex bi-national couples.

The current administration has long held itself out as an ally to the LGBT community. But such support has not held true in the immigration context. On February 23, 2011, many saw cause for celebration when Attorney General Eric Holder announced that the Department of Justice would stop defending DOMA in federal court after the Administration determined the law to be unconstitutional. Even the U.S. Citizenship and Immigration Services (USCIS) announced in late March that it would stop denying marriage-based petitions for same-sex couples (and at least two District Offices began to implement such a policy)<sup>6</sup>. But only a few days later, USCIS press secretary Christopher S. Bentley announced that the agency was reversing this decision, and thus continuing to deny marriage-based petitions for same-sex couples. Furthermore, as of June 6, 2011, the Department of Justice has also confirmed, via a letter sent to the American Immigration Lawyers Association (AILA), that the President has instructed immigration courts to continue to enforce DOMA, leaving to judges' discretion the deportation of immigrants whose sole relief otherwise would depend on their partnerships with gay or lesbian US citizens or lawful permanent residents.

The struggle against DOMA continues on several fronts: through litigation in federal courts, where the federal government continues to defend DOMA through outside counsel hired by House Republicans;<sup>7</sup> at the Board of Immigration Appeals (BIA);<sup>8</sup> and

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<sup>5</sup> The most recent version of UAFAs was introduced in Congress on April 14, 2011 by NY Congressman Jerrod Nadler.

<sup>6</sup> Sarah Taylor, Director of the Washington District Office, and Greg Collett, Director of the Baltimore District Office announced to members of the American Immigration Lawyers Association (AILA) that their offices had begun to place marriage-based petitions involving gay and lesbian couples on hold. See *The Daily Beast*, "Gay Immigrants' Same-Sex Marriage Lifeline." March 25, 2011. <http://www.thedailybeast.com/articles/2011/03/25/gay-immigrants-same-sex-marriage-lifeline.html>

<sup>7</sup> Although DOMA is no longer being defended by the Department of Justice, House Republicans hired the law firm of King and Spaulding to take over that task.

through the the Respect for Marriage Act, introduced in Congress this past July as a direct effort to repeal DOMA.<sup>9</sup> However, despite President Obama's announcement that he will no longer defend the constitutionality of DOMA, and that he supports the Respect for Marriage Act,<sup>10</sup> the position of the administration is to continue to deny immigration benefits to gay and lesbian bi-national couples until the question of DOMA is resolved. Such a response to this crisis is disappointing. The ILRC, along with countless other immigration advocates, are working to encourage more decisive action on the part of the Obama Administration on behalf of the tens of thousands of bi-national couples who are currently suffering injustice.

For the time being, there may be some relief at least for couples where the foreign spouse faces deportation in court. On August 18<sup>th</sup>, the Department of Homeland Security (DHS) announced it is taking steps to implement existing guidelines on prosecutorial discretion that would allow immigration authorities to administratively close deportation cases identified as "low priority," which DHS has clarified includes cases involving gay and lesbian families. Properly implemented, these guidelines may provide temporary relief for many gay and lesbian foreign spouse who would otherwise face deportation.

ILRC's current work in the area of LGBT immigration focuses primarily on educating legal practitioners and service providers on the unique needs of LGBT clients. The ILRC and other advocates will continue to push the administration to follow-through with the implementation of these guidelines. However, justice for same-sex bi-national couples will not be served until their unions are recognized by federal law and they are able to access the same benefits as heterosexual couples.

September 2011

Lourdes Martinez, Staff Attorney  
The Immigrant Legal Resource Center

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<sup>8</sup> The application of DOMA in an immigration context is currently being reviewed by the Board of Immigration Appeals (BIA) in the case of *Matter of Dorman*, 25 I&N Dec. 485 (A.G. 2011), which the Attorney General remanded to the BIA after appeal to the Third Circuit in order to answer the question of how DOMA is implicated where the respondent's relief to remain in the US and obtain lawful permanent resident would depend on whether or not his US citizen partner is considered a "qualifying relative," or a spouse, under the Immigration and Nationality Act.

<sup>9</sup> The Respect for Marriage Act of 2011, S. 589, 112<sup>th</sup> Cong. (2011) was introduced by Senator Dianne Feinstein and Congressman Jarrold Nadler in July of 2011 to repeal DOMA.

<sup>10</sup> White House spokesman Jay Carney announced on July 19<sup>th</sup> that President Obama was proud to support the Respect for Marriage Act.

<http://www.whitehouse.gov/blog/2011/07/19/president-obama-supports-respect-marriage-act>

**Department of Justice**  
Office of Public Affairs

FOR IMMEDIATE RELEASE

Wednesday, February 23, 2011

**Letter from the Attorney General to Congress on Litigation Involving the  
Defense of Marriage Act**

WASHINGTON – The Attorney General sent the following letter today to Congressional leadership to inform them of the Department’s course of action in two lawsuits, *Pedersen v. OPM* and *Windsor v. United States*, challenging Section 3 of the Defense of Marriage Act (DOMA), which defines marriage for federal purposes as only between a man and a woman. A copy of the letter is also attached.

The Honorable John A. Boehner  
Speaker  
U.S. House of Representatives  
Washington, DC 20515

Re: Defense of Marriage Act

Dear Mr. Speaker:

After careful consideration, including review of a recommendation from me, the President of the United States has made the determination that Section 3 of the Defense of Marriage Act (“DOMA”), 1 U.S.C. § 7,<sup>i</sup> as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment. Pursuant to 28 U.S.C. § 530D, I am writing to advise you of the Executive Branch’s determination and to inform you of the steps the Department will take in two pending DOMA cases to implement that determination.

While the Department has previously defended DOMA against legal challenges involving legally married same-sex couples, recent lawsuits that challenge the constitutionality of DOMA Section 3 have caused the President and the Department to conduct a new examination of the defense of this provision. In particular, in November 2010, plaintiffs filed two new lawsuits challenging the constitutionality of Section 3 of DOMA in jurisdictions without precedent on whether sexual-orientation classifications are subject to rational basis review or whether they must satisfy some form of heightened scrutiny. *Windsor v. United States*, No. 1:10-cv-8435 (S.D.N.Y.); *Pedersen v. OPM*, No. 3:10-cv-1750 (D. Conn.). Previously, the Administration has defended Section 3 in jurisdictions where circuit courts have already held that classifications based on sexual orientation are subject to rational basis review, and it has advanced arguments to defend DOMA Section 3 under the binding standard that has applied in those cases.<sup>ii</sup>

These new lawsuits, by contrast, will require the Department to take an affirmative position on the level of scrutiny that should be applied to DOMA Section 3 in a circuit without binding precedent on the issue. As described more fully below, the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.

### **Standard of Review**

The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation. It has, however, rendered a number of decisions that set forth the criteria that should inform this and any other judgment as to whether heightened scrutiny applies: (1) whether the group in question has suffered a history of discrimination; (2) whether individuals “exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group”; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual’s “ability to perform or contribute to society.” *See Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441-42 (1985).

Each of these factors counsels in favor of being suspicious of classifications based on sexual orientation. First and most importantly, there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today. Indeed, until very recently, states have “demean[ed] the[] existence” of gays and lesbians “by making their private sexual conduct a crime.” *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).<sup>iii</sup>

Second, while sexual orientation carries no visible badge, a growing scientific consensus accepts that sexual orientation is a characteristic that is immutable, *see* Richard A. Posner, *Sex and Reason* 101 (1992); it is undoubtedly unfair to require sexual orientation to be hidden from view to avoid discrimination, *see* Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

Third, the adoption of laws like those at issue in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence*, the longstanding ban on gays and lesbians in the military, and the absence of federal protection for employment discrimination on the basis of sexual orientation show the group to have limited political power and “ability to attract the [favorable] attention of the lawmakers.” *Cleburne*, 473 U.S. at 445. And while the enactment of the Matthew Shepard Act and pending repeal of Don’t Ask, Don’t Tell indicate that the political process is not closed *entirely* to gay and lesbian people, that is not the standard by which the Court has judged “political powerlessness.” Indeed, when the Court ruled that gender-based classifications were subject to heightened scrutiny, women already had won major political victories such as the Nineteenth Amendment (right to vote) and protection under Title VII (employment discrimination).

Finally, there is a growing acknowledgment that sexual orientation “bears no relation to ability to perform or contribute to society.” *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality). Recent evolutions in legislation (including the pending repeal of Don’t Ask, Don’t Tell), in community practices and attitudes, in case law (including the Supreme Court’s holdings in *Lawrence* and *Romer*), and in social science regarding sexual orientation all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives. See, e.g., Statement by the President on the Don’t Ask, Don’t Tell Repeal Act of 2010 (“It is time to recognize that sacrifice, valor and integrity are no more defined by sexual orientation than they are by race or gender, religion or creed.”)

To be sure, there is substantial circuit court authority applying rational basis review to sexual-orientation classifications. We have carefully examined each of those decisions. Many of them reason only that if consensual same-sex sodomy may be criminalized under *Bowers v. Hardwick*, then it follows that no heightened review is appropriate – a line of reasoning that does not survive the overruling of *Bowers* in *Lawrence v. Texas*, 538 U.S. 558 (2003).<sup>iv</sup> Others rely on claims regarding “procreational responsibility” that the Department has disavowed already in litigation as unreasonable, or claims regarding the immutability of sexual orientation that we do not believe can be reconciled with more recent social science understandings.<sup>v</sup> And none engages in an examination of all the factors that the Supreme Court has identified as relevant to a decision about the appropriate level of scrutiny. Finally, many of the more recent decisions have relied on the fact that the Supreme Court has not recognized that gays and lesbians constitute a suspect class or the fact that the Court has applied rational basis review in its most recent decisions addressing classifications based on sexual orientation, *Lawrence* and *Romer*.<sup>vi</sup> But neither of those decisions reached, let alone resolved, the level of scrutiny issue because in both the Court concluded that the laws could not even survive the more deferential rational basis standard.

### **Application to Section 3 of DOMA**

In reviewing a legislative classification under heightened scrutiny, the government must establish that the classification is “substantially related to an important government objective.” *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Under heightened scrutiny, “a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.” *United States v. Virginia*, 518 U.S. 515, 535-36 (1996). “The justification must be genuine, not hypothesized or invented post hoc in response to litigation.” *Id.* at 533.

In other words, under heightened scrutiny, the United States cannot defend Section 3 by advancing hypothetical rationales, independent of the legislative record, as it has done in circuits where precedent mandates application of rational basis review. Instead, the United States can defend Section 3 only by invoking Congress’ actual justifications for the law.

Moreover, the legislative record underlying DOMA's passage contains discussion and debate that undermines any defense under heightened scrutiny. The record contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships – precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against.<sup>vii</sup> See *Cleburne*, 473 U.S. at 448 (“mere negative attitudes, or fear” are not permissible bases for discriminatory treatment); see also *Romer*, 517 U.S. at 635 (rejecting rationale that law was supported by “the liberties of landlords or employers who have personal or religious objections to homosexuality”); *Palmore v. Sidotti*, 466 U.S. 429, 433 (1984) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”).

### **Application to Second Circuit Cases**

After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in *Windsor* and *Pedersen*, now pending in the Southern District of New York and the District of Connecticut. I concur in this determination.

Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch. To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality. This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.

As you know, the Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense, a practice that accords the respect appropriately due to a coequal branch of government. However, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because the Department does not consider every plausible argument to be a “reasonable” one. “[D]ifferent cases can raise very different issues with respect to statutes of doubtful constitutional validity,” and thus there are “a variety of factors that bear on whether the Department will defend the constitutionality of a statute.” Letter to Hon. Orrin G. Hatch from Assistant Attorney General Andrew Fois at 7 (Mar. 22, 1996). This is the rare case where the proper course is to forgo the defense of this statute. Moreover, the Department has declined to defend a statute “in cases in which it is manifest that the President has concluded that the statute is

unconstitutional,” as is the case here. Seth P. Waxman, *Defending Congress*, 79 N.C. L.Rev. 1073, 1083 (2001).

In light of the foregoing, I will instruct the Department’s lawyers to immediately inform the district courts in *Windsor* and *Pedersen* of the Executive Branch’s view that heightened scrutiny is the appropriate standard of review and that, consistent with that standard, Section 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law. If asked by the district courts in the Second Circuit for the position of the United States in the event those courts determine that the applicable standard is rational basis, the Department will state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3’s constitutionality may be proffered under that permissive standard. Our attorneys will also notify the courts of our interest in providing Congress a full and fair opportunity to participate in the litigation in those cases. We will remain parties to the case and continue to represent the interests of the United States throughout the litigation.

Furthermore, pursuant to the President’s instructions, and upon further notification to Congress, I will instruct Department attorneys to advise courts in other pending DOMA litigation of the President’s and my conclusions that a heightened standard should apply, that Section 3 is unconstitutional under that standard and that the Department will cease defense of Section 3.

A motion to dismiss in the *Windsor* and *Pedersen* cases would be due on March 11, 2011. Please do not hesitate to contact us if you have any questions.

Sincerely yours,

Eric H. Holder, Jr.  
Attorney General

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<sup>i</sup>DOMA Section 3 states: “In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”

<sup>ii</sup> See, e.g., *Dragovich v. U.S. Department of the Treasury*, 2011 WL 175502 (N.D. Cal. Jan. 18, 2011); *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal., 2005); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1308 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 145 (Bkrcty. W.D. Wash. 2004); *In re Levenson*, 587 F.3d 925, 931 (9th Cir. E.D.R. Plan Administrative Ruling 2009).

<sup>iii</sup>While significant, that history of discrimination is different in some respects from the discrimination that burdened African-Americans and women. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 216 (1995) (classifications based on race “must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States,” and “[t]his strong policy renders racial classifications ‘constitutionally suspect.’”); *United States v. Virginia*, 518 U.S. 515, 531

(1996) (observing that “our Nation has had a long and unfortunate history of sex discrimination” and pointing out the denial of the right to vote to women until 1920). In the case of sexual orientation, some of the discrimination has been based on the incorrect belief that sexual orientation is a behavioral characteristic that can be changed or subject to moral approbation. *Cf. Cleburne*, 473 U.S. at 441 (heightened scrutiny may be warranted for characteristics “beyond the individual’s control” and that “very likely reflect outmoded notions of the relative capabilities of” the group at issue); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (Stevens, J., dissenting) (“Unfavorable opinions about homosexuals ‘have ancient roots.’” (quoting *Bowers*, 478 U.S. at 192)).

<sup>iv</sup> See *Equality Foundation v. City of Cincinnati*, 54 F.3d 261, 266–67 & n. 2. (6th Cir. 1995); *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

<sup>v</sup> See, e.g., *Lofton v. Secretary of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (discussing child-rearing rationale); *High Tech Gays v. Defense Indust. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (discussing immutability). As noted, this Administration has already disavowed in litigation the argument that DOMA serves a governmental interest in “responsible procreation and child-rearing.” H.R. Rep. No. 104-664, at 13. As the Department has explained in numerous filings, since the enactment of DOMA, many leading medical, psychological, and social welfare organizations have concluded, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents.

<sup>vi</sup> See *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-94 (6th Cir. 1997).

<sup>vii</sup> See, e.g., H.R. Rep. at 15–16 (judgment [opposing same-sex marriage] entails both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality”); *id.* at 16 (same-sex marriage “legitimizes a public union, a legal status that most people . . . feel ought to be illegitimate” and “put[s] a stamp of approval . . . on a union that many people . . . think is immoral”); *id.* at 15 (“Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality”); *id.* (reasons behind heterosexual marriage—procreation and child-rearing—are “in accord with nature and hence have a moral component”); *id.* at 31 (favorably citing the holding in *Bowers* that an “anti-sodomy law served the rational purpose of expressing the presumed belief . . . that homosexual sodomy is immoral and unacceptable”); *id.* at 17 n.56 (favorably citing statement in dissenting opinion in *Romer* that “[t]his Court has no business . . . pronouncing that ‘animosity’ toward homosexuality is evil”).



# LEGAL ACTION CENTER

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AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY<sup>1</sup>

June 13, 2011

## **Protecting and Preserving the Rights of LGBT Families: DOMA, *Dorman*, and Immigration Strategies**

By The Legal Action Center and Immigration Equality

### **Introduction**

Lesbian and gay noncitizens face serious impediments to obtaining legal immigration status through marriage. The Board of Immigration Appeals (BIA or Board) relies on Section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, which defines marriage as a union between one man and one woman, in determining whether a marriage is valid for immigration purposes. *See Matter of Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005). Pursuant to 8 C.F.R. § 103.37(g), all officers and employees of the Department of Homeland Security as well as immigration judges are bound by Board decisions and decisions of the Attorney General.<sup>2</sup> Accordingly, the immigration agencies bar lesbian and gay U.S. citizens and permanent residents from successfully petitioning for their spouses. Similarly, noncitizens are precluded from obtaining other immigration benefits or relief from removal – such as a waiver or cancellation of removal – based on a marriage involving a gay or lesbian couple.

In February 2011, the Obama Administration (through the Attorney General) announced that it would not defend Section 3 in federal court challenges.<sup>3</sup> Nonetheless, the Attorney General said that the Department of Justice would still “enforce” DOMA pending a legislative repeal of

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The LAC and Immigration Equality are grateful for the assistance of the National Immigration Project of the National Lawyers Guild and Lambda Legal.

<sup>2</sup> *See also* U.S. Citizenship and Immigration Service’s Adjudicator’s Field Manual § 21.3(a)(2)(I) (DOMA governs).

<sup>3</sup> *See* Letter from Eric H. Holder, Jr., Attorney General, to John H. Boehner, Speaker, U.S. House of Representative, Re: Defense of Marriage Act (Feb. 23, 2011) *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

DOMA<sup>4</sup> or a “final judicial decision.” Advocates are urging the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR) to adopt interim measures that would preserve the status quo until there is final resolution.<sup>5</sup> To date, these entities have not changed their policies. Significantly, however, the Attorney General remanded a case involving immigration relief based upon a civil union between two gay men to the BIA to determine “whether and how the constitutionality of DOMA is implicated.” *Matter of Dorman*, 25 I&N Dec. 485 (A.G. 2011).

Outside of the immigration context, there are several pending federal court cases challenging DOMA. The Gay & Lesbian Advocates & Defenders (GLAD) achieved the first victory, convincing the district court in Massachusetts that DOMA is unconstitutional; the case now is pending in the First Circuit and the U.S. House of Representatives has moved to intervene to defend DOMA.<sup>6</sup> See *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010), *appeal docketed*, No. 10-2207 (1st Cir. filed Oct. 18, 2010). There also are pending cases in the district courts in Connecticut, New York, and California, in which plaintiffs are represented by GLAD, ACLU’s Lesbian, Gay, Bisexual, and Transgender (LGBT) Project, Lambda Legal, and the Legal Aid Society-Employment Law Center, respectively. *Pedersen v. Office of Pers. Mgmt.*, No. 10-1750 (D. Conn. filed Nov. 9, 2010); *Windsor v. United States*, No. 10-8435 (S.D.N.Y. filed Nov. 9, 2010); *Golinski v. Office of Pers. Mgmt.*, No. 10-257 (N.D. Cal. filed Jan. 20, 2010); *Dragovich v. United States Dep’t of the Treasury*, No. 10-1564 (N.D. Cal. motion to dismiss denied Jan. 18, 2011). It is likely that the Supreme Court ultimately will decide one of these cases. Although none of these cases involves immigration benefits, the resolution of these cases will have a considerable – perhaps dispositive – impact on the application of DOMA in immigration cases.<sup>7</sup>

Undoubtedly, the law surrounding DOMA is in flux. This Practice Advisory provides ideas for attorneys representing noncitizens in removal proceedings whose cases are affected by DOMA. Such individuals may seek to have their cases closed, continued, or held in abeyance. In the

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<sup>4</sup> Legislation has been introduced that would repeal DOMA. See Respect for Marriage Act, H.R. 1116, 112th Cong. (2011); Respect for Marriage Act of 2011, S. 598, 112th Cong. (2011).

<sup>5</sup> As part of this effort, advocates have made a formal request by submitting letters to the Secretary of Homeland Security, Director of EOIR, and DOJ’s Office of Immigration Litigation. The letters are available at <http://www.americanimmigrationcouncil.org/sites/default/files/docs/DOMA-letters-4-6-2011.pdf>.

<sup>6</sup> Following the Attorney General’s announcement that it would no longer defend DOMA, Members of the House Bipartisan Legal Advisory Group voted along party lines to intervene in DOMA litigation. Congress has similarly intervened in other instances where an administration has declined to defend the constitutionality of a law. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>7</sup> It is important to understand that the successes to date in DOMA litigation have been the result of a carefully crafted and coordinated strategy. At this point, we are not advising anyone to bring a federal DOMA challenge without first coordinating with the groups litigating these cases.

alternative, noncitizens may take steps to resolve other, non-DOMA issues so that their cases can be fully developed pending final resolution of judicial and legislative challenges to DOMA. As discussed at the end of this Practice Advisory, lesbian and gay noncitizens who are not in removal proceedings generally are advised to postpone taking steps to obtain legal status based on their marriage.

### **Ways in Which DOMA May Be Implicated**

There are a number of immigration benefits and forms of relief from removal that depend on the existence of a valid marriage. Thus, the validity of a marriage can be an issue in an affirmative application for an immigration benefit filed with U.S. Citizenship and Immigration Services (USCIS) or in an application for relief from removal filed with an immigration judge (IJ). The following are examples of situations where section 3 of DOMA may be implicated.

- Adjustment of status based on a family-based visa petition
- Adjustment of status based on being a derivative of a beneficiary of a visa petition (family-based or employment-based)
- Cancellation of removal requiring a qualifying relative
- Waivers that require a qualifying relative (such as § 212(h) and § 212(i))
- Derivative beneficiary of an asylum application
- VAWA
- NACARA

### **Attorney General's Decision in *Matter of Dorman***

Mr. Dorman, a citizen of the U.K., entered into a New Jersey civil union with his U.S. citizen partner. An IJ found that he was removable because he overstayed his visa. Mr. Dorman applied for non-lawful permanent resident (LPR) cancellation of removal (INA § 240A(b)), but the IJ found him ineligible because he did not have a qualifying relative. As a result, the IJ did not schedule an individual hearing on the cancellation application and pretermitted his application. The Board affirmed the IJ's order, and Mr. Dorman subsequently filed a petition for review in the Third Circuit Court of Appeals.

On April 26, 2011 – before the Third Circuit could decide the petition for review – the Attorney General issued a precedent decision in *Matter of Dorman*, 25 I&N Dec. 485 (A.G. 2011). The Attorney General vacated the underlying removal order and remanded the case to the Board “to make such findings as may be necessary to determine whether and how the constitutionality of DOMA is implicated.”<sup>8</sup> Further, the Attorney General specified four questions for the Board to consider:

- (1) whether respondent's same-sex partnership or civil union qualifies him to be considered a “spouse” under New Jersey law;

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<sup>8</sup> Following the Attorney General's decision, the government filed an unopposed motion to dismiss the petition for review for lack of jurisdiction.

- (2) whether, absent the requirements of DOMA, respondent's same-sex partnership or civil union would qualify him to be considered a "spouse" under the Immigration and Nationality Act;
- (3) what, if any, impact the timing of respondent's civil union should have on his request for that discretionary relief; and
- (4) whether, if he had a "qualifying relative," the respondent would be able to satisfy the exceptional and unusual hardship requirement for cancellation of removal.

Importantly, the Attorney General indicated that the Board is not limited to addressing solely these issues.

These questions go to aspects of the case that were not developed factually and which do not necessarily require the Board to address the applicability of section 3 of DOMA.<sup>9</sup> As of the date of this Practice Advisory, the Board had not yet set a briefing schedule in *Matter of Dorman*. Given the Board's limited authority to make findings of fact,<sup>10</sup> it is quite possible – if not likely – that the Board will remand the case to the IJ for factfinding before addressing the Attorney General's questions. Thus, it may be over a year before the Board issues a decision.

Until the BIA issues a decision, it is unclear how it will answer these questions and what other questions it may find necessary to address. It also is unclear what direction it ultimately might provide to IJs about how to handle removal cases implicating DOMA pending a judicial resolution on the constitutionality of the law.

## **Steps to Take if Client Is in Removal Proceedings or Has a Final Order of Removal**

### ***Pending removal proceedings***

If you have a client in removal proceedings and DOMA is implicated in one of the ways described above, there are steps your client may take to try to protect himself or herself and preserve all issues pending a final judicial resolution of DOMA. Importantly, EOIR has said that although the President has instructed federal agencies to continue to enforce DOMA, "EOIR

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<sup>9</sup> The first question requires an analysis of state law. The second question asks the Board to analyze current law regarding the validity of a marriage (absent DOMA), and similarly the third question suggests that the Board should apply current standards with respect to marriages entered into during the course of removal proceedings (and the presumption that the marriage is not bona fide). Finally, the fourth question relates to the extreme hardship requirement for cancellation of removal.

<sup>10</sup> Pursuant to 8 C.F.R. § 1003.1(d)(3)(iv), "the Board will not engage in factfinding in the course of deciding appeals."

continues, where appropriate to exercise discretion in individual cases based on the unique factors presented by that particular case.”<sup>11</sup>

*I. Move for Administrative Closure, a Continuance, or to Hold the Case in Abeyance*

For most individuals with pending removal cases, the best course of action is for the immigration court or Board to administratively close or continue the removal case pending a judicial resolution or legislative repeal of DOMA or, at a minimum, the Board’s decision in *Matter of Dorman*. Administrative closure temporarily removes a case from an IJ calendar or from the Board’s docket. *Matter of Gutierrez-Lopez*, 21 I&N Dec. 479, 480 (BIA 1996).<sup>12</sup> Alternatively, an IJ may continue or adjourn a case until a later date “for good cause shown.” See 8 C.F.R. § 1003.29; *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009). In *Matter of Hashmi*, the Board set forth factors the IJ may consider in adjudicating a continuance motion to await the adjudication of a pending family-based visa petition.<sup>13</sup> Although one factor is whether the visa petition is prima facie approvable, importantly, these factors are not exclusive and the Board has advised IJs to “consider any other facts that [they] deem[] appropriate.” *Matter of Hashmi*, 24 I&N Dec. at 794. As discussed below, the unique posture of cases implicating DOMA is an appropriate factor the IJ should consider. Some individuals already have had success obtaining continuances.

If the case is on appeal at the Board, the Board also can hold the case in abeyance.<sup>14</sup> The Board has taken such actions in other similar situations. For example, in 2001, former INS issued a proposed rule that would amend the asylum regulations. Subsequently, the Attorney General vacated the Board’s decision in *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999; A.G. 2001) (a case

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<sup>11</sup> Letter from Juan P. Osuna, Director, Executive Office for Immigration Review, to Crystal Williams, American Immigration Lawyers Association (June 6, 2011) *available at* <http://www.legalactioncenter.org/sites/default/files/docs/lac/Osuna-AILA-6-6-2011.pdf>.

<sup>12</sup> Although “[a] case may not be administratively closed if opposed by either of the parties,” *Matter of Gutierrez-Lopez*, 21 I&N Dec. at 480, the Board has ordered supplemental briefing on whether it should reconsider this policy. See *Matter of Huerta-Soto*, A093 219 001 (BIA supplemental briefing ordered May 9, 2011). Thus, if DHS opposes administrative closure, you may want to request it nonetheless and note that the issue is pending before the BIA.

<sup>13</sup> The factors are: (1) the DHS response to the motion; (2) whether the underlying visa petition is prima facie approvable; (3) the noncitizen’s statutory eligibility for adjustment of status; (4) whether the respondent’s application for adjustment merits a favorable exercise of discretion; and (5) the reason for the continuance and other procedural factors. *Matter of Hashmi*, 24 I&N Dec. at 790.

<sup>14</sup> Although the Board “does not normally entertain motions to hold cases in abeyance while other matters are pending (e.g., waiting for a visa petition to become current, waiting for a criminal conviction to be overturned),” the Practice Manual leaves open the possibility that certain cases warrant such action. Board of Immigration Appeals Practice Manual, § 5.9(i) *available at* <http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap5.pdf>. Importantly, the basis of the motion described here is distinguishable from the examples provided in the manual.

addressing asylum eligibility for an applicant who was a victim of domestic violence) and directed the Board to stay the case pending issuance of a final asylum rule. The Board not only stayed R-A-'s case, but also stayed a number of similar cases.<sup>15</sup>

The following are some of the reasons why administrative closure or a continuance is appropriate and may be included in a motion to the IJ or Board:

- The law surrounding DOMA is developing. As discussed in the introduction to this Practice Advisory, the Attorney General has opined that Section 3 of DOMA is unconstitutional. He also has directed the Board to address a variety of issues in a case potentially implicating DOMA, *see Matter of Dorman*. Furthermore, there are several pending federal court cases raising the constitutionality of DOMA.
- Currently, there is no Board precedent addressing DOMA with respect to a state-sanctioned relationship between a U.S. citizen and a gay or lesbian noncitizen. By issuing a precedent decision directing the Board to consider a wide variety of factual and legal issues, *see Matter of Dorman*, it seems likely that the Attorney General intended for the Board's resolution of the case to serve as a blueprint for deciding other immigration cases involving DOMA issues (not only cases involving cancellation of removal). As such, it is very likely that the Board's decision in *Matter of Dorman* will affect how the IJ or Board will decide the case.
- Given the current state of the law, administrative closure or a continuance serves the interest of judicial economy.

In addition, it is helpful to highlight the favorable and unique equities in your client's case. You also may want to contact the DHS trial attorney to ask if the government will join, consent to, or not oppose your motion. See the discussion below about prosecutorial discretion.

2. *Request a merits hearing or remand for findings regarding non-DOMA aspects of the case.*

If the IJ declines to close or continue the case, an alternative course of action is to ask the IJ to resolve all aspects of the case before rendering a decision. If the case is pending at the Board, you can ask the Board to remand the case to the IJ for a hearing on any unresolved issues.<sup>16</sup>

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<sup>15</sup> The Attorney General acknowledged this policy of staying cases in a 2008 order lifting the stay in light of other developments. *See Matter of R-A-*, A073753922 (A.G. Sept. 25, 2008) available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/AG-CertificationRemand-9-29-2008.pdf>.

<sup>16</sup> Because the Board cannot engage in factfinding, "[a] party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If further factfinding is needed in a particular case, the Board may remand the proceedings to the immigration judge...." 8 C.F.R. § 1003.1(d)(3)(iv). A motion to remand generally must comply with the substantive requirements for a motion to reopen. *See Matter of Coelho*, 20 I&N Dec.

The Attorney General's decision in *Matter of Dorman* supports such a request, as the Attorney General has directed the Board to dispose of all issues in the case. In *Dorman*, which involves cancellation of removal, the Board (and likely the IJ on remand) will address the hardship requirement and the existence of a qualifying relative (but for DOMA). Thus, the Attorney General's questions provide a roadmap for cancellation cases. In other cases, the issues the IJ and Board should address may be somewhat different. For example, for adjustment of status cases, the IJ should address such issues as whether the marriage is bona fide, whether the applicant has shown that he or she is not likely to become a public charge, whether any other grounds of inadmissibility are at issue and if so, whether the person qualifies and warrants a waiver in the exercise of discretion.

### ***Final Order of Removal***

#### *1. Petition for Review at the Court of Appeals*

If you have a client with a petition for review pending at the court of appeals, and DOMA is implicated in one of the ways described above, please contact the American Immigration Council's Legal Action Center ([clearinghouse@immcouncil.org](mailto:clearinghouse@immcouncil.org)). In collaboration with other national organizations, we are tracking other federal court litigation on DOMA and are available to help strategize on options for such cases.

In light of recent developments, petitioners may seek remand to the Board. Given that the Attorney General has directed the BIA to consider, in the first instance, whether and how the constitutionality of DOMA is implicated in *Dorman*, remand is appropriate. See *INS v. Ventura*, 537 U.S. 12, 16 (2002) (finding that remand is appropriate "for decision of a matter that statutes place primarily in agency hands"). The courts of appeals have a track record of remanding petitions for review in light of intervening Attorney General or Board precedents. The Department of Justice, Office of Immigration Litigation, may even support or join in a remand motion.

#### *2. No Pending Petition for Review*

If you have a client with a final order of removal, but there is no pending petition for review, please contact the American Immigration Council's Legal Action Center ([clearinghouse@immcouncil.org](mailto:clearinghouse@immcouncil.org)). The Legal Action Center and our colleague organizations are available to help strategize on options for final order cases. Some clients may want to consider filing a motion to reopen in light of recent developments on DOMA. In most cases, it probably is not advisable to do so given that the law is not settled. However, there may be situations where an individual may decide that filing a motion is appropriate (e.g., client faces imminent removal or client is still within 90 day statutory period for reopening). In addition, as discussed below, it may be advisable to ask DHS to exercise prosecutorial discretion.

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464, 471 (BIA 1992); see also 8 C.F.R. §§ 1003.23(b)(3) (setting forth substantive requirements for motion to reopen).

## **Prosecutorial Discretion**

“Prosecutorial discretion” is the authority of a law enforcement agency or officer charged with enforcing a law to decide whether to enforce the law in a particular case. A law enforcement officer who decides *not* to enforce the law against a person has *favorably* exercised prosecutorial discretion. Examples of the favorable exercise of prosecutorial discretion in the immigration context include granting a stay of removal; deciding not to issue a Notice to Appear or canceling it before it is filed with the immigration court; or declining to appeal a favorable IJ decision. Particularly relevant here, DHS attorneys have authority to exercise prosecutorial discretion to agree to join or oppose a motion (including a motion to continue, a motion to remand, or a motion to hold the case in abeyance). DHS also has discretion to grant deferred action in cases with strong humanitarian factors. There are strong arguments that DHS should not allow spouses of U.S. citizens to be removed from the United States based on a law that the Administration has determined is unconstitutional.

The American Immigration Council’s Practice Advisory on prosecutorial discretion discusses the options described above (as well as others), lays out the factors DHS considers in deciding whether to favorably exercise prosecutorial discretion, and offers suggestions for how to go about seeking a favorable exercise of discretion. *See Prosecutorial Discretion: How to Get DHS to Act in Favor of Your Client* (Nov. 30, 2010) available at <http://www.legalactioncenter.org/sites/default/files/ProsecutorialDiscretion-11-30-10.pdf>. In addition, Penn State Law’s Center for Immigrants’ Rights, in collaboration with Maggio + Kattar and Duane Morris LLP, issued a toolkit for seeking deferred action. *See Private Bills and Deferred Action Toolkit* available at [http://law.psu.edu/news/immigration\\_toolkit](http://law.psu.edu/news/immigration_toolkit).

## **Affirmative Applications with USCIS**

Noncitizens who are not in removal proceedings generally should be advised to postpone taking steps to obtain legal status based on a marriage involving a gay or lesbian couple. Given that the Attorney General has said he will continue to “enforce” DOMA and that to date, DHS has not adopted a policy of holding cases (such as visa petitions and adjustment applications) in abeyance, it generally is not advisable to file a petition or application. Likewise, it generally is not advisable to file a lawsuit challenging a denied immigration benefit, particularly without coordinating with other LGBT and immigrant rights litigators who have developed and continue to develop litigation strategies for challenging DOMA. Read more about who should and should not marry now and when it may make sense to take affirmative steps to file applications with USCIS in the Immigration Equality/AILA practice alert, *What Does the Department of Justice Defense of Marriage Act (DOMA) Announcement Mean for Immigration Cases?*, available at <http://www.aila.org/content/default.aspx?docid=34986>

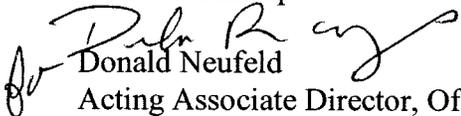
If you have a pending administrative appeal of a denied application or have filed or are planning to file a suit in district court, please contact the American Immigration Council’s Legal Action Center at [clearinghouse@immcouncil.org](mailto:clearinghouse@immcouncil.org).



U.S. Citizenship  
and Immigration  
Services

SEP 4 2009

## Memorandum

TO: Field Leadership  
FROM:  Donald Neufeld  
Acting Associate Director, Office of Domestic Operations

SUBJECT: Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children

### I. Purpose

This amended memorandum provides guidance to U.S. Citizenship and Immigration Services (USCIS) field offices and service centers regarding the processing of surviving spouses of deceased U.S. citizens and qualifying children of the surviving spouses. It affords a new process by which they may apply for deferred action. This policy guidance will be in effect until further notice and may be revised as needed. This memorandum revises and replaces in its entirety the June 15, 2009 "Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children".

### II. Background

Section 205.1(a)(3)(i)(C) of title 8 of the Code of Federal Regulations (8 CFR) requires that the approval of Form I-130, *Petition for Alien Relative*, be automatically revoked upon the death of the petitioner if the beneficiary<sup>1</sup> has not adjusted status in the United States or been inspected and admitted as an immigrant. In such instances, the beneficiary may request a reinstatement of the approval and USCIS, in its discretion, may grant such a request for humanitarian reasons. 8 CFR 205.1(a)(3)(i)(C)(2).

However, no avenue of immigration relief exists for the surviving spouse of a deceased U.S. citizen if the surviving spouse and the U.S. citizen were married less than 2 years at the time of the citizen's death and (1) the immigrant petition filed by the citizen on behalf of the surviving spouse has not been adjudicated by USCIS at the time of the citizen's death, or (2) no petition was filed by the

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<sup>1</sup> Depending on context, the term beneficiary in this guidance may include both actual and potential beneficiaries of Forms I-130 filed on their behalf.

citizen before the citizen's death. This issue has caused a split among the circuit courts of appeal and is also the subject of proposed legislation in the U.S. Congress (e.g., bills S. 815 and H.R. 1870).

### III. Policy Guidance

This policy guidance covers only (1) surviving spouses of U.S. citizens who died before the second anniversary of the marriage, who have not remarried and were not legally separated or divorced from the citizen spouse at the time of the citizen's death, and who are residing in the United States,<sup>2</sup> and (2) such surviving spouses' qualifying children. For purposes of this policy guidance, "qualifying children" are any children of the surviving spouse of the deceased U.S. citizen who remain unmarried and under 21 years of age and are residing in the United States (age determinations for beneficiaries of Forms I-130 should be made as provided in section 201(f) of the INA).

This guidance applies to the aforementioned applicants without regard to their manner of entry into the United States. Such surviving spouses are covered without restrictions on how long the U.S. citizen spouse has been deceased as long as the surviving spouse has not remarried.<sup>3</sup>

This guidance does not cover surviving spouses or qualifying children of deceased U.S. citizens who are residing outside the United States or surviving spouses and children of a lawful permanent resident or other non-U.S. citizen. This guidance also does not cover surviving spouses or qualifying children of deceased U.S. citizens if the surviving spouse remarried at any time after the U.S. citizen's death (regardless of whether the subsequent marriage has been terminated). This guidance does not cover any beneficiary who was legally separated or divorced from his or her U.S. citizen spouse at the time of the citizen's death, or such beneficiary's children.

Since current section 201(b)(2)(A)(i) of the Immigration and Nationality Act (INA) treats covered widow(er)s of U.S. citizens and their children as immediate relatives based upon a self-petition, they are not covered by this guidance. They may file a Form I-360, *Petition for Amerasian, Widow(er), or Special Immigrant*, in accordance with the instructions on the Form.

In order to address humanitarian concerns arising from cases involving surviving spouses of U.S. citizens, USCIS is instituting the following policy guidance, which is effective immediately and until further notice.

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<sup>2</sup> Section III(A) of this memorandum, however, regarding humanitarian reinstatement, shall apply to surviving spouses outside the United States.

<sup>3</sup> This guidance is applicable to a beneficiary who entered the United States on a K-1 Nonimmigrant Visa and married a U.S. citizen, including cases in which the marriage was to a U.S. citizen other than the U.S. citizen petitioner who filed the I-129F. If the U.S. citizen spouse died before the second anniversary of the marriage, the widow(er) is eligible for deferred action or humanitarian reinstatement as described herein. Nothing in this memorandum, however, is intended to provide or imply eligibility for immigrant classification or adjustment of status of any person granted deferred action or humanitarian reinstatement, including widow(er) of U.S. citizens other than U.S. citizens who filed the Form I-129F who are subject to section 245(d) of the INA.

It is not necessary for the widow(ers) of citizens to seek deferred action under the guidance in this memorandum, in a case governed by First, Sixth or Ninth Circuit law. Courts in those jurisdictions have held that the visa petitioner's death does *not* end a surviving spouse's eligibility for classification as an immediate relative. *Taing v. Napolitano*, 567 F.3d 19 (1st Cir. 2009); *Lockhart v. Napolitano*, 561 F.3d 611 (6th Cir. 2009); *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006). Litigation on this issue is currently pending in the Supreme Court. *Robinson v. Napolitano*, No. 09-94 (Cert petition filed July 23, 2009). Until such time as the Supreme Court decides the *Robinson* case on the merits, however, the *Taing*, *Lockhart* and *Freeman* cases remain the law in their respective circuits.

In the First, Sixth and Ninth Circuits, therefore, an officer should approve a Form I-130, and should also treat a pre-approval death as still valid, if the Form I-130 is approvable, apart from the issue of the petitioner's death. No request for reinstatement of a pre-death approval will be necessary. Should the beneficiary in a First, Sixth or Ninth Circuit case bring to the attention of USCIS a Form I-130 that was denied or revoked on or after August 30, 2001, solely because the petitioner had died officers should consider the *Taing*, *Lockhart* and *Freeman* decisions as a proper basis for reopening, *on USCIS motion*, the Form I-130, as well as any related Form I-485.<sup>4</sup> It is not necessary for the beneficiary to file a formal motion or pay any filing fee; any written request, such as a letter, will suffice. For purposes of this paragraph, a Form I-130 will be considered a First, Sixth or Ninth Circuit case if:

- the Form I-130 is pending in, or the original decision was made by, a USCIS office in the First, Sixth or Ninth Circuit; or
- either the petitioner or the beneficiary resided in First, Sixth or Ninth Circuit at the time of the petitioner's death.<sup>5</sup>

Whether an alien is actually admissible is not an issue in the adjudication of a Form I-130. *Matter of O-*, 8 I&N Dec. 295 (BIA 1959). In light of the judgment in *Hootkins v. Napolitano*, \_\_\_ F.Supp. 2d \_\_\_, 2009 WL 2222839 (C.D.Cal. 2009), an officer will not consider the presence or absence of Form I-864 from a substitute sponsor in deciding whether to approve or deny a Form I-130 in a First, Sixth or Ninth Circuit case. The *Hootkins* court ruled, however, that the Class Plaintiffs had failed to prove their claim that an alien widow(er) whose Form I-130 is approved under *Freeman* does not need a Form I-864 from a substitute sponsor. 2009 WL 2222839 at \*17, n. 23. The widow(er), therefore, must submit a new Form I-864 to obtain approval of the Form I-485, unless the Form I-485 applicant is exempt from this requirement under 8 CFR 213a.2(a)(2)(ii). Thus, the officer will treat the provision in AFM 21.5(a)(4)(B)(2) that requires submission of a new Form I-864 from a

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<sup>4</sup> No action is necessary if the Form I-130 was denied or revoked before August 30, 2001. A civil action must generally be brought against the United States within 6 years after the cause of action accrues. 22 U.S.C. 2401(a). August 30, 2001, is selected as the cut-off date for reopening First, Sixth and Ninth Circuit cases since that is 6 years before the filing of *Hootkins v. Napolitano*, \_\_\_ F.Supp. 2d \_\_\_ (C.D.Cal. 2009), which began as a putative nation-wide class action.

<sup>5</sup> The First Circuit includes Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico; the Sixth Circuit includes Kentucky, Michigan, Ohio, and Tennessee; and the Ninth Circuit includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and Guam. 28 U.S.C. § 41.

substitute sponsor as applying *only* to the adjudication of the Form I-485, and not to the adjudication of the Form I-130.

A widow(er) who is not able to submit a new Form I-864 from a substitute sponsor may seek deferred action, even if the Form I-130 itself is approved. In the case of a widow(er) whose Form I-485 cannot be approved because of the lack of a new Form I-864 from a substitute sponsor, a final decision on the Form I-485 will be held in abeyance during the period in which a grant of deferred action is in effect.

The *Taing*, *Lockhart* and *Freeman* cases apply only to First, Sixth and Ninth Circuit cases involving Forms I-130 filed for the spouses of citizens. These cases do not apply to a Form I-130 filed by a citizen for a step-child. Even if the citizen's widow(er) may have a Form I-130 and Form I-485 approved, therefore, any children of the widow(er) who are also beneficiaries of Forms I-130 filed by the deceased citizen may seek deferred action under this guidance.

**A. Form I-130 Approved Prior to the Death of the U.S. Citizen Spouse (Petitioner)**

Upon the death of the U.S. citizen petitioner, the approved Form I-130 is automatically revoked pursuant to 8 CFR 205.1(a)(3)(i)(C). The beneficiary, however, may request reinstatement of the revoked petition pursuant to 8 CFR 205.1(a)(3)(i)(C)(2). USCIS may then exercise discretion and grant the reinstatement after considering the facts and humanitarian considerations of the particular case. If the request for humanitarian reinstatement is approved, the beneficiary may proceed to the adjustment of status or consular processing stage.

This memorandum does not alter the process for reviewing a Form I-130 returned to USCIS by a U.S. Consular Officer overseas when the beneficiary is seeking a humanitarian reinstatement. If USCIS reinstates the Form I-130 returned by the consular officer, the I-130 should be forwarded to the National Visa Center to allow the beneficiary to resume consular processing. Section III(A) of this guidance, relating to humanitarian reinstatement, applies to beneficiaries who are within or outside the United States.

If a beneficiary covered by this guidance requests humanitarian reinstatement, adjudicators should presume that humanitarian reasons support a grant of the request. Absent extraordinary factors or a failure to meet the regulatory requirements of 8 CFR 205.1(a)(3)(i)(C)(2), adjudicators should favorably exercise discretion accordingly. If the request for reinstatement cannot be granted for any reason other than confirmed or suspected fraud or issues of criminality or national security, the beneficiary should be informed that he or she may request deferred action in the manner described in III(E) below.

**B. Form I-130 Pending at the Time of Death of the U.S. Citizen Spouse (Petitioner) – Married Less than 2 Years at Time of Death**

Once USCIS has received a copy of the U.S. citizen petitioner's death certificate, the pending, stand-alone Form I-130 should be held in abeyance at the pending location. Petitions may be transferred to

the Vermont Service Center to be consolidated with the A-file housing a deferred action request, if such a request is made by the beneficiary (see further guidance below).

Any concurrently filed Form I-485, *Application to Register Permanent Residence or Adjust Status*, and Form I-130, should be held in abeyance at the National Benefits Center until further guidance is issued. The beneficiary will remain eligible to receive the interim benefits of advance parole and employment authorization on the basis of the pending adjustment of status application.

If a Form I-485 was not concurrently filed, the beneficiary should be informed that he or she may request deferred action in the manner described in section III (E) below.

Note: In instances where the beneficiary and deceased U.S. citizen petitioner were married for at least two years at the time of the petitioner's death, the pending Form I-130 should be handled under existing procedures, including conversion of the Form I-130 to a Form I-360 for special immigrant classification as a widow/widower to the extent provided by 8 CFR 204.2(i)(1)(iv).

**C. Form I-130 Denied (Prior to the Issuance of this Guidance) due to the Death of the U.S. Citizen Spouse (Petitioner)**

A beneficiary who is the surviving spouse of a U.S. citizen petitioner and whose petition was denied by USCIS (1) due to the death of the U.S. citizen petitioner, and (2) prior to the issuance of this guidance, may request deferred action in the manner described in section III(E) below.

**D. Form I-130 Not Filed Prior to the Death of the U.S. Citizen Spouse**

A beneficiary who was legally married to a now deceased U.S. citizen at the time of the U.S. citizen's death, but for whom no Form I-130 was filed, may request deferred action in the manner described in section III(E) below.

If the beneficiary was not legally married to, or was legally separated from, the deceased U.S. citizen at the time of the U.S. citizen's death, a qualifying relationship does not exist. The beneficiary is therefore not eligible to submit Form I-360 based on the specific policy guidance set forth in section III(E) below.

**E. Required Documentation for Requests for Deferred Action**

Beneficiaries may request deferred action by submitting the following:

- 1) A Form I-360, *Petition for Amerasian, Widow(er), or Special Immigrant*, with the appropriate, non-waivable filing fee (currently \$375), completed in the format explained below; and
- 2) All of the documents requested in the Form I-360 filing instructions for widow/widowers.

The beneficiary of the Form I-360 must check box "**m. Other, explain:**" in Part 2 of the petition and cite the basis for eligibility as "**Deferred Action -- Surviving spouse of a deceased U.S.**

**citizen, married less than 2 years.**” The Form I-360 must be submitted to the Vermont Service Center for deferred action consideration. Note that while USCIS is utilizing Form I-360 for these deferred action requests, such filings are NOT special immigrant self-petitions under current law. They should be adjudicated as requests for deferred action only. In addition to the Part 2 information described above, the applicant must complete Parts 1, 3, 4, 7, 9, 10 and 11 of the Form I-360.

#### **F. Decision on Requests for Deferred Action**

Requests for deferred action based on the specific policy guidance set forth in this memorandum may only be considered for: 1) surviving spouses of U.S. citizens whose U.S. citizen spouse died before the second anniversary of the marriage and who are unmarried and residing in the United States; and 2) their qualifying children who are residing in the United States.

The following persons are ineligible for deferred action: 1) beneficiaries whose immigrant visa petition was denied or revoked for any reason other than or in addition to the death of the petitioning U.S. citizen spouse; 2) widow(er)s who have remarried or were legally separated or divorced from the U.S. citizen spouse at the time of the U.S. citizen’s death; and 3) beneficiaries with other serious adverse factors, such as national security concerns, significant immigration fraud, commission of other crimes, or public safety reasons. A grant of deferred action is a discretionary action on the part of USCIS. It is intended that this discretion should be liberally applied to provide a humanitarian benefit to eligible beneficiaries. However, deferred action may be denied for serious adverse factors, whether or not such factors are specifically identified in this guidance.

Requests for deferred action based on the specific policy guidance set forth in this memorandum will not be considered for beneficiaries who: 1) are surviving spouses or qualifying children of non-U.S. citizens; 2) are residing outside the United States; 3) meet the conditional marriage period set forth in INA 201(b)(2)(A)(i); or 4) have remarried subsequent to the U.S. citizen’s death (regardless of whether the subsequent marriage has been terminated).

Once a decision on the request for deferred action has been made, the decision must be communicated to the beneficiary via a decision letter. If the request has been granted, the deferred action grant letter must state that the beneficiary is eligible to file Form I-765, *Application for Employment Authorization*. If the request has been denied, the deferred action denial letter must cite the reasons for the denial. A decision on a request for deferred action falls within the discretion of the Secretary. A denial of a request for deferred action is not subject to administrative appeal or judicial review. See INA § 242(a)(2)(B), and (g).

#### **G. Validity Period for Deferred Action**

For any deferred action request received on or before May 27, 2011, the validity period of deferred action based on the policy guidance set forth in this memorandum is two (2) years from the date of grant of the Form I-360 request for deferred action.

#### **H. Eligibility for Employment Authorization**

The appropriate classification for Form I-765 filed on the basis of a deferred action grant is (C)(14) pursuant to 8 CFR 274a.12(c)(14). Beneficiaries may submit Form I-765, with the appropriate filing fee (currently \$340), using this classification at any time after the grant (but prior to the expiration) of deferred action. However, they must demonstrate an economic necessity. The validity period for an employment authorization document (EAD) under the classification (C)(14), based on the specific policy guidance set forth in this memorandum is two (2) years, not to exceed the expiration date of the grant of deferred action.

All requests for employment authorization based on the policy guidance set forth in this memorandum must contain the appropriate required supporting documentation. Applicants must follow currently established filing procedures for the Form I-765 in accordance with the instructions on the form. Fee waiver of the Form I-765 fee is available on a case-by-case basis for substantiated inability to pay as provided in 8 CFR 103.7(c)(1).

A beneficiary whose Form I-485 is being held in abeyance may also file a Form I-765, with the appropriate filing fee. The appropriate classification for employment authorization filed on such a basis is (C)(9) pursuant to 8 CFR 274a.12(c)(9). Evidence of an economic necessity is not required if using this classification. A beneficiary whose application is being held in abeyance may have been issued an employment authorization document valid for one year under category (C)(9). When such an applicant files a Form I-765 for renewal of his or her EAD under the classification (C)(9) based on the specific policy guidance set forth in this memorandum, the validity period will be **two (2) years**. An applicant with a valid EAD under the classification (C)(9) may file for renewal no more than 90 days prior to the expiration date of the valid document. The employment authorization may then be granted for two (2) years based on the specific policy guidance set forth in this memorandum.

#### **I. Effect of Grant of Deferred Action**

The grant of deferred action by USCIS does not confer or alter any immigration status. It does not convey or imply any waivers of inadmissibility that may exist, regardless of whether that inadmissibility is known to DHS or other agencies at the time of the request for deferred action. A grant of deferred action also does not eliminate any period of prior unlawful presence. However, periods of time in deferred action do not count as unlawful presence for the purposes of sections 212(a)(9)(B) and (C) of the INA. Any period of time in deferred action qualifies as a period of stay authorized by the Secretary of Homeland Security for those purposes.

As noted earlier in this memorandum, in the case of a widow(er) whose Form I-485 cannot be approved because of the lack of a new Form I-864 from a substitute sponsor, a final decision on the Form I-485 will be held in abeyance during the period in which a grant of deferred action is in effect.

**J. Eligibility for Advance Parole**

Beneficiaries granted deferred action based on the policy guidance set forth in this memorandum or whose applications for adjustment of status are being held in abeyance may request advance parole. Such request may be made by filing Form I-131, *Application for Travel Document*, in accordance with the Form I-131 instructions and with the appropriate fee. Note, however, that departure from the United States and return, even under a grant of advance parole, may adversely affect eligibility for adjustment of status of aliens with past periods of unlawful presence.

**K. Implementation**

USCIS offices and centers are to begin implementing the instructions established in this memorandum immediately.

**L. Contact Information**

Questions regarding this memorandum should be directed to the Office of Domestic Operations through appropriate channels.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies or entities, its officers, employees, or agents, or any other person.

**Distribution:**

Regional Directors  
District Directors  
Field Office Directors  
National Benefits Center Director  
Service Center Directors



U.S. Immigration  
and Customs  
Enforcement

June 17, 2011

MEMORANDUM FOR: All Field Office Directors  
All Special Agents in Charge  
All Chief Counsel

FROM: John Morton  
Director 

SUBJECT: Exercising Prosecutorial Discretion Consistent with the Civil  
Immigration Enforcement Priorities of the Agency for the  
Apprehension, Detention, and Removal of Aliens

Purpose

This memorandum provides U.S. Immigration and Customs Enforcement (ICE) personnel guidance on the exercise of prosecutorial discretion to ensure that the agency's immigration enforcement resources are focused on the agency's enforcement priorities. The memorandum also serves to make clear which agency employees may exercise prosecutorial discretion and what factors should be considered.

This memorandum builds on several existing memoranda related to prosecutorial discretion with special emphasis on the following:

- Sam Bernsen, Immigration and Naturalization Service (INS) General Counsel, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976);
- Bo Cooper, INS General Counsel, INS Exercise of Prosecutorial Discretion (July 11, 2000);
- Doris Meissner, INS Commissioner, Exercising Prosecutorial Discretion (November 17, 2000);
- Bo Cooper, INS General Counsel, Motions to Reopen for Considerations of Adjustment of Status (May 17, 2001);
- William J. Howard, Principal Legal Advisor, Prosecutorial Discretion (October 24, 2005);
- Julie L. Myers, Assistant Secretary, Prosecutorial and Custody Discretion (November 7, 2007);
- John Morton, Director, Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens (March 2, 2011); and
- John Morton, Director, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011).

*Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*

The following memoranda related to prosecutorial discretion are rescinded:

- Johnny N. Williams, Executive Associate Commissioner (EAC) for Field Operations, Supplemental Guidance Regarding Discretionary Referrals for Special Registration (October 31, 2002); and
- Johnny N. Williams, EAC for Field Operations, Supplemental NSEERS Guidance for Call-In Registrants (January 8, 2003).

Background

One of ICE's central responsibilities is to enforce the nation's civil immigration laws in coordination with U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS). ICE, however, has limited resources to remove those illegally in the United States. ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency's enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system. These priorities are outlined in the ICE Civil Immigration Enforcement Priorities memorandum of March 2, 2011, which this memorandum is intended to support.

Because the agency is confronted with more administrative violations than its resources can address, the agency must regularly exercise "prosecutorial discretion" if it is to prioritize its efforts. In basic terms, prosecutorial discretion is the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual. ICE, like any other law enforcement agency, has prosecutorial discretion and may exercise it in the ordinary course of enforcement<sup>1</sup>. When ICE favorably exercises prosecutorial discretion, it essentially decides not to assert the full scope of the enforcement authority available to the agency in a given case.

In the civil immigration enforcement context, the term "prosecutorial discretion" applies to a broad range of discretionary enforcement decisions, including but not limited to the following:

- deciding to issue or cancel a notice of detainer;
- deciding to issue, reissue, serve, file, or cancel a Notice to Appear (NTA);
- focusing enforcement resources on particular administrative violations or conduct;
- deciding whom to stop, question, or arrest for an administrative violation;
- deciding whom to detain or to release on bond, supervision, personal recognizance, or other condition;
- seeking expedited removal or other forms of removal by means other than a formal removal proceeding in immigration court;

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<sup>1</sup> The Meissner memorandum's standard for prosecutorial discretion in a given case turned principally on whether a substantial federal interest was present. Under this memorandum, the standard is principally one of pursuing those cases that meet the agency's priorities for federal immigration enforcement generally.

*Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*

- settling or dismissing a proceeding;
- granting deferred action, granting parole, or staying a final order of removal;
- agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of obtaining a formal order of removal;
- pursuing an appeal;
- executing a removal order; and
- responding to or joining in a motion to reopen removal proceedings and to consider joining in a motion to grant relief or a benefit.

Authorized ICE Personnel

Prosecutorial discretion in civil immigration enforcement matters is held by the Director<sup>2</sup> and may be exercised, with appropriate supervisory oversight, by the following ICE employees according to their specific responsibilities and authorities:

- officers, agents, and their respective supervisors within Enforcement and Removal Operations (ERO) who have authority to institute immigration removal proceedings or to otherwise engage in civil immigration enforcement;
- officers, special agents, and their respective supervisors within Homeland Security Investigations (HSI) who have authority to institute immigration removal proceedings or to otherwise engage in civil immigration enforcement;
- attorneys and their respective supervisors within the Office of the Principal Legal Advisor (OPLA) who have authority to represent ICE in immigration removal proceedings before the Executive Office for Immigration Review (EOIR); and
- the Director, the Deputy Director, and their senior staff.

ICE attorneys may exercise prosecutorial discretion in any immigration removal proceeding before EOIR, on referral of the case from EOIR to the Attorney General, or during the pendency of an appeal to the federal courts, including a proceeding proposed or initiated by CBP or USCIS. If an ICE attorney decides to exercise prosecutorial discretion to dismiss, suspend, or close a particular case or matter, the attorney should notify the relevant ERO, HSI, CBP, or USCIS charging official about the decision. In the event there is a dispute between the charging official and the ICE attorney regarding the attorney's decision to exercise prosecutorial discretion, the ICE Chief Counsel should attempt to resolve the dispute with the local supervisors of the charging official. If local resolution is not possible, the matter should be elevated to the Deputy Director of ICE for resolution.

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<sup>2</sup> Delegation of Authority to the Assistant Secretary, Immigration and Customs Enforcement, Delegation No. 7030.2 (November 13, 2004), delegating among other authorities, the authority to exercise prosecutorial discretion in immigration enforcement matters (as defined in 8 U.S.C. § 1101(a)(17)).

*Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*

Factors to Consider When Exercising Prosecutorial Discretion

When weighing whether an exercise of prosecutorial discretion may be warranted for a given alien, ICE officers, agents, and attorneys should consider all relevant factors, including, but not limited to—

- the agency's civil immigration enforcement priorities;
- the person's length of presence in the United States, with particular consideration given to presence while in lawful status;
- the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;
- the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
- whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
- the person's criminal history, including arrests, prior convictions, or outstanding arrest warrants;
- the person's immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud;
- whether the person poses a national security or public safety concern;
- the person's ties and contributions to the community, including family relationships;
- the person's ties to the home country and conditions in the country;
- the person's age, with particular consideration given to minors and the elderly;
- whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
- whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative;
- whether the person or the person's spouse is pregnant or nursing;
- whether the person or the person's spouse suffers from severe mental or physical illness;
- whether the person's nationality renders removal unlikely;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and
- whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S. Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.

This list is not exhaustive and no one factor is determinative. ICE officers, agents, and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities.

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That said, there are certain classes of individuals that warrant particular care. As was stated in the Meissner memorandum on Exercising Prosecutorial Discretion, there are factors that can help ICE officers, agents, and attorneys identify these cases so that they can be reviewed as early as possible in the process.

The following positive factors should prompt particular care and consideration:

- veterans and members of the U.S. armed forces;
- long-time lawful permanent residents;
- minors and elderly individuals;
- individuals present in the United States since childhood;
- pregnant or nursing women;
- victims of domestic violence, trafficking, or other serious crimes;
- individuals who suffer from a serious mental or physical disability; and
- individuals with serious health conditions.

In exercising prosecutorial discretion in furtherance of ICE's enforcement priorities, the following negative factors should also prompt particular care and consideration by ICE officers, agents, and attorneys:

- individuals who pose a clear risk to national security;
- serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind;
- known gang members or other individuals who pose a clear danger to public safety; and
- individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.

Timing

While ICE may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing the enforcement proceeding. As was more extensively elaborated on in the Howard Memorandum on Prosecutorial Discretion, the universe of opportunities to exercise prosecutorial discretion is large. It may be exercised at any stage of the proceedings. It is also preferable for ICE officers, agents, and attorneys to consider prosecutorial discretion in cases without waiting for an alien or alien's advocate or counsel to request a favorable exercise of discretion. Although affirmative requests from an alien or his or her representative may prompt an evaluation of whether a favorable exercise of discretion is appropriate in a given case, ICE officers, agents, and attorneys should examine each such case independently to determine whether a favorable exercise of discretion may be appropriate.

In cases where, based upon an officer's, agent's, or attorney's initial examination, an exercise of prosecutorial discretion may be warranted but additional information would assist in reaching a final decision, additional information may be requested from the alien or his or her representative. Such requests should be made in conformity with ethics rules governing

*Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*

communication with represented individuals<sup>3</sup> and should always emphasize that, while ICE may be considering whether to exercise discretion in the case, there is no guarantee that the agency will ultimately exercise discretion favorably. Responsive information from the alien or his or her representative need not take any particular form and can range from a simple letter or e-mail message to a memorandum with supporting attachments.

Disclaimer

As there is no right to the favorable exercise of discretion by the agency, nothing in this memorandum should be construed to prohibit the apprehension, detention, or removal of any alien unlawfully in the United States or to limit the legal authority of ICE or any of its personnel to enforce federal immigration law. Similarly, this memorandum, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

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<sup>3</sup> For questions concerning such rules, officers or agents should consult their local Office of Chief Counsel.



U.S. Citizenship  
and Immigration  
Services

HQOPRD 70/6

## Interoffice Memorandum

To: REGIONAL DIRECTORS  
SERVICE CENTER DIRECTORS  
DISTRICT DIRECTORS, INCLUDING OVERSEAS  
DIRECTOR, OFFICE OF INTERNATIONAL AFFAIRS

From: William R. Yates /s/  
Associate Director for Operations  
U.S. Citizenship and Immigration Services

Date: April 16, 2004

Re: Adjudication of Petitions and Applications Filed by or on Behalf of, or Document Requests by,  
Transsexual Individuals.

### I. Purpose

The purpose of this memorandum is to provide guidance related to the adjudication of petitions and applications filed by or on behalf of, or document requests by, transsexual individuals, including those who have either undergone sex reassignment surgery, or are in the process of doing so.

### II. Summary Conclusion

In the context of adjudicating spousal and fiancé petitions, CIS personnel shall not recognize the marriage, or intended marriage, between two individuals where one or both of the parties claims to be a transsexual, regardless of whether either individual has undergone sex reassignment surgery, or is in the process of doing so. In instances where an individual claims to be a transsexual, but the gender of the individual is not pertinent to the underlying application or petition, CIS personnel shall consider the merits of the application without regard to the applicant's transsexuality. Any documentation (whether original or replacement) issued as a result of the adjudication shall reflect the outward, claimed and otherwise documented sex of the applicant at the time of CIS document issuance.

### III. Background

No Federal statute or regulation addresses specifically the question of whether someone born a man or a woman can surgically change his or her sex. Transsexualism is a condition in which a person feels persistently uncomfortable about his or her anatomical sex, and often seeks medical treatment, including hormonal therapy and “sex reassignment surgery.” The former Immigration and Naturalization Service (INS) generally took the position that absent specific statutory authority recognizing sex changes for purposes of Federal immigration law; it could not recognize that a person can change his or her sex. In arriving at this conclusion, the INS stressed the following. First, whether a “marriage” qualifies for immigration purposes is a matter of Federal, not State or foreign, law. *Adams v. Howerton*, 673 F.2d 1036 (9<sup>th</sup> Cir. 1981). It is well settled that, in enacting immigration and nationality laws, Congress intended the terms “spouse” and “marriage” to include only the partners to a legal, monogamous marriage between one man and one woman. *Howerton, supra*. Moreover, the 1996 Defense of Marriage Act (DOMA), 1 U.S.C. § 7, bans any Federal recognition of same-sex marriages for immigration purposes, and defines marriage as an institution involving a “man” and a “woman.” The legislative history of the DOMA also clearly supports a traditional view of marriage, especially one that ties its basic character and importance to children, even though the marriage laws do not require that a couple be physically or mentally ready and able to procreate. See, H.Rep. 104-664, reprinted in 1996 U.S. Code Cong. & Admin. News 2905, 2916-19. For all of these reasons, the former INS maintained, and its successor U.S. Citizenship and Immigration Services (CIS) agrees, that no legal authority permits recognition of homosexual relationships as “marriages” for purposes of immigration and nationality laws, regardless of whether the relationship may be recognized as a “marriage” under the law where the relationship came into existence.

However, neither the DOMA nor any other Federal statute addresses whether a marriage between (for example) a man and a person born a man who has undergone surgery to become a woman should be recognized for immigration purposes or considered invalid as a same-sex marriage. While whether a marriage may be recognized for immigration purposes is a matter of Federal law, almost one-half of the states authorize the issuance of “new” birth certificates to individuals who have undergone sex reassignment surgery, as long as they present appropriate medical documentation. These same states also permit the issuance of marriage licenses for couples where one member presents a newly issued birth certificate reflecting his or her name and/or sex reassignment.

Differing state practices related to the issuance of new birth certificates and marriage licenses, coupled with a general lack of detailed guidance in this area, have resulted in inconsistent adjudications within the INS and CIS offices of cases involving transsexual applicants.

Current CIS policy disallows recognition of a change of sex so that a marriage between two persons born of the same sex can be considered bona fide for the purpose of spousal immigrant petitions. W. Yates, Memorandum for Regional Directors et al, Spousal Immigrant Visa Petitions (AFM Update AD 2-16) (March 20, 2003). With respect to replacement documents, CIS has required that the sex at birth as identified in the A-file be used unless the original birth certificate shows a CIS error with respect to sex at birth. Furthermore, if an individual indicates or claims a different gender than the one he or she was born with as reflected in his or her A-file, CIS policy has mandated use of the gender listed in the alien’s file unless the applicant presents a Federal court order directing CIS to change its records. I-90 Replacement National SOP at 6-22.

#### IV. Guidance

##### A. Spousal and Fiancé(e) Petitions

To ensure consistency with the legislative intent reflected in the DOMA, and to reiterate existing CIS policy, CIS personnel shall not recognize the marriage, or intended marriage, between two individuals where one or both of the parties claims to be a transsexual, regardless of whether either individual has undergone sex reassignment surgery, or is in the process of doing so. For example, a Form I-130, Petition for Alien Relative, or Form I-129F, Petition for Alien Fiancé(e), cannot be approved if one or both of the parties to the petition was born a sex other than what they claim to be at the time of filing. This same policy applies to any immigration benefit that is granted based on a marital relationship. For example, an individual shall not be approved for H-4 status based on a marriage to a principal alien if either the principal alien or the potential H-4 beneficiary was born a sex other than what they claim to be at the time of filing.

When adjudicating petitions and applications based on a spousal relationship, CIS officers should be guided by objective indicators, and avoid imposing subjective assumptions or judgments. For example, if the previous name used by the petitioner or the beneficiary is different than that contained elsewhere in the application materials or A-file, and is a name that would normally be used by the opposite sex, officers should issue a request for evidence (RFE) to establish that person's identity. The RFE should request copies of all birth certificates issued to that person and any court (or other) documentation evidencing the legal name change. Again, a petition or application based on a spousal relationship may only be approved if it has been clearly established that the underlying marriage is recognizable for immigration purposes, in accordance with the policy outlined in this memorandum.

##### B. Other Petitions or Applications

In instances where an individual claims to be a transsexual, but the gender of the individual is not pertinent to the underlying application or petition, CIS personnel shall consider the merits of the application without regard to the applicant's transsexuality. Any documentation (whether original or replacement) issued as the result of the adjudication shall reflect the outward, claimed and otherwise documented sex of the applicant at the time of CIS document issuance. For example, an alien with an approved Form I-140, Immigrant Petition for Alien Worker, and Form I-485, Application to Register Permanent Residence or Adjust Status, who underwent sex reassignment surgery shall be issued a Form I-551, Permanent Resident Card, reflecting the claimed sex of the alien at the time of issuance (provided, of course, that the alien submits appropriate medical and other documentation establishing the alien's new claimed gender and legal name). It is important to note that applicants are no longer required, as previously indicated in the I-90 Replacement National SOP at 6-22, to present a Federal court order directing the agency to change its records where such an individual indicates or claims a different gender than the one he or she was born with as reflected in his or her A-file.

In instances where an individual is requesting a replacement document to acknowledge a name change resulting from sex reassignment surgery, the alien must submit the birth certificate issued at birth, the newly issued birth certificate reflecting the name and/or claimed sex reassignment, and the court order granting the legal name change. Examples of such applications include, but are not limited to, Form I-765,

Application for Employment Authorization, or Form I-90, Application to Replace Alien Registration Receipt Card. Name changes arising in all other situations should be reviewed in accordance with established procedures.

Finally, as is the context of any other adjudication, all CIS officers shall perform their duties in a manner that accords maximal respect, sensitivity and consideration when adjudicating any petition, application or document request filed by, or on behalf of, a transsexual individual.

#### V. Further Information

CIS personnel with questions regarding the policy presented in this memorandum should raise them to Headquarters Operations through appropriate supervisory channels.



U.S. Citizenship  
and Immigration  
Services

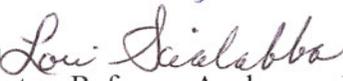
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HQOPS AD09-03  
HQ 70/8

## Interoffice Memorandum

To: Field Leadership

Through: Don Neufeld   
Acting Associate Director, Domestic Operations

Lori Scialabba   
Associate Director, Refugee, Asylum and International Operations

From:   
Carlos Iturregui  
Chief, Office of Policy and Strategy

Re: Adjudication of Petitions and Applications Filed by or on Behalf of Transsexual  
Individuals

Revisions to *Adjudicator's Field Manual* (AFM) Subchapter 21.3  
(AFM Update AD09-03)

### 1. Purpose

The purpose of this memorandum is to provide guidance to USCIS adjudicators concerning *Matter of Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005) in relation to the adjudication of spousal immigrant visa petitions in which one of the claimed spouses has undergone sex reassignment surgery. Under *Matter of Lovo-Lara*, USCIS may approve a Form I-130 (or in appropriate cases, an I-360 petition) in such a case if the petitioner establishes that, under the law of the place of marriage, the surgery resulted in a *legal* change of sex, and that the marriage is recognized as a valid heterosexual marriage. This guidance also applies to adjudication of a fiancé(e) petition (Form I-129F) and to claims that one person is another person's "spouse" for purposes of the ability to accompany or follow to join a principal alien.

### 2. Contact Information

This guidance is effective immediately. Please direct any questions concerning these changes through appropriate supervisory channels to Anne-Marie Mulagha, Office of Policy and Strategy, via electronic mail.

### 3. Use

This guidance is created solely for the purpose of USCIS personnel in performing their duties relative to adjudication of applications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantial or procedural, enforceable at law by any individual or any other party in removal proceedings, in litigation with the United States, or in any other or form or matter.

### 4. Background

Previous USCIS policy disallowed recognition of a change of sex for the purpose of spousal immigrant petitions. W. Yates, *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). In the context of adjudicating spousal and fiancé petitions, former USCIS policy did not recognize the marriage, or intended marriage, between two individuals where one or both of the parties claimed to be a transsexual, regardless of whether either individual had undergone sex reassignment surgery, or was in the process of doing so.

It is well-settled that only a legally valid and monogamous marriage between one man and one woman can form the basis of the approval of a spousal Form I-130. 1 U.S.C. § 7; *cf. Adams v. Howerton*, 673 F.2d 1036 (9<sup>th</sup> Cir. 1982). The basis for the USCIS position, as stated in the Yates Memorandum, is the traditional rule of construction that, in administering 1 U.S.C. § 7, the words “man” and “woman,” as with any other words in any statute, are to be given their common meaning in ordinary English. USCIS also noted the legislative history of 1 U.S.C. § 7, H. Rep. 104-664, at 13, in which the Committee Report specifically endorsed the traditional view that one’s sex is fixed at birth. Therefore, USCIS determined that absent specific statutory authority, a claimed marriage between two persons of the same birth sex was not valid for immigration purposes, even if one of them had undergone sex reassignment surgery.

In 2005, the Board of Immigration Appeals (BIA) rejected this interpretation of 1 U.S.C. § 7. *Matter of Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005). The Board concluded that whether sex reassignment surgery results in a change in a person’s *legal* sex, for purposes of marriage, is determined according to the law in which the claimed marriage took place. If the petitioner establishes that, under the law of the place of marriage, the claimed marriage is a legally valid, monogamous, heterosexual marriage, the Form I-130 (and, as appropriate, a widow’s or battered spouse’s Form I-360) may be approved.

*Matter of Lovo-Lara* involved a petitioner who was born in North Carolina, underwent sex change surgery, amended her birth certificate to reflect her sex change to female, 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 sex to marry each other, but permits an

amendment to one's birth certificate, to reflect that one has undergone sex reassignment surgery. The petitioner submitted documentation of, among other evidence, her sex reassignment surgery and her amended birth certificate. The Board concluded that the petitioner's marriage to the beneficiary was considered valid under North Carolina law.

USCIS adjudicators will, consistently with 8 CFR 1003.1(g), take *Matter of Lovo-Lara* as establishing that if two persons of the same birth sex claim to have married in North Carolina, and establish that one of them has undergone sex reassignment surgery, then the marriage is a valid heterosexual marriage under North Carolina law.

This reasoning may not apply to other States, however, even if those States also permit changes to birth certificates. Illinois law, for example, also permits such changes after sex reassignment surgery. 410 Ill. Comp. Stat. 535/17. This change does *not* however, result in an actual legal change of sex, for purposes of marriage. See *In Re Marriage of Simmons*, 355 Ill.App. 3d 942, 825 N.W.2d 303 (Ill. App. 2005). The Texas Court of Appeals reached the same conclusion, also in a case involving a changed birth certificate. See *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

The basic principle of *Matter of Lovo-Lara*, however, is binding on USCIS, no matter where the claimed marriage took place. A spousal Form I-130 (and, as appropriate, a widow's or battered spouse's Form I-360) may be approved, in a case involving two persons of the same birth sex, if the petitioner establishes, by a preponderance of the evidence, that:

- one of the claimed spouses has undergone sex reassignment surgery; AND
- the person who underwent sex reassignment surgery has taken whatever legal steps exist and may be required to have the legal change of sex recognized for purposes of marriage under the law of the place of marriage; AND
- the marriage is recognized under that law as a monogamous, heterosexual marriage.

## **5. Field Guidance and AFM Update**

Accordingly, AFM chapter 21.3 (a)(2)(j) is revised in its entirety to read as follows:

☞ (J) **Transsexuals**. In the case of a spousal Form I-130 (or, as appropriate, a widow's or battered spouse's Form I-360), a claimed marriage between two persons of the same birth sex, one of whom has undergone sex reassignment surgery, is valid for immigration purposes if the petitioner establishes by a preponderance of the evidence that:

- one of the claimed spouses has, in fact, undergone sex reassignment surgery; AND

- that person has taken whatever legal steps exist and may be required to have the legal change of sex recognized for purposes of marriage under the law of the place of marriage; AND
- the marriage is recognized under the law of the place of solemnization as a legally valid heterosexual marriage.

This guidance also applies to the adjudication of a Form I-129F on behalf of a K-3 spouse or fiancé(e) of a citizen. In the case of a proposed marriage between two persons of the same birth sex, one of whom has undergone sex reassignment surgery, the Form I-129F can be approved if the petitioner establishes that that person's *legal* sex has changed and the proposed marriage will be recognized under the law of the place of solemnization as a legally valid heterosexual marriage.

If the claimed marriage between two persons of the same birth sex, one of whom has undergone sex reassignment surgery, is recognized under the law of the place of solemnization as a legally valid heterosexual marriage, USCIS will recognize the partners as "spouses" for purposes of one spouse's ability to accompany or follow to join the other.

If an officer has questions about the validity of a marriage involving a person who has undergone sex reassignment surgery, the officer should contact his or her local USCIS counsel.

### **States that DO recognize transsexual marriages as valid heterosexual marriages:**

**North Carolina.** North Carolina law allows amendment of a birth certificate for persons who have undergone sex reassignment surgery. N.C. Gen. Stat. § 130A-118(b)(4) (2008). In *Matter of Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005), the Board held that North Carolina recognized a marriage as valid and heterosexual where one of the spouses had undergone sex reassignment surgery and her birth certificate had been amended to reflect her changed sex.

**New Jersey.** New Jersey law recognizes as a valid heterosexual marriage a marriage solemnized between two persons of the same birth sex, one of whom has undergone sex reassignment surgery, so long as the other claimed spouse was aware of the sex change. *M.J. v. J.T.*, 140 N.J.Super. 77, 355 A.2d 204 (N.J.Super. 1976).

**Maryland.** Maryland law permits a change of the person's legal sex, on the basis of sex reassignment surgery. *Re: Heilig*, 372 Md. 692, 816 A.2d 68 (Md. 2003). This case did not involve the issue of the person's ability to marry a person of the same birth sex. Until such time as the Maryland courts clarify this issue, however, USCIS adjudicators will assume that Maryland law recognizes as a valid heterosexual marriage

a claimed marriage between two persons of the same birth sex, one of whom has undergone sex reassignment surgery.

### **States that DO NOT recognize transsexual marriages as valid heterosexual marriages**

As of November 2008, the following States *do not* recognize sex reassignment surgery as changing a person's legal sex, for purposes of marriage:

**Florida** – *Kantaras v. Kantaras*, 884 So.2d 155 (Fla. App. 2004);

**Illinois** – *Re Marriage of Simmons*, 355 Ill. App. 3d 942, 825 N.W. 2d 303 (Ill. App. 2005)

**Kansas** – *Estate of Gardiner*, 273 Kan. 191, 42 P.3d 120 (Kan. 2002).

**Ohio** – *Re: Ladrach*, 32 Ohio Misc. 2d 6, 513 N.E.2d 828 (Oh. Probate 1987);

**Tennessee** – Tennessee Code 68-3-203(d)

**Texas** – *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

Unless a petitioner establishes that the relevant law has changed, a Form I-130 or Form I-360 may not be approved on the basis of a marriage solemnized in one of these States between two persons of the same birth sex, one of whom has undergone sex reassignment surgery. Nor may a Form I-129F be approved, if the proposed spouses intend to marry in one of these States.

### **Other States, and foreign countries, in which there are no precedent decisions**

Several States have laws providing for the change of a person's birth record to reflect that the person has undergone sex reassignment surgery. Other countries may have similar laws.

In light of the Illinois (*Simmons*) and Texas (*Littleton*) decisions, however, it is not necessarily the case that these statutes actually provide for the change of a person's legal sex for purposes of marriage. As of November 2008, it did not appear that the highest court of any other State had addressed the issue.

A USCIS adjudicator should find that the petitioner has established the validity of the claimed marriage (or proposed marriage, for a Form I-129F case) if the petitioner establishes, based on the actual text of the relevant statute or a precedent decision from the courts of that jurisdiction (*i.e.*, State or foreign country), that sex reassignment surgery does, in fact, result in a change in the person's *legal* sex.

In a case involving a claimed marriage solemnized in a foreign country, or a claimed or proposed marriage in U.S. jurisdictions other than Florida, Illinois, Kansas, Maryland, New Jersey, North Carolina, Ohio, Tennessee and Texas, and in which the statute is not clear and there is no binding precedent, a USCIS adjudicator may find that the

petitioner has established the validity of the claimed marriage (or proposed marriage for a Form I-129F case) if the petitioner submits a court order or a official record or statement from an appropriate agency of the Government (such as the vital statistics registrar or similar official) indicating that the person's having undergone sex reassignment surgery has resulted in a change of the person's *legal* sex under the law of the place of marriage.

Distribution List:      Service Center Directors  
                             National Benefits Center Directors  
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                             Field Office Directors

**In re Jose Mauricio LOVO-Lara, Beneficiary of a visa petition  
filed by Gia Teresa LOVO-Ciccone, Petitioner**

File A95 076 067 - Nebraska Service Center

*Decided May 18, 2005*

U.S. Department of Justice  
Executive Office for Immigration Review  
Board of Immigration Appeals

(1) The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), does not preclude, for purposes of Federal law, recognition of a marriage involving a postoperative transsexual, where the marriage is considered by the State in which it was performed as one between two individuals of the opposite sex.

(2) A marriage between a postoperative transsexual and a person of the opposite sex may be the basis for benefits under section 201(b)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1151(b)(2)(A)(i) (2000), where the State in which the marriage occurred recognizes the change in sex of the postoperative transsexual and considers the marriage a valid heterosexual marriage.

FOR PETITIONER: Sharon M. McGowan, Esquire, New York, New York

FOR THE DEPARTMENT OF HOMELAND SECURITY: Allen Kenny, Service Center Counsel

BEFORE: Board Panel: GRANT, HESS and PAULEY, Board Members.

GRANT, Board Member:

In a decision dated August 3, 2004, the Nebraska Service Center (“NSC”) director denied the visa petition filed by the petitioner to accord the beneficiary immediate relative status as her husband pursuant to section 201(b)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1151(b)(2)(A)(i) (2000). The petitioner has appealed from that decision. The appeal will be sustained.

**I. FACTUAL AND PROCEDURAL HISTORY**

The petitioner, a United States citizen, married the beneficiary, a native and citizen of El Salvador, in North Carolina on September 1, 2002. On November 20, 2002, the petitioner filed the instant visa petition on behalf of the beneficiary based on their marriage. The record reflects that when the petitioner was born in North Carolina on April 16, 1973, she was of the male

sex. However, an affidavit from a physician reflects that on September 14, 2001, the petitioner had surgery that changed her sex designation completely from male to female.

In support of the visa petition, the petitioner submitted, among other documents, her North Carolina birth certificate, which lists her current name and indicates that her sex is female; the affidavit from the physician verifying the surgery that changed the petitioner's sex designation; a North Carolina court order changing the petitioner's name to her current name; the North Carolina Register of Deeds marriage record reflecting the marriage of the petitioner and the beneficiary; and a North Carolina driver's license listing the petitioner's current name and indicating that her sex is female.

On August 3, 2004, the NSC director issued his decision denying the instant visa petition. In support of his denial, the NSC director stated that defining marriage under the immigration laws is a question of Federal law, which Congress clarified in 1996 by enacting the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) ("DOMA"). Pursuant to the DOMA, in order to qualify as a marriage for purposes of Federal law, one partner to the marriage must be a man and the other partner must be a woman. In his decision the NSC director stated as follows:

While some states and countries have enacted laws that permit a person who has undergone sex change surgery to legally change the person's sex from one to the other, Congress has not addressed the issue. Consequently, without legislation from Congress officially recognizing a marriage where one of the parties has undergone sex change surgery . . . , this Service has no legal basis on which to recognize a change of sex so that a marriage between two persons born of the same sex can be recognized.

The NSC director concluded that "since the petitioner and beneficiary were born of the same sex, their marriage is not considered valid for immigration purposes and the beneficiary is not eligible to be classified as the spouse of the petitioner under section 201(b) of the Act."

The petitioner filed a timely Notice of Appeal (Form EOIR-29) and subsequently filed a brief in support of her appeal. The Department of Homeland Security ("DHS") Service Center Counsel also filed a brief in support of the NSC director's decision.

## II. ISSUE

The issue presented by this case is whether a marriage between a postoperative male-to-female transsexual and a male can be the basis for benefits under section 201(b)(2)(A)(i) of the Act, where the State in which the marriage occurred recognizes the change in sex of the postoperative transsexual and considers the marriage valid.

### III. ANALYSIS

In order to determine whether a marriage is valid for immigration purposes, the relevant analysis involves determining first whether the marriage is valid under State law and then whether the marriage qualifies under the Act. *See Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1982). The issue of the validity of a marriage under State law is generally governed by the law of the place of celebration of the marriage. *Id.* at 1038-39.

In this case, the petitioner and the beneficiary were married in North Carolina. Section 51-1 of the General Statutes of North Carolina provides that “[a] valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other.” The terms “male” and “female” are not defined in the statute, but section 51-1 makes it clear by its terms that the State of North Carolina does not permit individuals of the same sex to marry each other. *See also* N.C. Gen. Stat. § 51-1.2 (2004).

Section 130A-118 of the General Statutes of North Carolina governs the amendment of birth certificates. That statute provides, in relevant part, as follows:

A new certificate of birth shall be made by the State Registrar when:

- (4) A written request from an individual is received by the State Registrar to change the sex on that individual’s birth record because of sex reassignment surgery, if the request is accompanied by a notarized statement from the physician who performed the sex reassignment surgery or from a physician licensed to practice medicine who has examined the individual and can certify that the person has undergone sex reassignment surgery.

N.C. Gen. Stat. § 130A-118(b)(4) (2004).

As noted above, the documents submitted by the petitioner reflect that she underwent sex reassignment surgery. Consequently, the State of North Carolina issued her a new birth certificate that lists her sex as female and registered her marriage to the beneficiary, listing her as the bride. In light of the above, we find that the petitioner’s marriage to the beneficiary is considered valid under the laws of the State of North Carolina. We also note that neither the NSC director nor the DHS counsel has asserted anything to the contrary on this point.

The dispositive issue in this case, therefore, is whether the marriage of the petitioner and the beneficiary qualifies as a valid marriage under the Act. Section 201(b)(2)(A)(i) of the Act provides for immediate relative classification for the “children, spouses, and parents of a citizen of the United States.” The Act does not define the word “spouse” in terms of the sex of the parties. However, the DOMA did provide a Federal definition of the terms “marriage” and “spouse” as follows:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

DOMA § 3(a), 110 Stat. at 2419 (codified at 1 U.S.C. § 7 (2000)).

Neither the DOMA nor any other Federal law addresses the issue of how to define the sex of a postoperative transsexual or such designation's effect on a subsequent marriage of that individual. The failure of Federal law to address this issue formed the main basis for the NSC director's conclusion that this marriage cannot be found valid for immigration purposes. As stated above, the NSC director found that because Congress had not addressed the issue whether sex reassignment surgery serves to change an individual's sex, there was no legal basis on which to recognize a change of sex. Accordingly, he concluded that he must consider the marriage between the petitioner and the beneficiary to be a marriage between two persons of the same sex, which is expressly prohibited by the DOMA.

In determining the effect of the DOMA on this case, we look to the rules of statutory construction. The starting point in statutory construction is the language of the statute. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987); *INS v. Phinpathya*, 464 U.S. 183, 189 (1984). If the language of the statute is clear and unambiguous, judicial inquiry is complete, as we clearly "must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). We find that the language of section 3(a) of the DOMA, which provides that "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife," is clear on its face. There is no question that a valid marriage can only be one between a man and a woman. Marriages between same-sex couples are clearly excluded.

This interpretation is further supported by the legislative history of the DOMA. The House Report specifically states that the DOMA was introduced in response to a 1993 decision of the Hawaii Supreme Court that raised the issue of the potential legality of same-sex marriages in Hawaii. See H.R. Rep. No. 104-664, at 2-6 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2906-10, 1996 WL 391835 (Leg. Hist.) (citing *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (remanding for application of strict scrutiny under the Hawaii equal protection clause to the question of the denial of marriage licenses to same-sex couples)). Throughout the House Report, the terms "same sex" and "homosexual" are used interchangeably. The House Report also repeatedly refers to the consequences of permitting *homosexual couples* to marry.

However, with regard to one of the specific issues we are facing in this case, i.e., whether the DOMA applies to invalidate, for Federal purposes, a marriage involving a postoperative transsexual, it is notable that Congress did

not mention the case of *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976), which recognized a transsexual marriage.<sup>1</sup> Nor did it mention the various State statutes that at the time of consideration of the DOMA provided for the legal recognition of a change of sex designation by postoperative transsexuals. Rather, Congress's focus, as indicated by its consistent reference to homosexuals in the floor discussions and in the House Report, was fixed on, and limited to, the issue of homosexual marriage.

Furthermore, a specific statement in the House Report's section-by-section analysis provides support for the conclusion that Congress did not consider transsexual marriages to be per se violative of the DOMA. According to that statement, "*Prior to the Hawaii lawsuit*, no State has ever permitted homosexual couples to marry. Accordingly, federal law could rely on state determinations of who was married without risk of inconsistency or endorsing same-sex 'marriage.'" H.R. Rep. No. 104-664, at 30 (emphasis added). As noted above, *M.T. v. J.T.*, *supra*, and the statutory provisions in several States recognizing a legal change of sex after surgery were in existence at the time the House Report was issued.

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<sup>1</sup> The case of *M.T. v. J.T.*, *supra*, was decided by the New Jersey Superior Court and involved a case where a wife had filed a complaint seeking support and maintenance from her husband. Her husband responded with the defense that his wife was actually a male-to-female transsexual and therefore their marriage was void. In rejecting his defense, the court upheld the validity of the marriage. The court began its analysis by accepting the "fundamental premise . . . that a lawful marriage requires the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female," and that New Jersey law would not permit recognition of a marriage between persons of the same sex. *Id.* at 207. The court then directly confronted the issue "whether the marriage between a male and a postoperative transsexual, who has surgically changed her external sexual anatomy from male to female, is to be regarded as a lawful marriage between a man and a woman." *Id.* at 208. The court concluded that "for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards." *Id.* at 209. On this basis, the court affirmed the finding of the trial court that the postoperative male-to-female transsexual was a female at the time of her marriage and entered into a valid marriage. *Id.* at 211.

In 1977, the Department of Health, Education, and Welfare prepared a Model State Vital Statistics Act that specifically provided for the amendment of a birth certificate upon proof of a change of sex by surgical procedure in section 21(e). *See In re Heilig*, 816 A.2d 68, 82-83 (Md. 2003). By 1996, at the time of consideration of the DOMA, several States had enacted legislation patterned after section 21(e) to provide a mechanism for amending a person's birth certificate to reflect a change of sex upon submission of a court order recognizing a sex change by surgical procedure. *See, e.g.*, Ariz. Rev. Stat. § 36-337 (2005) (previously at § 36-326); Cal. Health & Safety Code §§ 103425, 103430 (West 2005); Haw. Rev. Stat. § 338-17.7 (2003); La. Rev. Stat. Ann. § 40:62 (2004); Mich. Comp. Laws § 333.2831 (2005); Neb. Rev. Stat. § 71-604.01 (2004). A recent review of State legislation indicates that 22 States and the District of Columbia have now enacted provisions specifically permitting legal recognition of changes of sex by postoperative transsexuals. *See In re Heilig, supra*, at 83 & n.8 (collecting the relevant statutory provisions).

We therefore conclude that the legislative history of the DOMA indicates that in enacting that statute, Congress *only* intended to restrict marriages between persons of the same sex. There is no indication that the DOMA was meant to apply to a marriage involving a postoperative transsexual where the marriage is considered by the State in which it was performed as one between two individuals of the opposite sex.<sup>2</sup>

There is also nothing in the legislative history to indicate that, other than in the limited area of same-sex marriages, Congress sought to overrule our long-standing case law holding that there is no Federal definition of marriage and that the validity of a particular marriage is determined by the law of the State where the marriage was celebrated. *See Matter of Hosseinian*, 19 I&N Dec. 453, 455 (BIA 1987). While we recognize, of course, that the ultimate issue of the validity of a marriage for immigration purposes is one of Federal law, that law has, from the inception of our nation, recognized that the regulation of marriage is almost exclusively a State matter. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371 (1971); *Sherrer v. Sherrer*, 334 U.S. 343 (1948).<sup>3</sup> Interestingly, with regard to this point, the House Report stated the following:

If Hawaii or some other State eventually recognizes homosexual “marriage,” Section 3 will mean simply that that “marriage” will not be recognized as a “marriage” for purposes of federal law. *Other than this narrow federal requirement*, the federal

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<sup>2</sup> Our conclusion in this regard is consistent with an April 16, 2004, Interoffice Memorandum from William R. Yates, Associate Director for Operations of the United States Citizenship and Immigration Services (“CIS”), respecting the “Adjudication of Petitions and Applications Filed by or on Behalf of, or Document Requests by, Transsexual Individuals.” That memorandum acknowledges that “neither the DOMA nor any other Federal statute addresses whether a marriage between (for example) a man and a person born a man who has undergone surgery to become a woman should be recognized for immigration purposes or considered invalid as a same-sex marriage.”

<sup>3</sup> In deference to this fundamental aspect of our system of government, Federal statutes purporting to outlaw certain types of marriage are few and far between, and no Federal statute affirmatively authorizing a type of marriage appears to exist. Apart from the DOMA, the only other Federal statutory provisions purporting to outlaw certain types of marriage that our research has discovered are found at section 101(a)(35) of the Act, 8 U.S.C. § 1101(a)(35) (2000), which, in defining the terms “spouse,” “husband,” and “wife” for purposes of the Act, specifically excludes recognition of so-called proxy marriages “where the contracting parties thereto are not physically in the presence of each other, unless the marriage shall have been consummated,” and in the Mann Act, which was construed by the Supreme Court to prohibit the interstate transportation of women for purposes of engaging in polygamy. *See Cleveland v. United States*, 329 U.S. 14 (1946); *see also* section 212(a)(10)(A) of the Act, 8 U.S.C. § 1182(a)(10)(A) (2000) (rendering inadmissible any immigrant coming to the United States to practice polygamy). Section 3(a) of the DOMA would also appear to have as an incidental effect the declaration of invalidity of polygamy, as it provides that “the word ‘marriage’ means only a legal union between *one man and one woman* as husband and wife.” (Emphasis added.)

government will continue to determine marital status in the same manner it does under current law.

H.R. Rep. No. 104-664, at 31 (emphasis added). Therefore, we also conclude that Congress need not act affirmatively to authorize recognition of even an atypical marriage before such a marriage may be regarded as valid for immigration purposes, assuming that the marriage is not deemed invalid under applicable State law.<sup>4</sup>

The DHS counsel appears to argue that in determining whether a particular marriage is valid under the DOMA, we must look to the common meanings of the terms “man” and “woman,” as they are used in the DOMA. Counsel asserts that these terms can be conclusively defined by an individual’s chromosomal pattern, i.e., XX for female and XY for male, because such chromosomal patterns are immutable. However, this claim is subject to much debate within the medical community. According to medical experts, there are actually eight criteria that are typically used to determine an individual’s sex. They are as follows:

1. Genetic or chromosomal sex – XX or XY;
2. Gonadal sex – testes or ovaries;
3. Internal morphologic sex – seminal vesicles/prostate or vagina/uterus/fallopian tubes;
4. External morphologic sex – penis/scrotum or clitoris/labia;
5. Hormonal sex – androgens or estrogens;
6. Phenotypic sex (secondary sexual features) – facial and chest hair or breasts;
7. Assigned sex and gender of rearing; and
8. Sexual identity.

See Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 Ariz. L. Rev. 265, 278 (1999).

While most individuals are born with 46 XX or XY chromosomes and all of the other factors listed above are congruent with their chromosomal pattern, there are certain individuals who have what is termed an “intersexual condition,” where some of the above factors may be incongruent, or where an ambiguity within a factor may exist. *Id.* at 281. For example, there are individuals with a chromosomal ambiguity who do not have the typical 46 XX or XY chromosomal pattern but instead have the chromosomal patterns of XXX, XXY, XXXY, XYY, XYYY, XYYYY, or XO. *Id.* Therefore, because a chromosomal pattern is not always the most accurate determination of an individual’s gender, the DHS counsel’s reliance on chromosomal patterns as the ultimate determinative factor is questionable.

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<sup>4</sup> This conclusion is entirely consistent with *Adams v. Howerton*, *supra*, relied on by the DHS. In that case, the court held that even if a homosexual marriage between an American citizen and an alien was valid under Colorado law, the parties were not “spouses” under section 201(b) of the Act. The court reached its result through an interpretation of section 201(b) itself and the term “spouse” as used therein, not by finding a general Federal public policy against the recognition of such marriages.

Moreover, contrary to the suggestion of the DHS counsel, reliance on the sex designation provided on an individual's original birth certificate is not an accurate way to determine a person's gender.<sup>5</sup> Typically, such a determination is made by the birth attendant based on the appearance of the external genitalia. However, intersexed individuals may have the normal-appearing external genitalia of one sex, but have the chromosomal sex of the opposite gender. *Greenberg, supra*, at 283-92. Moreover, many incongruities between the above-noted factors for determining a person's sex, and even some ambiguities within a factor, are not discovered until the affected individuals reach the age of puberty and their bodies develop differently from what would be expected from their assigned gender. *Id.* at 281-92.

We are not persuaded by the assertions of the DHS counsel that we should rely on a person's chromosomal pattern or the original birth record's gender designation in determining whether a marriage is between persons of the opposite sex. Consequently, for immigration purposes, we find it appropriate to determine an individual's gender based on the designation appearing on the current birth certificate issued to that person by the State in which he or she was born.

#### IV. CONCLUSION

We have long held that the validity of a marriage is determined by the law of the State where the marriage was celebrated. The State of North Carolina considers the petitioner to be a female under the law and deems her marriage to the beneficiary to be a valid opposite-sex marriage. We find that the DOMA does not preclude our recognition of this marriage for purposes of Federal law. As the NSC director did not raise any other issues regarding the validity of the marriage, we conclude that the marriage between the petitioner and the beneficiary may be the basis for benefits under section 201(b)(2)(A)(i) of the Act. Accordingly, the petitioner's appeal will be sustained, and the visa petition will be approved.

**ORDER:** The petitioner's appeal is sustained, and the visa petition is approved.

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<sup>5</sup> We note that there could be anomalous results if we refuse to recognize a postoperative transsexual's change of sex and instead consider the person to be of the sex determined at birth in accordance with the DHS's suggestion. For example, the marriage of a postoperative male-to-female transsexual to a female in a State that recognizes marriages between both opposite-sex and same-sex couples would be considered valid, not only under State law, but also under Federal law, because, under the DHS's interpretation, the postoperative transsexual would still be considered a male, despite having the external genitalia of a female.

## What Does the Department of Justice Defense of Marriage Act (DOMA) Announcement Mean for Immigration Cases?

by Victoria Neilson, Legal Director of Immigration Equality in conjunction with the LGBT Rights Working Group of the American Immigration Lawyers Association

**Note: This is a practice alert designed primarily to assist immigration attorneys in understanding recent developments in DOMA litigation. Nothing in this alert should be construed as legal advice. If you are not an attorney, you should not file any immigration papers without consulting a qualified attorney.**

### BACKGROUND

#### The Defense of Marriage Act

U.S. Citizenship and Immigration Services (USCIS) and the Board of Immigration Appeals (BIA) have longstanding rules that recognize marriages for immigration purposes, so long as they are valid in the jurisdiction where celebrated and the state of domicile or intended domicile. However, in 1996, Congress passed the Defense of Marriage Act (DOMA), which defines marriage for all federal purposes as the legal union between one man and one woman. As a result, applications for immigration benefits based on a marriage of two persons of the same sex have uniformly been denied.

#### The DOMA Challenges

Gay & Lesbian Advocates & Defenders (GLAD) – the Boston-based legal organization – has filed two law suits challenging DOMA. The case that is further along procedurally is *Gill v. OPM*, which challenges on equal protection grounds the denial of federal benefits to couples who married in Massachusetts.<sup>1</sup> The Massachusetts District Court applied the rational basis standard of review and found that DOMA could not withstand even this deferential test, and on July 8, 2010, the judge declared Section 3 of DOMA unconstitutional. In a companion case, *Massachusetts v. U.S. Dept. of Health & Human Services*, brought by the Massachusetts Attorney General, the same judge struck down Section 3 of DOMA as violative of the Tenth Amendment and Spending Clause.<sup>2</sup>

Despite pressure from lesbian, gay, bisexual, and transgender (LGBT) rights activists, the Department of Justice (DOJ) appealed the district court decisions in *Gill* and *Commonwealth*. The two appeals were consolidated and are currently pending in the First Circuit Court of Appeals. The district court decisions have been stayed pending appeal.

Subsequent to the *Gill* decision, GLAD filed another DOMA challenge on behalf of couples married in Connecticut, Vermont, and New Hampshire in the District Court of Connecticut. The American Civil Liberties Union (ACLU) also filed its own DOMA challenge in New York on behalf of a widow whose deceased spouse was also a woman. Both cases were filed in November 2010, and any appeals will be heard by the Second Circuit Court of Appeals.

There has also been ongoing litigation in California over Proposition 8, which amended the state constitution to forbid marriages between same-sex couples. The California case, *Perry v. Brown*, is a

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<sup>1</sup> *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010).

<sup>2</sup> *Massachusetts v. U.S. Dept. of Health & Human Services*, 698 F. Supp. 2d 234 (D. Mass. 2010).

right-to-marry case seeking to end a state law ban on marriage and is not a DOMA case challenging Congress' refusal to recognize existing state-licensed marriages.<sup>3</sup> The plaintiffs claim that the state's denial of marriage violates both the equal protection and due process clauses of the Fourteenth Amendment. In *Perry*, the district court found that it is unconstitutional to limit marriage to opposite sex couples. That case was appealed to the Ninth Circuit, which punted the case back to the California Supreme Court to address an issue of standing. Significantly in *Perry*, both the California governor and attorney general decided not to defend Proposition 8, and thus the only defendants in the case were private organization interveners who oppose marriage recognition.

### **DOJ's February 23, 2011, Announcement**

As required by law, when the President concludes that a law is unconstitutional, the Attorney General notifies Congress by letter of the President's decision and invites Congress to step in and defend DOMA. On February 23, 2011, [Attorney General Eric Holder sent a letter](#) to the Speaker of the House stating that DOJ would not defend DOMA in the Connecticut and New York cases (AILA Doc. No. 11032830).<sup>4</sup> DOJ reasoned that it was justified in defending DOMA in the First Circuit because, in its view, there was binding precedent in that Circuit, which stated that sexual orientation cases should receive rational basis review.<sup>5</sup> Attorney General Holder went on to explain that there is no precedent in the Second Circuit regarding the appropriate standard of review, and that DOJ had determined that sexual orientation-based cases should receive "heightened scrutiny," rather than rational basis review. The Attorney General stated that DOMA would not survive heightened scrutiny, and that DOJ, therefore, could not defend the Second Circuit cases. Although briefing was due in *Gill* and *Commonwealth* on March 1, 2011, DOJ subsequently announced that it would also not defend those cases, at least to the extent that the court determines that heightened scrutiny applies.<sup>6</sup>

The importance of the President's and Attorney General's announcement that Section 3 of DOMA is unconstitutional cannot be overstated. At the same time, however, it is important to bear in mind that the decision on what standard of review applies in sexual orientation cases and whether DOMA can withstand constitutional scrutiny is ultimately a decision for the courts.<sup>7</sup>

### **Probable DOMA Defense by Congress**

It is very likely that the House of Representatives will step forward to defend DOMA. In fact, House Speaker John Boehner and House Majority Leader Eric Cantor recently announced that the House would probably intervene and defend DOMA's constitutionality.<sup>8</sup>

## **IMPACT ON IMMIGRATION CASES**

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<sup>3</sup> *Perry v. Brown*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

<sup>4</sup> See AILA Doc. No. 11032830, <http://www.aila.org/content/default.aspx?docid=34956>

<sup>5</sup> See *Cook v. Gates*, 528 F.3d 42, 60 (1st Cir. 2008).

<sup>6</sup> See <http://www.glad.org/uploads/docs/cases/gill-v-office-of-personnel-management/doj-letter-re-ma-doma-cases-02-2011.pdf>

<sup>7</sup> For more information on the DOMA challenges, see <http://www.glad.org/uploads/docs/publications/doma-doj-faq.pdf>.

<sup>8</sup> See <http://www.politico.com/news/stories/0311/50682.html>

## **DOMA Will Still Be Enforced**

The Attorney General's letter explained in no uncertain terms that, pending either legislative repeal of DOMA or a "final judicial decision," DOMA is still the law of the land and will still be enforced. Thus, until we hear otherwise, we must assume that U.S. citizens (USCs) and lawful permanent residents (LPRs) who file I-130s on behalf of their foreign same-sex spouses will still see the I-130s denied. Likewise, we must assume that applications for cancellation of removal, fiancé/ee visas, and waivers dependent upon a spousal relationship will be denied.

## **In the Extremely Unlikely Scenario that No One Intervenes in the *Gill* Appeal**

While it seems extremely likely that someone will step in to defend *Gill*, DOJ has stated that it will remain in the case and defend the named defendants. If the *Gill* and *Commonwealth* appeals succeed in Massachusetts, there will likely be Supreme Court review, resulting in a nationwide ruling on the constitutionality of DOMA's marriage definition.

## **The Possibility of "Abeyance"**

In late March, there were [reports](#) that USCIS was holding marriage-based cases for lesbian and gay couples in abeyance (AILA Doc. No. 11032842).<sup>9</sup> Unfortunately, by March 30, 2011, USCIS changed course and announced that applications were no longer on hold.<sup>10</sup> While immigration advocates continue to push the Administration for a broad abeyance policy, as of March 30, 2011, we must assume that I-130s filed by same-sex spouses will be denied.

## **Who Should Marry Now?**

An analysis of the possible benefits, as compared to the possible risks, that could be derived from marriage between a USC or LPR and a foreign national is necessary.

It is important to remember that any possible federal benefits from marrying still remain theoretical. For example, no one to date has received a U.S. immigration benefit based on a marriage to a lesbian or gay partner, and neither DHS nor DOJ has announced any change in their current policies of non-recognition of such marriages.

Before the Executive branch's shift on DOMA, it seemed unlikely that bi-national couples would derive a tangible benefit from entering into a state-sanctioned marriage. With DOJ taking a public stance that Section 3 of DOMA is unconstitutional, it is easier to envision successful arguments that marriages should be recognized in the immigration context.

While it remains to be seen whether DOMA will be repealed or struck down, this sea change in DOJ's position on DOMA means, for many couples, that the potential benefits of being married to a USC or LPR are greater than the potential detriments.

These are examples of how marriage could be beneficial now in an immigration context:

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<sup>9</sup> See AILA Doc. No. 11032842, <http://www.aila.org/content/default.aspx?docid=34968>, and *Federal agency halts green-card decisions for some gay immigrants*, Washington Post, [http://www.washingtonpost.com/politics/federal-agency-halts-green-card-decisions-for-some-gay-immigrants/2011/03/28/AFcClErB\\_story.html?hpid=z2](http://www.washingtonpost.com/politics/federal-agency-halts-green-card-decisions-for-some-gay-immigrants/2011/03/28/AFcClErB_story.html?hpid=z2)

<sup>10</sup> See *Immigration Official: "The Hold Is Over," Metro Weekly*, <http://metroweekly.com/poliglot/2011/03/immigration-official-the-hold.html>

- *Removal Proceedings*: If a foreign national is in removal proceedings, the existence of a USC spouse may support an argument for prosecutorial discretion to administratively close the case or an argument for a long continuance until federal courts decide the DOMA question. Please note, however, that if the couple marries while in removal proceedings, the burden of proof on the bona fides of the marriage is greater.
- *Asylum Seekers*: Marriage to a lesbian or gay spouse could be an important piece of evidence of an applicant's sexual orientation.
- *Undocumented Individuals*: If a foreign partner is undocumented, there is nothing to lose by marrying a USC or LPR partner. If the laws change, marriage may provide a future defense should removal proceedings be instituted, such as cancellation of removal, and would not add any risk to the situation the undocumented person is already in, provided no steps are taken to disclose the marriage to federal agents.

These are examples of how marrying now could be beneficial in the future in an immigration context:

- *Marriage Recognition through the End of DOMA*: If DOMA is struck down by the Supreme Court or repealed by Congress, married couples (at least in marriage recognition states) will be able to apply for immigration benefits. Since the foreign spouse who is married to a USC for less than two years is granted only conditional resident status and must later apply to have the conditions removed, there may be an advantage to marrying sooner rather than later.<sup>11</sup>
- *DOJ and/or DHS Change Their Current Position on Enforcing DOMA*: Advocacy efforts are underway to encourage DOJ and DHS to hold in abeyance, that is to neither approve nor deny, marriage-based petitions by same-sex couples, until there is a final resolution of the DOMA challenges. At this point, there is no indication that DOJ or DHS will change their positions and agree to long-term abeyance, but if they do, there could be an immediate benefit to couples who marry.
- *Passage of the Uniting American Families Act (UAFSA)*: UAFSA would amend the Immigration and Nationality Act to include the term "permanent partner" in most places where the term "spouse" now appears and would thus allow Americans to sponsor same-sex partners in much the same way as opposite-sex married couples currently do. Although there is no requirement in UAFSA that couples be married, they do have to prove the bona fides of the relationship, and a marriage certificate could help with this evidence.

### **Who Should Not Marry?**

While the potential benefits of marriage remain theoretical, there are still some risks involved in marrying:

- *Nonimmigrants Who Must Demonstrate a Lack of "Immigrant Intent"*: The primary reason to advise a couple not to marry is that if the marriage to a USC or LPR becomes known, the marriage can be taken as evidence of a lack of intent to return to the nonimmigrant's home country upon conclusion of a temporary stay, which could lead to a denial of a nonimmigrant visa or entry into the U.S. This is particularly an issue for applicants for tourist or student visas and for entrants under the Visa Waiver Program. Neither DHS nor DOS has issued guidance as to whether a foreign national, who is legally married to someone of the same sex in a state or a country with marriage recognition under that jurisdiction's laws, should indicate that she is "married" or "single" on the visa application form.

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<sup>11</sup> It is not clear when the clock would start ticking on a marriage that is recognized by a state but not the federal government.

### **Most Couples Should Not File an I-130**

The Attorney General's letter stated clearly that until DOMA is repealed or until there is a final court decision, it is the obligation of the Executive branch to comply with and enforce the law. Recent statements by DHS re-iterate this enforcement message; therefore, if a USC or LPR files an I-130 immigrant visa petition on behalf of his or her partner, it will be denied.

As discussed above, the theoretical benefits of marriage seem to outweigh the theoretical risks for many, if not most, bi-national couples. The same, however, cannot be said for the filing of an I-130 in several situations. For example:

- *A USC/LPR Should Generally Not File an I-130 on Behalf of an Undocumented Spouse:* An undocumented foreign national whose spouse files an I-130 on his or her behalf may be placed in removal proceedings. This moves the individual out from "under the radar" and puts them at greater risk of physical removal from the U.S.
- *A USC/LPR Should Generally Not File an I-130 on Behalf of a Spouse Who Has a Valid Tourist or Student Visa and Intends to Continue Using It:* The filing of an I-130 on behalf of a spouse is generally seen as an indication of the spouse's intent to remain in the U.S. permanently. Doing so will likely make it very difficult for the foreign spouse to enter the U.S. in the future as a tourist or a student.
- *A USC Should Generally Not File a Fiancé/ee Petition on Behalf of an Exiled Partner:* Since a fiancé/ee visa filed today will almost certainly be denied and may be evidence of immigrant intent, such a filing will likely lead to the denial of any future tourist or student visa application.

On the other hand, if the spouse of a USC or LPR is in removal proceedings and has nothing to lose by having his or her partner file an I-130, there is generally no reason not to file it. A pending I-130, or a pending appeal of a denied I-130, could form the basis for a request for prosecutorial discretion or administrative closure of the removal case.

### **Practitioners Should Not Race Into Court to File DOMA Challenges**

It is important to understand that the February 23, 2011, DOJ announcement did not occur in a vacuum. The LGBT legal rights movement has been very strategic in the DOMA challenges it has brought. The success of the fight for federal recognition of existing marriages has been a direct result of careful planning. In the process, many potential plaintiffs have been turned away, and an enormous amount of resources has been committed by non-profit organizations and through the pro bono work of large firms.

Bad litigation makes bad law, which hurts everyone; no one should consider bringing a DOMA challenge without speaking to the lawyers (at GLAD, Lambda Legal, National Center for Lesbian Rights, and the ACLU) who have gotten us this far.

### **Possible Scenarios for the End of Discrimination Against Same-Sex Bi-National Couples**

There are several different scenarios as to what could happen in the future, both on the litigation and legislative fronts, which would have different results for bi-national couples, at least in the short-term.

In general, when a USC or LPR files an I-130 petition on behalf of his or her foreign spouse, USCIS must answer three questions to determine whether the marriage is valid for immigration purposes:<sup>12</sup>

- 1) Was the marriage valid in the place of celebration?;
- 2) Is there a strong public policy against this type of marriage in the state of domicile or (for couples who marry abroad) the state of intended domicile?,<sup>13</sup> and
- 3) Is the marriage bona fide as defined by immigration law?

Beginning with these questions, different scenarios could lead to different outcomes depending on the geography of the applicant.

- *If the Gill and Commonwealth Cases Reach the Supreme Court and Win: Gill* is an “as applied” challenge dealing with specific federal programs. The *Commonwealth* case argues that the federal government has impermissibly intruded into a realm of governance reserved to the states. The reach of the Supreme Court ruling would depend in large part on the language of the decision. The Court could rule broadly that it is unconstitutional to discriminate against married couples based on their sexual orientation, or it could rule more narrowly in favor of the rights of states to define marriage. Thus, a favorable decision could lead to the complete demise of Section 3 of DOMA, or it could lead to a more limited ruling where the federal government recognizes marriages for couples domiciled in marriage recognition states but does not recognize marriages of couples domiciled in states with explicit mini-DOMAs.<sup>14</sup>
- *If DOMA Is Repealed through Legislation:* If legislation merely removes the existing DOMA, marriage recognition for federal purposes would be based on whether the marriage is considered valid at the state level. However, most Board of Immigration Appeals cases, which have found a strong state public policy ground for denying marriage recognition, have involved criminal sanctions against the marriage, such as in the context of polygamy.<sup>15</sup> Therefore, the fact that some states have mini-DOMAs may not be sufficient to overcome the strong presumption in favor of federal marriage recognition if marriages are valid where celebrated. Moreover, if the DOMA repeal language states explicitly that there is a right to marry which cannot be denied by states, the legislation could lead to the fall of the mini-DOMAs. If legislation with this language passes, it would not matter in which state the couple resides for purposes of immigration.
- *If UFAA Passes:* If UFAA passes, USCs and LPRs who can prove they are in committed relationships with their foreign partners could file for permanent residence on their behalf without regard to where they live.

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<sup>12</sup> For a comprehensive analysis of BIA cases that discuss marriage recognition in the immigration context, see Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in A World Without DOMA*, 16 Wm. & Mary J. Women & L. 537 (2010).

<sup>13</sup> Until DOMA is repealed or overturned, it is this federal policy against marriage recognition which prevents I-130s from being approved.

<sup>14</sup> See <http://www.freedomtomarry.org/states/> for a map of states which have marriage recognition for LGBT families and which prohibit marriage recognition. Note that it is not uncommon under current immigration law for USCIS recognition of a marriage to be dependent on the state of domicile of the couple. Under current law, a marriage involving a transgender woman who has had her birth certificate amended and a biologically born man would be recognized by USCIS if the couple marries and resides in North Carolina, but not if the couple marries and resides in Florida.

<sup>15</sup> See Titshaw, *supra*.

### **What Happens Next?**

The President's position and Attorney General's announcement are so new that the broader implications are still being reviewed and analyzed. This is the first time that the White House and DOJ have announced that Section 3 of DOMA is unconstitutional, and we hope that this announcement will soon pave the way to immigration recognition for bi-national couples.

In the meantime, if you have further questions about the effects of the DOJ announcement and would like guidance on how to proceed on a particular case, please contact Immigration Equality [www.immigrationequality.org](http://www.immigrationequality.org) or e-mail [vneilson@immigrationequality.org](mailto:vneilson@immigrationequality.org).

We are investigating every option and will have more to say soon.