

## LESSON PLAN OVERVIEW

**Course** Asylum Officer Basic Training

**Lesson** *Lesbian, Gay, Bisexual,  
Transgender and HIV-Positive (LGBT/H)  
Claims*

**Rev. Date** d

**Lesson Description** This lesson provides guidance on the unique issues presented in LGBT/H asylum claims. It includes definitions of relevant terms, a discussion of particular kinds of persecution, interviewing techniques, and one year deadline issues.

### **Field Performance**

**Objective** Given a request for asylum by an LGBT/H applicant, the asylum officer will appropriately determine eligibility for asylum.

**Academy Training** Given written and roleplay scenarios involving LGBT/H asylum

**Performance Objective** applicants, the trainee will identify the issues, use appropriate language in interviewing the applicant, and correctly apply the law to reach a decision on eligibility.

**Interim (Training)** 1. Identify

### **Performance Objectives**

**Instructional Methods** Lecture, discussion, practical exercises

### **Student References/ Materials**

**Method of Evaluation** Observed Lab exercise with critique from evaluator, practical exercise exam, written test

**Background Reading** 1

## CRITICAL TASKS

SOURCE: Asylum Officer Validation of Basic Training  
Final Report

## **I. INTRODUCTION**

In 1994, former Attorney General Janet Reno designated the BIA case *Toboso-Alfonso* 20 I&N Dec. 819 (BIA 1990) as a precedent decision. The *Toboso-Alfonso* case granted withholding of deportation to a gay man from Cuba, recognizing that the applicant's gay sexual orientation fell within the definition of "membership in a particular orientation." Although there were some successful asylum applications based on sexual orientation before this case was designated as precedent, the *Toboso-Alfonso* decision increased awareness of persecution of individuals on account of sexual orientation and bound asylum officers and immigration judges to the decision's holding that sexual orientation could form the basis of a particular social group. In the fifteen years since that decision, there have been more than 25 precedential decisions from the federal courts, and well over 100 non-precedential federal court decisions dealing with Lesbian, Gay, Bisexual, Transgender and HIV (LGBT/H) asylum claims, though *Toboso-Alfonso* remains the lone precedential BIA decision.

This lesson focuses on issues specific to LGBT/H cases including interviewing techniques and developments in the law. It lays out some of the terminology specific to these claims and discusses some of the complicated issues which may arise, including some specific possible one year filing deadline exceptions.

## **II. LESBIAN, GAY, BISEXUAL, TRANSGENDER AND HIV (LGBT/H) ASYLUM SEEKERS – OVERVIEW**

In the 15 years since the *Toboso-Alfonso* decision, LGBT/H asylum applications have formed a growing number of the overall pool of asylum seekers. These cases force the asylum seeker to discuss some of the most sensitive and difficult aspects of human identity and behavior – sexual attraction, gender identity, and life-threatening illness. These topics may be particularly difficult for applicants to discuss with a government official, and they may make the asylum officer

uncomfortable. This lesson is designed to familiarize the officer with terms that are common to LGBT/H cases, which may make it easier for both the applicant and the officer to discuss the relevant facts of the claim. As with any asylum claim, it is paramount for the officer to be respectful and sensitive to the difficulties the applicant may have in discussing these sensitive issues.

### **III. INTERNATIONAL GUIDELINES RELATING TO LGBT ASYLUM SEEKERS**

It is well accepted under international law that individuals who face persecution based on their LGBT identity should be protected under international refugee law. In 2008, the United Nations High Commissioner for Refugees (UNHCR) issued guidance on adjudicating LGBT-based refugee claims. The guidance discusses many of the same issues: types of harm; agents of persecution; nexus, etc, as this AOBTC and provides useful background reading.

*UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*

[http://www.usdoj.gov/eoir/vll/benchbook/resources/UNHCR\\_Guidelines\\_Sexual\\_Orientation.pdf](http://www.usdoj.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf)

### **IV. LESBIAN, GAY, BISEXUAL, TRANSGENDER AND HIV (LGBT/H) ASYLUM SEEKERS – TERMINOLOGY**

There are some terms which are likely to be used by LGBT/H applicants in their claims for asylum. It will be helpful for asylum officers to be thoroughly familiar with these terms prior to conducting an asylum interview.

#### **A. Sexual Orientation Terms**

Sexual orientation – is defined as the enduring erotic, affectional, or romantic attraction to individuals of a particular sex. Sexual orientation is a fundamental aspect of identity.

Homosexual – is used to describe individuals who are primarily attracted to members of the same sex. This term is often considered clinical with a slightly derogatory connotation within the LGBT/H community.

Gay – is generally used to mean men who are attracted to men. Some women who are attracted to women use the

For more general information about sexual orientation, see <http://www.apa.org/pubs/info/answers.html> on the American Psychological Association website.

term gay to describe themselves as well.

Lesbian – is used to mean women who are attracted to women, although homosexual women also sometimes use the term “gay” to describe themselves.

Straight – is used to mean “heterosexual” or men or women who are attracted to the opposite sex.

Bisexual – is used to mean men or women who are attracted to both sexes. It is important to understand that although bisexual individuals may feel attraction to members of either sex, they cannot “choose” whom (or which gender) to feel attracted to any more so than a heterosexual or homosexual individual can.

“Coming out” – is the process by which an individual comes to terms with his or her sexual orientation. For most people this process first involves self-acceptance (“coming out” to one’s self) and then may involve telling other people (“coming out” to others.) It is important to remember, however, that some people choose not to “come out” to others for fear of their safety. Some people realize as children that they are LGBT, whereas others may not come out to themselves until they are adults. Many lesbian and gay people enter into opposite sex marriages before coming to terms with their sexual orientation.

“Closeted” – this term, or “living in the closet” is sometimes used to describe a person who keeps his or her sexual orientation secret.

“Outed” – this term means the involuntary disclosure of a person’s LGBT identity. For example, an applicant may say, “My cousin saw me with my partner and then he ‘outed’ me to the whole community.”

Homophobia – a term used to denote deeply ingrained feelings of prejudice and hatred against lesbian, gay and bisexual people.

## **B. Gender Identity Terms**

Transgender – is an umbrella term for people whose gender identity and/or gender expression differs from the

For more information  
see National Center for

sex they were assigned at birth or the stereotypes associated with that sex. The term may include transsexuals and others who do not conform to gender stereotypes. Many people who fit the definition of “transsexual” below, continue to refer to themselves as transgender.

Transsexual – is a term used for people who seek to live in a gender different from the one assigned to them at birth. They may seek medical treatment to “transition.” It is important to note, however, that being “transsexual” does not necessarily mean that a person has undergone any particular surgery or treatment.

Transvestite – or, “cross-dresser,” means an individual who chooses to wear clothes generally associated with the opposite sex. Sometimes this is related to transgender identity, and sometimes it is not. Note, however, that Spanish language articles often refer to transgender people as “travestis” which translates to “transvestites.” “Transvestite” is considered an outmoded term and should not be used by the interviewer unless the applicant himself or herself uses it.

Transition – is the process of changing a gender expression from one gender to another. This process may be very different for different people. It may involve “coming out” as transgender to one’s self and to others; living in one’s chosen gender; changing legal documents; and/or accessing necessary medical treatment.

The medical treatment that transgender people receive is specific to each individual. There is no one specific procedure that changes a person’s gender. Rather, medical transition is a process which may include any number of possible treatments such as: hormone therapy, electrolysis, and surgeries such as, hysterectomy, mastectomy, and genital reconstruction.

MTF – refers to a male to female transsexual, that is an individual assigned the male gender at birth who now identifies as female.

FTM – refers to a female to male transsexual, that is an

Transgender Equality’s  
Teaching Transgender  
[http://www.nctequality.org/Resources/NCTE\\_Teaching\\_Transgender.pdf](http://www.nctequality.org/Resources/NCTE_Teaching_Transgender.pdf)

For more information about transition see the World Professional Association for Transgender Health website  
<http://www.wpath.org/documents/Med%20Nec%20on%202008%20Letterhead.pdf>

individual assigned the female gender at birth who now identifies as male.

“Corrected gender” – the gender with which a transgender individual identifies. For example, for an MTF transgender woman, female would be her “corrected gender.”

“Passing” – is a term sometimes used to describe a transgender person’s ability to live in his or her corrected gender without it being readily apparent that he or she is transgender.

Transphobia – a term used to denote deeply ingrained feelings of prejudice and hatred against transgender people.

Intersex – refers to a condition where an individual exhibits characteristics of both sexes or does not match the typical characteristics for either gender. This condition was previously referred to as being a “hermaphrodite,” but this term is considered outmoded and should not be used unless the applicant uses it himself or herself.

For more information on intersex issues, see the Advocates for Informed Choice website, [www.aiclegal.org](http://www.aiclegal.org)

### **C. HIV Terms**

HIV-positive – means that a person has been exposed to the Human Immunodeficiency Virus (HIV) and developed anti-bodies to the virus. Once a person has tested positive for HIV, he or she will always test positive for HIV, regardless of is or her health.

*For more information about HIV see <http://www.gmhc.org/health/basics.html> on the Gay Men’s Health Crisis website.*

AIDS – or Acquired Immunodeficiency Syndrome, is the medical term used for people with the HIV virus who have either experienced certain opportunistic infections (such as PCP pneumonia or Kaposi’s Sarcoma), or whose T-cells (infection fighting blood cells) have dropped below 200.

Not everyone who is HIV positive has AIDS, but everyone who has AIDS is HIV positive. HIV is transmitted through the transfer of bodily fluids from an infected individual to an uninfected individual. People are primarily infected with HIV through sexual contact which involves the exchange of bodily fluids; from

sharing intravenous drug paraphernalia; during childbirth and breast-feeding; and from receiving contaminated blood transfusions. There is no risk of HIV transmission from casual contact, such as shaking hands or sharing a drinking glass.

CD4 count or T-Cell count – this is a test used to measure the well-being of the immune system of an individual who is HIV-positive. People with healthy immune systems generally have between 800-1200 T-cells. If T-cells drop below 200, a person is considered to have AIDS.

## **V. LEGAL ANALYSIS – MEMBERSHIP IN A PARTICULAR SOCIAL GROUP**

LGBT/H individuals may be eligible for political asylum based on their membership in a particular social group. The first, and only, precedential BIA decision in this area is *In re Toboso-Alfonso* which found gay men in Cuba to constitute a particular social group. Since then, there have been cases concerning lesbians, gay men, gay men with female sexual identity and transgender individuals which are discussed below. At this point, it is well established that being lesbian, gay, bisexual, transgender or HIV-positive may constitute a particular social group.

There have been several cases which recognize “gay men with female sexual identities” as a particular social group. This somewhat strained identity encompasses gay men who are extremely effeminate but may not identify overtly as transgender.

There has also been a Ninth Circuit case which uses the term “male-to-female transsexual” to describe the applicant. There is no discussion of particular social group in the case, indicating that the court accepted the social group as framed.

There has not yet been a precedential case that explicitly recognizes HIV-positive status as a particular social group. In 1996, legacy INS issued a memorandum explaining that HIV-positive status can

*Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005), holding, “all alien homosexuals are members of a ‘particular social group.’”

*Hernandez-Montiel v. INS*, 225 F.3d 1088 (9th Cir. 2000), *Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004) and *Ornelas Chavez v. Gonzalez*, 458 F.3d 1052 (9th Cir. 2006).

*Morales v. Gonzalez*, 478 F.3d 972 (9th Cir. 2007).

“Seropositivity for HIV and Relief from Deportation,” 2/16/96, available at



constitute a particular social group. Additionally, a federal court has implicitly accepted that HIV status constitutes a particular social group, while denying asylum on another ground.

<http://www.immigrationequality.org/uploadedfiles/HIV%20asylum%20memo.pdf>

It is currently DHS policy to refer all asylum cases which are based solely on HIV-positive status to Headquarters for review.

Also, note, *Manini v. Filip*, in which the 8<sup>th</sup> Circuit found that a Kenyan woman who missed the one year filing deadline did not meet the higher standard for withholding of removal, but the court implicitly accepted that she was a member of a particular social group based on her HIV-positive status.

It may also be possible for an applicant to claim asylum based on imputed sexual orientation. Often individuals who test positive for HIV fear that if their diagnosis becomes known, others will assume that they are gay, regardless of their actual sexual orientation. Likewise, transgender individuals may be perceived as gay or lesbian even though they identify as heterosexual.

In *Amanfi v. Ashcroft*, 328 F.3d 719 (3d Cir. 2003) a heterosexual man from Ghana claimed that he engaged in a sexual act to avoid being subjected to ritual sacrifice. He was thereafter perceived as gay and claimed persecution on that ground.

## **VI. INTERVIEWING CONSIDERATIONS**

The purpose of this section is to familiarize the officer with some basic terminology and techniques which may make it easier to discuss LGBT/H issues with the applicant. For many applicants, it will be very difficult to talk about something as personal as sexual orientation, gender identity or HIV-positive status. It is therefore especially important for the officer to create an interview environment that is open and non-judgmental. This section is a supplement to the guidance in the Asylum Officer Basic Training lessons on interviewing

and should be considered along with the guidance contained in those lessons.

### **A. Pre-Interview File Review**

The officer should thoroughly review the file prior to the interview. All asylum officers are expected to conduct interviews of applicants with LGBT/H-related claims. Due to the personal nature of these claims, some applicants may feel more comfortable discussing their claims with either an officer of the same sex or of the opposite sex. To the extent that personnel resources permit, asylum offices should honor an applicant's request for an interviewer of a particular sex.

### **B. Considerations Related to LGBT/H Claims**

Many LGBT/H asylum seekers will find it extremely difficult to discuss their sexual orientation, gender identity, or HIV-positive status, especially with a government official. It is also very important to remember that while many LGBT individuals in the United States embrace their LGBT identity and have a language to talk about these issues, for many LGBT individuals who come from countries where topics of sexuality are completely taboo, the way that applicants express themselves may be completely different from what an interviewer would expect from an American LGBT person.

### **C. Proving one's LGBT/H Identity**

If an applicant is seeking asylum based upon sexual orientation, he or she will be expected to prove that he or she actually is gay, lesbian, bisexual, transgender or HIV-positive.

### **D. Sexual Orientation**

As with any other type of asylum case, an applicant's detailed, consistent credible testimony may be sufficient to prove his or her sexual orientation. The applicant should be able to describe his or her "coming out" experience, that is he or she should be able to explain

when he or she first began to feel attracted to members of the same sex, when he or she first engaged in a romantic or sexual relationship with a member of the same sex, how this made him or her feel, whether he or she told other people or kept this aspect of his or her identity secret, etc.

While Americans are accustomed to reading and hearing about gay, lesbian, homosexual, bisexual, and transgender issues in the news, these terms may be largely unfamiliar to applicants from other cultures. Some countries do not even have words for different sexual orientations other than homophobic slurs. The fact that an applicant may be uncomfortable with these terms may be a result of his or her own ingrained homophobia from growing up in a country where such terms were the equivalent of vile curses.

It is never appropriate for an officer to ask an applicant sexually explicit questions about his or her sexual experiences. If an applicant begins to volunteer such information, the officer should explain to the applicant that such information is not necessary for the officer to assess the case.

#### **E. “Looking LGBT”**

As discussed above, transgender identity and sexual orientation are distinct concepts. Nonetheless, there are some individuals who identify as gay who may also consider themselves effeminate and some individuals who identify as lesbian who may also consider themselves masculine (“butch,” “dyke”).

For some LGBT people, the harm they suffer, especially in their youth before accepting their LGBT identity, may be related to their feminine characteristics (for males) or their masculine characteristics (for females.) This harm should be considered related to their LGBT status.

On the other hand, many men who identify as gay will not appear effeminate and many women who identify as lesbians will not appear masculine. The fact that a person does not “look gay” should not be used against the person’s claim. By way of analogy, a religious convert will probably not look different from members

See, for example *Hernandez-Montiel v. INS*, 225 F.3d 1088 (9th Cir. 2000) recognizing a particular social group of gay men with female sexual identities

*Shahinaj v. Gonzales*, 481 F.3d 1027 (8th Cir. 2007), remanding case to new immigration judge in part because IJ had improperly relied on his own stereotypes and

of the country's majority religion, nor will a member of a political party look different from other members of society.

In some cases, an applicant will testify that he or she was harmed or fears future harm because his or her appearance makes his or her LGBT identity apparent. In applications where this is not the case, it is appropriate for the officer to elicit testimony about why the applicant fears harm. For example, in many countries, the fact that a person is unmarried or childless after young adulthood will make him or her suspect. In other countries, the only way for LGBT people to meet other LGBT people is in gay clubs, or parks, which may put them at risk for exposure. For transgender applicants, having identity documents that do not match their name or outward gender appearance, may put them at risk.

Likewise, while it may be obvious from the appearance of some transgender individuals that they are transgender, other transgender individuals may "pass" as their corrected gender. By way of contrast, transgender people who are at the beginning of their transition also may not "look transgender." In these cases, as in other categories of asylum cases, the officer should not base his or her decision on the applicant's outward appearance. Instead, the officer should elicit relevant testimony about the applicant's identity, and, if appropriate request corroborating evidence.

## **F. Corroborating Sexual Orientation**

Where possible, an applicant should corroborate his or her sexual orientation. This could take the form of a letter from a current or ex-partner; a letter from a friend whom the applicant has discussed his or her sexual orientation; a letter from his or her family member; proof that he or she is involved in an LGBT political or social organization; a letter from a mental health professional who has evaluated him or her, etc.

found an Albanian applicant's claim to be gay incredible because he did not exhibit gay "mannerisms", "dress" or "speech."

*Razkane v. Holder*, 562 F.3d 128 (10th Cir. 2008), rejecting IJ's finding that applicant's appearance was not gay enough for persecution to be likely to occur. *See also Ali v. Mukasey*, 529 F.3d 478 (2nd Cir. 2008), rejecting IJ's conclusion that a "dangerous criminal" could not be identified as a "feminine . . . homosexual" in his native Guyana.

The *Real ID Act* INA §208(b)(1)(B)(i), generally requires asylum seekers to provide corroborating evidence that the adjudicator would reasonably want to see, or provide an

explanation about the unavailability of such evidence.

There may be situations where the applicant will not be able to provide any corroboration, for example, if he or she is no longer in contact with an ex-partner in his or her country, where his or her family has disowned him or her, and where he or she does not yet know any LGBT people in the United States. The case should not be denied for lack of corroboration, but it is reasonable for the officer to question the applicant about why corroboration is unavailable.

### **G. Transgender Identity**

Again the applicant's detailed, consistent credible testimony may be sufficient to prove his or her transgender identity. The applicant should be able to describe his or her "coming out" process as a transgender individual. That is he or she should be able to explain when he or she first started to feel "different" or uncomfortable with the gender he or she was assigned at birth; ways in which his or her behavior and feelings differed from gender norms; steps he or she has taken to express the gender that he or she feels comfortable with, etc.

It may be appropriate to elicit information about what steps the applicant has taken in his or her transition but remember how personal and difficult it will be for the applicant to talk about these issues. See interviewing techniques # below.

### **H. Corroborating Transgender Identity**

Many transgender individuals receive necessary medical treatment to help conform their outward appearance and characteristics with their internal identity. Bear in mind, however, that the treatment plan for every transgender person is different. There is not a single surgery which transforms a transsexual from one gender to another. If a transgender applicant is receiving treatment from a medical doctor or mental health professional (such as counseling, hormones, implants, or other surgeries), it is reasonable to expect corroboration of this treatment.

*In Eke v. Mukasey*, 512 F.3d 372, 381 (7th Cir. 2008), the court denied the case of a Nigerian man who claimed to be gay but made significant inconsistent statements about fathering children and the man he claimed to live with and was unable to supply any extrinsic evidence such as, "letters, affidavits, photographs, or other forms of corroborative evidence; or establish that such evidence was not reasonably available to him."

Many transgender individuals do not receive ongoing treatment, however. Some transgender individuals self-administer hormones, while others identify with their chosen gender without undergoing any medical treatment as part of their transition. Many others would like to access transition-related medical care but cannot, because of immigration status or lack of financial resources. In any event, an applicant should be able to corroborate any treatment he or she has received or explain why such corroboration is not available.

### **I. HIV-Positive Status**

An applicant who is claiming asylum in whole or in part based on being HIV-positive, should be able to provide some external corroboration that he or she is HIV-positive, such as a letter from a doctor or the results of an HIV test.

*HIV test sites can be located through the CDC sponsored website <http://www.hivtest.org/>.*

## **VII. LEGAL ANALYSIS – TYPES OF PERSECUTION**

### **A. Persecution – Criminal Penalties**

In many countries homosexuality is illegal and, if discovered by the authorities, a lesbian or gay man may be arrested or imprisoned based upon her or his sexual orientation. In some countries, authorities target homosexuals and entrap them by pretending to set up dates on the internet and then arrest the individual once it is clear that he or she is gay or lesbian. In other countries, individuals accused of consensual sex with a member of the same sex may be subject to prosecution.

According to the 2008 Department of State Report on Human Rights on Iran, sodomy between consenting adults is a capital crime. <http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119115.htm>

In many other countries, there may not be actual laws prohibiting homosexuality, but authorities may still persecute people because of their sexual orientation. Thus many asylum applicants have been arrested, detained, beaten, sexually assaulted, and/or forced to pay bribes by police or army officials because of their sexual orientation.

*Maldonado v. Attorney General*, 188 Fed. Appx. 101, 103 (3d Cir. 2006), finding persecution where gay Argentine man had been arrested and beaten by the police at least twenty times when leaving gay clubs, though he never suffered a serious injury.

The U.S. Supreme Court has made it clear that intimate sexual activity between consenting adults is a constitutionally protected activity.

Thus, laws in other countries which seek to criminalize such conduct cannot be seen as serving a legitimate penological interest.

### **B. Persecution – Military**

Many countries require military services of their citizens. It is not uncommon for an LGBT individual engaging in mandatory military service to face severe harm including beatings and sexual violence if his or her LGBT status becomes known. Such government-sanctioned harm should generally be considered persecution.

### **C. Rape and Sexual Violence**

Because LGBT people are often perceived as undermining gender norms, they are uniquely at risk for sexual violence in many countries. Case law has repeatedly held that rape is a harm serious enough to constitute persecution. Other types of sexual violence, for example, being forced to perform oral sex may also constitute persecution.

### **D. Beatings, Torture and Threats**

Many LGBT people are subjected to physical violence. For example, an applicant may have been the victim of repeated “gay bashings” that the police never investigated. Other applicants may have been threatened by neighbors or had their property vandalized.

In cases where the harm comes from the applicant’s own family, even if there is a finding that such harm constitutes past persecution, the officer may find that fear of future persecution has been rebutted if the officer feels that the applicant can safely relocate in the home country away from the family member. However, if the past harm is serious enough, the officer may grant humanitarian asylum.

*Lawrence v. Texas*, 539 U.S. 558 (2003) finding Texas anti-sodomy law unconstitutional. “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”

In *Nabulwala v. Gonzales*, 481 F.3d 1115 (8th Cir. 2007), when a Ugandan lesbian’s family learned of her sexual orientation, they sent a stranger to rape her to “cure” her. The 8<sup>th</sup> Circuit found that this type of harm constituted persecution and remanded for the IJ to determine whether the Ugandan government was unable or unwilling to protect her.

In *Ixtlilco-Morales v. Keisler*, 507 F.3d 651 (8th Cir. 2007) the court found that although the beatings the applicant had suffered as a child by his father in Mexico amounted to past can constitute persecution,

the presumption of future persecution was rebutted because he would not have to live with his father as an adult. The court noted that he had not applied for humanitarian asylum before the IJ so could not raise the issue on appeal.

### **E. Severe Economic Deprivation**

While being fired from a job generally is not considered persecution, if an individual can demonstrate that his or her LGBT/H status would make it impossible to engage in any kind of gainful employment, this may constitute persecution. For example, in many countries transgender people face such severe discrimination that the only way they can survive is by engaging in prostitution.

In *Kadri v. Mukasey* 543 F.3d 16 (1st Cir. 2008), the 1<sup>st</sup> Circuit remanded a case of a gay Indonesian doctor who was fired by his hospital and had dropped a discrimination case when the judge in the Indonesian court grilled him about his sexual orientation.

### **F. Forced Marriage**

There is precedent to show that forced marriage, that is a marriage that is forced on an applicant against her will,

In many countries, if a family fears that a daughter is a lesbian, the family may force her into a marriage. While a forced marriage is unconscionable under any circumstances, the effects of such a marriage may be even more severe for a woman who feels no physical attraction to any man. Likewise, gay men may be forced into marriages and experience this as persecution.

*Matter of A-T-*, 24 I&N Dec. 296 (BIA 2007)

### **G. Forced Psychiatric Treatment or Other Efforts to “Cure” Homosexuality**

Many cultures see lesbian, gay, or bisexual sexual orientation or gender non-conformity as a disease, a mental illness or a severe moral failing .

*Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997), the Ninth Circuit found that even if the



Any forced efforts to change an individual's fundamental sexual orientation or gender identity should be seen as persecutory.

## **H. Discrimination and Harassment**

Discrimination and harassment may amount to persecution if cumulatively they are sufficiently severe. Many LGBT people are disowned by their families if their sexual orientation or transgender identity becomes known. It is important to consider such mistreatment within the context of the applicant's culture. In many countries it is virtually impossible for an unmarried person to find housing outside of his or her family home. Likewise, in many cultures, it would be impossible for a woman to find employment on her own.

## **I. Gender Based Mistreatment**

It is important to bear in mind that lesbians and transgender women, in addition to being homosexual or transgender, are also female. Likewise, before coming out, transgender men are generally raised as girls. In many parts of the world, it is unusual for women to live their lives in the public sphere. Thus persecution faced by lesbians may be more subtle than that encountered by gay men because they may be less visible. Lesbians and transgender women may be particularly vulnerable to rape by attackers who wish to punish them for their sexual identity. The types of harm that a lesbian may suffer will frequently parallel the harms in gender-based claims more closely than the harms in gay male asylum claims.

## **J. Pattern and Practice**

In some countries, mistreatment may be so widespread and so well-documented, that even if the asylum officer does not find that the applicant suffered past persecution, the officer may be able to find a likelihood of future persecution based on the pattern and practice of persecution of LGBT individuals without showing an individualized risk of harm.

intent of the Russian authorities in forcing Pitcherskaia to undergo psychiatric treatment was to "cure" her of being a lesbian rather than to punish her, what matters is not the subjective intent of the persecutor but rather the effect on the victim.

*Nabulwala v. Gonzales*, 481 F.3d 1115 (8th Cir. 2007); *Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims* by Victoria Neilson, 16 *Stanford Law & Policy Review* 417 (2005), available at [http://www.immigrationequality.org/uploadedfiles/Neilson\\_Website\\_Version\\_Lesbian\\_article.pdf](http://www.immigrationequality.org/uploadedfiles/Neilson_Website_Version_Lesbian_article.pdf)

In *Bromfield v. Mukasey*, 543 F.3d 1071 (9th Cir. 2008), the 9<sup>th</sup> Circuit found that the State Department report "compels" a finding of pattern and practice of

persecution against gay people and remanded to determine whether Bromfield qualified for withholding of removal.

## **K. HIV Cases**

An individual whose claim for asylum is based on HIV-positive status must make a showing that he or she fears persecution, not merely hardship.

In one case [Name Withheld], which was reported at 78 No. 3 Interpreter Release 233, January 15, 2001, an Immigration Judge granted asylum to an HIV positive applicant from India. The Immigration Judge identified the applicant as being a member of the particular social group of “married women in India who have contracted HIV, who fear that their families will disown them or force them to get a divorce, and who wish to or need to be employed.” The Judge found that the standard for persecution had been met because the Indian Supreme Court had prohibited people with AIDS from marrying and HIV positive Indian nationals who violated the law had been imprisoned. The Judge also recognized that Indian nationals faced extreme stigmatization and job loss because of their HIV status.

It is also important to bear in mind that an applicant may be persecuted based on perceived identity. Thus, an applicant who is known to be HIV positive may suffer persecution based on a perception that he or she is homosexual, whether or not this is true.

See *Amanfi v. Ashcroft*, 328 F.3d 719 (3d Cir. 2003).

## **VIII. LEGAL ANALYSIS – AGENT OF PERSECUTION**

As with any asylum claim the applicant must show that the harm he or she fears is from his or her government. This means either that a government actor is responsible for the persecution, or, where the applicant claims either past persecution by or a well founded fear of future persecution by non-government actors, the officer will have to determine whether the applicant’s government is unwilling or unable to control the actions of the non-governmental actor.

In *Hernandez-Montiel v. INS*, 225 F.3d 1088 (9th Cir. 2000), the police themselves raped and threatened the applicant with death.

In many cases, the applicant will testify that when he or she tried to report an incident to the police, the police called the applicant a homophobic name and laughed about the incident. In other cases, the applicant may already have been mistreated directly by the police at a gay or lesbian club, and thus fear any further interaction with them.

Additionally, many countries have anti-sodomy laws or other laws on the books that criminalize homosexuality or cross-dressing. Whether or not these laws are actively enforced, they may have a chilling effect on an LGBT person who would be afraid to make a complaint because doing so could subject him or her to criminal prosecution.

In some cases, an officer will be able to use corroborating evidence about conditions in the country for LGBT individuals to conclude that making a complaint would be fruitless.

For more information on issues relating to the government's willingness to protect an applicant from a non-governmental persecutor, see AOBTC lesson plan "Asylum Eligibility I: Definition of a Refugee".

## **IX. LEGAL ANALYSIS -- NEXUS**

Even if an applicant has established that he or she suffered the type of harm that constitutes persecution, he or she must also demonstrate that the harm was "on account of" the protected characteristic. It is therefore critical when interviewing the applicant to gain a full understanding of why he or she feels that he or she was attacked, and to bring out anything that the assailant may have said. Even if the attacker does not specifically make homophobic statements during an attack, the applicant may believe that the attacker knew his or her sexual orientation because he or she was targeted in a neighborhood, in a park, in a club, etc. that is known to be an LGBT gathering place or because the applicant was with another person who was LGBT.

*Ornelas Chavez v. Gonzalez*, 458 F.3d 1052 (9th Cir. 2006), the 9th Circuit found that attempting to report harm by private actors to the police was not a requirement for a finding that the government is unwilling or unable to protect the applicant.

In *Matter of S-A-* 22 I&N Dec. 1328 (BIA 2000), the BIA accepted that it would have been futile for a liberal Moroccan woman to seek police protection from her father.

Additionally, it is important to bear in mind that many LGBT individuals will experience harm even before they accept themselves as LGBT, because others perceive them as “different,” or not complying with expected gender norms. Thus, for example, there may be instances where a gay man was sexually abused as a child because he was effeminate, well before the applicant had come to terms with his own sexual orientation.

### **A. Nexus – Transgender Cases**

Regardless of how the applicant has framed his or her membership in a particular social group, a transgender applicant’s social group may be connected to sexual orientation. That is, for example, an applicant may identify as a transgender woman, but an attacker may refer to her as “faggot,” because the attacker perceives her as a gay man.

Also, a transgender applicant may not have begun to transition at the time he or she left his or her country of origin, and may continue to be perceived as a gay man or lesbian if he or she returns rather than as a transgender woman or man. Likewise even transgender people who have transitioned may continue to be perceived as gay or lesbian if they do not “pass.”

## **X. INTERVIEWING TECHNIQUES**

The asylum officer must always conduct the interview in a non-adversarial and open atmosphere designed to elicit the most information from the applicant. The officer should be mindful that for many people there is no topic more difficult to discuss with a stranger than matters relating to sexuality and gender identity.

### **A. Suggested Interview Techniques -- Generally**

Remind that applicant that the interview is confidential.

Explain that the applicant has applied for asylum based

In *Hernandez-Montiel v. INS*, 225 F.3d 1088 (9th Cir. 2000), the IJ initially denied asylum finding that the applicant was raped and threatened because he chose to wear women’s clothes which was not immutable. The 9<sup>th</sup> Circuit reversed, finding that expressing his female identity through his mode of dress was an inherent part of Hernandez-Montiel’s sexual identity.

On sexual orientation or gender identity and that the officer understands how difficult it is to discuss these issues, but that it is necessary to fully evaluate the application.

The early part of the interview should be devoted, in

Always try to use the same language that the applicant has used in his or her own applications. If an applicant refers to himself as “gay,” the officer should use this term too, rather than “homosexual” which many gay and lesbian people don’t like because it has historically been used in a medical context to describe being gay or lesbian as a pathology.

Some applicants may come from cultures where there is no word for homosexuality. The most important thing is to understand what a difficult topic this may be for the applicant to discuss and to be respectful in discussing his or her sexual orientation.

For transgender applicants, it is best to ask at the beginning of the interview what pronoun the applicant feels more comfortable with and to ask if there is a name he or she prefers using. For example, if an individual with a female appearance, who has described her claim as based on transgender identity, has filled in the biographical information with an obviously male name, the officer should ask if there is a name she would prefer that the officer use.

Note: when going through the biographical information at the beginning of the interview, it is appropriate for the officer to inquire whether the applicant has legally changed his or her name. If yes, the officer can request the legal name change documents, if no, the officer should explain why it is necessary to use the legal name on the form, but that during the interview the officer will refer to the applicant by the name that the applicant feels most comfortable using.

One of the biographical information questions is “gender.” Since this issue will be sensitive and go to the heart of the applicant’s claim, it may be better to come back to this question at the end of the interview after the applicant has described the steps he or she has taken to transition, rather than at the beginning of the interview.

on eliciting sensitive information, especially concerning rape and sexual assault.

part, to putting the applicant at ease. If the officer immediately questions the legitimacy of the “gender” box which he or she has checked off, the applicant may be uncomfortable for the rest of the interview.

### **B. Making the Applicant Feel Comfortable**

It is important to remember that discussing one’s sexual orientation and romantic attachments is by nature a very personal matter. Again, it’s a good idea to use the same language that the applicant used in his or her application and to remind the applicant that the interview is completely confidential.

### **C. Allowing the Applicant’s Partner to Be Present**

It is common for asylum applicants to want to have family members or significant others present for the interview. Retelling traumatic events is, obviously, a very stressful experience and having a significant other present can help provide support for the applicant and calm him or her during the interview. Where practical, an asylum officer should allow the partner to be present. However, the officer should always confirm, in private, with the applicant that he or she wants the partner present before allowing him or her to be there for the interview. In some circumstances, an applicant may not want a partner to hear all the details of his or her case but may not feel comfortable saying this in front of his or her partner.

In some cases, an applicant will bring a partner to the asylum office to testify as corroboration of the applicant’s sexual orientation or gender identity. If the officer feels that this corroboration would be helpful, the partner should be permitted to testify.

### **D. Eliciting Sensitive Information**

The officer should reference the AOBTC on Female Asylum Applicants and Gender-Related Claims for tips

Again, officers have a great deal of training in assessing credibility and can put the same skills to use in assessing an LGBT/H claim as they do in determining, for example, whether a person is sincere in his religious beliefs or whether a person really belongs to a particular tribal group.

If an officer is having difficulties assessing the credibility of an applicant who claims to be LGBT, it may be helpful to ask the applicant some of the following questions.

#### **E. Sexual Orientation – Sample Questions**

- ❖ When did you first realize you were gay (or lesbian, bisexual)?
- ❖ Did you tell anyone?
- ❖ Why/why not?
- ❖ If yes, when?
- ❖ What was their reaction?
- ❖ Have you met any other gay people?
- ❖ Where?
- ❖ Does your family know you're gay?
- ❖ If yes, what was their reaction when you told them?
- ❖ Have you ever been in a relationship?
- ❖ How did you and your partner meet?
- ❖ Are you still together/ in touch?
- ❖ How do lesbian [or gay, or bisexual] people meet one another in your country?
- ❖ Are you involved in any LGBT organizations here?

If the applicant was aware that he or she was lesbian, gay or bisexual while in his or her country of origin, ask about his or her experiences there and his or her awareness of the lives of other lesbian, gay, or bisexual people there.

## F. Transgender Identity – Sample Questions

Discussing a person's transgender identity may make the officer and the applicant uncomfortable. It is important to remember that being transgender involves an overall dysphoria with the gender assigned at birth; it is not about having one particular surgery. In many cases it will be appropriate to ask the applicant about the steps he or she has taken to transition gender, but this question should be framed as one question among many that elicits the applicant's expression of his or her transgender identity.

For further reading see *Immigration Law and the Transgender Client* available at <http://www.immigrationequality.org/template3.php?pageid=1135>

- ❖ When did you first realize you were transgender?
- ❖ How did you realize this?
- ❖ Did you know other transgender people in your country?
- ❖ When did you begin to transition?
- ❖ What steps have you taken to transition?
- ❖ When did you begin to live full-time as a man [or woman]?
- ❖ Does your family know you're transgender?
- ❖ If yes, what was your reaction when you told them?

Many transgender applicants will not have begun to live full-time in their corrected gender until they have come to the United States. In many cases, a person may discuss past mistreatment in terms of perceived sexual orientation. In these cases, it is appropriate to ask questions that pertain to sexual orientation as well as gender identity.

The most important thing to remember is to be respectful. If the officer feels that it is necessary to ask a question which the applicant may perceive as intrusive, the officer should explain why the answer to the question is legally necessary. If the officer is confused about the applicant's self-identification, the officer should



respectfully admit to feeling confused and ask the applicant to explain in his or her own words.

### **G. HIV Status – Sample Questions**

If an applicant's case is based in whole or in part on his or her HIV-positive status, the officer will, of course, need to ask questions about this. The officer should be mindful that HIV is a very serious illness and that many individuals, especially those from countries with fewer treatment options, see an HIV diagnosis as a death sentence. It is therefore imperative for the officer to be extremely sensitive in asking about the applicant's HIV status.

The risk factor for HIV infection is generally not relevant to the applicant's claim, so it is not appropriate to ask the applicant how he or she thinks that he or she contracted HIV. In some cases, the HIV status may be directly related to the persecution, for example, if a lesbian was raped and believes this was her only possible risk for HIV exposure. If the HIV status is related to the harm the applicant suffered, it will be relevant for the officer to ask questions about this.

In some cases, an applicant's HIV status may also be relevant to a one year filing deadline exception, for example, if the applicant was extremely ill during his or her first year in the United States. It would then be relevant to ask questions such as the following:

- ❖ When did you learn that you are HIV positive?
- ❖ How did you feel when you received your diagnosis?
- ❖ Have you ever seen a mental health professional as a result of your diagnosis?
- ❖ Have you ever been hospitalized because of your HIV?
- ❖ Have you experienced any HIV-related symptoms?
- ❖ Are you taking any HIV-related medications?
- ❖ When did you begin taking them?
- ❖

- ❖ Do you experience any side effects from the medication?
- ❖ Does your family know that you're HIV-positive?
- ❖ What was their reaction?

however, the applicant married with the intent to file for a green card, but then decided not to file, the marriage

In some instances an applicant's primary fear associated with HIV will be the lack of medical care in his or her home country. But in many other cases, the HIV status may exacerbate fears of sexual orientation-related persecution because if community members learn that the applicant is HIV-positive they will assume that he is gay. In other cases, an applicant may be very fearful of violence, stigma and extreme discrimination based on his or her HIV status.

## **XI. ASSESSING DIFFICULT ISSUES THAT ARISE IN LGBT CASES**

### **A. Marriage**

Some applicants may have been married in their own countries and/or have children there. This fact alone does not mean that the applicant is not gay or lesbian. For some applicants a forced marriage may itself be a form of persecution that the applicant has endured. In other cases, even if the applicant was not forced into the marriage by his or her family, the applicant may experience enormous social pressure to marry and may do so just to try to appear "normal." Other applicants, while grappling with their sexual identity, have tried to lead a heterosexual life and "fit in" within their society by marrying or having children.

Even in the United States, it is not uncommon for lesbians or gay men to marry people of the opposite sex in an effort to conform to the societal norm. While some lesbians and gay men may feel that they have always known their sexual orientation, many others do not come to terms with their sexual identity until much later in life.

Some applicants may marry while in the United States. If an applicant admits to engaging in immigration marriage fraud, the officer may feel compelled to deny the asylum application as a matter of discretion. If,

should not have adverse consequences on the asylum application.

### **B. Assessing the Existence of LGBT Rights Organizations or LGBT Marches in the Home Country**

Just because LGBT organizations exist in a particular country, the officer should not conclude that LGBT people are not persecuted in the country. For example, Christian churches exist in Egypt, but Christians there are denied many fundamental rights. Likewise, some countries may allow an annual LGBT march, but that does not mean that LGBT people do not face ongoing violence and harm.

For example, in Jamaica, an LGBT rights organization, Jamaica Forum for Lesbians, All Sexuals, and Gays (J-FLAG), exists, but it keeps the location of its offices secret because of threats of arson and death.

### **C. Assessing Applications for Individuals from Countries which Appear to Have Legal Protections for LGBT People**

Some countries with laws that state that their citizens and nationals are guaranteed religious, political or other freedoms do not enforce these protections. Similarly some countries have anti-discrimination laws that seemingly protect LGBT nationals on the books, but in reality the laws are not enforced or are openly flaunted.

For example, although Ecuador has a provision in its constitution explicitly forbidding discrimination on the basis of sexual orientation, in 2002 Amnesty International issued a report outlining severe abuse suffered by lesbian, gay, bisexual and transgender people, both directly at the hands of the police and through the government's failure to investigate claimed abuses by non-government actors.

2008 Department of State Report on Human Rights on Jamaica available at <http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119165.htm>

Department of State Report on Human Rights on Ecuador available at <http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119158.htm>

Amnesty International Report, *Ecuador: Pride and Prejudice: Time to break the vicious circle of impunity for abuses against lesbian, gay, bisexual and*

For applicants who come from countries where the governments are making efforts to improve human rights for LGBT people, the officer must be especially diligent in assessing the claim. It is important to remember that if the applicant has established past persecution, there is a presumption of future persecution. The officer will have to determine whether any recent improvements in LGBT rights are sufficient in nature to rebut this presumption.

If the application is based solely on a fear of future persecution, the applicant will have to explain why, given the seeming improvements in the country, he or she still believes that he or she would suffer persecution and the officer will have to ascertain whether, in light of all available country conditions documentation, the applicant's fear is still objectively reasonable.

#### **D. Assessing Applications Where the Applicant Was Not “Out” (Did Not Yet Identify as LGBT) in His or Her Country**

Ironically, sometimes applicants will have greater difficulties proving their cases if they come from extremely repressive countries. In countries where the persecution of sexual minorities is greatest, applicants may be forced to go to greater lengths to hide their identities in order to survive. Thus they may not have suffered past persecution at the hands of the government or non-government actors because they had to hide a fundamental part of their identity. In these cases, the Officer will have to make a decision based on whether the applicant has a well-founded fear of future persecution. This determination should be made based on the applicant's testimony of what he or she fears if

*transgendered people,  
available at*

<http://www.amnesty.org/en/library/asset/AMR28/001/2002/en/93614994-d8a6-11dd-ad8c-f3d4445c118e/amr280012002en.html>

forced to return to his or her country as well as country condition reports on the treatment of LGBT people in the applicant's country of origin and it should be made in accordance with asylum law on establishing a well-founded fear of persecution.

### **E. Status Versus Conduct**

At times questions arise as to whether the applicant faces persecution based on his or her status as an LGBT person versus his or her conduct in expressing his or her identity, such as engaging in sexual or romantic activities. Just as it would be improper to require a political activist to give up his or her political activity, or require a person of a particular religion not to attend services, it is improper to deny an asylum application based on the premise that an LGBT person could "choose" not to have relationships.

By way of contrast, an applicant may not be able to prevail on an asylum claim if he or she has broken a public decency law that applies equally to heterosexual citizen or has otherwise engaged in sexual misconduct.

### **F. Assessing Bisexual Claims**

The officer will have to decide on a case-by-case basis the viability of a claim by a bisexual applicant. If the applicant has been romantically involved with both men and women in the past, and suffered persecution as a result, the fact that he or she has had some relationships with the opposite sex should not prevent a grant of asylum. On the other hand, if the applicant has had relationships with members of both sexes but has not suffered past persecution, and is currently married to a person of the opposite sex, the applicant may not have a well-founded fear of future persecution.

It is also important to keep in mind that in countries where lesbians and gay men are severely stigmatized, an applicant may feel more comfortable referring to himself

*Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005), the court cannot "saddl[e] Karouni with the Hobson's choice" of facing persecution for engaging in homosexual acts [in his native Lebanon] or never again having a gay relationship."

*Kimumwe v. Gonzales*, 431 F.3d 319 (8th Cir. 2005), the court accepted the finding that Kimumwe's jailing was because of the non-consensual nature of his sexual relations rather than that the relations were between two men.

or herself as “bisexual” than “homosexual” even if he or she does not generally feel attracted to the opposite sex. This may be a way for the applicant to cope with internalized homophobia.

## **XII. ONE YEAR FILING DEADLINE ISSUES**

Asylum officers should apply the general principles of the AOBTC on the One-Year Filing Deadline to LGBT/HIV cases. There are, however, some one year issues and exceptions which may arise specifically in the context of LGBT/H claims.

Many LGBT applicants miss the one-year filing deadline for asylum because they did not know that it was possible to apply for asylum based on their sexual orientation or gender identity. While applicants from countries with repressive governments may have an awareness that they could seek asylum in the United States or elsewhere based on their political beliefs or religion, many foreign nationals (and, indeed, many U.S. immigration attorneys) are not aware that sexual orientation or transgender identity might form the basis of an asylum claim. This problem may be compounded for LGBT individuals who come to the U.S. and immediately take up residence in an immigrant community with people from their own country. Furthermore, the potential asylum seeker may seek advice from an attorney from his or her own country and feel uncomfortable revealing his or her sexual orientation, gender identity, or HIV-positive status to the attorney. However, lack of knowledge of the one-year deadline or of the ability to apply for asylum at all, is not in general, considered a legally acceptable exception to the deadline.

### **A. Changed Circumstances Specific to LGBT/H Applicants**

#### **1. Changed Country Conditions**

As with any other type of asylum claim, if conditions in the applicant’s country of origin have changed

See *The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal* by Victoria Neilson & Aaron Morris, 8 *New York City Law Review* 233 (Summer 2005), available at [http://www.immigrationequality.org/uploadedfiles/Published\\_version\\_pdf\\_CNY106\\_\(3\).pdf](http://www.immigrationequality.org/uploadedfiles/Published_version_pdf_CNY106_(3).pdf)

substantially, this may form the basis of a one year filing deadline exception. For example, a fundamentalist government may have just come to power and instituted criminal sanctions for consensual homosexual activity.

## **2. “Coming Out” as LGBT**

In many instances an individual does not feel comfortable accepting himself or herself as LGBT until he or she is in a country where the applicant can see that it is possible to live an open life as an LGBT person. If an individual has recently “come out” as lesbian, gay, bisexual or transgender, this may qualify him or her for a changed circumstances exception. Of course, almost by definition, this means that the individual’s case will be based on fear of future persecution only. These cases may be analogized to religious conversion cases, where the applicant has undergone a change in a fundamental aspect of their identity after leaving the home country.

## **3. Recent Steps in Gender Transitioning**

As noted above, transitioning from the gender assigned at birth to the gender with which the applicant identifies is a process which may involve many steps. At some point during this process, the applicant may realize that he or she could no longer “pass” as his or her birth gender and may become more fearful of returning to his or her country of origin. For example, a transgender woman (MTF) may have recently had breast implants which would now make it impossible to “pass” as male.

## **4. Recent HIV Diagnosis**

Some individuals will decide to apply for asylum only after they have been diagnosed with HIV. For some applicants, the asylum claim will be based wholly on his or her HIV status and the persecution he or she believes will be faced as a result. For other individuals who may also be LGBT, the HIV diagnosis may be “the last straw” and make the applicant realize that returning to the country of origin would be a death sentence. Many countries do not have confidentiality laws protecting HIV status, so some LGBT people fear that their HIV status could become widely known. In many countries, being HIV-positive is equated with being LGBT, and

*In Manini v. Filip* 552 F.3d 894, (8<sup>th</sup> Cir. 2009), a Kenyan woman entered the U.S. in October 2001, was diagnosed with HIV in January 2003 and filed for asylum in May 2004. She applied affirmatively for asylum, and while the asylum office did accept her recent HIV diagnosis as a “changed circumstance,” it found

some applicants may have a greater fear of LGBT-based persecution once they learn that they are HIV-positive.

## **B. Extraordinary Circumstances Specific to LGBT/H Cases**

### **1. HIV-Positive Status**

Applicants who are HIV-positive may exhibit life-threatening symptoms and require hospitalization. An individual may qualify for a one year exception based upon serious illness. Additionally, many individuals living with HIV experience extreme depression and other mental health issues as a result of their diagnosis which may affect the applicant's ability to timely file and/or may affect what period of time is "reasonable" to file after an HIV diagnosis.

### **2. PTSD or Other Mental Health Issues**

As with any other asylum seekers, LGBT applicants may suffer from Post Traumatic Stress Disorder or other mental health issues which make it impossible to file within a year of entry into the United States. LGBT individuals who suffer from internalized homophobia and transphobia, or who have been subjected to coercive mental health treatment to "cure" them in their home countries may find it especially difficult to access the mental health treatment that they would need to proceed with their applications.

Many LGBT individuals will have fled to the United States leaving behind a partner. Under current immigration law, there is no way for an asylee to sponsor a same-sex partner for immigration benefits, so the applicant may also be dealing with the potentially permanent loss of a partner by coming to the U.S.

### **3. Severe Family Opposition or Isolation**

Many LGBT people who arrive in the United States stay with extended family members or with other members of their community. Being surrounded by family or

that the 16 month delay in filing after the diagnosis fell outside the "reasonable period of time" required by law. See also *Ixtlilco-Morales v. Keisler*, 507 F.3d 651 (8th Cir. 2007), accepting recent HIV diagnosis as a changed circumstance.



community members may make it impossible for the LGBT asylum applicant to timely file for fear that if the family member learns of the applicant's LGBT identity, he or she will be thrown out of the home, the applicant's family at home will be told, and/or the applicant and his or her family will be disgraced.

Likewise, the AOBTC on the One Year Filing Deadline recognizes extreme isolation within a refugee community as a possible exception. It is common for foreign nationals who have newly arrived in the United States to be steered to immigration attorneys from within their own cultural community. Often an LGBT applicant would be fearful of disclosing his or her LGBT status to any community member, and so might be informed by an immigration attorney that his or her only option to legalize would be to marry.

### **XIII. FURTHER RESOURCES**

It is often more difficult to obtain country conditions information on LGBT issues than on other issues for which people seek asylum (like political opinion, race, or religion.) State Department and human rights organization reports may be silent on the treatment of LGBT people in the country. Officers should not conclude that if these issues are not mentioned that there are no problems. Many organizations that report on human rights issues lack contacts within the local LGBT communities to even know what LGBT individuals experience in their countries.

Often the countries where homosexuality is most taboo have the least country conditions information available. For many countries, particularly those with conservative, religious governments, there is literally no mention of the existence of LGBT citizens in any media.

Useful resources in gathering information for officers may be the National Asylum Project on Sexual Minorities LGBT section of Asylumlaw.org [http://www.asylumlaw.org/legal\\_tools/index.cfm?category=116&countryID=233](http://www.asylumlaw.org/legal_tools/index.cfm?category=116&countryID=233).

Immigration Equality maintains links to precedential LGBT asylum decisions.

<http://www.immigrationequality.org/template.php?pageid=204> .

The International Lesbian and Gay Association ([www.ilga.org](http://www.ilga.org)) website contains a legal survey in which officers can search legal codes and country conditions.

Human Rights Watch ([www.hrw.org](http://www.hrw.org)) also has an LGBT division and an HIV division.

Andrew Reding, who has prepared reports for legacy INS in the past on country conditions for sexual minorities, recently completed a lengthy study on the treatment of LGBT people in the Americas. The study is available online at <http://www.worldpolicy.org/globalrights/gayindex.html> .

## **SUMMARY**

### **A. Lesbian, Gay, Bisexual, Transgender and HIV (LGBT/H) Asylum Seekers – Overview**

LGBT and HIV-positive asylum seekers may face unique difficulties in talking about their cases and proving them. Additionally, asylum officers may find it particularly difficult to discuss the sensitive issues of sexuality, gender, identity, and HIV raised in these cases.

In the last fifteen years, LGBT/H-based asylum claims have become much more common. There is now ample case law, as well as practical experience to help guide asylum officers in making decisions in these cases.

### **B. International Guidelines Relating to LGBT Asylum Seekers**

Claims to asylum based on LGBT/H status have gained recognition under international law.

*UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*  
[http://www.usdoj.gov/eoir/vll/benchbook/resources/UNHCR\\_Guidelines\\_Sexual\\_Orientation.pdf](http://www.usdoj.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf)

### **C. Lesbian, Gay, Bisexual, Transgender and Hiv (LGBT/H) Asylum Seekers – Terminology**

LGBT/H individuals often use specific terminology to describe their personal experiences. It will be very helpful to the asylum officers understanding of the claim for him or her to have a thorough familiarity with this language. Using appropriate terminology will also help put the asylum seeker at ease and make it easier for him or her to relate the substance of his or her claim.

### **E. Interviewing Considerations**

There are few topics which are more sensitive and difficult to discuss than topics relating to sexual and gender identity. The difficulty in discussing this topics is often even greater for asylum seekers who come from countries where such topics are strictly taboo, especially when meeting with a government official.

The best practice is to use the same language that the applicant uses in describing him or herself. For transgender applicants, the asylum officer should use the name and gender the applicant identifies with throughout the interview.

While it is the officer's job to elicit testimony from the applicant to prove his or her LGBT/H identity, it is not appropriate to ask the applicant about his or her sexual practices, nor is it appropriate to ask an HIV-positive individual how he or she believes that he or she contracted the virus.

### **F. Legal Analysis – Types of Persecution**

Because LGBT individuals may offend gender norms in their countries of origin, they are uniquely at risk for rape and other forms of sexual assault and abuse. These harms are serious enough to amount to persecution.

In claims involving lesbians and transgender women, it is important to remember that in addition to their sexual orientation or gender identity, the applicants may experience harm based on being female (or having been raised as female in the case of transgender men.)

Discrimination and harassment may amount to persecution if the adverse practices or treatment accumulate to the level of persecution, or is so serious

that it leads to consequences of a substantially prejudicial nature.

### **G. Legal –Analysis Agent of Persecution**

In evaluating whether a government is unwilling or unable to control the infliction of harm or suffering, the asylum officer should consider whether the government takes reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to the existing state protection.

Evidence that the government does not respond to requests for protection is a strong indication that state protection is unavailable. In some cases, an applicant may establish that state protection is unavailable even she he or she did not actually seek protection. In countries which have sodomy laws or otherwise criminalize homosexual relationships, or have laws criminalizing cross-dressing, an LGBT applicant may not feel safe seeking protection from his or her government.

### **H. Legal Analysis – Nexus**

In many LGBT/H cases, the nexus of the harm and the protected characteristic will be obvious because of hate speech used by the persecutor during the attack. In some cases, the attacker may not say anything overtly homophobic or transphobic, but the attacker’s motive may be inferred by where the harm took place, for example, when the applicant was leaving a gay bar.

### **I. Interviewing Techniques**

To establish that an asylum seeker actually is LGBT, the asylum officer should elicit information about the formation of the claimant’s identity. This should include questions about when the applicant first began to see him or herself as “different,” when he or she first had a romantic relationship with a member of the same sex (for sexual orientation cases), when he or she began to live as the gender he or she identifies with (for transgender cases), and what types of harm he or she has experienced in the past and fears in the future.

## **J. Assessing Difficult Issues That Arise in LGBT Cases**

There are certain issues which may present particular difficulties in LGBT/H cases. For example, if the applicant is married or has been married in the past, the officer should ask further questions about this. However, it is important for the officer to remember that for many people, “coming out” as LGBT can be a long process, and the fact that an applicant has had an opposite sex marriage, in and of itself, does not mean that he or she is not LGBT.

While country conditions for some countries may reveal that governments are taking steps to improve protections for LGBT/H people, or that there are LGBT/H rights groups in the country, it is important for the officer to fully review the country conditions materials and assess the specific facts of the applicant’s case to determine whether or not the applicant will be able to obtain protection from persecution in his or her country.

## **K. One Year Filing Deadline Issues**

There are many reasons that LGBT/H asylum applicants may not file within the one year deadline. Many LGBT will be able to demonstrate “changed circumstances” because they do not “come out” fully until they are in the more open environment in the United States. For such individuals, it is not until they come to terms with their LGBT identity that they have a claim to asylum. In some cases this means a person will accept him or herself as LGBT for the first time. In other cases, this means that because of internalized homophobia or transphobia, the applicant was unable to discuss his or LGBT identity publicly until recently. Transgender applicants may not take significant steps in their transition until they come to the United States. Likewise, an HIV-based claim will not arise until the applicant tests positive for HIV which may be several years after he or she last entered the United States.

LGBT/H asylum seekers may also be prevented by “exceptional circumstances” from seeking asylum. HIV-positive applicants may be too sick from the virus, side effects from the HIV medication, or mental health

effects of an HIV diagnosis, to pursue their claims. LGBT/H asylum seekers may also face extraordinary isolation upon arriving in the United States. Many LGBT/H asylum seekers live with extended family members, within insular ethnic communities in the United States and continue to be terrified here that their LGBT/H identities will become known. The asylum officer should consider the unique challenges faced by LGBT/H asylum seekers in assessing one year filing deadline issues and exceptions.

### **L . Further Resources**

Although analysis of LGBT/H issues in U.S. State Department reports has improved significantly in recent years, there are still many country reports with very limited information on LGBT/H issues. It is particularly important in LGBT/H cases for the officer to conduct independent research, especially if the applicant has not submitted many materials on country conditions.