



U.S. Citizenship
and Immigration
Services

HQOPRD 70/6

Interoffice Memorandum

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS
DISTRICT DIRECTORS, INCLUDING OVERSEAS
DIRECTOR, OFFICE OF INTERNATIONAL AFFAIRS

From: William R. Yates /s/
Associate Director for Operations
U.S. Citizenship and Immigration Services

Date: April 16, 2004

Re: Adjudication of Petitions and Applications Filed by or on Behalf of, or Document Requests by,
Transsexual Individuals.

I. Purpose

The purpose of this memorandum is to provide guidance related to the adjudication of petitions and applications filed by or on behalf of, or document requests by, transsexual individuals, including those who have either undergone sex reassignment surgery, or are in the process of doing so.

II. Summary Conclusion

In the context of adjudicating spousal and fiancé petitions, CIS personnel shall not recognize the marriage, or intended marriage, between two individuals where one or both of the parties claims to be a transsexual, regardless of whether either individual has undergone sex reassignment surgery, or is in the process of doing so. In instances where an individual claims to be a transsexual, but the gender of the individual is not pertinent to the underlying application or petition, CIS personnel shall consider the merits of the application without regard to the applicant's transsexuality. Any documentation (whether original or replacement) issued as a result of the adjudication shall reflect the outward, claimed and otherwise documented sex of the applicant at the time of CIS document issuance.

III. Background

No Federal statute or regulation addresses specifically the question of whether someone born a man or a woman can surgically change his or her sex. Transsexualism is a condition in which a person feels persistently uncomfortable about his or her anatomical sex, and often seeks medical treatment, including hormonal therapy and “sex reassignment surgery.” The former Immigration and Naturalization Service (INS) generally took the position that absent specific statutory authority recognizing sex changes for purposes of Federal immigration law; it could not recognize that a person can change his or her sex. In arriving at this conclusion, the INS stressed the following. First, whether a “marriage” qualifies for immigration purposes is a matter of Federal, not State or foreign, law. *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1981). It is well settled that, in enacting immigration and nationality laws, Congress intended the terms “spouse” and “marriage” to include only the partners to a legal, monogamous marriage between one man and one woman. *Howerton, supra*. Moreover, the 1996 Defense of Marriage Act (DOMA), 1 U.S.C. § 7, bans any Federal recognition of same-sex marriages for immigration purposes, and defines marriage as an institution involving a “man” and a “woman.” The legislative history of the DOMA also clearly supports a traditional view of marriage, especially one that ties its basic character and importance to children, even though the marriage laws do not require that a couple be physically or mentally ready and able to procreate. See, H.Rep. 104-664, reprinted in 1996 U.S. Code Cong. & Admin. News 2905, 2916-19. For all of these reasons, the former INS maintained, and its successor U.S. Citizenship and Immigration Services (CIS) agrees, that no legal authority permits recognition of homosexual relationships as “marriages” for purposes of immigration and nationality laws, regardless of whether the relationship may be recognized as a “marriage” under the law where the relationship came into existence.

However, neither the DOMA nor any other Federal statute addresses whether a marriage between (for example) a man and a person born a man who has undergone surgery to become a woman should be recognized for immigration purposes or considered invalid as a same-sex marriage. While whether a marriage may be recognized for immigration purposes is a matter of Federal law, almost one-half of the states authorize the issuance of “new” birth certificates to individuals who have undergone sex reassignment surgery, as long as they present appropriate medical documentation. These same states also permit the issuance of marriage licenses for couples where one member presents a newly issued birth certificate reflecting his or her name and/or sex reassignment.

Differing state practices related to the issuance of new birth certificates and marriage licenses, coupled with a general lack of detailed guidance in this area, have resulted in inconsistent adjudications within the INS and CIS offices of cases involving transsexual applicants.

Current CIS policy disallows recognition of a change of sex so that a marriage between two persons born of the same sex can be considered bona fide for the purpose of spousal immigrant petitions. W. Yates, Memorandum for Regional Directors et al, Spousal Immigrant Visa Petitions (AFM Update AD 2-16) (March 20, 2003). With respect to replacement documents, CIS has required that the sex at birth as identified in the A-file be used unless the original birth certificate shows a CIS error with respect to sex at birth. Furthermore, if an individual indicates or claims a different gender than the one he or she was born with as reflected in his or her A-file, CIS policy has mandated use of the gender listed in the alien’s file unless the applicant presents a Federal court order directing CIS to change its records. I-90 Replacement National SOP at 6-22.

IV. Guidance

A. Spousal and Fiancé(e) Petitions

To ensure consistency with the legislative intent reflected in the DOMA, and to reiterate existing CIS policy, CIS personnel shall not recognize the marriage, or intended marriage, between two individuals where one or both of the parties claims to be a transsexual, regardless of whether either individual has undergone sex reassignment surgery, or is in the process of doing so. For example, a Form I-130, Petition for Alien Relative, or Form I-129F, Petition for Alien Fiancé(e), cannot be approved if one or both of the parties to the petition was born a sex other than what they claim to be at the time of filing. This same policy applies to any immigration benefit that is granted based on a marital relationship. For example, an individual shall not be approved for H-4 status based on a marriage to a principal alien if either the principal alien or the potential H-4 beneficiary was born a sex other than what they claim to be at the time of filing.

When adjudicating petitions and applications based on a spousal relationship, CIS officers should be guided by objective indicators, and avoid imposing subjective assumptions or judgments. For example, if the previous name used by the petitioner or the beneficiary is different than that contained elsewhere in the application materials or A-file, and is a name that would normally be used by the opposite sex, officers should issue a request for evidence (RFE) to establish that person's identity. The RFE should request copies of all birth certificates issued to that person and any court (or other) documentation evidencing the legal name change. Again, a petition or application based on a spousal relationship may only be approved if it has been clearly established that the underlying marriage is recognizable for immigration purposes, in accordance with the policy outlined in this memorandum.

B. Other Petitions or Applications

In instances where an individual claims to be a transsexual, but the gender of the individual is not pertinent to the underlying application or petition, CIS personnel shall consider the merits of the application without regard to the applicant's transsexuality. Any documentation (whether original or replacement) issued as the result of the adjudication shall reflect the outward, claimed and otherwise documented sex of the applicant at the time of CIS document issuance. For example, an alien with an approved Form I-140, Immigrant Petition for Alien Worker, and Form I-485, Application to Register Permanent Residence or Adjust Status, who underwent sex reassignment surgery shall be issued a Form I-551, Permanent Resident Card, reflecting the claimed sex of the alien at the time of issuance (provided, of course, that the alien submits appropriate medical and other documentation establishing the alien's new claimed gender and legal name). It is important to note that applicants are no longer required, as previously indicated in the I-90 Replacement National SOP at 6-22, to present a Federal court order directing the agency to change its records where such an individual indicates or claims a different gender than the one he or she was born with as reflected in his or her A-file.

In instances where an individual is requesting a replacement document to acknowledge a name change resulting from sex reassignment surgery, the alien must submit the birth certificate issued at birth, the newly issued birth certificate reflecting the name and/or claimed sex reassignment, and the court order granting the legal name change. Examples of such applications include, but are not limited to, Form I-765,

Application for Employment Authorization, or Form I-90, Application to Replace Alien Registration Receipt Card. Name changes arising in all other situations should be reviewed in accordance with established procedures.

Finally, as is the context of any other adjudication, all CIS officers shall perform their duties in a manner that accords maximal respect, sensitivity and consideration when adjudicating any petition, application or document request filed by, or on behalf of, a transsexual individual.

V. Further Information

CIS personnel with questions regarding the policy presented in this memorandum should raise them to Headquarters Operations through appropriate supervisory channels.