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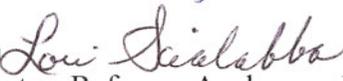
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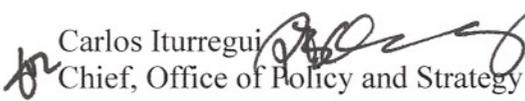
HQOPS AD09-03  
HQ 70/8

## Interoffice Memorandum

To: Field Leadership

Through: Don Neufeld   
Acting Associate Director, Domestic Operations

Lori Scialabba   
Associate Director, Refugee, Asylum and International Operations

From:   
Carlos Iturregui  
Chief, Office of Policy and Strategy

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

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

### 1. Purpose

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

### 2. Contact Information

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

### 3. Use

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

### 4. Background

Previous USCIS policy disallowed recognition of a change of sex for the purpose of spousal immigrant petitions. W. Yates, *Memorandum for Regional Directors et al, Adjudication of Petitions and Applications Filed by or on Behalf of, or Document Requests by, Transsexual Individuals*. (April 16, 2004). In the context of adjudicating spousal and fiancé petitions, former USCIS policy did not recognize the marriage, or intended marriage, between two individuals where one or both of the parties claimed to be a transsexual, regardless of whether either individual had undergone sex reassignment surgery, or was in the process of doing so.

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

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

*Matter of Lovo-Lara* involved a petitioner who was born in North Carolina, underwent sex change surgery, amended her birth certificate to reflect her sex change to female, married her husband in North Carolina and filed an I-130 petition on his behalf. The Board noted that North Carolina law does not permit individuals of the same sex to marry each other, but permits an

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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