



April 27, 2012

United States Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director, Mailstop 2000
Washington, DC 20529-2000

Via E-mail: opefeedback@uscis.dhs.gov

**Re: Adjudication of Immigration Benefits for Transgender Individuals;
Addition of *Adjudicator's Field Manual* (AFM) Subchapter 10.22 and
Revisions to AFM Subchapter 21.3 (AFM Update AD12-02)
(PM-602-0061)**

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To Whom It May Concern:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the interim policy memorandum entitled “Adjudication of Immigration Benefits for Transgender Individuals; Addition of *Adjudicator's Field Manual* (AFM) Subchapter 10.22 and Revisions to AFM Subchapter 21.3 (AFM Update AD12-02).”¹

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Since 1946, our mission has included the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, United States citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. AILA appreciates the opportunity to comment on this interim policy memorandum and believes that our members' collective expertise provides experience that makes us particularly well qualified to offer views that will benefit the public and the government.

AILA commends the U.S. Citizenship and Immigration Services (USCIS) on the improvements made to the Adjudicators Field Manual (AFM) through policy memorandum PM-602-0061 (hereinafter “Policy Memo”). These clarifications will make it easier for transgender immigrants to obtain accurate identity documents and will result in fairer and more consistent adjudications of marriage-based petitions.

¹ *USCIS Interim Memo on Immigration Benefits for Transgender Individuals*, AILA Doc. No. 12041360, <http://www.aila.org/content/default.aspx?docid=39245>.

Identity Documents

On October 14, 2010, AILA sent a letter to USCIS urging the exact changes which are being implemented in the AFM through this memorandum.² Specifically, AILA asked USCIS to update its guidance for correcting gender markers to conform to the guidance the Department of State (DOS) issued in the summer of 2010, that allows U.S. citizens to correct gender markers on their passports. AILA noted the incongruous results that could occur with different policies employed by different agencies whereby a U.S. citizen might have one gender marker on his or her U.S. passport and a different gender marker on his or her naturalization certificate.

The Policy Memo takes the right approach on correcting gender markers. Prior to this, the only guidance on this topic was the largely-superseded Yates memorandum from April 16, 2004, *The Memorandum for Regional Directors et al, Adjudication of Petitions and Applications Filed by or on Behalf of, or Document Requests by, Transsexual Individuals*.³ The 2004 Yates memo confusingly stated that gender markers should accurately reflect the “outward, claimed and otherwise documented sex of the applicant” and that appropriate medical documentation was required. The memo did not delineate what the medical documentation had to say or by whom it had to be signed.

With the implementation of this Policy Memo and the revisions to the AFM, officers and applicants now have clear instructions regarding the level of proof that is required to correct a gender marker. If the applicant has an amended birth certificate, passport, or court order recognizing the new gender, that is sufficient to update immigration-issued identity documents. Understanding that many non-citizens may not be able to obtain these government-issued documents, the Policy Memo also allows an applicant to submit a medical certification of corrected gender by a licensed physician who has treated the individual or has reviewed and evaluated his or her medical history. Importantly, the Policy Memo explicitly states that proof of sex reassignment surgery is not required, and it allows the officer to rely on the decision of a medical professional rather than having to try to make a determination as to what the individual’s gender is based on complicated medical documents. AILA believes that these guidelines are clear, fair, and will result in fewer wrongful denials of requests to amend documents, as well as identity documents that will more accurately reflect the gender of the individual.

Marriage Based Petitions

The Policy Memo also updates the AFM to accurately interpret the holding in *Matter of Lovo-Lara* for adjudications involving marriage-based petitions involving a transgender spouse.⁴ The court held in *Lovo-Lara* that USCIS should look to the law of the state where the marriage was entered into to determine the validity of the marriage for immigration purposes. However, the AFM, as amended in 2009, added a requirement that the transgender spouse “had in fact undergone sex reassignment

² AILA Letter to USCIS on Gender Change for Transgender Individuals, AILA Doc. No. 10101441, <http://www.aila.org/content/default.aspx?bc=6715|6721|8815|34318|39382>

³ USCIS Addresses Petitions/Applications for Transsexuals, AILA Doc. No. 04080367, <http://www.aila.org/content/default.aspx?docid=11143>

⁴ *Matter of Lovo*, 23 I&N Dec. 746 (BIA 2005) I.D. #3512, *BIA Rules that Marriage Between Transsexual and Member of Opposite Sex May Be Basis for Benefits*, AILA Doc. No. 05051961, <http://www.aila.org/content/default.aspx?docid=16461>

surgery.” The BIA did not specify in *Lovo-Lara* what type of medical treatment was required in order for a person’s gender to be legally corrected. As a result of the 2009 AFM language, confusion and inconsistent adjudications occurred where couples entered into marriages that are considered different-sex in the jurisdiction where the marriage took place, even though the transgender spouse had not undergone “sex reassignment surgery.”⁵

The Policy Memo instead reemphasizes the Board’s longstanding rule that USCIS should focus on the law where the marriage took place. Additionally, the Policy Memo includes a list of documents that the transgender spouse may submit to prove that he or she has corrected his or her gender including: an amended birth certificate; passport; court order; naturalization certificate; or, in some instances, a driver’s license. As with the guidance concerning identity documents, the memorandum now allows the transgender individual to submit a certification by a licensed physician as to his or her gender if there are no official identity documents available.

Finally, rather than attempting to list jurisdictions which place restrictions on the recognition of marriages where a spouse is transgender, the Policy Memo instructs officers to direct questions to local USCIS counsel. Given that this area of the law may be subject to change, this approach is more sensible than the AFM’s prior approach, which listed jurisdictions that had case law addressing marriages where one spouse is transgender. AILA also agrees with the Policy Memo’s provisions that the same rules apply for fiancé/e petitions, and that if the officer does not believe the marriage would be valid, the officer must issue a detailed notice of intent to deny, which will allow the petitioner to potentially address the perceived problem.

The only change we suggest be made to the Policy Memo would be to remove the last sentence of footnote 4. This sentence is confusing since marriages may remain valid under state law, even if a spouse transitions and changes legal gender after a marriage. USCIS should follow the guidance issued by the federal Office of Personnel Management (OPM), which clearly states that the spouses of federal employees can continue to receive insurance benefits based on the marriage, even if one spouse transitions subsequently.⁶ USCIS should not have a different rule from the OPM on the effect of gender transition after entering into a valid, different-sex marriage.

Conclusion

AILA commends USCIS for issuing this Policy Memo and believes that it will result in more consistent adjudications with fair results. We thank USCIS for the opportunity to submit comments, and we hope that USCIS will make the interim memo permanent.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

⁵ Indeed, even the phrase “sex reassignment surgery” is confusing as this term may be used to signify one or more of over a dozen different gender conforming surgeries.

⁶ *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, <http://www.opm.gov/diversity/Transgender/Guidance.asp>