



March 22, 2012

Alejandro Mayorkas
Director, United States Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529

Re: USCIS Guidance on Marriages Involving a Transgender Spouse and Changing Gender Identity on Identity Documents

Dear Director Mayorkas,

We are writing to express our concern about the lack of action from USCIS on two policy matters of critical importance to transgender people and their families. We hope that you will ensure these matters are given prompt attention and appropriate action is taken to resolve them.

In October and December 2009, we met with officials from the USCIS and submitted written recommendations concerning the need for (1) guidance on requirements and procedures for updating gender designations on immigration-related identification documents, and (2) clarifying revisions to the Adjudicator's Field Manual (AFM) regarding marriages involving a transgender spouse. In October 2010, the American Immigration Lawyers Association also wrote to you regarding the need for guidance on gender change on immigration documents. Since 2010, several other federal agencies have taken positive action to address these issues within their own areas of operation, however there has been no action from USCIS on either issue. While we appreciate the strides taken by the USCIS to address other issues of importance to the LGBT community – especially in the area of refugee and asylum claims – we are concerned that no action has been taken by the agency on these two important issues.

Gender Change on Immigration Documents

It is vitally important that transgender people have identification documents that accurately reflect their lived gender. Having identification that misrepresents one's lived gender "outs" a transgender person in any situation where he or she needs to show the document—when stopped by police, while filling out forms for employers, or conducting business with state and local government offices. This violates the privacy of transgender people, puts them at risk for discrimination, and according to the World Professional Association for Transgender Health (WPATH), "may have a deleterious impact on a person's social integration and personal

safety.”¹ In a national survey, transgender people reported frequently experiencing harassment (40%), being asked to leave a place of business (15%), and even physical violence (3%) as a result of showing documentation that did not match their lived gender.² Transgender people who have been unable to update the gender on government identification experience job and housing discrimination at higher rates than those who have updated their information.³

At present, the only existing USCIS guidance regarding gender designations on immigration documents comes from a 2004 memo, which states confusingly that documents should “reflect the outward, claimed and otherwise documented sex of the applicant.”⁴ This guidance has proven inadequate, as it has been confusing to USCIS adjudicators, counsel and applicants and has been inconsistently interpreted and applied. Since we first submitted our recommendations in 2009, three other federal agencies have implemented policies regarding gender change on official documents and records that are similar to the approach we recommended USCIS adopt:

- On June 10, 2010, the **U.S. Department of State (DOS)** adopted a new policy for updating gender on U.S. passports. Under the new policy, an applicant need only provide certification from a licensed physician who has treated the applicant or reviewed and evaluated the medical history of the applicant, that the applicant has undergone appropriate clinical treatment for gender transition. The policy explicitly states that proof of surgery or other detailed medical information is not required and should not be requested.⁵
- On May 27, 2011, the **Office of Personnel Management (OPM)** issued guidance to the heads of all executive agencies and departments regarding gender transition in the workplace, including new procedures for updating gender designations in official federal personnel records. This procedure provides for updating the designation based on submission of an updated passport, updated state driver’s license or identification card, or a physician’s certification that the employee has had appropriate clinical treatment for gender transition. As with the DOS policy, OPM’s policy makes clear that additional medical information is not required and should not be requested.⁶
- On June 9, 2011, the **Veterans Health Administration (VHA)** issued a directive on serving transgender veterans, which provided for updating the gender designation in patient records. While the directive does not spell out this procedure in detail, the VHA has informed us that their procedure mirrors DOS’s passport policy, and that either an updated passport or a physician’s certification of appropriate clinical treatment for gender transition appropriate clinical treatment for gender transition is sufficient to update the designation.⁷

These policies represent the best practices at the federal level for updating gender designations

¹ WPATH Clarification, at 2; See also WPATH Statement, June 16, 2010, available at <http://www.wpath.org>.

² J.M. GRANT, L.A. MOTTET, J. TANIS, J. HARRISON, J.L HERMAN, M. KEISLING, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY, 153-54 (2011), available at http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

³ *Id.*

⁴ USCIS Interoffice Memorandum from William R. Yates Re: Adjudication of Petitions and Applications Filed by or on Behalf of, or Document Requests by, Transsexual Individuals (Apr. 16, 2004).

⁵ US Department of State Foreign Affairs Manual, 7 FAM 1300 APPENDIX M, available at <http://www.state.gov/documents/organization/143160.pdf>.

⁶ The Guide to Personnel Recordkeeping, Office of Personnel Management, June 1, 2011 available at http://www.opm.gov/feddata/Ch4_ReconstructPersonnelFolder.pdf.

⁷ Veterans Health Administration Directive 2011-02, Providing Healthcare for Transgender and Intersex Veterans, (Jun. 9 2011), available at http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2416.

on identification documents and official records. The magazine of the American Association of Motor Vehicle Administrators recently noted a similar trend in policies regarding driver's licenses and state identification cards.⁸ USCIS would benefit from adopting a clear and readily administrable policy that is in line with other government agencies. Currently, many naturalized citizens are able to obtain a U.S. passport with their updated gender marker, but not a naturalization certificate. It is irrational and confusing for these documents not to match. Given the large number of transgender immigrants who are refugees and asylum-seekers and the difficulties that incongruent identification can cause in integrating into the United States, a clear policy would also advance the goal of the President's direction in his December 6, 2011 memorandum directing the Department of Homeland Security to "enhance [its] ongoing efforts to ensure that LGBT refugees and asylum seekers have equal access to protection and assistance."⁹

Marriages Involving a Transgender Spouse

In January 2009, USCIS revised Chapter 21.3 of the AFM with the intent of simplifying the administration of marriage-based petitions for lawful permanent residence involving transgender spouses and incorporating the holding of *In re Lovo-Lara* 23 I&N Dec. 746 (BIA 2005). However, as we stated in our written recommendations in December 2009, these revisions failed to accurately reflect the law as stated in *Lovo-Lara*, and imposed unnecessary and burdensome requirements on transgender people and their spouses.

Contrary to the holding of *Lovo-Lara*, the AFM guidance currently requires any transgender petitioner or spouse to have undergone "sex reassignment surgery" ("SRS") in order to have their corrected gender recognized for purposes of marriage. Although the petitioner in *Lovo-Lara* had undergone a form of surgical treatment in support of her gender transition, the BIA did not require SRS as a prerequisite to recognizing a marriage involving a transgender person as an opposite sex marriage. Given the complexities that the Board recognized exist in this area, it concluded that "for immigration purposes, we find it appropriate to determine an individual's gender based on the designation appearing on the current birth certificate issued to that person by the State in which he or she was born."¹⁰ The provision in the AFM requiring that a transgender person "has, in fact, undergone sex reassignment surgery," therefore imposes a requirement that goes beyond the holding of *Lovo-Lara* and the requirements of state and federal law. Such a rule serves no legal purpose, and has the potential to create confusion and lead to dispositions that are inconsistent with controlling law.

Additionally, the AFM currently contains an incomplete, inaccurate and misleading list of jurisdictions that do and do not recognize gender change for purposes of marriage. In fact, nearly every jurisdiction in the United States recognizes gender change for purposes of marriage. To date, Kansas is the only state in which the highest court has definitively held that its laws do not recognize gender change for purposes of marriage. The AFM section misinterprets a highly fact-

⁸ Tom Manuel, "Transgender Drivers: New Norms in Customer Service," MOVE Magazine, pp. 29-32 (Spring/Summer 2011), available at: <http://www.aamva.org/Publications/Move/Archives.htm>.

⁹ Presidential Memorandum – International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual and Transgender Persons (Dec. 6, 2011).

¹⁰ *In re Lovo-Lara* at 753.

bound decision of Illinois’s intermediate appellate court, and cites an opinion of an intermediate appellate court in Texas that has since been superseded by statutory amendment. Rather than attempting to either partially or exhaustively catalogue state statutes and decisional law, the AFM could readily provide adjudicators with straightforward guidance that would resolve the overwhelming majority of cases. Although standards for amending birth certificates vary from state to state, consistent with *Lovo-Lara* jurisdictions overwhelmingly recognize gender change for individuals who have obtained an amended birth certificate or meet the jurisdiction’s underlying criteria for such amendments¹¹.

Actions at the federal and state level have underscored the importance of our recommendations. In 2011, both California and Vermont passed new legislation providing for gender change on birth certificates based on a physician’s determination that an individual has had appropriate individualized treatment for gender transition, which may or may not include surgery.¹² Similar legislation is pending in other states. Also in 2011, OPM has issued guidance to federal managers clarifying that gender transition subsequent to an otherwise valid marriage (a significant issue not addressed by *Lovo-Lara*) does not affect the continuing validity of the marriage.¹³ These developments reinforce the need to revise the guidance provided in the AFM to ensure that it is accurate, complete, and results in fair dispositions consistent with state and federal law.

Summary of Recommendations

Our recommendations are restated here as follows:

First, the USCIS should adopt a clear, written policy for gender change on immigration documents that mirrors the DOS, OPM and VHA policies, and which:

- Provides for updating a gender designation on presentation of either:
 - A physician’s letter certifying that the individual has had appropriate clinical treatment for gender transition, or
 - Official documentation of gender change from a federal, state or foreign agency or court, such as an amended passport, driver’s license or state identification card.
- Makes clear that additional personal or medical information should not be required.

Second, USCIS should revise the Adjudicator’s Field Manual to accurately reflect federal and state law and the *Lovo-Lara* decision by incorporating the following principles:

¹¹ It is important to note that for some spouses, especially if the transgender spouse is foreign born, it may not be possible to obtain an amended birth certificate. So long as the transgender applicant can produce other legal documentation of gender change, or documentation that he or she could meet the requirements of amending the birth certificate in the state where he or she resides, his or her gender change should be recognized. *See, e.g.,* In re Ahmad, A96-609-556, 2007 WL 3301748 (BIA Sept. 26, 2007) (recognizing a citizen of Singapore as female even though she could not obtain an amended birth certificate when she had a passport with a female gender designation); *Vecchione v. Vecchione*, No. 96D003769 (Cal. Sup. Ct. Orange Cty. Apr. 12, 1999) (recognizing a husband as male even though he could not obtain an amended birth certificate from the jurisdiction where he was born where by virtue of his medical history he would have been able to do so had he been born in California).

¹² Cal. Health & Safety Code § 103425; Vt. Stat. Tit. 18 § 5112.

¹³ Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, U.S. Office of Personnel Management, available at <http://www.opm.gov/diversity/Transgender/Guidance.asp>.

- If a gender transition occurred subsequent to a marriage, a valid marriage entered into between a man and woman remains valid for its duration in all jurisdictions.
- If a gender transition occurred prior to marriage, it will typically be recognized for purposes of marriage in most states. Sufficient documentation of gender change for this purpose shall ordinarily include official documents indicative of recognition by a state or a foreign government, including any of the following:
 - An amended birth certificate;
 - A court order;
 - A passport; or,
 - Medical documentation, such as a letter from a physician confirming that the individual has had sufficient medical treatment to satisfy applicable state requirements for recognition of gender change. For some states, this will require proof of surgical treatment. For others such as California, Washington and Vermont, a doctor's statement that the individual has had treatment appropriate for the individual for gender transition will suffice.

These recommendations are consistent with applicable state and federal law and would bring USCIS procedures into alignment with other agencies. They would also reduce inconsistencies in the adjudication process, thereby increasing equity for transgender individuals and their families.

We urge you to take prompt action on each of these matters. Please feel free to contact Harper Jean Tobin at (202) 903-0112 or hjtobin@transequality.org or Victoria Neilson at (212) 714-2904 ext. 25 or vneilson@immigrationequality.org to discuss these matters.

Sincerely,



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