

**CHAPTER 1**

**INTRODUCTION TO LGBTQ IMMIGRATION**

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**§ 1.1 A Note from the ILRC Regarding Language & the LGBTQ Acronym**

The acronym LGBTQ stands for *lesbian, gay, bisexual, transgender and queer*. These terms refer to aspects of an individual’s identity relating to their gender, their sexual orientation, their cultural background and sometimes their social and political views. Therefore, they are not parallel but can intersect. This is explored in more detail in § 2.1 of **Chapter 2, *The ABC’s of LGBTQ: Terminology in Context***. People may be more familiar with the shorter acronym, LGBT, which has a longer history and is more commonly associated with the LGBT Rights Movement. Where other sources cited make use of the LGBT acronym, we have left this intact in our references to these materials throughout this manual. However, we have chosen to use the longer acronym that includes the term *queer* in the title and in our own reference to the LGBTQ community in recognition of a growing voice within the Immigrant Rights Movement and the LGBTQ Rights Movement. This voice comes from individuals who use the term *queer* to reclaim what was once a term of exclusion and marginalization in self-reference, in an expression of personal liberation and empowerment. In the immigration context, this voice has come from undocumented LGBTQ youth who have felt such exclusion and marginalization not only as LGBT people but also as immigrants without official recognition by the law. The *UndocuQueer*, as these individuals often refer to themselves, thus seek to be included in both struggles—the Immigrant Rights and the LGBTQ Rights Movement—as they fight for their rights as both, undocumented immigrants and LGBTQ individuals. Their use of the term *UndocuQueer* illustrates the intersectional nature of the many identities of LGBTQ immigrants that we believe is at the heart of what this publication is intended to address.<sup>1</sup>

**§ 1.2 History and Background of LGBTQ Immigration**

Historically, U.S. immigration law has long discriminated against gays and lesbians, who have only been able to lawfully immigrate to the United States for the last 25 years. The

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<sup>1</sup> To learn more about the UndocuQueer Movement, see Erika L. Sanchez, NBC Latino, “The UndocuQueer movement rises to push for a DREAM Act.” November 2, 2012; and Elena Shore, New America Media, “Who Are the 'UndocuQueer?' New Reports Shed Light.” March 8, 2013.

Immigration Act of 1917 excluded gay and lesbian individuals from immigration into the U.S. by denying admission to individuals who were found to be “mentally defective” or who had a “constitutional psychopathic inferiority,” which the then Immigration and Naturalization Service (INS) interpreted to include gays and lesbians, in accordance to a U.S. Public Health Service a definition for “homosexual.”<sup>2</sup> The then Immigration and Nationality Act (INA) of 1952 continued this exclusion by denying admission to “aliens afflicted with a psychopathic personality, epilepsy, or a mental defect,” which the U.S. Supreme Court interpreted to include gays and lesbians as well.<sup>3</sup>

This discriminatory law was then amended in 1965 to add “sexual deviation” as a health-related ground of exclusion for which an individual could be denied admission into the U.S.<sup>4</sup> Therefore, if a U.S. Public Health Service (PHS) official determined that an immigrant applicant for admission was gay, it would issue a certificate reflecting its findings, which would then be sent to the then INS and used as the basis for exclusion of the individual. In 1979, six years after the American Psychiatric Association had removed “homosexuality” from its list of mental illnesses,<sup>5</sup> the Surgeon General ordered the U.S. Public Health Service to stop issuing medical certificates solely because an alien was suspected of being gay.<sup>6</sup>

However, the Justice Department directed the then INS to continue to enforce the law’s exclusionary provisions against gays and lesbians; and in 1980, the then INS adopted its “*Guidelines and Procedures for the Inspection of Aliens Who Are Suspected of Being Homosexual.*” Although individuals seeking admission into the U.S. were not to be asked questions regarding their sexual orientation, if an individual or a third party made a voluntary statement identifying an immigrant applicant as a “homosexual,” an investigation would be conducted and the INS could refer the person to exclusion proceedings.<sup>7</sup> It wasn’t until the Immigration Act of 1990 that Congress finally removed the words “sexual deviation” from the INA. That same year, in the case of *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990), the Board of Immigration Appeals (BIA) granted withholding of deportation to a gay Cuban man based on his membership in the particular social group of “homosexuals.”

Nevertheless, between 1993 and 2010, the Department of Health and Human Services (HHS) designated HIV as a “communicable diseases of public health significance” that made a person inadmissible to the U.S. under the health-related grounds of inadmissibility.<sup>8</sup> The so-called “HIV ban” particularly prevented gay men from visiting or immigrating to the U.S. during

<sup>2</sup> Davis, Tracy J. “Opening the Doors of Immigration: Sexual Orientation and Asylum in the United States.” Human Rights Brief 6, no. 3 (1999), pg. 19-20.

<sup>3</sup> *Boutilier v. INS*, 387 U.S. 118 (1967)(finding that the term “psychopathic personality” was intended to include “homosexuality,” to which it mainly refers as a behavior or conduct).

<sup>4</sup> 8 USC Sec. 1182(a) (1982).

<sup>5</sup> Note that the Diagnostic and Statistical Manual of Mental Disorders (DSM), removed the term “homosexuality” from its list of mental disorders, but it replaced it by the category “Sexual Orientation Disturbance.”

<sup>6</sup> 56 Interpreter Releases 387, 398 (1979), cited in *Hill v. INS*, 714 F.2d 1470 (9<sup>th</sup> Cir. 1983).

<sup>7</sup> For a brief summary of this history, see *Hill v. INS*, 714 F.2d 1470 (9<sup>th</sup> Cir. 1983).

<sup>8</sup> See 42 CFR § 34.2(b) and INA § 212(a)(1)(A).

the years it was in place. Before the ban was lifted, LGBT advocates raised the concern that the HIV ban discouraged some LGBT foreign nationals already living in the United States from seeking testing and medical care in connection with HIV because of the possible risks involving their immigration status, in addition to the stigma that the ban promoted.<sup>9</sup> In 2010, under President Obama, HHS finally removed HIV from the list of inadmissible communicable diseases, following the enactment in 2008 of the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis and Malaria Reauthorization Act, pursuant to which HHS was no longer *required* to so designate the disease.

Finally, same-sex couples were denied immigration benefits based on marriage until 2013, when the Supreme Court declared unconstitutional the Defense of Marriage Act (DOMA) in the case of *United States v. Windsor*, 133 S.Ct. 2675 (2013); and until 2012, transgender immigrants were required to prove that they had undergone sex reassignment surgery in order for the U.S. Citizenship and Immigration Services (USCIS) to recognize their gender transition by reflecting their correct gender marker on official documents.<sup>10</sup>

### § 1.3 Introduction to This Manual

According to a report published by the Williams Institute in 2013, there are approximately 267,000 lesbian, gay, bisexual, and transgender (LGBT) adult undocumented immigrants and 637,000 LGBT adult documented immigrants living in the United States (U.S.) today.<sup>11</sup> Furthermore, there are more than 32,000 same-sex binational couples living in this country.<sup>12</sup> The immigrant experience of these lesbian, gay, bisexual, transgender or queer (LGBTQ) individuals can present special difficulties that often pose an obstacle to an LGBTQ immigrant's ability to obtain lawful immigration status.

For example, the Center for American Progress has stated that “because LGBT undocumented people find themselves at the intersection of two already marginalized groups—the LGBT population and the undocumented population—they are among society’s most vulnerable.”<sup>13</sup> Furthermore, the National Coalition of Anti-Violence Programs (NCAVP) published a report on Hate Violence Against Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Communities in the United States in 2013, concluding, “[what] emerges clearly in the findings of this year’s report is that many of the people at risk for the most severe hate violence are at the intersection of multiple forms of oppression and discrimination including

<sup>9</sup> Julia Preston, “Obama Lifts a Ban on Entry Into U.S. by H.I.V.-Positive People,” *The New York Times*, October 30, 2009.

<sup>10</sup> See USCIS Policy Memorandum, “Adjudication of Immigration Benefits for Transgender Individuals; Addition of *Adjudicator’s Field Manual* (AFM) Subchapter 10.22 and Revisions to AFM Subchapter 21.3 (AFM Update AD12-02),” April 10 2012, included in this manual as Appendix B.

<sup>11</sup> Gary J. Gates, “LGBT Adult Immigrants in the United States,” *The Williams Institute*. March 2013.

<sup>12</sup> *Id.*

<sup>13</sup> Crosby Burns, Ann Garcia, and Philip E. Wolgin, “Living in Dual Shadows: LGBT Undocumented Immigrants,” *Center for American Progress*. March 2013.

racism and citizenship status.”<sup>14</sup> The report found that that LGBTQ undocumented individuals, transgender women, people of color and gay men face the most severe forms of violence.

Confronted with the same cumbersome immigration system as other immigrants, LGBTQ individuals often face unique challenges because of issues that arise in connection with their sexual orientation or gender identity. For example, the process of self-identifying as LGBTQ and overcoming the fear of coming-out can take time and require the kind of support that can be scarce for newcomers to this country. This often delays an individual’s ability to come forth with a valid asylum claim based on sexual orientation or gender identity, causing many LGBTQ potential asylees to miss the one-year deadline. See **Chapter 4**.

Furthermore, LGBTQ undocumented immigrants are highly vulnerable to violence incited by an anti-immigrant and/or an anti-LGBTQ bias. Such individuals who become victims of a hate crime may be eligible for a U nonimmigrant visa. See **Chapter 5**. Additionally, although federal law in the United States now recognizes same-sex marriage, marriage equality is still not accessible by many same-sex couples because of discriminatory restrictions in the laws of many U.S. states and other countries. Some of these couples could resort to a visa for the fiancé(e) of a U.S. citizen, but they may be afraid of appearing for an interview at a consulate in a city or country where they feel unsafe being identified as LGBTQ. Other couples, such as those who are not “out” to their families, may have difficulty proving they entered into a good-faith marriage because of lack of evidence traditionally requested by USCIS. See **Chapter 3**. Finally, the immigration bureaucracy may become a part of another very important process taking place in the life of a transgender person, as such an individual tries to obtain immigration documents that reflect their real gender identity. See **Chapter 2**.

Therefore, understanding how an individual’s LGBTQ identity influences their immigration experience is crucial to ensuring that LGBTQ immigrants receive culturally competent services that adequately meet their needs and ultimately help them to access the protections and benefits to which they have a right under our immigration laws. This manual is intended to serve as a tool for legal representatives and other service providers who will represent LGBTQ individuals in immigration matters. It is our hope that with the help of this manual, immigration practitioners and others that may work with LGBTQ foreign nationals will be prepared to help their LGBTQ immigrant clients to confront the challenges they face and to successfully navigate our nation’s complicated immigration system.

**Chapter 2: Working with LGBTQ Immigrants.** In Chapter 2 of this manual, you will find a glossary of terms to help you become familiar with the terminology and the experiences associated with LGBTQ identities. This chapter also provides tips on how to make a legal office a welcoming, comfortable and safe space for LGBTQ clients. You will also find guidance on best practices for working with LGBTQ individuals, such as suggestions about language and your approach to asking questions regarding sexual orientation or gender identity. Similar guidance is

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<sup>14</sup> Press Release from the National Coalition of Anti-Violence Programs, regarding the “National Report on Hate Violence Against Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Communities in 2013.” May 29, 2014.

also provided for working with victims of violence and other forms of trauma, as is the case with many LGBTQ individuals applying for things such as asylum, U nonimmigrant status and relief from detention, among other immigration benefits. This chapter also provides information regarding special considerations when representing transgender individuals, including how to help your clients obtain identity documents that reflect their correct name and gender.

**Chapter 3: Marriage-Based Immigration for Same-Sex Couples.** Chapter 3 provides an overview of the two-step process involved in marriage-based immigration, focusing on special considerations for same-sex binational and dual non-citizen couples. Therefore, the chapter explores in detail the interplay between marriage equality and the immigrant visa petition filed by a U.S. citizen or lawful permanent resident on behalf of a foreign spouse. In this chapter, advocates will find tips on how to prove a same-sex couple’s marriage is legally valid and *bona fide*. Chapter 3 will also walk you through the process of adjustment of status and consular processing, focusing on how to prepare a couple for a marriage interview with either the USCIS or a consular officer, and what to do should problems arise. A general overview of conditional resident status is provided, along with an introduction to the petition that a couple must file in order to lift the conditions on residence, as well as the waivers available to the conditional resident when this is not possible. Additionally, special instructions are provided for those who may seek a change of venue either for consular processing or in connection with a K-1 fiancée visa. Finally, this chapter also provides a summary of the process of self-petitioning available to victims of domestic violence and abuse through the Violence Against Women Act (VAWA).

**Chapter 4: Asylum Protection for LGBTQ Immigrants.** In Chapter 4, advocates are guided through the legal components of an asylum claim based on sexual orientation or gender identity. The chapter provides an extensive overview of the forms of persecution to which LGBTQ people are subjected worldwide, as well as tips on how to provide evidence of such persecution that will meet the standard to show a well-founded fear of persecution. Advocates will also find a thorough discussion of the “particular social group” ground for claiming asylum, with a focus on how to prove a person is LGBTQ. Special consideration is given to obstacles that arise in LGBTQ cases, such as country conditions evidence that suggests the laws of a particular country are inclusive of LGBTQ people; misunderstandings by adjudicators regarding LGBTQ identities, which then lead to negative findings on credibility, among other adverse effects; or the various difficulties LGBTQ immigrants face in meeting the one-year deadline because of issues that arise in connection with processes such as “coming out” or a gender transition; etc. The various other bars to asylum are also outlined. Finally, this chapter also includes a brief summary and comparative chart regarding withholding of removal and protection under the Convention Against Torture (CAT).

**Chapter 5: U Visa and Other Benefits.** Chapter 5 takes advocates through the eligibility requirements in connection with an application for U nonimmigrant status. A detailed look at what constitutes “qualifying criminal activity” includes an explanation of the role that state hate crime laws can play in elevating a criminal offense committed against an LGBTQ immigrant from a non-qualifying to a qualifying crime. Strategies and practice tips are also provided for successful advocacy with certifying law enforcement agencies regarding this issue. This chapter also discusses how the U nonimmigrant visa provides protection for victims of

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domestic violence for immigrants who are not eligible for the protections under VAWA discussed in **Chapter 3**. Finally, a summary is also provided regarding the T nonimmigrant visa option for immigrant victims of human trafficking.

**Chapter 6: Detention.** In Chapter 6, we have provided information about the challenges detained LGBTQ individuals face while in detention centers. Along with this discussion, we have laid out the various policies and regulations that ICE and the federal government have created in order to protect the rights and the safety of detained individuals. You will, therefore, find guidance regarding how to use the various tools available to obtain your client's release from detention, such as bonds, parole, alternatives to detention and *habeas corpus* petitions. This chapter also provides strategies to advocate for the fair and humane treatment of an LGBTQ individual in detention, including an overview of key parts of ICE's 2011 Performance-Based National Detention Standards (PBNDS) and a similar overview of the protections provided by the Prison Rape Elimination Act (PREA).