Living in Dual Shadows
LGBT Undocumented Immigrants

Crosby Burns, Ann Garcia, and Philip E. Wolgin  March 2013

*Correction, April 24, 2013: This report incorrectly stated the number of binational same-sex couples. The correct number is 24,700.*
iv The LGBT undocumented by the numbers

1 Introduction and summary

6 The LGBT-identified undocumented immigrant community

13 Challenges for LGBT families

18 Immigration enforcement and the LGBT undocumented population

24 LGBT asylum seekers: Unique obstacles and challenges

27 Recommendations

31 Acknowledgements and about the authors

33 Endnotes
The LGBT undocumented
By the numbers

Of the 11 million undocumented immigrants in the United States today, hundreds of thousands identify as lesbian, gay, bisexual, and transgender, or LGBT. In a first-of-its-kind analysis, a report by the Williams Institute at UCLA estimates the number of LGBT-identified undocumented adults living in the United States today.

There are at least 267,000 LGBT adult undocumented immigrants living in the United States today.

For them, a path to citizenship would mean:
- Progress in bringing family separations to an end
- More job security
- Greater access to social services
- Higher wages

LGBT adult undocumented immigrants are more likely to be male, younger, less likely to be Hispanic, and more likely to be Asian.

There are an estimated 904,000 LGBT adult immigrants in the United States today, 30 percent of whom are undocumented.

There are an estimated 24,700* binational same-sex couples (one native-born U.S. citizen and one noncitizen) in the United States today.

Because of the Defense of Marriage Act, U.S. citizens and residents cannot sponsor a same-sex partner for family-based immigration, unlike their heterosexual counterparts. Including the provisions of the Uniting American Families Act in immigration reform would end discrimination against binational same-sex couples.


*Correction, April 24, 2013: This report incorrectly stated the number of binational same-sex couples. The correct number is 24,700.
Introduction and summary

When Pulitzer Prize-winning journalist José Antonio Vargas came out as undocumented in an essay published in The New York Times in the summer of 2011, he was “coming out” for the second time in his life. The first time occurred when Vargas raised his hand in history class during his junior year of high school after watching a documentary on Harvey Milk—the first openly gay person to be elected to public office in California—and told his classmates and teacher that he was gay. And while we’ve known that there are thousands of people like Vargas who are undocumented and who also identify as lesbian, gay, bisexual, and transgender, or LGBT, we’ve known little about their actual numbers or demographic characteristics.

In a first-of-its-kind analysis, the Williams Institute at UCLA—which researches sexual-orientation and gender-identity law and public policy—today estimates that there are at least 267,000 LGBT-identified individuals among the adult population of undocumented immigrants. Undocumented people who identify as LGBT are more likely to be male and younger; less likely to be Hispanic; and more likely to be Asian than the overall undocumented population. And because LGBT undocumented people find themselves at the intersection of two already marginalized groups—the LGBT population and the undocumented population—they are among society’s most vulnerable individuals.

With this report, we build upon the Williams Institute’s demographic findings by first unpacking demographic characteristics of the population, and then detailing the disparities and hardships that make the LGBT-identified members of the undocumented population among the most vulnerable members of our society. These issues—including employment insecurities, wage and income disparities, and health inequities—would be significantly lessened if undocumented LGBT immigrants were given a chance to earn legal status and, eventually, citizenship. Passing an immigration reform bill with a direct road map to earned citizenship would lift these immigrants out of the shadows, treat them with the dignity that they deserve, and enable them to become full and equal participants in our society, economy, and democracy.
Citizenship cannot solve all of the issues facing the LGBT undocumented community, however, and the second and third parts of this report deal with the specific challenges facing this population. We begin with the issues facing LGBT families, including the inability to sponsor a same-sex spouse or partner through family-based immigration preferences. This section details the emotional and economic pain of separation when family members are detained or deported. We then address the challenges that LGBT immigrants encounter when they come into contact with the immigration-enforcement system. Specifically, we examine how U.S. detention centers fail to provide an adequate level of safety and care to LGBT immigrants—including to those living with HIV—who are routinely mistreated, discriminated against, and denied health care while in detention. Finally, we look at the particular obstacles—legal and otherwise—facing LGBT asylum seekers in the United States.

To alleviate the burdens facing undocumented immigrants who identify as LGBT and their families, this report makes the following recommendations.

---

Pass immigration reform, that:

**Includes a path to citizenship:** Legalizing the at least 267,000 undocumented immigrants in America who identify as LGBT and providing them with a roadmap to citizenship would give them the legal certainty that they will not be torn away from their families and communities, give them the ability to work legally and earn higher wages, and allow them to become full and equal members of society.

**Ends discrimination against binational same-sex couples:** Including the provisions of the Uniting American Families Act in immigration reform would finally give U.S. citizens and permanent residents in same-sex couples the ability to sponsor their loved one for family-based immigration. If passed, the law would not only extend sponsorship rights to U.S. citizens and residents with same-sex spouses but also to those with committed same-sex partners—which is important, considering that same-sex couples cannot marry in 41 states. For this reason, passage of the Uniting American Families Act will be necessary even if Congress or the courts repeal the Defense of Marriage Act, the discriminatory law that prevents these couples from accessing family-based immigration preferences that are afforded to all other couples.
Fixes and protects family-based migration: On top of ensuring that LGBT immigrants are included in family reunification, immigration reform must do more to fix and protect the family preference visa system. The more than 4 million people stuck on backlogs waiting for a family visa must be granted a quick and reasonable path to reunification. Potential fixes include the Reuniting Families Act, which would—among other things—recapture visas that are lost to bureaucratic delay by allowing unused visa slots from one year to carry over into the next, and raise the per-country limits that restrict any one sending country to only 7 percent of all yearly visas—thus treating Mexico and Luxembourg equally, as if they were equal in size and circumstance.4

Grants young people access to education and citizenship: Including the provisions of the DREAM Act in immigration reform would provide thousands of undocumented LGBT youth with an expedited roadmap to citizenship, giving them the ability to reach their full potential even sooner. Those who entered the United States prior to age 16 and are currently under the age 35 would be able to earn their citizenship by completing high school and some college or U.S. military service.

Repeal the federal Defense of Marriage Act

One of the many reasons that Congress and the Supreme Court need to repeal the Defense of Marriage Act is to ensure that the government treats all families equally under existing immigration law. Congress can and should swiftly pass the Respect for Marriage Act, which would legislatively repeal the Defense of Marriage Act. Alternatively, in United States v. Windsor—a case currently pending before the Supreme Court—the court could strike down the section of the law that denies federal benefits and protections to same-sex couples. The repeal of the Defense of Marriage Act would then allow the federal government to treat all families equally for the purpose of family-based immigration.

Modify detention and asylum standards to address the issues facing the LGBT-identified undocumented community

Implement and vigorously enforce existing standards: Over the past four years, the Department of Homeland Security has issued guidance, rules, and regulations that promote the safety and well-being of LGBT detainees. The department
has taken similar administrative actions to ensure that LGBT asylum seekers are treated with dignity and given a fair asylum hearing. While these policies are significant steps forward, the Obama administration must work to implement and enforce them in practice.

To reform detention standards, the administration should:

- Provide sensitivity training on a regular basis to detention staff working with LGBT detainees and create oversight to ensure compliance
- Ensure that detention staff understand their role in preventing, detecting, and responding to physical and sexual abuse of LGBT detainees
- Investigate allegations of abuse, discrimination, neglect, denial of medical services, and violence against detainees, including those who are LGBT
- Revoke the contracts of and funding for detention centers that fail to adequately implement and enforce these standards
- Provide increased access to legal services for people in detention, including those who are LGBT

**Pass the Detainee Basic Medical Care Act:** The Detainee Basic Medical Care Act would fill significant gaps in the detention health care system that have resulted in substandard medical treatment and even deaths among immigrant detainees. The proposed law contains a provision that requires immigration officials to ensure that immigrants continue to have access to medications prescribed prior to their detention, including those for transgender and HIV-positive detainees. This bill also gives immigration detainees with serious medical or health care conditions priority consideration for release on parole, on bond, or into an alternate to detention program, which again will benefit transgender and HIV-positive detainees. Third, and perhaps most importantly, by providing a basic floor of medical care to detainees, this proposal would help to address the significant health issues and inequities facing the LGBT undocumented population.

**Expand the use of alternatives to detention:** To protect the most vulnerable detainees from mistreatment—particularly LGBT detainees—policymakers should consider alternatives to traditional detention such as house arrest or ankle monitors. These are common-sense cost-saving solutions that would advance the
twin goals of monitoring the undocumented and protecting the most vulnerable
detainees from avoidable mistreatment. In fact, detentions cost taxpayers $122 per
day or more, while alternatives to detention can cost as little as $12 per day, a sav-
ings that allows the detainee to remain with their family and in their community.⁶

Another alternative to traditional detention for LGBT detainees is to create spe-
cial facilities that separate LGBT detainees from others in detention without plac-
ing them into administrative segregation. In 2012 the Department of Homeland
Security created the country’s first dedicated protective custody unit for LGBT
detainees.⁷ While creating new facilities for LGBT detainees is not optimal, it is
better than putting them in solitary confinement or putting them in harm’s way.

**End the one-year filing deadline for asylum seekers and ensure standards:** The
one-year deadline to apply for asylum is arbitrary and has resulted in the denial of
protections to thousands of otherwise legitimate asylum seekers. Because of the
one-year ban, LGBT people are often forced to return to their home countries and
risk persecution or death because of their sexual identity. Congress must repeal
the one-year filing deadline and allow all people with a well-founded fear of perse-
cution the right to asylum guaranteed by international law.

The Department of Homeland Security should also ensure that the training
included in its LGBT refugee manual is implemented in practice. All too often
asylees are at risk of having their cases dismissed if they do not conform to stereo-
types about what it means to be a gay man or lesbian woman. All asylum adjudica-
tors must ensure that they give each and every asylum seeker a fair hearing—one
that is free of prejudice.
The LGBT-identified undocumented immigrant community

Like all undocumented immigrants, LGBT undocumented immigrants are all too often torn from their families by a broken and outdated immigration system that is harmful to our society, our economy, and our values. In this section we examine the demographic characteristics of this population, outline the particular vulnerabilities that LGBT undocumented immigrants face, and argue that providing a road map to earned citizenship is a critical component of advancing the economic and physical well-being of LGBT people in the United States.

Number of LGBT-identified undocumented individuals

According to research from the Williams Institute at UCLA, there are at least 267,000 LGBT undocumented adult immigrants in the United States today. An additional 637,000 LGBT adult immigrants have legal status. In other words, of the approximately 904,000 LGBT immigrants living in the United States today, 70 percent have legal status and 30 percent are undocumented. This roughly matches the breakdown of the entire foreign-born population, of which 72 percent are documented and 28 percent are undocumented.

Two notes of caution: These calculations are inherently conservative and take into account under-reporting by self-identified LGBT undocumented individuals, particularly among people who are, as the Williams Institute points out, reluctant to identify as such. Thus, these total figures represent the lower-bound estimates of the true LGBT undocumented population in this country. Furthermore, the 267,000 immigrants figure includes only adult immigrants; it does not account for the undocumented immigrants under the age of 18 who identify as LGBT. Given these factors, it is likely that the number of undocumented immigrants who identify as LGBT is significantly higher than estimated.
Demographic characteristics

The Williams Institute found that 67 percent of LGBT-identified immigrants who are undocumented are men, and 33 percent are women. This figure represents a significant difference from the total undocumented population, which is 57 percent male and only 43 percent female, indicating that the LGBT-identified undocumented cohort is more likely to be male than the average undocumented immigrant.11

The LGBT undocumented population is also younger than the general undocumented population. A full 49 percent of those who identify as LGBT and are undocumented are adults under the age of 30. That is well above the 30 percent of the total undocumented population that falls in this same age range. In fact, according to the Williams Institute, undocumented adult immigrant under age 30 are twice as likely as the broader undocumented immigrant population to identify as LGBT.12

Asian immigrants who identify as LGBT are the most likely to also identify as LGBT, with 3.6 percent of Asian undocumented immigrants reporting that they are also LGBT. Hispanic undocumented immigrants are next, with 2.5 percent identifying as LGBT. In terms of sheer population size, approximately 189,000 LGBT-identified adult immigrants are Hispanic—71 percent of all LGBT-identified undocumented adults—40,000, or 15 percent, are Asian or Pacific Islander, 22,600, or 8.5 percent, are white, and 15,400, or 5.8 percent, are black.13

### Snapshot of LGBT-identified undocumented immigrants

The LGBT-identified undocumented population compared to all undocumented immigrants

<table>
<thead>
<tr>
<th></th>
<th>LGBT undocumented</th>
<th>All undocumented</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>67%</td>
<td>57%</td>
</tr>
<tr>
<td>Under 30</td>
<td>49%</td>
<td>30%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>71%</td>
<td>77%</td>
</tr>
<tr>
<td>Asian</td>
<td>15%</td>
<td>11%</td>
</tr>
</tbody>
</table>

- LGBT-identified undocumented immigrants are more likely to be male.
- LGBT-identified undocumented immigrants are younger.
- LGBT-identified undocumented immigrants are less likely to be Hispanic.
- LGBT-identified undocumented immigrants are more likely to be Asian.

Source: Gates, "LGBT Adult Immigrants in the United States"
Hardships and disparities facing LGBT undocumented immigrants

Undocumented LGBT immigrants face numerous challenges endemic both to their lack of immigration status and to their sexual orientation and gender identity. For those who are both LGBT and undocumented, this double minority status has compounding harmful effects on their social, economic, and psychological well-being that make them among our society’s most vulnerable people.

Employment insecurity

Both undocumented and LGBT workers face employment insecurity and discrimination. Without legal status, undocumented immigrants are unauthorized to work legally in the United States; consequently, they are all too often exploited by their employers and have few avenues for recourse. Unauthorized immigrants in a National Employment Law Project national study had some of the highest rates of workplace and employment discrimination, with a full 85 percent of respondents reporting, for example, overtime rate violations. And because of their status, many undocumented immigrants are too fearful to come forward and report these violations. A comprehensive study from the Williams Institute found that LGBT people suffer from high rates of workplace discrimination based on their sexual orientation or gender identity. In another study, the National Center for Transgender Equality and the National Gay and Lesbian Task Force found that 90 percent of transgender people have experienced some form of harassment or mistreatment on the job, or report having taken some action such as hiding who they are to avoid it.

Like undocumented immigrants who fear coworkers revealing their undocumented status to employers or immigration officials, LGBT workers similarly fear being “outed” on the job, based on a well-founded fear of discrimination and harassment should their coworkers or supervisors discover their sexual orientation or gender identity. And like undocumented immigrants, LGBT workers in general are not afforded the full range of protections necessary to shield them from employment discrimination. In a majority of states, for example, it is perfectly legal under state law to fire someone based on their sexual orientation or gender identity. Given the employment insecurities facing both LGBT and undocumented people, those that find themselves at the intersection of these two populations face extreme difficulties in finding and securing a job.
Income insecurity

Both undocumented immigrants and LGBT Americans face significant economic inequity. Undocumented immigrants have a median income that is $14,000 less per year than the median household income for U.S.-born residents. And contrary to commonly held stereotypes, families headed by same-sex couples make on average $15,500 less per year than families headed by opposite-sex couples. Children in both LGBT-headed families and households headed by undocumented parents are nearly twice as likely to be living in poverty as children in families headed by opposite-sex, U.S.-citizen parents. Transgender people face an even more significant economic burden, with 15 percent of the population earning less than $10,000 per year—a rate of poverty nearly four times that of the general population. While no data exist on the median household income of LGBT undocumented immigrants, the combination of the undocumented and LGBT statuses means that it is all but a certainty that this population’s earnings are especially low.

Health insurance coverage gaps

Undocumented immigrants and LGBT people are more likely to lack sufficient health insurance coverage compared to the general population. In 2007, the year for which data are most recently available, more than half—59 percent—of adult undocumented immigrants did not have health insurance, compared to only 15 percent of people in the general population who were uninsured that same year. Research from the Institute of Medicine shows that gay and lesbian adults are roughly twice as likely as the general population to be without health insurance coverage, and rates of insurance coverage are even lower for some populations of transgender and bisexual individuals—namely, individuals who are racial or ethnic minorities. Undocumented immigrants are barred from accessing federal health care benefits, including the ability to purchase insurance through the exchanges set up by the Affordable Care Act. This lack of coverage is largely why LGBT undocumented people often forgo medical treatment, and even when they do seek treatment, they face a significant financial burden when it comes to paying for that care.

Mental health disparities

A significant body of research from the National Center on LGBT Health shows that LGBT people suffer from worse health outcomes compared to the non-
LGBT population. According to the research, LGBT people are at greater risk for cancer, depression, and alcoholism, all of which are largely due to the stigma and minority stress associated with sexual orientation and gender identity-based discrimination. Other studies reveal that immigrants are similarly at a high risk for negative health outcomes. Undocumented immigrants more frequently have jobs with higher occupational hazards, for example, which put them at greater risk of injury. Children growing up in communities that have experienced detentions and deportations exhibit a range of mental health issues and express a constant fear that their loved ones will be taken from them—a fear that they carry with them as they develop and grow. For both groups—undocumented immigrants and LGBT people—the overall lack of health insurance coverage compounds these health problems because it often means forgoing preventive care.

A road map to citizenship and further research

Many advocates in the LGBT movement are working to address the economic, social, and health-related disparities outlined above. The Human Rights Campaign, for example, recently released a comprehensive report, “Living Outside the Safety Net: LGBT Families and Social Security,” which calls on Congress to end the unequal practice of denying LGBT families full and equal access to Social Security benefits. In another example, the National Center for Transgender Equality and the National Gay and Lesbian Task Force released a comprehensive report in 2011 that uncovered the extreme economic hardships and health disparities facing transgender people in the United States. It is work such as this that has helped and will continue to advance the financial and physical livelihood of LGBT people and their families.

Building off of this important work, an immigration reform bill that includes a road map to earned citizenship is and should be a critical priority toward achieving equality for LGBT people. Passing comprehensive immigration reform that legalizes undocumented immigrants and provides them with a road map to citizenship will go a long way toward alleviating many of the burdens that come with undocumented status. Specifically, legalization will allow the 267,000 undocumented LGBT immigrants to find peace of mind in knowing that they and their families will not be torn apart by deportations, they will have the chance to earn higher wages, they will have greater access to health care and other social services, and their jobs will be more secure.
Yenny, 21, had a turbulent childhood in Peru. Her father, a policeman, subjected her to brutal abuse because she identifies as queer. At age 10, after enduring countless beatings, Yenny left her home in Peru and traveled to the United States, where her mother and younger brother would welcome her. Leaving Peru was bittersweet for Yenny—yes, she was escaping years of violence at the hands of her father, but she was leaving behind her beloved grandmother, a woman she calls “her inspiration.”

Upon arriving in New York, Yenny encountered an uphill battle. The stress of her double minority status as undocumented and queer pushed her to think about taking her own life. Some friends and family rejected her because of her sexual orientation, while many employers were unwilling to employ her due to her undocumented status. Yenny felt her dream of someday becoming a social worker slipping away from her. What pulled Yenny out of the depths of despair and into action was learning of the tragic story of Joaquin Luna, an 18-year-old Texas DREAMer who committed suicide after leaving behind letters expressing anxiety about his undocumented status.

Understanding that she had to do something to bring her family, her community, and herself out of the shadows, Yenny joined the Queer Undocumented Immigrant Project in 2012. The initiative aims to build bridges between the immigration and the LGBT advocacy communities with the goal of securing equality on both fronts. Their priority in 2013 is to ensure that LGBT individuals and families are included in immigration reform.

Yenny received legal status last year after applying for the Special Immigrant Juveniles Status, which provides foreign-born youth living in the United States who have been abused, abandoned, or neglected a chance to get a green card and remain in the country legally. With a green card in hand and the peace of mind that she will not be returned to her abusive father, Yenny hopes to fulfill her dream of traveling back to Peru to see her grandmother.

In the meantime, Yenny remains at the forefront of the effort to pass immigration reform that includes a roadmap to citizenship for the 11 million undocumented immigrants living among us, including her mother and brother. “If I don’t see my community and my family smiling, I’m not going to smile,” she says, her determination undeniable.
While it is impossible to put an exact dollar amount on the economic value of legalizing the nation’s 267,000 undocumented LGBT immigrants, we do know from previous work that legalization and a road map to citizenship translates into higher wages. A 1996 U.S. Department of Labor study, for example, found that legalized workers under the Immigration Reform and Control Act made 15 percent higher wages within five years of legalization. Likewise, University of Southern California economists Manuel Pastor and Justin Scoggins found that naturalized citizens make between 8 percent and 11 percent higher wages than legal permanent residents. Legalizing LGBT immigrants and giving them a road map to citizenship will undoubtedly translate into more money in the economy, as higher wages lead to more spending on goods and services, which in turn helps businesses grow and hire more people. Higher wages also mean more tax revenue for federal, state, and local governments. Simply put, citizenship is good for both immigrants and the nation as a whole.

Still, discrimination and wage and health gaps among LGBT immigrants will persist even after legalization. Combating discrimination against workers based on their sexual orientation and gender identity—something that is legal in the majority of states—will require legislation such as the Employment Non-Discrimination Act, a bill that would make it illegal under federal law to discriminate against LGBT workers. And even if the LGBT undocumented population was given a roadmap to legalization, same-sex couples are still only afforded the rights and responsibilities of marriage in nine states. Without adequate relationship-recognition laws, LGBT people—documented or undocumented—will continue to experience discrimination in accessing safety net programs and in the tax code, meaning that they will have to spend more of their income on things such as access to health care—which might otherwise be taken care of through the safety net—to reach parity with non-LGBT people.

More research is required to fully understand the experience of being both LGBT and undocumented. We only know so much about this population due to limitations on the data that are collected on people’s legal status, sexual orientation, and gender identity. We must work to fill these research gaps so that advocates are better suited to address the economic, physical, and mental health issues of this vulnerable population—even after Congress passes immigration reform.

We turn next to specific immigration issues facing the undocumented LGBT community, beginning with issues facing LGBT families and then exploring issues facing LGBT migrants as they come into contact with the immigration-enforcement regime.
Challenges for LGBT families

LGBT families face specific challenges when it comes to family reunification. The federal government’s definition of family, for example, fails to recognize families headed by same-sex couples, barring them from receiving the same rights to reunification as other married couples. And when it comes to immigration enforcement, LGBT immigrant families face significant challenges—including the real possibility of family separation—if one partner is detained or deported.

The Defense of Marriage Act continues to tear binational couples apart

One of the primary foundations of U.S. immigration law is that families have the right to reunite, and that individuals should not have to choose between the people they love and the country the love. U.S. citizens, for example, can sponsor an immediate relative such as a spouse, a parent, or an unmarried minor child for legal permanent residency—a green card—outside of the caps placed on the number of visas issued. Within these numerical caps, U.S. citizens and legal permanent residents can sponsor a range of family members, including siblings and adult children. Fully two-thirds of the legal immigrants who have come to the United States since the 1960s have attained legal status through family-based immigration.40

LGBT immigrants, however, face unequal treatment when it comes to family reunification. The Defense of Marriage Act defines marriage as the union between one man and one woman for the purposes of federal law. In doing so, the law bars the government from recognizing the legally valid marriages of same-sex couples. This means that for the purposes of immigration, U.S. citizens and legal permanent residents are unable to obtain a green card for their same-sex spouses or partners through family-based immigration preferences.41 And because spouses of citizens and legal permanent residents can apply for citizenship after only three years, rather than the normal five-year naturalization wait period, even those LGBT immigrants who are able to gain a visa in another manner—often under
categories such as employment-based visas—are unable to take advantage of the shorter path to full citizenship accorded to other married immigrants.\(^{42}\)

Sadly, thousands of families remain at risk of being senselessly separated when a same-sex foreign-born spouse or partner is deported. In updated figures from its November 2011 report, “Same-sex Couples and Immigration in the United States,”\(^ {43}\) the Williams Institute estimates that there are approximately 32,300 binational same-sex couples—in which one spouse or partner is a native-born U.S. citizen and one is a noncitizen—residing in the United States today.\(^ {44}\)

While it is not possible to estimate the exact proportion of the 24,700* binational same-sex couples that include an undocumented immigrant, we do expect that a significant portion of these couples would secure a legal status through the passage of an immigration reform bill that provides a road map to legal status for undocumented immigrants. Still, for those binational couples in which the nonresident is either in the United States on a temporary visa or still living abroad, the legalization provisions of immigration reform will offer no chance for family reunification.

Losing talented Americans and immigrants

Our nation’s discriminatory immigration policies impose significant economic and emotional harm on binational same-sex couples. Couples such as Lisa and Deb, profiled below, must spend down their life savings on legal fees, plane tickets, and moving expenses simply to be with one another. Equally unfair is that binational same-sex couples must endure the indignity of being told by their government that their relationship is not worthy of equal treatment.

The harm caused by the inability to sponsor a same-sex spouse or partner for residency, however, goes beyond the immigrants themselves. In many cases, U.S. citizens—even those who are native born—are forced to leave the country because their same-sex spouses cannot secure a visa. In this way, the spousal sponsorship issue is an impediment to our economic competitiveness. Because of this discriminatory policy, talented doctors, engineers, and scientists are denied family-based immigration visas and are sent back to—or must remain in—their home countries. When this happens, the United States loses out on critical sources of talent that help it remain competitive. For these reasons, a broad coalition of businesses—from American Airlines to Nike to Bain & Company to Pfizer—has publicly opposed the discriminatory treatment of binational same-sex couples.\(^ {45}\)
“It was like love at first sight,” says Lisa, recalling when she first met Deb in New York six years ago. Although Deb—who was visiting the United States on a tourist visa—lived in Scotland and Lisa lived in New York City, the couple decided to make the international relationship work by flying back and forth between their two countries. But after a while, the committed couple recognized that the travel was unsustainable and that it was time to move in together. As Lisa says, “You can’t go on like that forever.”

While both women wanted to reside in the United States—where Lisa worked as a doctor and Deb was a highly sought-after decorative artist—the Defense of Marriage Act prohibited Lisa from sponsoring Deb for residency, a right that would have been afforded to the couple if they were heterosexual. Torn between the country she loved and the woman she loved, Lisa ultimately made the decision to leave the United States and move to Scotland so that she and Deb could be together.

The inability to sponsor Deb for residency imposed a significant emotional and financial toll on the couple. Having left her stable job as a doctor, Lisa had to spend down her retirement savings to pay for legal fees, moving expenses, and flights simply to be with her partner. Furthermore, Lisa would only be able to practice medicine in the United Kingdom as a specialist registrar, the equivalent of a resident or trainee doctor in the United States. If Lisa wanted to work as a fully trained and accredited doctor in the United Kingdom, she would be required to retrain for four additional years—training that she had already received as a postgraduate in the United States.

But the harm was not limited to just Lisa and Deb. Lisa’s inability to sponsor Deb for permanent residence had a ripple effect that went far beyond the couple. In New York City Lisa estimates that she served between 2,000 and 3,000 clients a year in a high-volume health clinic that largely worked with the LGBT community and HIV-positive patients. Her departure from the United States has meant that thousands of vulnerable individuals lost a caring and highly skilled clinician. Lisa’s plight also highlights the broader economic harm of this policy. As Lisa notes, the couple would have bought a car and a house—among many other goods and services—and paid taxes if they had been allowed to remain in the United States.

Four years later, Lisa and Deb now live in Cambridge, Canada, where their relationship is fully recognized and Lisa is able to practice medicine. For many couples, the sacrifices and hardships involved in moving, making new friends, and leaving parents behind—as well as those suffered through lost income and the inability to find a permanent place to settle down—would have been insurmountable. But as Lisa says, “It was never an option to lose the relationship.”

Lisa and Deb keep hope alive that one day U.S. policymakers will act so that they and other international couples like them can have the opportunity to live as a committed couple together in the United States if and when they so choose.
Stalled family unification

The right of families to be together is one of the key foundations of our nation’s immigration policy, and yet there are currently more than 4 million people backlogged in the immigration system and waiting for a visa. In some cases, the waiting times are decades long. Under current U.S. immigration law, no country can receive more than 7 percent of all green cards in a year—a policy that treats Mexico and Luxembourg the same even though they are equal in neither size nor circumstance. Certain countries with large populations—in particular, Mexico, India, China, and the Philippines—have particularly long backlogs: The siblings of Filipino immigrants, for example, would have to have applied before July 15, 1989—more than a 23-year wait—to receive a green card in March 2013. Adult children of legal permanent residents from Mexico would have to have applied prior to March 15, 1993—a 20-year wait. These arbitrary backlogs are difficult on all groups, but they are particularly difficult on the LGBT undocumented population, which comprises a higher percentage of Asian immigrants—and consequently some of the longest backlogs—than the general undocumented population.

Family separation

In addition to binational couples, undocumented and LGBT communities are confronted with significant burdens when it comes to family life in the United States. Undocumented immigrants face a constant fear of being torn away from their family members through detention and deportation. Even though two-thirds of undocumented immigrants have been in the country for more than a decade—and an even higher percentage live in families with children that are among the native born—their length of residency and familial status offers them little security from immigration enforcement. The Obama administration has set a new record for deportations, having removed more than 400,000 people per year, including more than 200,000 undocumented parents of U.S. citizens between July 2010 and September 2012 alone. The Applied Research Council estimates that 5,100 citizen children of undocumented immigrants currently live in foster care because their parents have been detained or deported. The economic strain and emotional pain that separation causes immigrant families cannot be overemphasized.

LGBT families face a particularly high risk of having their children taken from them and placed in foster care after a detention or deportation. Child welfare
systems in many states already often funnel children of same-sex parents into the foster care system under the deeply flawed assumption that the system is better equipped to support the development of that child than loving same-sex parents. If a same-sex partner is detained or deported, even in cases where the other partner is a U.S. citizen or legal permanent resident, there is a strong chance that prejudices in the system and a lack of relationship recognition will lead to their children being taken from them.\textsuperscript{52} More research is needed to understand how many families face this situation.

**Administrative action to protect LGBT families from deportation**

Over the past few years, President Barack Obama has taken significant action to halt deportations of binational same-sex couples, though more can be done. In 2011 the Department of Homeland Security issued prosecutorial discretion guidelines that refocused government resources on removing those immigrants who pose a threat to public safety or national security—instead of law-abiding individuals. In line with this policy, the Homeland Security guidelines instruct immigration officials to halt the deportations of individuals with significant “family relationships” in the United States, and the Department later clarified that family relationships include “long-term same-sex partners.” This move represented the first time the Obama administration put in writing a policy that protects gay and lesbian couples that are threatened with deportation and family separation.\textsuperscript{53}

Still, with evidence that prosecutorial discretion is not being implemented well or uniformly—indeed, in the first year of the program, less than 2 percent of immigration cases reviewed by the Obama administration under the policy actually received prosecutorial discretion—it is very likely that the policy is not doing enough to protect LGBT undocumented families.\textsuperscript{54} Immigration reform that includes legal status and eventual citizenship for all undocumented immigrants living in the country would go a long way toward ensuring that the 267,000 undocumented LGBT immigrants do not see their families separated. Even if immigration reform fails to pass, however, the administration can take additional steps to protect this population such as expanding programs to cover LGBT families. It can expand, for example, the Deferred Action for Childhood Arrivals program, which allows undocumented youth to receive a two-year reprieve from deportation and a work permit.\textsuperscript{55}
Immigration enforcement and the LGBT undocumented population

The issues facing the LGBT immigrant population go beyond those that could be covered under an inclusive immigration reform bill—even one that provides a road map to citizenship and includes the Uniting American Families Act. Even with immigration reform, some people will inevitably come into contact with the immigration-enforcement system, including individuals who are LGBT.

This section looks at two of the critical enforcement issues facing the LGBT immigrant community. First, we examine how the U.S. detention system fails to provide an adequate level of safety and care to LGBT immigrants, who all too often experience discrimination, harassment, and physical sexual violence while in detention. Second, we examine the particular obstacles that LGBT asylum seekers face when seeking refuge from countries that persecute them based on their sexual orientation or gender identity.

LGBT detainees: Unique obstacles and challenges

Among the main consequences of our broken immigration system is the rise of immigration detention. Undocumented immigrants, asylum seekers, and even individuals with minor visa violations are among the thousands of people who are funneled into a decentralized system of privately run prisons, county jails, and federal facilities every year. According to the Global Detention Project, the United States possesses the largest immigration detention system in the world.\(^56\) In 2011 immigration officials placed 429,000 individuals in immigration detention centers across the United States, and over the past decade, a total of 3 million people have spent time in immigration detention.\(^58\)

Detention centers all too often foster less than humane conditions for detainees, who lack access to legal counsel, experience discrimination and harassment at the hands of detention officials and other detainees, are transferred without notice away from their families, and are denied a basic level of health care while in detention.
tion. The failure of our detention systems to provide an adequate level of safety and care to detainees is a problem for all immigrants. But LGBT immigrants may be especially impacted by the inhumane conditions of detention.

Though it is not possible to make precise estimates, of the over 400,000 men, women, and children that Immigration and Customs Enforcement detains each year, thousands are LGBT. And because many asylum seekers—40 percent of the entire immigrant detention population—are placed in mandatory detention while they await an asylum hearing, a significant number of LGBT asylum seekers languish in detention facilities each year.

Discrimination, harassment, and physical violence

When LGBT immigrants end up in mandatory detention facilities, they experience some of the worst forms of discrimination, harassment, and mistreatment, as well as denial of basic health care. These immigrants are sadly targeted for mistreatment because of their sexual orientation and gender identity. The National Immigration Justice Center points to clients such as Juan—a detainee who was sexually assaulted by two other detainees in part “because of his perceived effeminacy”—as an example of the mistreatment faced by LGBT immigrants in detention. According to the National Immigration Justice Center, “Despite repeated requests for a transfer to another facility because he feared for his safety [Juan] was not transferred until three months after the incident.” And among the remedies suggested at the Otero County Detention Center in New Mexico where Juan was being held, one guard “told him publicly, ‘Walk like a man, not like a gay man’”—as if that would stop Juan’s abuse.

Transgender detainees experience perhaps the worst forms of mistreatment. They are all too often misplaced in housing that is discordant with their actual gender identity. Transgender women, for example, are placed in male detention housing, and transgender men are placed in female detention housing. Because of this misplacement, transgender detainees are particularly vulnerable to physical and sexual victimization. This is especially true for transgender women who are incorrectly placed in male housing and subjected to invasive strip searches by male officers. According to one study from the University of California Irvine, sexual assault is 13 times more prevalent among transgender detainees than among the prison population as a whole, with fully 6 in 10 transgender detainees reporting being sexually assaulted by a detention official or another detainee.
While living in her home country of Mexico, Bamby was regularly beaten, sexually abused, and even incarcerated because she was transgender. Bamby came to the United States in 1985 at the age of 17 seeking asylum from persecution based on her gender identity. After making her claim in 2005, immigration officials placed Bamby in a U.S. detention facility while she waited for her asylum claim to be adjudicated.

While in detention, Bamby continued to experience discrimination, mistreatment, and physical violence based on her gender identity, much of it due to the fact that she was placed in male housing. Immigration officials failed to recognize that putting her in male housing would put her in danger of harassment and abuse at the hands of the other detainees. Bamby recalls being forced to shower alongside approximately 10 men, who according to Bamby, “laughed, some made hateful comments, and yelled out sexual remarks. It was completely embarrassing, degrading, and scary.” In one instance, a male detainee attacked her while she was in the bathroom and ended up fracturing her nose, among other injuries.

After being assaulted, Bamby was placed in administrative segregation (otherwise considered a punishment akin to solitary confinement) in an effort to protect her from physical and sexual victimization while in detention. As Bamby notes, most people are put in administrative segregation for misbehaving, but “as transgender people, we are placed in that unit because of who we are.”

Bamby’s story also illustrates the pitfalls of the arbitrary one-year deadline in immigration law. With little knowledge of U.S. law, Bamby did not know that she had to file for asylum prior to the one-year anniversary of her arrival within the United States. Asylum seekers filing after one year have to prove “extraordinary circumstances” which caused them to miss the one-year deadline. With no such circumstances, Bamby was unable to secure asylum.

Luckily, Bamby was granted “withholding of removal” status, which means an immigration judge determined that Bamby would be extremely likely to experience persecution if deported back to Mexico. Her new status means that she will not be deported, but it leaves her in legal limbo: withholding of removal status grants no right to apply for residency, a right that is conferred to individuals who have been granted asylum in the United States.

Bamby is just one of the many LGBT detainees and asylum seekers who face unique hardships and often insurmountable obstacles when encountering the immigration system. Even through these challenges, Bamby has been able to make a life for herself in America. She is now an advocate for her community, serving as President of the Translatin@ Coalition.
Segregation

In an effort to ensure the safety and care of detainees, Immigration and Customs Enforcement officials often opt to place LGBT detainees in administrative segregation rather than place them alongside other detainees, where they may be at increased risk for mistreatment. While detention personnel may be acting in what they consider to be the best interests of detainees, administrative segregation is otherwise considered a punitive measure similar to solitary confinement.63

LGBT detainees in administrative segregation can be kept in total isolation for up to 23 hours a day without access to library resources, outdoor recreation, or legal services that are otherwise available to detainees. Segregating LGBT detainees heightens a sense of helplessness and fosters depression, increasing the risk of self-harm. Administrative segregation also imposes limits on when and for what length of time detainees can visit with loved ones. While immigration officials may segregate LGBT detainees to protect them from potentially violent detainees, this policy clearly falls short, perpetuating the unequal treatment of detained LGBT immigrants.64

HIV-positive detainees denied health care

U.S. detention centers do a woeful job of providing a basic level of health care to detainees. In particular, HIV-positive detainees are among those who are systemically denied medication, refused access to mental health services, and given sub-standard health care from personnel while in state and local jails, private detention facilities, and publicly run detention centers.65

HIV-positive detainees face a number of obstacles in accessing life-saving drugs and treatments necessary to prevent the spread of the virus while in detention. In numerous instances, HIV-positive detainees have been denied medication such as antiretroviral drugs that suppress HIV and stop the progression of the HIV disease. Due to overcrowding and unsanitary detention conditions, many HIV-positive detainees acquire infections while in immigration custody but fail to receive proper treatment due to a lack of specialized medical care within the facility. Victoria Arrelano, a 23-year-old transgender HIV-positive immigrant, died in custody in a San Pedro detention center in 2007 after being denied essential medical care to treat her AIDS.66 HIV-positive detainees such as Arrelano have also been denied medication and life-saving treatments even when they had access to and relied upon those medications and treatments prior to arriving in deten-
tion. For these detainees, the denial of medication poses a significant threat to their health and longevity as people living with HIV.

Transgender detainees denied medically necessary services

Transgender detainees are denied a host of medically necessary services. Many transgender individuals who relied upon hormone therapies prior to their detention are denied access to those treatments—even though groups such as the American Medical Association and the American Psychological Association have affirmed that hormone therapy can be a medically necessary treatment for what is known as gender identity disorder. While the terminology of “disorder” is increasingly outdated, it describes the significant mental, emotional, and physical stress that transgender people experience when their outward sex conflicts with their inward sense of gender. Mirroring discrimination in health care that transgender people experience even outside of detention—such as outright denial of care—transphobic medical personnel may deny transgender detainees adequate health care, meaning that the medical needs of transgender detainees—whether a bout of the flu, a broken bone, or cervical cancer—all too often go unmet. And even if medical personnel are required to treat a detainee, it is possible that they may deliver suboptimal care—a form of medical-care discrimination transgender people also experience outside of detention.

For both HIV-positive and transgender detainees, these problems are compounded when detainees are transferred between detention facilities, which occurs frequently and often without notice. When this happens, detainees’ medical care is often interrupted, and they may go days without receiving any medication—or they may be transferred to another facility where that treatment and care is denied. For example, an HIV-positive patient may be given access to a daily regimen of antiretroviral medication at one facility—one that rightly serves the basic health care needs of its detainees—but he or she may be denied those drugs at another facility.

President Obama has acted to help LGBT detainees

Over the past four years, the Obama administration has instituted a number of reforms to the immigration detention system to make it more humane, safe, and
fair for immigrant detainees. Two of those reforms in particular have had a positive impact on addressing the specific problems and needs of LGBT detainees.

First, in March 2012 the Department of Homeland Security released new detention standards—titled “Performance-Based National Detention Standards”—that aimed to improve the treatment and condition of LGBT detainees. These standards contain a number of significant guidelines to help detention personnel identify LGBT detainees that are at a high risk for mistreatment—for example, recognizing that transgender individuals are especially vulnerable to discrimination and denial of medical services.

To mitigate mistreatment, the standards require that strip searches of transgender detainees be conducted in private and allow transgender immigrants to continue to receive medically necessary hormone therapy if they received it prior to being detained. Under these standards, immigration officials must not determine a transgender detainee’s housing based solely on their physical anatomy and instead house detainees in accordance with their gender identity. Importantly, the new detention standards also recognize the need to provide adequate health care to detainees living with HIV. This includes ensuring that “all FDA medications currently approved for the treatment of HIV/AIDS are accessible” to HIV-positive detainees.

In addition to these new standards, the Obama administration has taken further action to prevent the sexual abuse of detainees, including those who are LGBT. As part of the Prison Rape Elimination Act of 2003, the Department of Homeland Security issued a final rule in December 2012 that proposes standards for officials to be trained to prevent, detect, and respond to sexual abuse and assault in detention facilities. This training includes teaching officials “how to communicate effectively and professionally with detainees, including gay, bisexual, transgender, intersex, or gender nonconforming detainees.” The rule also says that detention facilities should consider whether an inmate’s sexual orientation or gender identity puts them at risk for sexual victimization, taking appropriate action to prevent abuse. This rule—like the 2012 Performance-Based Standards—should be closely monitored to ensure it is are fully implemented.
LGBT asylum seekers: Unique obstacles and challenges

Under the U.N. Convention on the Status of Refugees, individuals with a well-founded fear of persecution must be granted the right of asylum in other countries. In 1994 the U.S. government recognized persecution based on sexual orientation as grounds for attaining asylum status, and since that time it has included persecution based on gender identity. Even so, LGBT asylum seekers face specific challenges in the United States because of their sexual orientation and outdated standards for protection.

Nearly 80 countries have laws that in some way criminalize people who are LGBT. In five of those countries—Iran, Mauritania, Saudi Arabia, Sudan, and Yemen—the punishment for violating such laws is death. In addition to persecution codified in government laws, repressive societies may also threaten the safety of LGBT people when their sexual orientation or gender identity does not conform—or is not seen as conforming—to prevailing cultural, political, or social norms. Many homophobic and transphobic societies fail to provide adequate medical health care for individuals who are HIV-positive because of their sexual orientation and gender identity.

In both cases, the livelihoods of LGBT people are at stake, as they risk losing their job, face criminal penalties and imprisonment, are subject to medical abuse, and face the threat of honor killings or execution based on their sexual orientation or gender identity. As a result, many LGBT individuals have fled their home countries—and the human rights abuses within them—in search of countries that are safer and offer a more tolerant environment for LGBT people.

Since one’s sexual orientation and gender identity is not always readily apparent, LGBT asylum seekers are at risk of having their cases dismissed because they fail to conform to stereotypes about what it means to be a gay man or lesbian woman. In one particular case documented by Immigration Equality, a leading organization working with LGBT asylum seekers, an Albanian lesbian who had been threatened with gang rape to “cure” her of her lesbianism was denied asylum.
because she was young, attractive, and single. In cases such as this one, nonfeminine gay men and nonmasculine lesbian women have been denied asylum and deported back to their home country because they failed to conform to stereotypes of what it is to be a gay man or lesbian woman.

The one-year ban on asylum seekers is especially problematic for LGBT people

U.S. immigration law dictates that asylum seekers must file for asylum within one year of entering the United States. This arbitrary filing deadline has prevented many individuals from seeking affirmative asylum relief, and consequently, it has resulted in the denial of asylum protections to thousands of otherwise legitimate refugees. In fact, one study conducted by the National Immigrant Justice Center, Human Rights First, and Pennsylvania State Law’s Center for Immigrants’ Rights, found that in approximately 46 percent of cases where the filing deadline is an issue, it is the only reason cited by the Board of Immigration Appeals as justification for denial of asylum. Like all immigrants, far too many LGBT people are denied asylum based on this technicality. After years of living in societies that ask LGBT people to suppress their sexual orientation and gender identity, LGBT asylum seekers in the United States may not immediately come to terms with their identity. Immigration judges and asylum officers all too often fail to fully grasp the psychological aspects of enduring systematic trauma and repression and of being forced to flee a country as a result of one’s sexual orientation or gender identity. Developing a sense of one’s own sexual orientation or gender identity is an intensely personal and sensitive issue. Because of the one-year ban, LGBT people are often forced back to their home countries, where their lives are literally at risk because of persecution based on their sexual orientation or gender identity.

President Obama has taken steps to address issues facing LGBT asylees

The Obama administration has taken a number of steps to address the unique difficulties that LGBT refugees experience when articulating their claims for asylum. In the fall of 2011, the Department of Homeland Security created a training module on LGBT issues that is mandatory for all officers adjudicating refugee and asylum claims. This module, called “Guidance for Adjudicating LGBTI Refugee
This comprehensive guide for immigration officials lays out the appropriate terminology and questions to ask when discussing the deeply personal issue of a refugee’s sexual orientation or gender identity. The manual also instructs immigration officials not to rely on stereotypes of gay and lesbian individuals and includes specific examples of harm that may constitute persecution of LGBT people, as well as a nonexhaustive list of possible one-year filing-deadline exceptions that may apply for LGBT people, including recently “coming out” as LGBT.

When serious harm, gang rape, and even death are distinct possibilities that could result from persecution in one’s home country based on one’s sexual orientation or gender identity, it is critical that the United States remains a beacon of freedom and tolerance for all people with a well-founded fear of persecution, including individuals who are LGBT.
Recommendations

This report has illustrated many of the issues and burdens facing the nation’s approximately 267,000 LGBT undocumented immigrants. Beyond simply knowing the number of people who fall in this category, more research is needed both in terms of the types of obstacles and hardships they experience, as well as the policies that Congress and the administration can adopt to lessen those obstacles and hardships. With that caveat, we make the following recommendations to alleviate the burdens facing undocumented LGBT-identified immigrants:

**Pass immigration reform, that:**

**Includes a path to citizenship:** Legalizing the at least 267,000 undocumented immigrants who identify as LGBT and providing them with a roadmap to citizenship would give them the legal certainty that they will not be torn away from their families and communities, would give them the ability to work legally and earn higher wages, and would allow them the opportunity to become full and equal members of society.

**Ends discrimination against binational same-sex couples:** Including the provisions of the Uniting American Families Act in immigration reform would finally give U.S. citizens and permanent residents in same-sex couples the ability to sponsor their loved one for family-based immigration. If passed, the law would not only extend sponsorship rights to U.S. citizens and residents with same-sex spouses, but also those with committed same-sex partners, which is important considering that same-sex couples cannot marry in 41 states. For this reason, the Uniting American Families Act will be necessary even if Congress or the courts repeal the Defense of Marriage Act, the discriminatory law that prevents these couples from accessing family-based immigration preferences afforded to all other couples.

**Fixes and protects family-based migration:** On top of ensuring that LGBT immigrants are included in family reunification, immigration reform must do more to
fix and protect the family preference system. The over 4 million people stuck on backlogs waiting for a family visa must be granted a quick and reasonable path to reunification. Potential fixes include the Reuniting Families Act, which would, among other things, recapture visas that are lost to bureaucratic delay by allowing unused visa slots from one year to carry over into the next, and raise the per-country limits that restrict any one sending country to only 7 percent of all yearly visas (thus treating Mexico and Luxembourg equally, as if they were equal in size and circumstance.)

**Grants young people access to education and citizenship:** Including the provisions of the DREAM Act in immigration reform would put thousands of undocumented LGBT youth on an expedited roadmap to citizenship, giving them the ability to reach their full potential even sooner. Those who entered the United States prior to age 16 and are currently under the age 35 would be able to earn their citizenship by completing high school, and some college or U.S. military service.

---

**Repeal the federal Defense of Marriage Act**

One of the many reasons that Congress and the Supreme Court need to repeal the Defense of Marriage Act is to ensure that the government treats all families equally under existing immigration law. Congress can and should swiftly pass the Respect for Marriage Act, which would legislatively repeal the Defense of Marriage Act. Alternatively, in United States v. Windsor, a case currently pending before the Supreme Court, the Court could strike down the section of the law that denies federal benefits and protections to same-sex couples. The repeal of the Defense of Marriage Act would then allow the federal government to treat all families equally for the purpose of family-based immigration.

---

**Modify detention and asylum standards to address the issues facing the LGBT-identified community**

**Implement and vigorously enforce existing standards:** Over the past four years the Department of Homeland Security has issued guidance, rules, and regulations that promote the safety and wellbeing of LGBT detainees. The department has taken similar administrative actions to ensure that LGBT asylum seekers are treated with dignity and given a fair asylum hearing. While these policies are
significant steps forward on paper, the Obama administration must work to implement and enforce them in practice.

To reform detention standards, the administration should:

• Provide sensitivity training on a regular basis to detention staff working with LGBT detainees and create oversight to ensure compliance

• Ensure that detention staff understand their role in preventing, detecting, and responding to physical and sexual abuse of LGBT detainees

• Investigate allegations of abuse, discrimination, neglect, denial of medical services, and violence against detainees, including those who are LGBT

• Revoke the contracts of and funding for detention centers that fail to adequately implement and enforce these standards

• Provide increased access to legal services for people in detention, including those who are LGBT

Pass the Detainee Basic Medical Care Act: The Detainee Basic Medical Care Act would fill significant gaps in the detention health care system that have resulted in substandard medical treatment and even deaths among immigrant detainees. The proposed law contains a provision that requires immigration officials to ensure that immigrants continue to have access to medications prescribed prior to their detention, including those for transgender and HIV-positive detainees. Second, this bill gives immigration detainees with serious medical or health care conditions priority consideration for release on parole, on bond, or into an alternate to detention program, which again will benefit transgender and HIV-positive detainees. Third, and perhaps most importantly, by providing a basic floor of medical care to detainees this proposal would help to address the significant health issues and inequities facing the LGBT undocumented population.

Expand the use of alternatives to detention: To protect the most vulnerable detainees from mistreatment, particularly LGBT detainees, policymakers should consider alternatives to traditional detention such as house arrest or ankle monitors. These are commonsense cost-saving solutions that would advance the twin goals of monitoring the undocumented and protecting the most vulnerable
detainees from avoidable mistreatment. In fact, detentions cost taxpayers $122 per day or more, while alternatives to detention can cost as little as $12 per day, a savings that allows the detainee to remain with their family and community.\textsuperscript{83}

Another alternative to traditional detention for LGBT detainees includes creating special facilities that separate LGBT detainees from others in detention without placing them into administrative segregation. In 2012 the Department of Homeland Security created the country’s first dedicated “protective custody unit” for LGBT detainees.\textsuperscript{84} While creating new facilities for LGBT detainees is not optimal, it is better than putting LGBT detainees in solitary confinement or to putting them in harm’s way.

**End the one-year filing deadline for asylum seekers and ensure standards:** The one-year deadline to apply for asylum is arbitrary and has resulted in denying protections to thousands of otherwise legitimate asylum seekers. Because of the one-year ban, LGBT people are often forced to return to their home countries and risk persecution or death because of the sexual identity. Congress must repeal the one-year filing deadline and allow all people with a well-founded fear of persecution the right to asylum guaranteed by international law.

The Department of Homeland Security should also ensure the training included in its LGBT refugee manual is implemented in practice. All too often asylees are at risk of having their cases dismissed if they do not conform to stereotypes about what it means to be a gay man or lesbian woman. All asylum adjudicators must ensure that they give each and every asylum seeker a fair hearing, free of prejudice.
Acknowledgements

The authors of this report owe a debt of gratitude to CAP’s Immigration Policy team: Angela Kelley, Marshall Fitz, Patrick Oakford, and Sanam Malik. This report would not have been possible without their expertise and valuable advice. Similarly, Katie Miller, Winnie Stachelberg, and Jeff Krehely of CAP’s LGBT Policy team were instrumental in contributing to this report. Lastly, but certainly not least, this report would not have been possible without CAP’s brilliant Editorial, Art, and Communications teams.

About the authors

**Crosby Burns** is a Policy Analyst for the LGBT Research and Communications Project at American Progress. Crosby has helped develop American Progress’s strategic policy and communications agenda to advance equality and fairness for LGBT Americans through congressional and administrative action. Crosby has led American Progress’s efforts to combat employment discrimination based on sexual orientation and gender identity by advocating for laws and policies that extend legal workplace protections to the LGBT workforce.

While at American Progress, Crosby has also documented discrepancies in the higher-education financial aid system that impact applicants with same-sex parents—as well as LGBT applicants themselves. Additionally, Crosby monitored the Don’t Ask, Don’t Tell repeal process to ensure a swift and efficient implementation of repeal.

Prior to joining American Progress, Crosby worked at the U.S. Department of Justice, where he helped investigate mergers and acquisitions in the telecommunications and media markets. Crosby holds a bachelor’s degree in political science and psychology from the University of California, Berkeley. He will be attending Harvard University in the fall of 2013, where he will be pursuing his master’s degree in public policy at the John F. Kennedy School of Government.
Ann Garcia is a Policy Analyst for the Immigration Policy team at American Progress. Ann has helped American Progress develop a robust body of literature on the economic contributions of immigrants living in the United States. While at American Progress, she has also led numerous innovative projects that have informed the public and policymakers on a range of issues, such as the economic benefits of passing the DREAM Act and the harm done by anti-immigrant laws passed at the state level. Ann’s work has been featured in The New York Times, Colorlines, and The Hill. She holds a bachelor’s degree in international politics and economics from Middlebury College.

Philip E. Wolgin is a Senior Policy Analyst for the Immigration Policy team at American Progress. He has led the Immigration team’s work on programs such as E-Verify and directed report series such as the “Documenting the Undocumented” project. He holds a master’s degree and a doctorate in American History from the University of California, Berkeley, and a bachelor’s degree from New York University. Philip has been published in peer-reviewed journals, as well as in online publications such as The Huffington Post. He has also taught at the University of California Washington Center. He has also been involved with local D.C.-area immigration and refugee causes, volunteering with the Hebrew Immigrant Aid Society and the Central American Resource Center, or CARECEN.
Endnotes


2 In this report, the term “gay” is used as an umbrella term to describe people that identify as gay, lesbian, or bisexual.


8 Gates, “LGBT Adult Immigrants in the United States.”


10 For more information on methodology, see: Gates, “LGBT Adult Immigrants in the United States.”


12 Gates, “LGBT Adult Immigrants in the United States.”

13 Ibid.


18 The median household income for undocumented immigrants is $36,000, compared to $50,000 for the native born. See: Passel and Cohn, “A Portrait of Unauthorized Immigrants.”


20 Ibid; Passel and Cohn, “A Portrait of the Unauthorized.”

21 Grant and others, “Injustice at Every Turn.”

22 See, for example: Research from the Center for American Progress’s “FIRE Initiative,” which examines the lives of black LGBT Americans, showing that a double minority identity has an additive harmful effect on an individual’s financial and physical health. Families headed by black same-sex couples, for example, report lower earnings than both families headed by black heterosexual couples and families headed by white same-sex couples. Aisha C. Moodie-Mills, “Jumping Beyond the Broom: Why Black Gay and Transgender Americans Need More Than Marriage Equality” (Washington: Center for American Progress, 2012), available at http://www.americanprogress.org/issues/race/report/2012/01/19/10962/jumping-beyond-the-broom/.


Baker and Krehely, “Changing the Game.”

Menjívar and Abrego, “Legal Violence in the Lives of Immigrants.”


Ariel Eure, “The Defense of Marriage Act and Undocumented Immigrants: A Double Disadvantage for Bina

For more information on requirements for citizenship, see: U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, “Citizenship Through Naturalization” January 22, 2013, available at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=d84d6811264a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=d84d6811264a3210VgnVCM100000b92ca60aRCRD.


For more information on requirements for citizenship, see: U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, “Citizenship Through Naturalization” January 22, 2013, available at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=d84d6811264a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=d84d6811264a3210VgnVCM100000b92ca60aRCRD.


Graz Z. Gates, “LGBT Adult Immigrants in the United States.”


Personal communication via email from Lisa, February 26, 2013.


52 Movement Advancement Project, Family Equality Council, and Center for American Progress, “All Children Matter.”


55 For more information on the Deferred Action program, see: U.S. Citizenship and Immigration Services, “Consideration of Deferred Action for Childhood Arrivals,” available at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243da7543f6d1a/?vgnextcen=f2ef2f19470f7310VgnVCM100000082ca60aRCRD


59 Name withheld for privacy reasons.


64 Ibid.


67 Human Rights Watch, “Chronic Indifference.”


70 Ibid.


72 Ibid.


76 Ibid.


82 American Civil Liberties Union, “ACLU Welcomes Detainee Basic Medical Care Act.”

83 Detention Watch Network and Mills Legal Clinic, “Community-Based Alternatives to Detention”; Lutheran Immigration and Refugee Service, “Unlocking Liberty.”

84 Harmon, “Eight Months in Solitary.”
The Center for American Progress is a nonpartisan research and educational institute dedicated to promoting a strong, just, and free America that ensures opportunity for all. We believe that Americans are bound together by a common commitment to these values and we aspire to ensure that our national policies reflect these values. We work to find progressive and pragmatic solutions to significant domestic and international problems and develop policy proposals that foster a government that is “of the people, by the people, and for the people.”
The Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744) is a bi-partisan immigration reform bill with several components, including: (a) creating pathways to citizenship for undocumented youth and adults; (b) preserving family unity by clearing out green card backlogs; (c) expanding protections for asylum seekers and refugees; and (d) reforming immigration detention. However, the bill has significant gaps and problematic provisions that must be addressed before it can be truly comprehensive.

Why is immigration reform necessary?
Shortcomings and inequities in current United States immigration law impact an estimated 267,000 LGBT adult undocumented immigrants, of which an estimated 15,000 to 50,000 are transgender, along with their families. In a population that is already highly marginalized, transgender immigrants are among the most vulnerable to discrimination and violence, including in the immigration system itself. Often, transgender immigrants are disproportionately affected by problems in our current immigration system, especially with regard to family recognition and unification, asylum, detention, solitary confinement, and employer verification issues. We need immigration reform to address the systemic problems that affect all immigrants and especially those who suffer additional injustices because of their transgender status.

What additional reforms are needed?
Although the Senate’s current immigration reform bill contains many positive proposals, common sense immigration reform must include additional provisions that:

1. Make the pathway to citizenship realistic and accessible to transgender immigrants,
2. Help unify LGBT families by incorporating the Uniting American Families Act (UAFA),
3. Ensure that any employment verification system does not violate the privacy of trans workers, and
4. Decrease reliance on our wasteful and inhumane detention system and sharply limit solitary confinement.

How will immigration reform make the United States stronger?
Passing common sense immigration reform will strengthen our country economically and socially. Providing legal status to millions of undocumented workers will increase federal tax revenue, increase the GDP, and decrease the federal deficit because the influx of immigrants’ higher wages will help grow the economy. Including UAFA means that US citizens will not have to leave the country to be with their foreign-born partners while taking their talents and economic contributions with them. Enacting common sense immigration reforms will strengthen our families, our economy, our diverse culture, and our tradition of fair treatment and opportunity for all.
Per Curiam

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 15–674

UNITED STATES, ET AL., PETITIONERS v.
TEXAS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 23, 2016]

PER CURIAM.
The judgment is affirmed by an equally divided Court.
No. 15-674

In the Supreme Court of the United States

United States of America et al.,

v.

State of Texas et al.,

Petitioners,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL QUEER
ASIAN PACIFIC ISLANDER ALLIANCE,
INC., AND OTHERS AS AMICI CURIAE
SUPPORTING PETITIONERS

Glenn D. Magpantay
National Queer Asian
Pacific Islander
Alliance, Inc.
233 Fifth Ave., Ste. 4A
New York, N.Y. 10016
917.439.3158
Counsel for the National
Queer Asian Pacific
Islander Alliance, Inc.

James W. Kim
Counsel of Record
Lisa A. Linsky
Joshua D. Rogaczewski
Michael S. Stanek
Irene A. Firippis
Ellen S. Pyle
McDermott Will & Emery
LLP
500 N. Capitol St., N.W.
Washington, D.C. 20001
202.756.8000
jakim@mwe.com
Counsel for Amici Curiae
TABLE OF CONTENTS

TABLE OF AUTHORITIES ........................................ iii
INTERESTS OF AMICI CURIAE ................................. 1
SUMMARY OF ARGUMENT ..................................... 7
ARGUMENT .......................................................... 10

I. The Enjoined Programs Strengthen Family Unity and Support, Both of Which Are Essential to U.S. Citizen/Lawful Permanent Resident LGBT Children in Asian and Pacific Islander Communities ........................................ 10

A. U.S. LGBT Citizen/Lawful Permanent Resident Children Derive Significant Strength from Their Families .................. 12

B. Family Serves a Particularly Important Role in Asian and Pacific Islander Communities .......................................... 14

C. The Enjoined Programs Directly Impact U.S. LGBT Citizen/Lawful Permanent Resident Children in Asian and Pacific Islander Communities ........................................ 15

1. Example 1: Asian Family with an LGBT Citizen Child and an Undocumented Parent ...................................................... 16

2. Example 2: Undocumented Pacific Islander LGBT Immigrant over the Age of Thirty Who Arrived in the United States as a Child ........................................... 18
3. Example 3: Asian LGBT Immigrant Participant in DACA ..................................................... 19

II. Without the Enjoined Programs, Families with Undocumented Parents and LGBT Children Who Are U.S. Citizens/Lawful Permanent Residents Face a No-Win Decision ............................................................ 21

A. The United States Contains a Significant Network of Social Services for LGBT Individuals and This Nation’s Legal Regime Protects Significant LGBT Rights .......................................................... 22

B. The Cultural Homelands of the Asian and Pacific Islander Communities Do Not Protect LGBT Rights .................................................. 28

C. The Injunction in This Case Creates a No-Win Choice for LGBT Individuals in Families with Undocumented Members and Undocumented LGBT Individuals ..... 32

CONCLUSION ............................................................................................................. 38
# TABLE OF AUTHORITIES

**Cases**

*Avendano-Hernandez v. Lynch*,
  800 F.3d 1072 (9th Cir. 2015) .......................... 35

*Ayala v. U.S. Att’y Gen.*,  
  605 F.3d 941 (11th Cir. 2010) .......................... 35

*Bowers v. Hardwick*,  
  478 U.S. 186 (1986) ........................................... 34

*Byrum v. Landreth*,  
  566 F.3d 442 (5th Cir. 2009) .............................. 8

*Kadri v. Mukasey*,  
  543 F.3d 16 (1st Cir. 2008) ............................... 35

*Lawrence v. Texas*,  
  539 U.S. 558 (2003) ........................................... 34

*Loving v. Virginia*,  
  388 U.S. 1 (1967) ............................................... 23

*Maldonado v. Attorney Gen. of the U.S.*,  
  188 F. App’x 101 (3d Cir. 2006) .......................... 35

*Moab v. Gonzales*,  
  500 F.3d 656 (7th Cir. 2007) .............................. 35

*Morett v. Gonzales*,  
  190 F. App’x 47 (2d Cir. 2006) ............................ 35

*Nabulwala v. Gonzales*,  
  481 F.3d 1115 (8th Cir. 2007) ............................ 35

*Obergefell v. Hodges*,  
  135 S. Ct. 2584 (2015) ................................. 10, 11, 23, 33

*Razkane v. Holder*,  
  562 F.3d 1283 (10th Cir. 2009) .......................... 35
iv

*Sepulvado v. Jindal*,
729 F.3d 413 (5th Cir. 2013) ......................... 8

*Texas v. United States*,
809 F.3d 134 (5th Cir. 2015) ......................... 8

*Matter of Toboso-Alfonso*,
20 I. & N. Dec. 819 (BIA 1990) .......................33

*United States v. Windsor*,
133 S. Ct. 2675 (2013) ..................................24, 34

*Vitug v. Holder*,
723 F.3d 1056 (9th Cir. 2013) ......................... 35

**Federal Statutes and Rules**


Don’t Ask, Don’t Tell Repeal Act of 2010,

Higher Education Act of 1965, § 485, 20

Immigration and Nationality Act § 101, 8

National Defense Authorization Act for
Fiscal Year 2010, Pub. L. No. 111-84,
123 Stat. 2190 (2009) ........................................ 26

Omnibus Crime Control and Safe Streets
(Supp. II 2014) ............................................ 26

S. Ct. R. 37......................................................... 1

Violence Against Women Act of 1994,
§ 40002, 42 U.S.C. § 13925 (Supp. II
2014) .................................................... 26
Federal Regulation and Executive-Branch Material

8 C.F.R. § 208.4 (2015) .................................................. 36

Exec. Order No. 13,672, 3 C.F.R. 282
app. at 998 (Supp. II 2014) ......................... 26

Memorandum from the Attorney General
to the President Regarding
Implementation of United States v.
Windsor (June 20, 2014) ....................... 24, 25

State Statutes

Cal. Gov’t Code § 12920 (West Supp. 2016) ....... 27
Cal. Gov’t Code § 12921 (West Supp. 2016) ....... 27
Cal. Gov’t Code § 12940 (West Supp. 2016) ....... 27
Cal. Gov’t Code § 12944 (West Supp. 2016) ....... 27
Cal. Gov’t Code § 12949 (West Supp. 2016) ....... 27
775 Ill. Comp. Stat. 5/1-102 (2014) .............. 27
Md. Code Ann., State Gov’t § 20-602
(LexisNexis repl. vol. 2014) ....................... 27
Md. Code Ann., State Gov’t § 20-606
(LexisNexis repl. vol. 2014) ....................... 27
N.Y. Exec. Law § 296 (McKinney Supp.
2016), amended by Act of Oct. 21, 2015,
ch. 365, §§ 1–4 (Westlaw), and Act of
Oct. 21, 2015, ch. 369, § 2 (Westlaw) ........... 27
Wash. Rev. Code § 49.60.030 (2014) ...................... 27

**State Executive-Branch Material**

Exec. Order No. 12-02 (Wash. June 20, 2012) .......................................................... 27

**Other Authorities**


Randy Capps et al., *Deferred Action for Unauthorized Immigrant Parents: Analysis of DAPA’s Potential Effects on Families and Children* (Feb. 2016) ...................... 9


Tony Choi, Remarks at NQAPIA Press Conference at U.S. Court of Appeals for the Second Circuit (Apr. 15, 2012) ..............20, 21


Angeliki Kastanis & Gary J. Gates, *LGBT Asian and Pacific Islander Individuals and Same-sex Couples* (n.d.)................................. 15


NQAPIA, *Uncovering Our Stories: Sandy* (July 23, 2013) ......................................................... 17

Yolanda Padilla et al., Parental Acceptance and Illegal Drug Use Among Gay, Lesbian, and Bisexual Adolescents: Results from a National Survey, 55 Social Work 272 (2010)................... 11

Caitlin Ryan, Supportive Families, Healthy Children: Helping Families with Lesbian, Gay, Bisexual & Transgender Children (2009) ................. 12, 13


  Programme, Being LGBT in Asia: the
  Programme, Being LGBT in Asia:
  Programme, Being LGBT in Asia: Viet
  Nam Country Report (2014) .......................... 30
U.S. Citizenship & Immigration Servs.,
  Dep’t of Homeland Sec.,
  Implementation of the Supreme Court
  Ruling on the Defense of Marriage Act
  (July 1, 2013) ............................................. 25
Jose Antonio Vargas, Bio (n.d.) ........................ 18
The National Queer Asian Pacific Islander Alliance, Inc., is a federation of organizations serving lesbian, gay, bisexual, and transgender (“LGBT”) individuals with Asian American, South Asian Southeast Asian, and Pacific Islander (“Asian and Pacific Islander”) backgrounds. NQAPIA seeks to strengthen local LGBT groups for Asians and Pacific Islanders by building their organizational capacity, developing their leadership, promoting their visibility, educating their respective communities, enhancing recruitment of their members, and expanding their collaborations with other organizations. In addition, NQAPIA challenges homophobia and racism wherever it finds them. Many LGBT individuals of Asian and Pacific Islander descent are members of families with undocumented members.

API Chaya supports Asian, South Asian, and Pacific Islander survivors and families impacted by domestic violence and sexual assault, as well as human trafficking survivors from all communities. API Chaya engages communities to change societal conditions that enable domestic and sexual violence, human trafficking, and all forms of oppression, especially violence against women and the most vulnerable in our society.

---

1 As demonstrated by the consent letters accompanying it, all parties have consented to the filing of amici’s brief. See S. Ct. R. 37.3(a). No counsel for a party authored this brief in whole or in part; no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. See id. R. 37.6.
The Asian Pacific Islander Pride of Portland promotes the visibility and the just treatment of the LGBT Asian Pacific Islander community. It provides education and advocacy in the larger Asian and Pacific Islander, sexual-minority, and mainstream communities on issues affecting its constituency. It also creates and provides a welcoming, inclusive, and safe space wherein these individuals can find connection with others with common ground and background. Further, it provides social opportunities and other activities wherein these individuals can find mutual support. Finally, it educates its members about issues that affect its constituency and empowers the members to meaningfully, constructively, and successfully address the challenges of those issues.

The Bay Area Lawyers for Individual Freedom is a bar association of more than 600 LGBT members of the San Francisco Bay Area legal community. As the nation’s oldest and largest LGBT bar association, BALIF promotes the professional interests of its members and the legal interests of the LGBT community at large. To accomplish this mission, BALIF actively participates in public-policy debates concerning the rights of LGBT individuals. BALIF frequently appears as amicus curiae in cases, like this one, in which it can provide valuable perspective and argument on matters of broad public importance.

Familia: Trans Queer Liberation Movement is the only national organization that addresses, organizes, educates, and advocates for the issues most important to its LGBT and Latino communities. The organization is inclusive and serves all LGBT Latinos, Latinas, and gender-nonconforming
individuals. It also collaborates with non-LGBT families and friends who support its vision of a united LGBT Latino and Latina community.

The Gay Asian and Pacific Islander Men of New York (“GAPIMNY”) was founded in 1990 and is an all-volunteer, membership-based community organization that provides a range of political, social, educational, and cultural programming. GAPIMNY works in coalition with other community organizations to help educate its communities on issues of race, sexuality, gender, and health. Its mission is to empower LGBT Asian and Pacific Islander people to create positive change.

The Gay Asian Pacific Alliance in San Francisco Bay Area is an organization dedicated to furthering the interests of LGBT Asian and Pacific Islanders by creating awareness, developing a positive collective identity, and establishing a supportive community.

hotpot! Philly is a Philadelphia-based group working to build community for LGBT Asian and Pacific Islanders through social gatherings, political action, and good food.

Immigration Equality is the only national organization focused entirely on representing LGBT and HIV-affected immigrants and their families. Immigration Equality coordinates a pro bono asylum project, provides technical assistance to attorneys, maintains an informational website, and fields questions from LGBT and HIV-affected individuals from around the world. Immigration Equality has provided trainings to asylum officers on asylum claims based on sexual orientation and gender identity, and co-authored the leading manual on
the subject. The organization currently has nearly 550 open LGBT–HIV asylum cases.

The Lesbian, Gay, Bisexual and Transgender Community Center in New York City fosters a welcoming environment where everyone is celebrated for who they are. The Center offers the LGBT communities of New York City health and wellness programs; arts, entertainment, and cultural events; and recovery, wellness, parenthood, and family support services.

The National Center for Transgender Equality, founded in 2003, is dedicated to improving the lives of transgender people and ending discrimination and violence through advocacy, education, and collaboration. NCTE works with Congress, federal agencies, and state and local advocates and stakeholders to advance public policies that will improve transgender people's lives in areas including employment, health care, housing, and education.

The National LGBTQ Task Force advances full freedom, justice, and equality for LGBT people.

PFLAG, Inc., is the nation’s largest LGBT family and ally nonprofit organization, with more than 200,000 members and supporters and 400 affiliates, including seven chapters in Maryland. PFLAG’s members are parents, children, grandparents, siblings, and friends of LGBT individuals. Founded in 1972, PFLAG is committed to advancing equality and full societal affirmation of LGBT people through its threefold mission of support, education, and advocacy.

The Queer Asian Pacific-Islander Alliance in Boston is committed to providing a supportive so-
cial, political, and educational environment for LGBT people of Asian and Pacific Islander heritage in the Boston and New England areas.

SALGA-NYC serves to promote awareness, acceptance, empowerment, and safe inclusive spaces for people of all sexual and gender identities, who trace their heritage to South Asia or who identify as South Asian. SALGA-NYC is a not-for-profit, all-volunteer organization, serving the South Asian LGBT community. Its mission is to enable community members to establish cultural visibility and take a stand against oppression and discrimination in all its forms.

Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders (“SAGE”) is a national organization that offers supportive services and consumer resources to LGBT older adults and their caregivers, advocates for public-policy changes that address the needs of LGBT older people, and provides training for aging providers and LGBT organizations. In partnership with constituents and allies, SAGE works to achieve a high quality of life for LGBT older adults, supports and advocates for their rights, fosters a greater understanding of aging in all communities, and promotes positive images of LGBT life in later years.

Southerners on New Ground (“SONG”) is a regional queer-liberation organization made up of people of color, immigrants, undocumented people, people with disabilities, working-class, rural, and small-town LGBT people in the South. SONG believes that its members are bound together by a shared desire for themselves, each other, and their communities to survive and thrive. SONG believes
that community organizing is the best way for the group to build collective power and transform the South. Out of this belief SONG is committed to building freedom movements rooted in southern traditions like community organizing, political education, storytelling, music, breaking bread, resistance, humor, performance, critical thinking, and celebration.

The Transgender Law Center changes law, policy, and attitudes so that all people can live safely, authentically, and free from discrimination regardless of their gender identity or expression.

The mission of the Trevor Project is to end suicide among LGBT young people. The organization works to fulfill this mission through four strategies: (1) providing crisis counseling to LGBT young people thinking of suicide; (2) offering resources, supportive counseling, and a sense of community to LGBT young people to reduce the risk that they become suicidal; (3) educating young people and adults who interact with young people on LGBT-competent suicide prevention, risk detection, and response; and (4) advocating for laws and policies that will reduce suicide among LGBT young people.

UTOPIA Seattle’s mission is to promote unity and strength among the Polynesian LGBT community; provide support and guidance to youths regarding sexual orientation and how it is viewed within the Polynesian culture; provide awareness to the LGBT, Polynesian, and greater community on issues regarding the prejudices and difficulties LGBT Polynesians face and to propose potential solutions; offer a referral service to Polynesians to help them address problems they face as recent
immigrants to the United States; and share culture with the greater community through traditional songs and dance.

VAYLA is a progressive multi-racial community-based organization in New Orleans that empowers youth and families through supportive services and organizing for cultural enrichment and positive social change.

Amici have long supported immigration rights and deferred-action programs like the ones enjoined in this case.

SUMMARY OF ARGUMENT

The Fifth Circuit affirmed a district court preliminary injunction, pending trial, forbidding expansion of the Deferred Action for Childhood Arrivals policy (“DACA”) and implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents program (“DAPA”). As the government explained in its petition, the Enjoined Programs represented the Executive Branch’s attempt to balance the enforcement of federal immigration law, Congress’s direction to focus on serious criminals and terrorists, and the reality that Congress had appropriated insufficient funds to eject all undocumented aliens from the United States. (Pet. 8–10.) In particular, the Enjoined Programs allowed undocumented parents of U.S. citizens and lawful permanent residents to seek—and the Executive Branch to grant on a case-by-case basis—deferred action on their immigration status. (Id.)

2 Amici refer in their brief to the expansion of DACA and the implementation of DAPA as “the Enjoined Programs.”
The Fifth Circuit affirmed this decision based, in part, on a conclusion that “[t]he states have shown ‘that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted.’ The states have alleged a concrete threatened injury in the form of millions of dollars of losses.” *Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015) (Pet. App. 86a) (quoting *Sepulvado v. Jindal*, 729 F.3d 413, 417 (5th Cir. 2013) (quoting *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009))). Similarly, the Fifth Circuit also held:

The states have also sufficiently established that “an injunction will not disserve the public interest.” *Sepulvado*, 729 F.3d at 417 (quoting *Byrum*, 566 F.3d at 445). . . . The main difference is that, instead of relying on their financial interests, the states refer to the public interest in protecting separation of powers by curtailing unlawful executive action.

. . . The interest the states have identified cannot be, given the difficulty of restoring the *status quo ante* if DAPA were to be implemented. The public interest easily favors an injunction.

*Id.* at 187 (Pet. App. 88a) (footnote omitted).

In rendering its decision, the Fifth Circuit over-stated the alleged harm caused by the Enjoined Programs on certain states and minimized the actual harm that the injunction would inflict, and has inflicted, on undocumented LGBT individuals as
well as U.S. citizen/lawful permanent resident LGBT children with undocumented parents. In doing so, the court ignored the specific harms resulting from the injunction that adversely impact the population of undocumented persons in the United States and their families.

A recent study by the Migration Policy Institute places the number of undocumented adults with children eligible for DAPA at 3.6 million undocumented individuals caring for over 4.3 million U.S. citizen/lawful permanent resident children. In the case of Asian and Pacific Islander LGBT individuals, these sub-populations are particularly vulnerable to the disruption to the family structure that the injunction creates.

The Enjoined Programs, at their core, strengthen family unity and support, both of which are essential to LGBT individuals in Asian and Pacific Islander communities. The injunction places at risk of deportation DACA-expansion-eligible individuals as well as DAPA-eligible parents, putting children, a population particularly dependent on social and familial support, at risk of significant injury due to lack of support by separating them from their parents. The United States recognizes in its Constitution the dignity of LGBT individuals and their families and provides them with fundamental protections and rights. Without the Enjoined Programs, DACA-expansion-eligible LGBT individuals are

---

forced into situations where they may be forced to move to a country where they will be subject to harassment, violence, and potential legal prosecution. Similarly, families consisting of DAPA-eligible undocumented parents and U.S. citizen/lawful permanent resident LGBT children are being forced into an unenviable decision—choosing between leaving the safety of the United States and traveling with their children to a potentially dangerous legal and social environment, or leaving the United States without their children, who would remain alone in this country, stripped bare of critical family support, and in many cases unable to survive on their own.

ARGUMENT

I. The Enjoined Programs Strengthen Family Unity and Support, Both of Which Are Essential to U.S. Citizen/Lawful Permanent Resident LGBT Children in Asian and Pacific Islander Communities.

As this Court recognized in *Obergefell v. Hodges*:

[M]any same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Childhood and adolescence are periods of profound physical, cognitive, and social development, and include the development of sexual identity. This development has been shown to directly affect a child’s emotional and psychosocial well-being. During this period of development children and adolescents find support from their parents, families, and caregivers.

For children, regardless of sexual orientation or ethnicity, the link between social support and health is well established. Evidence suggests that parental support is a vital source of social support for young people, particularly within the LGBT community, where LGBT children face developmental challenges with a stigmatized identity. Social stigma associated with homosexuality and deviation from gender roles remains prevalent, especially for young people. Parental support for children is even stronger in the Asian and Pacific Is-

---


5 Belinda L. Needham & Erika L. Austin, Sexual Orientation, Parental Support, and Health During the Transition to Young Adulthood, 39 J. Youth & Adolescence 1189, 1190 (2010).


lander community as the societal emphasis is on loyalty to the family first; the family unit is the primary center for support, including religious, economic, political, and social mores.8

The disruption of the strength of the family bond created by the injunction puts children, a population particularly vulnerable and dependent on social support, at risk of significant injury due to lack of familial support by placing undocumented parents of these U.S. citizens/lawful permanent residents at risk of deportation.9

A. U.S. LGBT Citizen/Lawful Permanent Resident Children Derive Significant Strength from Their Families.

Parents, families, foster parents, caregivers, and guardians have very dramatic impacts on the health and well-being of their LGBT children.10 Research strongly supports the correlation between a family’s connectedness and support of an LGBT child and that child’s physical and mental health. For example, a recent study suggested that “sexual minorities” may have worse health-related out-

---


9 Even when families do not support their LGBT children and estrangement occurs, such children understandably hope for reconciliation with their families, and the Enjoined Programs increase the opportunity for such reconciliation.

comes during adolescence because they report lower levels of “family connectedness,” a key protective resource. Researchers have also concluded that Asian American LGBT youth in the Midwestern United States who perceived lower levels of family caring and had negative perceptions of the climate in their schools reported lower self-esteem, resulting in greater emotional distress.

Other studies suggest that the manner in which parents react to their LGBT children’s sexual or gender identity can significantly affect their children’s physical and mental health. Scientific studies have established a clear link between specific parental and caregiver rejecting behaviors and negative health problems in lesbian, gay, and bisexual adults. A family’s attitudes, behaviors, and interactions have been shown to clearly apply to the LGBT adolescent’s physical and emotional states. Research proves that connections to family have been shown to prevent major health risk behaviors.

The Enjoined Programs strengthen family support, which is critical to the health and well-being of LGBT youth. Forcing LGBT youth into rejection-type situations, such as family division due to deportation or removal from the United States, will

---

11 Needham & Austin, supra note 5, at 1190.


14 Id.

15 Id.
deprive them of family connectedness that is essential for their healthy development and well-being.

**B. Family Serves a Particularly Important Role in Asian and Pacific Islander Communities.**

The risk of family separation that the Enjoined Programs manage—and the district court’s injunction enhances—affects Asian and Pacific Islander LGBT children acutely, because in their communities the family is one’s primary obligation and first loyalty, as well as the center for religious, economic, political, and social mores.

Asian and Pacific Islander families emphasize interdependence among family members, stressing self in relation to others within the family. The family is the central focus of Asian culture, so much so that some have asserted that the family is considered the prototype for all relationships.\(^\text{16}\) Asian children are taught from an early age that family relationships and obligations are a primary obligation. Accordingly, these children mature with a deep sense of obligation and loyalty to the family unit, which is put first before all others.\(^\text{17}\)

The Asian and Pacific Islander child–parent relationship is also shaped by this cultural emphasis on interdependence among family members.\(^\text{18}\) Asian and Pacific Islander family obligation ex-

---

\(^{16}\) Markus & Kitayama, *supra* note 8, at 241.

\(^{17}\) *Id.*

tends to all family members’ care obligations: children care for aging adults; adults care for children and younger siblings.

This increased reliance and dependence on family relationships makes it even more critical in Asian and Pacific Islander families with LGBT children that parents be present to foster acceptance, an attribute proven to lead to healthy young adulthood. This is demonstrated in the fact that more than one in four Asian and Pacific Islander same-sex couples raise children, a rate which is projected to continue to grow based on these social and cultural norms.19

This cultural emphasis on family interdependence makes even more acute the negative effects of the lower court’s injunction on the child–parent relationship for Asian-Pacific Islander families with U.S. citizen/lawful permanent resident children.

C. The Enjoined Programs Directly Impact U.S. LGBT Citizen/Lawful Permanent Resident Children in Asian and Pacific Islander Communities.

There are an estimated 267,000 undocumented LGBT immigrants in the United States, of which a disproportionate share are from Asian and Pacific

---

Islander communities. The manner in which the Enjoined Programs preserve family relationships and protect some of the most vulnerable members of our population is best illustrated by several examples of Asian and Pacific Islander LGBT individuals who could substantially and materially benefit from the Enjoined Programs.

1. Example 1: Asian Family with an LGBT Citizen Child and an Undocumented Parent.

Sandra Meetran, a sixteen-year-old student, currently resides in Rhode Island. Sandra and her sister are natural-born U.S. citizens. Sandra’s family is from Laos, and Sandra’s father and mother were undocumented in the United States, having overstayed their visitor visas. Sandra’s father was deported to Laos when she was in middle school, at a time when she was realizing that she was gay. According to Sandra:

> When I was first starting to question my sexuality, my dad was suddenly taken away from my family and me. He got sent away and was placed in ICE holding for four to five months. . . . My dad was taken from me when I was really young. I didn’t know what to do about it. It was devastating to me because it meant my dad wasn’t going to watch me grow up. He missed

---

my middle school graduation, he’s going to miss me driving for the first time, and he’s going to miss me graduating from high school and maybe even college. He’s missing all the things a father needs to see.21

After Sandra’s father was deported, the disruption to the family structure resulted in additional pressures being shifted to Sandra and her mother, who remains at risk of potential deportation as well. In Sandra’s own words,

My dad has spent the last couple years in Laos. He has no job, and his only income is money my mom sends him, maybe a few hundred dollars. My mom becomes depressed and suffers from bad heart problems. She is overworked and very stressed because of all the responsibilities she had to take on after my dad was deported. Ever since this happened our family has fallen into poverty.

Id.

Sandra’s parents, as undocumented parents of an Asian LGBT child who is a citizen of the United States, may have been eligible to benefit from the Enjoined Programs’ familial protections. Sandra’s father and mother could have had the opportunity to remain in the United States under the DAPA program, and provide the financial and psychologi-
cal support necessary for success for any child who identifies herself as part of the LGBT community. Instead, Sandra’s story serves as an example of how the Enjoined Programs directly and uniquely benefit some of the most vulnerable portions of the population, and of the direct negative consequences of the injunction, factors ignored in the Fifth Circuit’s decision.

2. Example 2: Undocumented Pacific Islander LGBT Immigrant over the Age of Thirty Who Arrived in the United States as a Child.

Jose Antonio Vargas is a thirty-four-year old Pulitzer-prize winning journalist, filmmaker, and media producer who resides in Los Angeles, California. He is the founder of Define American, a non-profit media and culture organization that seeks to elevate the conversation around immigration and citizenship in America; and the founder and editor of #EmergingUS, a digital platform that lives at the intersection of race, immigration, and identity in a multicultural America. Jose has received numerous additional accolades for his work, including the Public Service Award from the National Council of La Raza, the country’s largest Latino advocacy organization; the Salem Award from the Salem Award Foundation, which draws upon the lessons of the Salem Witch Trials of 1692; the Freedom to Write Award from PEN Center USA; and an honorary Doctor of Letters from Colby College.22

Jose is also an undocumented LGBT individual. Jose first arrived in the U.S. in 1993 at the age of twelve from the Philippines, sent by his mother to live with his grandparents in California. It was not until four years later when Jose applied for a driver’s license at the age of sixteen that he realized that he was undocumented—his grandparents had purchased a set of documents to facilitate his arrival in the United States.

Based on his age, Jose was ineligible for the initial DACA program, missing the deadline by four months. Jose is, however, eligible for participation in expansion of DACA, which would give him the chance to visit his mother in the Philippines for the first time in over two decades and permit him to continue his successful career in the United States. In contrast, the district court’s injunction puts Jose at continued risk of physical violence, bigotry, and pervasive discrimination in social life and the workplace against LGBT individuals if deported to the Philippines, or if he were to leave the country to visit his mother.

Jose’s story is one example of the many LGBT adults over the age of thirty eligible for the DACA expansion who despite significant cultural and economic contributions to the United States, continue to be at risk of deportation and personal risk based on the district court’s injunction.

3. **Example 3: Asian LGBT Immigrant Participant in DACA.**

Tony Choi is a twenty-four-year old gay South Korean undocumented beneficiary of the DACA program who lives in Little Ferry, New Jersey. Tony originally arrived in the United States at the
age of eight with his family “in the aftermath of the Asian financial crisis that had wiped away our hopes and dreams. So we moved to the United States to start anew.”

He graduated college in 2011, with a major in Spanish and political science and is active with the immigrant community.

Tony’s own words best capture how DACA personally benefitted him as an undocumented gay Asian-American:

In 2010, after the failure of the DREAM Act in a Democratic controlled Senate and my mother’s cancer diagnosis, I had lost hope. The choices ahead of me were to live a closeted life taking care of my mother or to return to Korea where my LGBT identity would subject me to harsh hazing for two years in the mandatory military service.

Instead, I chose a third option to speak out and advocate for my community when everyone was saying that the legislative pathway to citizenship was dead. As a result of collaborative actions taken by other undocumented youth like me, President Obama announced Deferred Action for Childhood Arrivals, DACA. Since then, I have helped dozens of other undocumented youth find reprieve through DACA and continued working

---

to halt deportations. I’ve also just Because of this measure, I was able to file taxes for this year as well.24

Tony’s story illustrates how the DACA program protects Asian and Pacific Islander LGBT individuals from potential harassment and discrimination in their home countries and, in turn, how the Enjoined Programs could provide the same benefits to an even greater population of vulnerable individuals and their families.

II. Without the Enjoined Programs, Families with Undocumented Parents and LGBT Children Who Are U.S. Citizens/Lawful Permanent Residents Face a No-Win Decision.

The injunction in this case—which nullifies the protections of the announced Enjoined Programs—places U.S. citizen/lawful permanent resident LGBT children with undocumented parents in extremely difficult circumstances. It presents parents with an impossible decision: leave the United States with their children and go to the potentially dangerous legal and social environment of their home countries, or leave the United States with their children remaining alone here, thus putting their children at risk due to lack of family support.

In cases of LGBT individuals, particularly those from Asian and Pacific Islander countries, forcing families to choose between keeping the family together by returning to their home countries or leaving the LGBT child here on his or her own without parental support places the LGBT child at signifi-

24 Id.
cant personal and legal risk due to the legal and social environment. The system of legal protections and social services available to LGBT individuals in the United States is vastly superior to those of many of the anti-LGBT home countries to which Asian and Pacific Islander families will be forced to return. Indeed, for many LGBT young people, doing so is tantamount to a death sentence.

A. The United States Contains a Significant Network of Social Services for LGBT Individuals and This Nation’s Legal Regime Protects Significant LGBT Rights.

Through its history, the United States has proudly held itself to be a place of freedom and opportunity for immigrants from around the world, for the “huddled masses, yearning to be free.”25 This promise has had particular truth for immigrants from certain minority groups seeking to flee persecution and violence in their native countries. The Constitution’s protections of the free exercise of religion, expression, and speech, and the due-process and equal-protection guarantees afforded to racial and ethnic minorities have allowed countless religious and ethnic minorities to find safe harbor in the United States since our nation’s founding. Today, the United States is a nation that also recognizes the dignity of LGBT immigrants and their families under federal law and the Constitution, allowing them to pursue the full promise of the

American dream that so many seek when they immigrate to our country.\footnote{Obergefell, 135 S. Ct. at 2599.}

The Constitution has been held to guarantee LGBT families the right to the same legal recognition afforded to heterosexual marriages by the United States government and the states.\footnote{Id.} In recognizing that same-sex marriage is protected by the Fifth and Fourteenth Amendments of the U.S. Constitution, this Court found that marriage is central to the human condition, “[r]ising from the most basic human needs,” and “essential to our most profound hopes and aspirations.”\footnote{Id. at 2594.} Having long held that the right to marry is a fundamental constitutional right, the Court found that choices about marriage and family “shape an individual’s destiny,” by allowing a married couple, regardless of sexual orientation, to pursue other core freedoms such as expression, intimacy, and spirituality.\footnote{Loving v. Virginia, 388 U.S. 1, 12 (1967); Obergefell, 135 S. Ct. at 2599.} The Court also found that guaranteeing the right for LGBT couples to marry “safeguards children and families,” by affording recognition and legal structure to the familial relationship.\footnote{Obergefell, 135 S. Ct. at 2600.} Marriage equality, simply put, brings permanency and stability to LGBT families, which the Court found erases the stigma that children suffer when their families are not fully recognized under the law.\footnote{Id.}
LGBT families in the United States are also afforded a significant number of federal benefits, rights, and protections, in accordance with the Constitution’s recognition of the equality and dignity afforded LGBT individuals under the law of this country. In United States v. Windsor, the Court recognized a guiding principle that the Constitution mandates recognition of the dignity of LGBT people under our laws. There are 1,138 benefits, rights, and protections provided on the basis of marital status under federal law in the United States. In accordance with the Windsor decision, the federal government has since made available a number of additional significant benefits to LGBT couples and families.

Following the decision, the Executive Branch directed federal agencies to make the promise of Windsor a reality, and began working to identify “every federal law, rule, policy, and practice in which marital status is a relevant consideration.” Following the President’s directive to the federal government, the Department of Homeland Security “directed U.S. Citizenship and Immigration Ser-

32 133 S. Ct. 2675, 2696 (2013) (finding DOMA was “invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity”).


vices (USCIS) to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse.”35 Similarly, DHS guidance recognized same-sex spouses for refugee status and asylum.36 In addition, the Social Security Administration now processes retirement benefit claims based on same-sex marriages, in accordance with Windsor.37 The federal government now treats LGBT families equally with regard to Supplemental Nutrition Assistance Program eligibility, recognizes LGBT families for federal student financial aid programs, recognizes LGBT families for Medicaid and Children’s Health Insurance Program eligibility, grants LGBT families equal access to Affordable Care Act exchanges, and recognizes same-sex spouses under the Family and Medical Leave Act.38 LGBT veterans’ spouses and surviving spouses now have equal access to veterans’ benefits, and lesbian and gay service members can serve openly in America’s armed forces following the repeal of “Don’t Ask, Don’t Tell.”39


36 See Memorandum from the Attorney General to the President, supra note 34, attach. at 4–5.

37 See id. attach. at 13.

38 Id. attach. at 1–3, 6, 12.

While LGBT individuals are not uniformly protected by a federal nondiscrimination law, Congress passed hate-crime legislation in 2009 to protect LGBT individuals by expanding existing law to include crimes motivated by a victim’s actual or perceived gender, sexual orientation, gender identity, or disability.\textsuperscript{40} The federal government has also implemented nondiscrimination policies for federal workers and contractors.\textsuperscript{41} In July 2014, the President amended earlier executive orders regarding equal-employment opportunity in the federal government and in federal contracting by adding sexual orientation and gender identity to the lists of protected categories.\textsuperscript{42} Further, LGBT victims of domestic violence in the United States now receive federal protections and substantial support under programs authorized by the Violence Against Women Act.\textsuperscript{43}

In addition to federal protections and benefits, many state and local jurisdictions afford protec-
tions and benefits to LGBT people and their families. While some states with significant populations of undocumented immigrants, such as Texas and Arizona, do not afford protections from discrimination on the basis of sexual orientation, many states with significant populations of individuals eligible for DAPA or DACA have robust nondiscrimination protections for people on the basis of sexual orientation, gender identity, or both.

44 The Migration Policy Institute estimates that approximately 3.6 million individuals are potentially eligible for the deferred action under the DAPA program. See Migration Policy Inst., National and State Estimates of Populations Eligible for DAPA and DACA Programs, 2009–2013 (n.d.), available at http://www.migrationpolicy.org/sites/default/files/databank/DACA-DAPA-2013State%20Estimates-Spreadsheet-FINAL.xlsx. The Migration Policy Institute further estimates that approximately 559,000 individuals eligible for DAPA live in Texas and 97,000 live in Arizona. Id.

B. The Cultural Homelands of the Asian and Pacific Islander Communities Do Not Protect LGBT Rights.

The climate for LGBT individuals remains largely dangerous throughout the world outside the United States. Worldwide there are seventy-five countries where same-sex sexual acts are illegal.\textsuperscript{46} Homosexual activity remains punishable by the death penalty in seven countries: Iran, Mauritania, the northern provinces of Nigeria, the southern regions of Somalia, Saudi Arabia, Sudan, and Yemen.\textsuperscript{47} Pakistan, Afghanistan, and Qatar also have death-penalty statutes for same-sex conduct, but these statutes are not generally used.\textsuperscript{48} In Yemen, sex between women is punishable by up to three years in prison and one hundred lashes; sex between men is punishable by whipping, imprisonment, and death by stoning.\textsuperscript{49}

Furthermore, the Asia-Pacific region of the world is of particular concern as the legal and soci-
etal norms are overwhelmingly anti-LGBT in many of these countries, including, but not limited to:

- **Malaysia**, where whipping is condoned for homosexual acts.\(^{50}\)

- **China**, where its LGBT population experiences violence and discrimination in society as well as within their own familial structure.\(^{51}\) Bullying of LGBT youth in schools is also common in China; a survey conducted in 2012 revealed that 77 percent of respondents had encountered bullying based on sexual orientation or gender identity.\(^{52}\)

- **South Korea**, where pervasive societal discrimination coupled with the absence of any comprehensive antidiscrimination law make many in the LGBT community conceal their sexuality.\(^{53}\)

---


\(^{53}\) Immigration and Refugee Board of Canada, *Korea, Republic of: Treatment of Homosexuals, Including Legislation,*
Nepal, which lacks laws against discrimination and LGBT individuals report facing discrimination and abuse in employment. Despite recent recognition of a “third gender” for people who do not identify as male or female, Nepal lacks legislation to protect LGBT individuals from violence, harassment, or discrimination based on their gender identity. LGBT individuals report being widely harassed.54

Vietnam, where LGBT individuals experience discrimination, physical and psychological assaults and societal abandonment. Employment opportunities remain limited; the discriminatory environment is a leading cause of poverty for LGBT individuals. LGBT individuals also report denial of education and harassment in school.55

Even where Asian and Pacific Islander countries offer some legal protections to LGBT individuals, such protections are often de facto ignored by society, the authorities, or both:


• Thailand for example, though thought of as friendly to LGBT individuals, remains a country where LGBT individuals are widely discriminated against. Employment opportunities and social rights remain limited by discrimination. Violence against LGBT individuals remains quite common.56

• Similarly, though Mongolia was the first country in Asia to integrate LGBT issues into a sexual-education curriculum, it remains a society where LGBT individuals face strong bias and discrimination. The LGBT community remains largely in the closet fearful of stigma, discrimination and violent acts, and criminal acts including severe violence; and abuse from law enforcement personnel is widely reported by Mongolia’s LGBT community.57

• Daily LGBT life in the Philippines is fraught with danger of physical violence, bigotry, and pervasive discrimination in social life and the work place. In fact, the Philippines experienced the highest rates of murders of transgender people in all of Asia from 2008


to 2014. In 2008 there were twenty-nine murders of transgender people. In 2011, twenty-eight were killed because of their sexual identities.  

- LGBT Cambodians report harassment and discrimination in the workplace as well as limitations in occupational choice. Physical attacks and abuse are wildly reported even in public settings.

These examples starkly contrast with the strength of the legal protections and benefits provided to LGBT individuals within the United States. Undocumented LGBT individuals as well as LGBT children with undocumented parents of adults are placed at significant risk of discrimination, harassment, and legal prosecution if the lower court’s injunction is affirmed.

C. The Injunction in This Case Creates a No-Win Choice for LGBT Individuals in Families with Undocumented Members and Undocumented LGBT Individuals.

The Enjoined Programs allow undocumented LGBT individuals and LGBT individuals with undocumented family members to stay with their

---


families and continue to benefit from the services available to them in the United States consistent with the growing respect for “dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.” Obergefell, 135 S. Ct. at 2599. The Enjoined Programs are consistent with the Executive Branch’s longstanding respect for LGBT individuals under immigration law, and the district court’s injunction has the perverse effect of diverting LGBT individuals from the United States—where they could seek asylum—to nations less likely to protect their LGBT rights.

Since the 1990s, the Executive Branch has recognized the ability of LGBT individuals to seek asylum in the United States because of their sexual orientation or gender identification. To establish asylum, immigrants must demonstrate that they are “refugees” fleeing a country “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2012). In 1990, the Board of Immigration Appeals held that being homosexual made a Cuban man a member of a “particular social group.” Matter of Toboso-Alfonso, 20 I. & N. Dec. 819, 822–23 (BIA 1990). Toboso-Alfonso was no one-off decision: the Attorney General subsequently designated it “precedent in all proceedings involving the same issue or issues.” Id. at 819 n.1 (internal quotation marks omitted). LGBT asylum applications still have to demonstrate the persecution elements of their claims to prevail, but Toboso-
Alfonso renders the particular-social-group issue moot in their cases.

The Executive Branch’s post-Toboso-Alfonso treatment of LGBT individuals in asylum cases contrasted sharply with other areas of federal law that—at the time—took a less favorable view of LGBT rights. For example, when the BIA decided Toboso-Alfonso, this Court had recently held that laws criminalizing homosexual activity did not violate the Constitution, Bowers v. Hardwick, 478 U.S. 186, 190–96 (1986), and Congress would soon define marriage to exclude same-sex marriage, Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419–20 (1996) (codified at 1 U.S.C. § 7). Bowers represents the nadir of this Court’s treatment of LGBT rights, but the reversing trend following Bowers has been positive. The Court has since recognized the dignity of LGBT individuals in many cases, including overruling Bowers in Lawrence v. Texas, 539 U.S. 558, 564–78 (2003), and holding section 3 of DOMA unconstitutional in Windsor, 133 S. Ct. at 2693–96. (See supra Part II.A.) The Judicial Branch has consistently de-
ferred to and reinforced the Executive Branch’s LGBT asylum policy.61

Under the regime that has existed since the 1990s, thousands of LGBT individuals have sought and received asylum in the United States.62 Simi-

61 See, e.g., Kadri v. Mukasey, 543 F.3d 16, 21–22 (1st Cir. 2008) (remanding case for assessment of whether Indonesian man suffered persecution because of his sexual orientation); Morett v. Gonzales, 190 F. App’x 47, 48–49 (2d Cir. 2006) (remanding case of Venezuelan man and finding he had a well-founded fear of persecution on account of his sexual orientation); Maldonado v. Attorney Gen. of the U.S., 188 F. App’x 101, 103–05 (3d Cir. 2006) (remanding case of Argentinian man and finding he presumed to have a well-founded fear of persecution because of his sexual orientation); Moab v. Gonzales, 500 F.3d 656, 659–71 (7th Cir. 2007) (remanding case of Liberian man because sufficient evidence did not support the BIA’s decision); Nabulwalala v. Gonzales, 481 F.3d 1115, 1117–19 (8th Cir. 2007) (remanding case of Ugandan woman because the immigration judge erred in evaluating her evidence of past persecution because of her sexual orientation); Vitug v. Holder, 723 F.3d 1056, 1064–66 (9th Cir. 2013) (remanding case of Filipino man because he demonstrated past persecution and BIA erred in denying him withholding of removal); Razkane v. Holder, 562 F.3d 1283, 1287–89 (10th Cir. 2009) (remanding case of Moroccan man because underlying proceedings included gay stereotyping by the immigration judge); Ayala v. U.S. Att’y Gen., 605 F.3d 941, 948–51 (11th Cir. 2010) (remanding case of Venezuelan man because BIA’s findings regarding past persecution were not supported by substantial evidence); cf. Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1079 (9th Cir. 2015) (explaining that rapes and assault of Mexican woman singled out because of her transgender identity constitute torture).

62 See Elizabeth M. Glazer, Sexual Reorientation, 100 Geo. L.J. 997, 1038 (2012) (citing 2005 estimation that thousands of immigrants have received asylum since 1994 because of their sexual orientation).
larly, the Enjoined Programs fulfill many of the same policy goals and objectives as the asylum process. Nevertheless, while the Enjoined Programs provide similar benefits to undocumented persons, asylum is not an alternative to the benefits provided under the Enjoined Programs.

Asylum applications must be filed within one year of arriving in the United States. 8 C.F.R. § 208.4(a) (2015). The Enjoined Programs, by their terms, require an undocumented individual to have lived in the United States continuously since January 1, 2010, disqualifying eligible undocumented persons from applying for asylum in the United States without first leaving the country. Furthermore, asylum cases involve complex immigration proceedings, often require a substantial time to reach a decision, and do not provide applicants the immediate ability to obtain a work authorization in the United States, putting a substantial burden on applicants to support themselves while in the application process for asylum. In contrast, the Enjoined Programs are available to undocumented individuals without having to leave the United States and grant eligible individuals a streamlined application process whereby qualified persons can obtain a work authorization utilizing a more cost-efficient and timely process, saving scarce federal resources in this area.

The deferred-action programs at issue in this case similarly allow LGBT individuals—some of whom are citizens—to enjoy the benefits of this nation without sacrificing the critical support they receive from their family. The lower court’s injunction, however, places undocumented LGBT individuals and LGBT individuals with undocumented
family members in the unenviable position of choosing the United States or their families. If they choose the latter, they may also be settling for nations where LGBT rights are not protected and their LGBT status places them in grave danger.63

In evaluating the balance of the harms related to injunctive relief in this case, the Fifth Circuit overstated the alleged harm caused by the deferred-action programs on certain states and undervalued the actual harm that the injunction would inflict, and has inflicted, on undocumented LGBT individuals and LGBT individuals with undocumented family members.

---

63 Arwen Swink, Note, *Queer Refuge: A Review of the Role of Country Condition Analysis in Asylum Adjudications for Members of Sexual Minorities*, 29 Hastings Int'l & Comp. L. Rev. 251, 251–52 (2006) (noting that many countries criminalize homosexual activity, some countries prosecute LGBT individuals under vague morality laws, and that enforcement against LGBT individuals can take brutal forms); (see also supra Part II.B).
CONCLUSION

For the foregoing reasons and those in the briefs of Petitioners and the other amici curiae supporting them, the National Queer Asian Pacific Islander Alliance, Inc., and the other amici curiae on this brief urge the Court to reverse the judgment of the Fifth Circuit and allow the government to implement the enjoined deferred-action programs.

Dated: March 4, 2016

Glenn D. Magpantay
National Queer Asian Pacific Islander Alliance, Inc.
233 Fifth Ave., Ste. 4A
New York, N.Y. 10016
917.439.3158

Counsel for the National Queer Asian Pacific Islander Alliance, Inc.

Respectfully submitted,

James W. Kim
Counsel of Record
Lisa A. Linsky
Joshua D. Rogaczewski
Michael S. Stanek
Irene A. Firippis
Ellen S. Pyle
McDermott Will & Emery LLP
500 N. Capitol St., N.W.
Washington, D.C. 20001
202.756.8000
jakim@mwe.com

Counsel for Amici Curiae
RAIO Combined Training Course

GUIDANCE FOR ADJUDICATING LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND ASYLUM CLAIMS

TRAINING MODULE
GUIDANCE FOR ADJUDICATING LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND ASYLUM CLAIMS

Training Module

MODULE DESCRIPTION:

This module provides guidelines for adjudicating and considering immigration benefits, petitions, protections, or other immigration-related requests by lesbian, gay, bisexual, transgender, and intersex, (LGBTI) individuals. The module addresses the legal analysis of claims that involve LGBTI applicants as well as related interviewing considerations.

FIELD PERFORMANCE OBJECTIVE(S)

When interviewing in the field, you (the Officer) will elicit all relevant information from an LGBTI applicant to properly adjudicate and consider the immigration benefit, petition, protection, or other immigration-related request before you.

INTERIM PERFORMANCE OBJECTIVES

1. Summarize the developments in U.S. law that focus on LGBTI applicants.

2. Describe the types of harm that may be present in refugee and asylum claims involving LGBTI issues.

3. Describe how membership in a particular social group is analyzed when looking at the refugee or asylum claims involving LGBTI issues.

4. Identify factors to consider when evaluating evidence presented by LGBTI applicants.

5. Identify factors that may hinder an interview of an LGBTI applicant.

6. Identify methods and techniques to put an LGBTI applicant at ease during an interview.
7. Use sensitive questioning and listening techniques that aid in eliciting information from LGBTI applicants.

**INSTRUCTIONAL METHODS**

- Interactive presentation
- Discussion
- Practical exercises

**METHOD(S) OF EVALUATION**

- Multiple-choice exam
- Observed practical exercises

**REQUIRED READING**


3. Memorandum from Don Neufeld, Acting Associate Director, Domestic Operations and Lori Scialabba, Associate Director, Refugee, Asylum, and International Operations, *Adjudication of Petitions and Applications Filed by or on Behalf of Transsexual Individuals* (January 14, 2009).


**Division-Specific Required Reading - Refugee Division**

**Division-Specific Required Reading - Asylum Division**

**Division-Specific Required Reading - International Operations Division**

**ADDITIONAL RESOURCES**

1. LGBTI-related Case Law


**Division-Specific Additional Resources - Refugee Division**

**Division-Specific Additional Resources - Asylum Division**

**Division-Specific Additional Resources - International Operations Division**

**CRITICAL TASKS**

SOURCE: The Tasks listed below are from the Asylum Division’s 2001 Revalidation. These tasks will need to be modified to reflect the results of the RAIO Directorate – Officer Training Validation study.

<table>
<thead>
<tr>
<th>Task/ Skill #</th>
<th>Task Description</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### SCHEDULE OF REVISIONS

<table>
<thead>
<tr>
<th>Date</th>
<th>Section (Number and Name)</th>
<th>Brief Description of Changes</th>
<th>Made By</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
# Table of Contents

1. **INTRODUCTION** .................................................................11

2. **LEGAL ANALYSIS – OVERVIEW** .......................................14

3. **LEGAL ANALYSIS – NEXUS AND THE FIVE PROTECTED GROUNDS** .........................................................14

   3.1 Membership in a Particular Social Group – Defining the Group ..................................................14

   3.1.1 Possession or Imputed Possession of a Protected Characteristic ...........................................14

   3.1.2 Particular Social Group – Immutable or Fundamental Characteristic .......................................15

   3.1.3 Particular Social Group – Visibility .........................................................................................16

   3.2 “On Account Of”/Nexus ..................................................................................................................18

   3.2.1 The Persecutor’s Motive and the Applicant’s Experience .........................................................18

   3.2.2 Prosecution vs. Persecution .......................................................................................................19

4. **LEGAL ANALYSIS – PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION** ..........19

   4.1 Types of Harm That May Befall Sexual Minorities .......................................................................20

   4.2 Agents of Persecution ....................................................................................................................24

   4.3 Internal Relocation ........................................................................................................................24

5. **LEGAL ANALYSIS – WELL FOUNDED FEAR** ..........................................................25

   5.1 Objective Elements ........................................................................................................................25

   5.2 Fear of Future Persecution .............................................................................................................26

   5.3 Refugees *Sur Place* .........................................................................................................................26

6. **INTERVIEW CONSIDERATIONS** .............................................26

   6.1 Pre-Interview Considerations .......................................................................................................27

   6.1.1 File Review .................................................................................................................................27

   6.1.2 How the Presence of Family and Relatives May Affect the Interview ......................................27

   6.1.3 How the Presence of Interpreters May Affect the Interview .....................................................28

   6.1.4 Reviewing Biographical Information with the Applicant .........................................................28

   6.2 Suggested Techniques for Eliciting Testimony .............................................................................29

   6.2.1 Setting the Tone and Putting the Applicant at Ease ....................................................................29

   6.2.2 Explore all possible grounds ....................................................................................................31

   6.2.3 Sample Questions .....................................................................................................................32
7 EVIDENCE ASSESSMENT........................................................................................................38

7.1 Credibility Considerations During the Interview .................................................................39
   7.1.1 Plausibility..................................................................................................................39
   7.1.2 Consistency...............................................................................................................41
   7.1.3 Detail.........................................................................................................................43

7.2 Country of Origin Information .............................................................................................43

7.3 Corroborating Evidence.......................................................................................................44

8 CONCLUSION .......................................................................................................................46

9 SUMMARY..............................................................................................................................46

9.1 LGBTI and HIV Terminology...............................................................................................46
9.2 Legal Analysis – Nexus and the Five Protected Characteristics .........................................47
9.3 Legal Analysis – Types of Persecution ...............................................................................47
9.4 Legal Analysis – Well-Founded Fear .................................................................................47
9.5 Legal Analysis – One-Year Filing Deadline (asylum only) ................................................48
9.6 Interviewing Considerations...............................................................................................48
9.7 Burden of Proof and Evidence – Credibility ....................................................................49
9.8 Burden of Proof and Evidence – Country of Origin Information .......................................50

PRACTICAL EXERCISES ...........................................................................................................51

OTHER MATERIALS..................................................................................................................52

SUPPLEMENT A – REFUGEE AFFAIRS DIVISION ...............................................................60

Required Reading......................................................................................................................60
Additional Resources...............................................................................................................60
Supplements..............................................................................................................................60

SUPPLEMENT B – ASYLUM DIVISION ............................................................................61

Required Reading......................................................................................................................61
Additional Resources...............................................................................................................61
Supplements..............................................................................................................................61

SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION .....................................65
Required Reading...........................................................................................................................65
Additional Resources.....................................................................................................................65
Supplements...................................................................................................................................65
Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division’s supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

1 INTRODUCTION

It has been over 20 years since Fidel Armando Toboso Alfonso, a gay man from Cuba, was granted withholding of deportation in the United States based on his sexual orientation.1 The Toboso-Alfonso decision paved the way for hundreds of lesbian, gay, bisexual, and transgender individuals as well as individuals with intersex conditions (LGBTI) to obtain refugee and asylum status in the United States. Recently, the United Nations marked another “significant milestone in the long struggle for equality, and the beginning of a universal recognition that LGBT[I] persons are endowed with the same inalienable rights – and entitled to the same protections – as all human beings”2 by passing a Resolution on Human Rights, Sexual Orientation, and Gender Identity. The increasing number of refugee and asylum (protection) claims related to LGBTI and HIV-positive status has resulted in the need for greater awareness of the issues involved in these claims and training on their adjudication.3

Interviews with LGBTI or HIV-positive refugee and asylum applicants require the individual “to discuss some of the most sensitive and private aspects of human identity and behavior”4 – sexual orientation, gender identity, and life-threatening illness. These topics may be particularly difficult for applicants to discuss with government officials and may also be uncomfortable for the Interviewer to discuss.5

---

2 Statement by the President on the UN Human Rights Council Resolution on Human Rights, Sexual Orientation, and Gender Identity. The White House, Office of the Press Secretary, June 17, 2011.
All Officers in the RAIO Directorate should be familiar with the contents of this training module as it constitutes primary field guidance for interviewing LGBTI applicants and analyzing their claims. This module seeks to: 1) increase awareness about the issues sexual minorities face; 2) foster discussion about LGBTI issues; and, 3) provide consistent legal and interview guidance regarding these issues.

The RAIO LGBTI Training Module is the result of a collaborative effort between USCIS and non-governmental organizations (NGOs).

The module first addresses the legal issues you, the Interviewing Officer, must consider when analyzing cases and making protection determinations. Second, because establishing eligibility for refugee and asylum status presents its own challenges, the module covers the factors you must take into account when interviewing LGBTI individuals. Third, the module addresses proper techniques for assessing credibility.

A Note about Terminology

The terminology involving LGBTI issues is still evolving. For purposes of this module, the term "sexual minorities" and the acronym "LGBTI" are used interchangeably as umbrella terms to refer to issues involving sexual orientation, gender identity, and intersex conditions. The following are some essential LGBTI definitions. For a more comprehensive set of definitions, please click the hyperlink to the LGBTI Glossary located in the “Other Materials” section of this module.

The use of the term homosexual is limited in this module. It has a somewhat derogatory connotation within the LGBTI community as it has historically been used in a medical context to describe being gay or lesbian as an illness.6

Sexual orientation is the emotional, physical, and romantic attraction a person feels towards another person.7 The term gay is used to mean men who are attracted to men. The term lesbian is used to mean women who are attracted to women, although homosexual women also sometimes use the term gay to describe themselves. The term heterosexual or straight is used to mean men or women who are attracted to the opposite sex. The term bisexual is used to mean men or women who are attracted to both sexes.

Gender is what society values as the roles and identities of being male or female. Sex is the assignment of one’s maleness or femaleness on the basis of anatomy and reproductive organs. Gender and sex are assigned to every individual at birth. Gender identity is an individual’s internal sense of being male, female, or something else. Since gender

identity is internal, one’s gender identity is not necessarily visible to others. Gender expression is how a person expresses one’s gender identity to others, often through behavior, clothing, hairstyles, voice, or body characteristics. Transgender is a term used for people whose gender identity, expression, or behavior is different from those typically associated with their assigned sex at birth. Some transgender people dress in the clothes of the opposite gender; others undergo medical treatment, which may include taking hormones and/or having surgery to alter their gender characteristics.

Intersex refers to a condition in which an individual is born with a reproductive or sexual anatomy and/or chromosome pattern that does not seem to fit typical definitions of male or female. The conditions that cause these variations are sometimes grouped under the terms “intersex” or “DSD” (Differences of Sex Development). Individuals with these conditions were previously referred to as “hermaphrodites,” but this term is considered outmoded and should not be used unless the applicant uses it. These conditions may be apparent at birth, may appear at puberty, or may be discovered in a medical examination. Intersex is not the same as transgender, although an intersex person may identify themselves as transgender. Keep in mind that an intersex person may identify as male or female, and as lesbian, gay, bisexual, or heterosexual.

Transgender is a gender identity, not a sexual orientation. Thus, like any other man or woman, a transgender person may have a heterosexual, bisexual or homosexual sexual orientation.

It is also important to be familiar with the issues and terminology related to the Human Immunodeficiency Virus (HIV) and AIDS. USCIS has encountered claims from applicants who fear persecution because they were incorrectly perceived as gay, based on the fact that they were HIV-positive. We have also encountered claims where the persecutor incorrectly assumed that the applicant was HIV-positive based on the fact that the applicant was gay or was perceived to be gay. Because such claims involve overlapping and related issues, they are being addressed within the same module.

A person who was exposed to HIV and developed anti-bodies to the virus is HIV-positive. AIDS, or Acquired Immunodeficiency Syndrome, describes people with HIV who have either experienced certain infections 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 not spread by casual contact. It is

8 For more information on transgender identity, see http://transequality.org/Resources/NCTE_TransTerminology.pdf and http://transequality.org/Resources/NCTE_UnderstandingTrans.pdf (National Center for Transgender Equality.)
9 For more information on intersex conditions, see the Advocates for Informed Choice website at www.aiclegal.org.
10 For more information about HIV see http://www.gmhc.org/learn/hiv aids-basics, (Gay Men’s Health Crisis website).
2 **LEGAL ANALYSIS – OVERVIEW**

This module does not expand the statutory definition of a refugee. The legal criteria used to evaluate an LGBTI applicant's eligibility for asylum or refugee status are the same criteria used in all other protection adjudications. However, because LGBTI applicants' experiences are often different from those of others, it is useful to discuss how these experiences fit into the legal framework of established refugee and asylum law.

3 **LEGAL ANALYSIS – NEXUS AND THE FIVE PROTECTED GROUNDS**

As explained in greater detail in the RAIO training module, *Nexus and the Five Protected Grounds*, to be eligible for asylum or refugee status, the applicant must establish that the persecution suffered or feared was or will be motivated “on account of” his or her actual or imputed possession of a protected characteristic. This is known as the nexus requirement and it applies equally to LGBTI applicants. The type of harm that may constitute persecution in the context of LGBTI claims will be discussed later in this module.

Depending on the facts of the case, claims relating to sexual orientation and gender identity are primarily recognized under membership in a particular social group (PSG) but may overlap with other grounds, in particular religion and political opinion.12

The nexus analysis first requires consideration of whether the persecutor perceives the applicant as possessing a protected characteristic (either because the applicant does possess it or because the persecutor imputes it to the applicant); then whether the persecutor acted or would act against the applicant because of the persecutor’s perception of that protected characteristic.

3.1 **Membership in a Particular Social Group – Defining the Group**

When deciding if the persecutor perceives in an applicant an actual or imputed characteristic that can define a cognizable PSG, you must first identify the characteristics that the persecutor perceives; then explain why individuals with those characteristics form a PSG within the meaning of the refugee definition. This is often referred to as “framing the PSG.”

3.1.1 **Possession or Imputed Possession of a Protected Characteristic**

---

12 See *Matter of S-A*, 21 I & N Dec. 1050; *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).
To determine whether a group to which the applicant belongs may be considered a PSG, first determine whether there are any precedent decisions that analyze similar facts and rely on any such decisions to reach a conclusion. As mentioned previously, in 1990, the Board of Immigration Appeals (BIA) in *Matter of Toboso-Alfonso*, recognized persons identified as homosexuals by the Cuban Government as a PSG. Toboso-Alfonso was a gay man who was subjected to detention and forced labor by the Cuban government for being gay.

Four years later, the U.S. Attorney General designated *Toboso-Alfonso* "as precedent in all proceedings involving the same issue or issues."14

While the BIA has not specifically ruled on claims by other sexual minorities, many U.S. Circuit Courts of Appeals have. Claims involving actual or imputed sexual minority status may qualify under the PSG category and may involve applicants who:

- identify as gay or lesbian15
- are viewed as a sexual minority, regardless of whether the persecutor or society involved distinguishes between sexual orientation, gender, and sex.
- are transgender16 (note that even if a transgender applicant identifies as heterosexual, he or she may be perceived as gay or lesbian)
- are “closeted” gays and lesbians
- test positive for HIV, regardless of their sexual orientation17
- are viewed as "effeminate" or "masculine" but identify as heterosexual
- are not actually gay but are thought to be gay by others18
- are from throughout the world, not just Cuba19

For a comprehensive list of court cases involving LGBTI asylum and refugee issues, click LGBTI-Related Case Law found in the “Other Materials” section of this module.

### 3.1.2 Particular Social Group – Immutable or Fundamental Characteristic

To determine if an applicant is a member of a PSG, you must decide whether:

---

13 *See Toboso-Alfonso.*

14 Attorney General, Order number 1895 (June 19, 1994).

15 *See, e.g., Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir 2005); *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997); *Nabulawala v. Gonzales*, 481 F.3d 1115 (8th Cir. 2007).

16 *Hernandez-Montiel v. INS*, 225 F.3d 1088 (9th Cir. 2000).


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

19 This will depend on country of origin information. LGBTI claims are put forward from all over the world.
the group is comprised of individuals who share a common, innate characteristic – such as sex, color, kinship ties, or past experience – that members cannot change,

or

whether the group is comprised of individuals who share a characteristic that is so fundamental to the members’ identity or conscience that they should not be required to change it.20

Sexual orientation, gender identity, and having an intersex condition can be classified as either innate or fundamental. They are characteristics that an individual cannot change about him or herself or should not be required to change.21 Most experts agree that sexual orientation - whether heterosexual, lesbian, or gay - is set in place early in life and is highly resistant to change. Also keep in mind that it has been over 30 years since the American Psychiatric Association (APA) revised its Diagnostic and Statistical Manual (DSM) to remove any references to homosexuality being an illness or a diagnosable mental disorder.22 In the case of a transgender person, he or she either cannot change or should not be required to ignore the inner feelings that his or her gender identity does not match his or her biological sex at birth. Even if these traits could somehow be changed, they are traits that are so fundamental to a person’s identity that he or she should not be required to change them.

Harm imposed because an applicant was mistakenly perceived as belonging to a sexual minority may also qualify as “on account of” a protected ground.

3.1.3 Particular Social Group – Visibility

When analyzing the PSG issue, you must not only make a finding regarding immutability or fundamentality, you must also determine social visibility or social distinction, i.e., whether the actual or imputed characteristic is “easily recognizable and understood by others to constitute a social group.”23 Some adjudicators mistakenly believe that social visibility or distinction requires that the applicant “look gay or act gay.” See Burden of Proof and Evidence, Credibility-Plausibility section below. In this context, social visibility or distinction does not mean visible to the eye. Rather, this means that the society in question distinguishes individuals who share this trait from individuals who do not.

21 See Matter of Toboso-Alfonso at 822.
In *Matter of C-A-*, the BIA lists men recognized as homosexuals by the government as an example of a social group that involves a characteristic that is "highly visible and recognizable by others in the country in question."\(^{24}\) Although *C-A-* was discussing the PSG as formulated in *Toboso-Alfonso*, which involved the applicant’s registration as a homosexual by the Cuban government, formal registration or recognition by a government is not required for a PSG.

For purposes of the “social visibility” analysis, you must examine the evidence, including country conditions, to determine whether the society in question distinguishes sexual minorities from other individuals in a meaningful way. While government registration of individuals as homosexuals would establish social visibility, it would not be required. Information about discriminatory attitudes or behavior toward sexual minorities would also be an example of evidence of social visibility.

### Possible PSG Formulations

It is important to remember that, in order to conduct an accurate assessment of nexus, a PSG should not be formulated too broadly or too narrowly. Rather, it should refer to the trait that the persecutor perceives the applicant to possess.

Because LGBTI claims involve individuals with a variety of characteristics, and because the persecutors in given cases may perceive the applicants’ traits in a variety of ways, the appropriate PSG formulation will depend on the facts of the case, including evidence about how the persecutor and the society in question view the applicant and people like the applicant.

Consider the following as possible ways to formulate the PSG:

- **Sexual minorities in Country X.** This may be an appropriate PSG in cases where the persecutor in question perceives any sexual minority as “outside the norm” but does not necessarily distinguish between orientation, gender, and sex. It might also be appropriate where there are a variety of traits involved in the claim, but the persecutor’s animus toward those different traits stems from a more general animus toward all sexual minorities. This might be the case, for example, in a situation where an applicant has an intersex condition or has undergone Sex Reassignment Surgery (SRS) in the United States after having been harmed in the past for simply being perceived as gay. This prevents the need to analyze past and future harm for two separate PSGs when past and future harm are both based on the applicant’s sexual minority status. (Example: “sexual minorities in Mexico” in lieu of “transgender Mexican women perceived as homosexual Mexican men cross dressing as women.”);

- **Gay, lesbian, transgender, or HIV-positive (choose one) / men or women**

\(^{24}\) *Matter of C-A-* at 960.
(choose one) / from Country X (choose one) (Example: “Lesbian women from Uganda.”); or

- Men or women (choose one) / from Country X (choose one) / imputed to be gay, lesbian, transgender, or HIV-positive (choose one) (Example: “men from Ghana imputed to be gay.”)

### 3.2 “On Account Of”/Nexus

#### 3.2.1 The Persecutor’s Motive and the Applicant’s Experience

The “on account of” requirement focuses on the motivation of the persecutor. The persecutor in most LGBTI cases seeks to harm the individual based on the individual’s perceived or actual sexual orientation, on the persecutor’s belief that the applicant transgresses traditional gender boundaries, or on the persecutor’s more general animus toward sexual minorities of any kind. In some situations, the persecutor may have been trying to “cure” the applicant of his or her sexual orientation or gender identity.\(^{25}\) Most persecutors may not have been making the distinction between gay, lesbian, bisexual, transgender, intersex, or HIV-positive. They may simply have harmed or want to harm the applicant based on their perception that the applicant is gay or a sexual minority that is “outside the norm.”

The applicant must provide some evidence, direct or circumstantial, that the persecutor is motivated to act against the applicant because he or she possesses or is believed to possess one or more of the protected characteristics in the refugee definition.\(^{26}\) For example, in an LGBTI claim, you would consider evidence that the persecutor harmed or tried to correct the applicant because the persecutor knows or believes the applicant belongs to a sexual minority.

This evidence may include the applicant’s testimony regarding:

- what the persecutor said or did to the applicant
- what the persecutor said or did to others similar to the applicant
- the context of the act of persecution (for example, if the applicant was attacked in a gay bar or while holding hands with a same-sex partner)
- reliable Country of Origin Information (COI) that corroborates such testimony

---

\(^{25}\) *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Pitcherskaia v. INS.*

have said to him or her when the harm was inflicted or when the threats were made.

As with other types of refugee or asylum claims, there is no malignant intent required on the part of the persecutor, as long as the applicant experiences the abuse as harm.\(^{27}\) State and non-state actors may inflict harm on LGBTI persons with the intention of curing or treating them, for example, through what is effectively medical abuse or forced marriage.\(^{28}\) (See Types of Harm That May Befall Sexual Minorities, Forced Psychiatric or Other Efforts to “Cure” Homosexuality below.)

3.2.2 Prosecution vs. Persecution

The U.S. Supreme Court has made it clear that intimate sexual activity between consenting adults is a constitutionally protected activity.\(^{29}\) This Constitutional principle, while not directly applicable to the analysis of an asylum claim, is consistent with the recognition that punishing conduct or sexual activity between consenting adults of the same sex is tantamount to punishing a person simply for being gay. If a law exists in another country that prohibits intimate sexual activity between consenting adults, enforcement of the law itself may constitute persecution and not simply prosecution.

4 Legal Analysis – Persecution and Eligibility Based on Past Persecution

In evaluating whether harm constitutes persecution in an LGBTI-related case, you should consider the same factors as in any other protection case. The relevant considerations are: 1) does the harm rise to the level of persecution; and 2) is the persecutor the government or an individual or entity from which the government is unable or unwilling to provide reasonable protection?

Because the amount of harm that rises to the level of persecution is discussed in detail in the RAIO training module, Refugee Definition, Definition of Persecution, and Eligibility Based on Past Persecution, this section focuses on the types of harm directed at sexual minorities.

In asylum processing, if the applicant establishes past persecution on account of one of the five protected grounds, he or she is presumed to have a well-founded fear of persecution in the future. The burden then shifts to USCIS to show that there has been a fundamental change in circumstances or that the applicant can reasonably relocate within the country of origin. If USCIS does not meet this


\(^{28}\) Pitcherskaia v. INS.

\(^{29}\) Lawrence v. Texas, 539 U.S. 558 (2003).
burden, it must be concluded that the applicant’s fear is well-founded.

To be eligible for resettlement as a refugee in the United States, an applicant must establish either past persecution or well-founded fear of persecution on account of a protected ground. Therefore, in general, a refugee applicant who is found to have suffered past persecution but who does not have a well-founded fear of future persecution is still able to establish that he or she meets the refugee definition. There is no rebuttable presumption or burden shifting as there is in asylum processing.

4.1 Types of Harm That May Befall Sexual Minorities

The types of harm directed at LGBTI applicants vary and include the same types of harm that are directed at other applicants. LGBTI individuals, however, may be more vulnerable to some types of harm than other applicants and may be subject to harm unique to them.

When considering whether harm will amount to persecution, you must not only consider the objective degree of harm or whether the harm rises to the level of persecution, but also whether the applicant personally experienced or would experience the act(s) as serious harm. You must evaluate the opinions and feelings of each applicant individually. Because each case is unique and each applicant has his or her own psychological makeup, interpretations of what amounts to persecution vary widely.

While discrimination is often a fundamental part of claims made by LGBTI individuals, applicants also frequently reveal having experienced serious physical and sexual violence. These incidents of harm must be assessed in their totality. They must be analyzed in light of prevailing attitudes with regard to sexual orientation and gender identity in the country of origin.

Violation of Fundamental Rights

30 INA § 101(a)(42)
31 UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity.
32 See RAIO training module, Refugee Definition, Definition of Persecution, and Eligibility Based on Past Persecution, “Whether the Harm Experienced Amounts to Persecution, General Considerations, Individual Circumstances.”
34 UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, paragraph 12.
Being compelled to abandon or conceal one's sexual orientation or gender identity, where this is instigated or condoned by the state, may amount to persecution. LGBTI persons who live in fear of being publicly identified often conceal their sexual orientation in order to avoid the severe consequences of such exposure - including the risk of incurring harsh criminal penalties, arbitrary arrests, physical and sexual violence, dismissal from employment, and societal disapproval.

**Criminal Penalties**

In some countries, homosexuality is criminalized and, “if discovered by the authorities, a lesbian or gay man may be arrested or imprisoned based on her or his sexual orientation.”

In some countries, individuals accused of consensual sex with a member of the same sex may be subject to prosecution and even death. For example, in Mauritania any Muslim male who engages in a sexual act with another male is subject to death by stoning; in Kenya, the Penal Code explicitly states that engaging in a consensual sexual act between two men is a felony and punishable by up to imprisonment for five years.

In other countries, there may not be laws that actually prohibit homosexuality, but authorities may still persecute people because of their sexual orientation. Thus, applicants have been arrested, detained, beaten, sexually assaulted, and/or forced to pay bribes by police or army officials because of their sexual orientation, even if a non-discriminatory legal basis is used as a pretext for the action.

**Rape and Sexual Violence**

Because LGBTI people are often perceived as undermining gender norms, they are at heightened risk for sexual violence in many countries. Rape and sexual assault are types of harm that rise to the level of persecution. Other types of sexual violence, for example being forced to perform sexual acts upon another, may also constitute

---

35 *Fatim v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993); *See also, Karouni v. Gonzales* (9th Cir. 2005); and UNHCR Sexual Orientation Guide Note, paragraph 12.


37 [http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119115.htm](http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119115.htm)


41 *See Immigration Equality Draft Model LGBT Asylum Guidance, 2004.*

42 *Nabulwala v. Gonzales.*
persecution. Some applicants may have been raped as a measure to “correct” their behavior or status or as a means of punishing them for being gay or “outside the norm.”

**Beatings, Torture, and Inhumane Treatment**

Many LGBTI people are subjected to severe forms of physical violence. An applicant may have been the victim of repeated physical violence that the police never investigated or that the police themselves perpetrated. Many applicants have been seriously harmed by members of their own family.

Claims made by LGBTI persons often reveal exposure to physical and sexual violence, extended periods of detention, medical abuse, the threat of execution, and honor killing. Generally, these are acts of harm that would rise to the level of persecution.

LGBTI individuals can also experience other forms of physical and psychological harm, including harassment, threats of harm, vilification, intimidation, and psychological violence that can rise to the level of persecution, depending on the individual circumstances of the case and the impact on the particular applicant.

**Forced Medical Treatment**

The case of an individual with an intersex condition may involve the applicant's fear or history of non-consensual surgery and other non-consensual medical treatment. In other cases, the applicant's fear may involve the lack of medical care in their home country.

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

Many cultures see homosexuality as a disease, a mental illness, or a severe moral failing. Forced efforts to change an individual’s fundamental sexual orientation or gender identity would generally rise to the level of persecution. The American Psychiatric Association (APA) has stated that efforts to “convert” gay people to being heterosexual are unethical and ineffective. Forced institutionalization, electroshock, and forced drug injections could constitute persecution. It is important to remember that there is no requirement that harm be inflicted with the intent to harm the victim. Rather, you should assess whether it is objectively serious harm and was experienced as serious harm by the applicant.

---

45 *Ixtilco-Morales v. Keisler*, 507 F.3d 651 (8th Cir. 2007). See also *Nabulwala v. Gonzales*
46 *Pitcherskaia v. INS*.
48 See *Matter of Kasinga* and *Pitcherskaia v. INS*. 
**Discrimination, Harassment, and Economic Harm**

Many LGBTI people are disowned by their families if their sexual orientation or transgender identity becomes known.\(^{49}\) 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. In such cultures, being disowned by one’s family in and of itself could be found to rise to the level of persecution, since it would have such severe consequences.

Some applicants may have been threatened by neighbors or had their property vandalized. Others may have been repeatedly fired from jobs and found it impossible to engage in any form of employment once their sexual orientation became known. While being fired from a job generally is not considered persecution, if an individual can demonstrate that his or her LGBTI 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.

Discrimination and harassment may amount to persecution if cumulatively they are sufficiently severe.\(^{50}\) This may be the case, for example, where an LGBTI person is consistently denied access to normally available services in his or her private life or workplace, such as education, welfare, health, and access to the courts.

**Forced Marriage**

LGBTI persons may be unable to engage in meaningful relationships, be forced into arranged marriages, or experience extreme pressure to marry.\(^{51}\) They may fear that failure to marry will reveal them to be LGBTI to their family and to the public at large. Societal and cultural restrictions that require them to marry individuals in contravention of their sexual orientation may violate their fundamental right to marry and may rise to the level of persecution.\(^{52}\) For instance, a lesbian who has no physical or emotional attraction to men and is forced to marry a man may experience this as persecution. Likewise, a gay man who is in no way attracted to women who is forced to marry a woman may experience this as persecution.

**Gender-Based Mistreatment**


\(^{51}\) UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity at paragraph 13.

\(^{52}\) *Id.*
Lesbians often experience harm as a result of their gender as well as their sexual orientation. The types of harm that a lesbian may suffer will frequently parallel the harms in claims filed by women in general more closely than the harms in gay male asylum claims. Likewise, before “coming out,” transgender men are generally raised as girls and may experience the same types of harm. In many parts of the world persecution faced by lesbians may be less visible than that encountered by gay men. Lesbians and transgender women may be particularly vulnerable to rape by attackers who wish to punish them for their sexual identity. This can include retaliation by former partners or husbands.

Transgender individuals may be more visible and may be viewed as transgressing societal norms more than gay men or lesbians. Therefore, they may be subject to increased discrimination and persecution.

4.2 Agents of Persecution

The second step in the analysis of whether harm constitutes persecution is to determine if the agent of persecution is the government or a nongovernment actor. It is well established that an applicant can qualify for refugee or asylum status whether the persecutor is the government or an individual or entity from whom the government is unable or unwilling to provide reasonable protection. In LGBTI cases this may include governmental agents of persecution such as the police, military, or militias. Family, relatives, neighbors, and other community members are examples of non-governmental agents of persecution.

4.3 Internal Relocation

The issue of internal relocation arises when determining whether an applicant has established a well-founded fear or, in the context of asylum, whether the presumption of a well-founded fear is rebutted by the reasonable possibility of internal relocation. In the asylum context, once an applicant has established past persecution, the burden then shifts to the Government to show that internal relocation is reasonable. In cases where the persecutor is a government or government sponsored, there is a presumption that internal relocation is not reasonable. In some cases there may be evidence to rebut that presumption, such as, for example, evidence that the government's authority is limited to certain parts of the country. Homophobia, “whether expressed in laws or people’s attitudes and behavior, often tends to exist nationwide.”


55 Id.

56 UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity at paragraph 33.
place of persecution, would normally also be enforceable in other parts of the country of
origin.\textsuperscript{57}

Where a nongovernmental actor is the persecutor, the government’s inability or
unwillingness to protect the applicant in one part of the country may also be evidence that
it is unwilling or unable to do so in other parts of the country.\textsuperscript{58} It is not reasonable to
expect an applicant to suppress his or her sexual orientation or gender identity through
internal relocation. He or she should not have to depend on anonymity to avoid the reach
of the persecutor. While a major capital city “in some cases may offer a more tolerant
and anonymous environment, the place of relocation must be more than a ‘safe haven.’”
The applicant must also be able to access a minimum level of political, civil, and
socioeconomic rights.\textsuperscript{59} Thus, he or she must be able to access the protection in a
genuine and meaningful way. The existence of LGBTI-related nongovernmental
organizations does not in itself provide protection from persecution.

5 \hspace{1cm} \textbf{LEGAL ANALYSIS – WELL FOUNDED FEAR}

LGBTI-specific issues may also arise in cases where the applicant has not experienced
past persecution but may nevertheless have a well-founded fear of persecution. Because
well-founded fear is discussed in detail in the AOTC and ROTC \textit{Well-Founded Fear}
lessons, this section focuses on common well-founded fear issues raised in LGBTI
claims.

5.1 \hspace{1cm} \textbf{Objective Elements}

An applicant may qualify for asylum or refugee status even if he or she was not
persecuted in the past but has a well-founded fear of future persecution. To establish
well-founded fear, the applicant must have a subjectively genuine fear and an objectively
reasonable fear of return.

The existence of certain objective elements in a particular claim will not necessarily
undermine the applicant’s subjective fear or credibility. For example, just because a
country permits an LGBTI organization to exist or allows an annual public LGBTI event
does not mean that LGBTI people are free from ongoing violence and harm in that
country.

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

\textsuperscript{57} \textit{Id.}

\textsuperscript{58} UNHCR \textit{Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity} at paragraph 34.

\textsuperscript{59} \textit{Id.}
5.2 Fear of Future Persecution

LGBTI applicants who were forced to conceal their sexual orientation in their home countries in order to avoid harm might not have experienced injuries that rise to the level of persecution. These applicants need not show that the persecutor knew about their sexual orientation before leaving, only that the persecutor may become aware of it if they return.

5.3 Refugees Sur Place

A *sur place* claim for refugee status may arise as a consequence of events that have occurred in the applicant's country of origin since his or her departure, or as a consequence of the applicant's activities since leaving his or her country of origin. This may also occur where he or she has been "outed" to members of his or her family back home or where his or her LGBTI status or views on sexual orientation have been publicly expressed, for example by taking part in advocacy campaigns, demonstrations, or other human rights activism on behalf of LGBTI individuals.

Additionally, LGBTI applicants might have left the country of origin for a reason other than their sexual orientation, for example to pursue employment and educational opportunities in the United States and have "come out" after arrival in the country of asylum or first asylum. These applicants may qualify for refugee or asylum status if they can demonstrate a well-founded fear of future persecution.

You should carefully consider whether the applicant’s sexual orientation or gender identity may come to the attention of the authorities or relatives in the country of origin and the ensuing risk of persecution. Keep in mind that in making this analysis, it is not appropriate to assume that an individual who is lesbian, gay, or bisexual could “go back in the closet” or that a transgender individual who is living in their “corrected gender” could go back to “passing.”

As with all claims based solely on a fear of future persecution, the claim must meet the four elements in the *Mogharrabi* test. See RAIO training module Well-Founded Fear.

In the asylum context, there are some one-year filing deadline issues that may arise specifically in the context of LGBTI *sur place* claims. See Asylum Supplement - One-Year Filing Deadline below.

6 INTERVIEW CONSIDERATIONS

It is important to create an interview environment that allows applicants to freely discuss the elements and details of their claims and to identify issues that may be related to

---

60 UNHCR *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* at paragraph 23.

61 *Id.*
sexual orientation or imputed sexual orientation. Like most gender-based claims, LGBTI claims involve very private topics that are difficult for applicants to talk about openly. LGBTI applicants may hesitate to talk about past experiences and may be afraid they will be harmed again because of their actual or perceived sexual orientation or gender identity. For many, it will be very difficult to talk about something as private as sexual orientation, gender identity, or HIV-positive status. Furthermore, you, yourself may feel uncomfortable discussing some of these issues. It is therefore especially important for you to create an interview environment that is open and non-judgmental.62

This section should be considered along with the guidance contained in the RAIO Interviewing modules, which also address issues related to sexual minorities.

The following may help you interact more meaningfully with LGBTI applicants during an interview.

6.1 Pre-Interview Considerations

6.1.1 File Review

Before the interview, when you review each file, be mindful of any LGBTI-related issues in the claim. Due to the delicate and personal issues that surround sexual abuse, sexual orientation, and gender identity, some applicants may have inhibitions about disclosing past experiences to an interviewer of a particular sex. Some LGBTI applicants may be more comfortable discussing their experiences with Officers of a particular gender, particularly in cases involving rape, sexual abuse, or other sexual violence.

To the extent that personnel resources permit, an applicant’s request for an interviewer of a particular sex should be honored. If a pre-interview review of the file indicates that the case may involve sensitive LGBTI-related issues, you may consult with your supervisor or team leader prior to the interview to evaluate whether it would be more appropriate for an Officer of a different sex to conduct the interview.

6.1.2 How the Presence of Family and Relatives May Affect the Interview

For a variety of reasons, the presence of relatives may help or impede an applicant’s willingness to discuss LGBTI-related persecutory acts or fears. For example:

- The applicant’s relatives may not be aware of the harm he or she experienced. He or she may wish that the relative remain unaware of those experiences or may be ashamed to say what he or she has experienced or fears in front of a relative. In addition, the applicant’s claim may be based, in part, on fear of the relative who is present.

---

• Or, the applicant may want a family member or significant other present during the interview. Sometimes having a loved one present can provide support to the applicant when recounting traumatic events.63

Therefore, to the extent possible, the choice of whether to be interviewed alone or with a relative present should be left to the applicant. The applicant should be asked his or her preference, when possible, in private, prior to the interview.

If the applicant elects for the relative to be present at the interview, you should exercise sound judgment during the interview, determining whether the presence of the relative is impeding communication. If it appears that relative’s presence is interfering with open communication, the relative should be asked to wait in the waiting room.

In some cases, an applicant will bring a partner to the interview to testify as corroboration of the applicant’s sexual orientation or gender identity. If you feel that this corroboration would be helpful, the partner should be permitted to testify. Note: in the Asylum context, an Officer may exercise discretion and request that the witness’s testimony be submitted in writing.

6.1.3 How the Presence of Interpreters May Affect the Interview

Interpreters play a critical role in ensuring clear communication between you and an LGBTI applicant. The actions of an interpreter can affect the interview as much as those of the interviewing Officer. As in all interviews, you should confirm that the applicant and the interpreter fully understand each other.

As explained in greater detail in the RAIO training module Working with an Interpreter, an applicant's testimony on sensitive issues such as sexual abuse may be diluted when received through the filter of an interpreter. The applicant may not feel comfortable discussing such LGBTI issues with an interpreter of the same nationality, ethnicity, or clan, etc.

The same holds true for the interpreter; even if the applicant feels comfortable using a particular interpreter, the interpreter may be inhibited about discussing LGBTI-related issues or using certain terms. For example, the interpreter may substitute the word “harm” for “rape” because the interpreter is not comfortable discussing rape due to cultural taboos.64

6.1.4 Reviewing Biographical Information with the Applicant

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 of the application form with an obviously male name, you should ask if there is a name she would prefer that you use.

One of the biographical information questions on the forms is “gender.” Since this issue may 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. The early part of the interview should be devoted, in part, to putting the applicant at ease. If you immediately question the legitimacy of the “gender” box that he or she has checked off, the applicant may be uncomfortable for the rest of the interview.

When going through the biographical information on the application form at the beginning of the interview, it is appropriate for you to inquire whether the applicant has legally changed his or her name. If yes, you can request the legal name change documents. If no, you should explain why it is necessary to use the legal name on the form, but that during the interview you will refer to the applicant by the name that the applicant feels most comfortable using.\(^65\)

**Note:** If the applicant provides any new name or gender information, additional database systems may need to be updated and further security checks may be required. Please refer to USCIS and division procedures for updating name and gender information.

### 6.2 Suggested Techniques for Eliciting Testimony

#### 6.2.1 Setting the Tone and Putting the Applicant at Ease

While you must conduct all of your interviews in a non-adversarial manner, it is crucial when interviewing LGBTI applicants that you set a tone that allows the applicant to testify comfortably and that promotes a full discussion of the applicant's past experiences. You must conduct the interview in an open and nonjudgmental atmosphere designed to elicit the most information from the applicant.

You should be mindful that for many people there is no topic more difficult to discuss with a stranger than matters relating to sexual orientation, gender identity, and serious illness.\(^66\) Furthermore, many applicants have been physically and sexually abused, harassed, tormented, and humiliated over many years because of their actual or perceived sexual orientation or gender identity.

Asking questions about difficult or private issues is a sensitive balancing act you


face in all interviews. On the one hand, you need to obtain detailed testimony from the applicant. On the other hand, you do not want to badger or traumatize the applicant. The most important thing to understand is that this may be a difficult topic for the applicant to talk about and to be respectful in discussing sexual orientation, gender identity, and serious illness.  

You can help alleviate some of the applicant’s reluctance to discuss some of these issues by incorporating the following suggestions into your interviews:

**Remind the applicant that the interview is confidential.** It can also help to ease the applicant’s nervousness if you explain confidentiality to the interpreter in the presence of the applicant.

**Be particularly sensitive when questioning the applicant about past sexual assault.** Applicants may be reluctant to talk about actual or perceived sexual orientation or to disclose experiences of sexual violence. This may be especially true for LGBTI applicants who are not “out of the closet” or where the applicant was sexually assaulted. In many societies, sexual assault is seen as a violation of community or family morality for which the victim is held responsible. The combination of shame and feelings of responsibility and blame for having been victimized in this way can seriously limit an LGBTI applicant’s ability to discuss or even to mention such experiences.

**Explore all relevant aspects of the claim, even if they make you particularly uncomfortable.** While you must be sensitive as you interview an applicant regarding such delicate topics, at the same time you must not shy away from your duty to elicit sufficient testimony to make an informed adjudication. This may include instances involving sexual violence. It is critical that you ask all necessary and relevant follow-up questions to help the applicant develop his or her claim.

It is important to remember that in the PSG analysis, the relevant inquiry is not whether the applicant actually possesses the protected trait. Rather, it is whether the persecutor believes the applicant possesses the trait (either because the applicant does possess it or because the persecutor imputes it to the applicant). Thus, the issue is not whether the applicant actually is LGBTI, but whether the persecutor believes that he or she is, either because the applicant is or because the persecutor imputes it to the applicant.

It is not necessary to probe the details of the applicant’s personal life beyond what is necessary to make this specific determination. So, once you have established

---


68 See RAIO Training Module, Gender Related Claims.

that the persecutor perceives the applicant to have a protected trait, further inquiry into the specific nature of the applicant’s LGBTI status is not necessary to establish inclusion in a PSG.

Try to use the same language that the applicant has used in his or her own application. If an applicant refers to himself as “gay,” you should use this term, rather than “homosexual” and vice versa. The most important thing is to understand what a difficult topic this may be for the applicant to discuss and to be respectful.  

Do not assume that being a sexual minority is a lifestyle or a choice. This will help you avoid asking questions in a way that may put the applicant on the defensive and result in the applicant holding back information rather than imparting it.

Become familiar with the legal issues, terminology, and questioning techniques specific to the LGBTI community. You can use this information to help the applicant tell his or her own story.

Be mindful that the applicant and the interpreter may not be familiar with many of these issues or terms. While many LGBTI individuals in the United States embrace their LGBTI identity and have a language to talk about these issues, for many LGBTI individuals who come from countries where topics of sexuality are taboo, the way that applicants express themselves may be different from what an interviewer would expect from an LGBTI person in the United States.

The fact that an applicant may be uncomfortable with these terms may be a result of the fact that he or she comes from a culture where there is no word for homosexuality or transgender identity. It may be a result of his or her own ingrained homophobia from growing up in a culture where such terms were the equivalent of insults.

Become well-versed in country of origin information. This allows you to ask relevant follow-up questions. The more you know about the applicant's country of origin, the less likely you will be to miss important facts. Additionally, awareness of country conditions may also assist you in conducting the interview with cultural sensitivity and may help you put the applicant at ease during the interview. If the applicant notices that you took the time to try to understand the situation he or she faces in the country of origin as an LGBTI individual, he or she may be more inclined to talk in detail about his or her experiences and fears.

6.2.2 Explore all possible grounds

70 Id.
71 Id.
72 Id.
Many LGBTI applicants may not know that their sexual orientation, gender identity, HIV-positive status, or intersex condition is the basis for a protection claim and may be reluctant to talk about these topics because they are so private. This is especially true where applicants are not represented. They may only put forward the elements of their past experiences that their family or members of their communities recommend.

For example, an applicant from Colombia appears before you for an interview. The majority of claims you have adjudicated from Colombia involve fear of the FARC. The applicant tells you about all of the instances when he has had contact with the FARC. At the end of the interview you have already begun to analyze the case and despite being credible, your assessment is that the applicant has not established nexus, past persecution, or well-founded fear.

When you ask the applicant if there is any other reason he fears returning to Colombia, he appears to have something more to say, but hesitates. You suspect that there may be an issue that the applicant has not put forward. In this situation it would be appropriate to try to explain to the applicant that there is more than one ground for asylum or refugee status.

“Refugee (or Asylum) status is a case-by-case determination made based on an individual's unique circumstances and is not just for people fleeing because of political opinion. Individuals who are afraid to return because of their religion, sexual orientation, clan membership, or because of domestic violence may also be eligible. Are there any other circumstances affecting you that you would like to tell me about?”

It is important to remember that the applicant would still be required to provide credible testimony regarding past harm and/or fear of future harm on account of one of the five protected grounds.

6.2.3 Sample Questions

The following are appropriate types of questions to elicit testimony and assess credibility in LGBTI cases. Please note that these questions are intended as starting points and should not be used as a substitute for all necessary lines of inquiry and follow-up questions during your adjudication. In other words, it is good to have a general outline of questions you need to ask or questions you need the answers to, but not a script. Remember, credible testimony alone may be enough and, other than reliable country of origin information, is often the only other evidence the applicant submits to you.

Sexual Orientation

Appropriate Lines of Inquiry
The most common LGBTI claims are based on sexual orientation and involve gay men, and to a lesser extent lesbian women. If the applicant was aware that he or she was lesbian, gay, or bisexual while in the country of origin, he or she should be able to describe his or her personal experiences as well as the lives of gay people in general. The applicant should be able to describe what it was like coming to terms with his or her sexual orientation. Likewise, the applicant should be able to describe his or her first relationship, and the harm he or she suffered or fears in the home country. Keep in mind that this might only be true if the person is "out."

Ask the applicant about his or her experiences in the home country and his or her awareness of the lives of other lesbian, gay, or bisexual people there. These questions focus on the possession or perceived possession of a protected characteristic. You must also ask about past harm and fear of future harm.

The following are some suggested questions when adjudicating claims that involve the applicant’s sexual orientation:

- When did you first realize you were gay (or lesbian or bisexual)?
- Did you tell anyone?
- Why/why not?
- If yes, when?
- How did they react?
- Did you know other gay people in your home country?
- If yes, how were they treated?
- Did you hear about other gay people in your home country?
- If yes, how were they treated?
- 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?

---

75 Id.
76 Id.
• How do lesbian [or gay, or bisexual] people meet one another in your country?
• Were you involved in any LGBTI organizations in your country?
• Are you involved in any LGBTI organizations here?
• When you say people in your country want to kill people like you, can you explain what you mean by “people like you?”

Inappropriate Lines of Inquiry

The applicant’s specific sexual practices are not relevant to the claim for asylum or refugee status. Therefore, asking questions about "what he or she does in bed" is never appropriate.\(^77\) If the applicant begins to volunteer such information, you should politely tell him or her that you do not need to hear these intimate details in order to fairly evaluate the claim.

Transgender Identity\(^78\)

Appropriate Lines of Inquiry

A transgender applicant may identify as straight, lesbian, gay, or bisexual and that gender identity has to do with the person’s inner feelings about his or her sexual identity.\(^79\) Most transgender people consider themselves to be male or female. Therefore do not think of "transgender" as a gender. Male to female (M to F) transgender individuals were assigned the male gender at birth and consider themselves to be female. They are called transgender women.\(^80\)

Female to male (F to M) transgender individuals were assigned the female gender at birth and consider themselves to be male. They are called transgender men.\(^81\)

Start off with easy questions and gradually ease into asking the more sensitive ones; be cognizant not to put words in the applicant’s mouth. It is important to remember that being transgender involves an overall dissatisfaction 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.\(^82\) This question should be framed as one question among many that elicits the applicant’s expression of his or

---


\(^78\) For further reading see Immigration Law and the Transgender Client, available at http://www.immigrationequality.org/issues/law-library/trans-manual/


\(^81\) Id.

her transgender identity, such that it is perceived by the persecutor and the society in which the applicant lived.83

The most important thing to remember is to be respectful and nonjudgmental. If you feel that it is necessary to ask a question that the applicant may perceive as intrusive, you should explain why the answer to the question is legally necessary. If you are confused about the applicant’s self-identification, you should respectfully admit to feeling confused and ask the applicant to explain in his or her own words.84

The following are some suggested questions that, depending on the facts, may be appropriate when adjudicating a claim that involves the applicant’s gender identity:85

- When did you first realize you were transgender? Or: When did you first realize that although you were born as a male (female) you felt more like a female (male)?
- How did you realize this?
- Did you know other transgender people in your country? Or: Did you know other people who felt like you in your country?
- If yes, how were they treated?
- Did you hear about other transgender people in your country?
- If yes, how were they treated?
- When did you begin to transition from a man to a woman or woman to a man?
- What steps have you taken to transition?
- Do you now live full-time as a man (or woman)? When did you begin to live full-time as a man (or woman)
- Does your family know you’re transgender?
- If yes, how did they react when they found out?

Many transgender applicants will not have begun to live full-time in their corrected gender until they have come to the United States.86 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.

Inappropriate Lines of Inquiry

If an applicant testifies that he or she was not accepted in his or her home country because “people think I look like a girl, but I’m a guy,” do not follow up by asking “So,

---

83 Id.
what are you?” Furthermore, do not put words in the applicant’s mouth by asking such questions as: “You haven’t had any surgery or anything like that, right? So you’re a male who looks effeminate?”

If the applicant has not indicated that he or she was harmed or fears being harmed for being gay, do not begin by asking the applicant if he or she is homosexual. It is important to remember that gender identity and sexual orientation are two different issues. A transgender applicant may also be gay, lesbian, or bisexual, but that is not necessarily the case. It is also important to remember that even if the applicant is heterosexual, he or she may be perceived as homosexual because he or she does not fit the societal norms for his or her gender. Instead, focus on the problems the applicant experienced in the country of origin and address the issue of sexual orientation later, if necessary.

This approach also ensures that your questioning is tailored to eliciting information that allows you to determine what trait the persecutor, and the society in question, perceives in the applicant. Since this is the evidence required to analyze the nexus requirement and the social distinction of the relevant social group, lines of questioning that focus on what the applicant experienced and how he or she was or would be viewed will likely be the most effective.

**HIV Status**

**Appropriate Lines of Questioning**

You 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 you to be extremely sensitive in asking about the applicant’s HIV status.

If an applicant’s case is based in whole or in part on his or her HIV-positive status, you will need to ask questions about this. It is appropriate to ask about the applicant's state of health, current treatment regimen, and the availability of treatment in the home country.

In some cases, the applicant’s HIV status may be directly related to the persecution, for example, where a lesbian was raped and believes this was her only possible risk for HIV exposure. If the applicant’s HIV status is related to the harm the applicant suffered, it will be relevant for you to ask questions about this as well.

Many cases involve an applicant’s fear of harm based on the fact that his or her HIV-positive status may lead community members to assume, whether correctly or not,

---

87 Id.
89 Id.
that he or she is gay.\textsuperscript{90} If a claim is not based on the applicant’s sexual orientation or
gender identity and HIV status is not mentioned, it is not appropriate for you to ask the
applicant if he or she is HIV-positive.

Some cases will involve an applicant’s fear of violence, stigma, and extreme
discrimination based on his or her HIV-positive status. In other instances, the applicant’s
primary fear may be the lack of medical care in his or her home country.

It is important to keep in mind that if an applicant's case is based on sexual orientation or
gender identity and is not based on his or her HIV status, that you should not presume
that he or she is HIV-positive.

\textbf{Inappropriate Lines of Questioning}

Generally, the risk factor for HIV infection is 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.\textsuperscript{91}

In some asylum 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 or the applicant may not have been diagnosed until several years
after entering the United States. (\textit{See Asylum Supplement One-Year Filing Deadline},
below).

\textbf{Intersex Conditions}

\textbf{Appropriate Lines of Inquiry}

When questioning applicants with intersex conditions, use the same type of sensitive
questioning techniques suggested for sexual orientation, transgender identity, and
HIV-positive status claims.

Some intersex people will never have heard of anyone else like themselves, but others
will. There are some intersex conditions that run in families or are more common in
certain populations. Where the condition is known in a given culture, an applicant should
be able to describe how people like them are treated. Where the condition is known to
run in a family (but not throughout the culture), the entire family may face stigma, or
family members may be on the lookout for signs of the condition in order to keep the
family secret. For example, Androgen Insensitivity Syndrome (AIS) is an inherited
condition. People with this condition will have a typical-looking female body, but will be
infertile and will have only a shallow vaginal opening or none at all. Female relatives of
an affected woman may be carriers and can pass it on to their children. Normally it is not
discovered until puberty when the girl does not menstruate.

\textsuperscript{90} Id.

\textsuperscript{91} Id.
Many persons with intersex conditions may have difficulty understanding and articulating their own physical conditions and medical history. Therefore, some of these questions may be more appropriate for parents or families of young intersex children who face persecution.

The following are some suggested questions that, depending on the facts, may be appropriate when adjudicating a claim that involves the applicant’s intersex condition:

- When did you first learn about your condition?
- How did you learn about it?
- Did you tell anyone?
- Why/why not?
- If yes, when?
- How did they react?
- Does your family know about your condition?
- If yes, how did they react when they found out?
- Did you go to a doctor or other medical professional?
- Have you ever received medical treatment for your condition?
- What were you told about your condition?
- How much do you understand about your condition?
- Did you know other people with similar conditions in your country? Or did you know other people like you in your country?
- If yes, how were they treated?

7 **EVIDENCE ASSESSMENT**

As explained in greater detail in the RAIO training modules *Eliciting Testimony* and *Evidence Assessment*, while the burden of proof is on the applicant to establish eligibility, equally important is your duty to elicit all relevant testimony. Establishing eligibility means the applicant must establish past persecution or a well-founded fear of future persecution based on actual or imputed (perceived) sexual orientation or gender identity. Your duty includes always recognizing the non-adversarial nature of the adjudication, applying interviewing techniques that best allow you to elicit detailed testimony from an LGBTI applicant, and diligently conducting relevant country of origin information research.

In addition to the applicant’s testimony, reliable country of origin information may be the only other type of evidence available to you when you make your decision in a case involving LGBTI applicants. It is important to remember that reliable information
regarding the treatment of LGBTI individuals may sometimes be difficult to obtain and that the absence of such information should not lead you to presume that LGBTI individuals are not at risk of mistreatment.

7.1 Credibility Considerations During the Interview

If an applicant is seeking refugee or asylum status based on his or her sexual orientation, gender identity, intersex condition, or HIV-positive status, he or she will be expected to establish that the persecutor views the applicant as a sexual minority or HIV-positive, either because the applicant actually has such status or because the persecutor imputes it to him or her. Under either basis, the critical point to establish is what trait the persecutor perceived in the applicant.

Credible testimony alone may be enough to satisfy the applicant’s burden. Sexual minority or imputed sexual minority claims tend to rely heavily on the applicant's own testimony to establish all of the elements of the claim. Therefore, your job will be to fully and fairly elicit all testimony with regard to the harm the applicant suffered or fears based on his or her actual status as a sexual minority or perceived status as a sexual minority.

7.1.1 Plausibility

The fact that an applicant testifies about events that may appear unlikely or unreasonable does not mean it is implausible that the events actually occurred. You must take care not to rely on your views of what is plausible based on your own experiences, which are likely to be quite different from the applicant’s.

What if the Applicant is Married or Has Children?

An applicant may have gotten married in his/her home country and/or have children. This, by itself, does not mean that the applicant is not gay. “Many applicants describe enormous social pressure to marry and being forced into a marriage by their family or society. Other applicants, while grappling with their sexual identity, have tried to lead a heterosexual life and ‘fit in’ within their society.”

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 societal norms. 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.

---

93 Id.
94 Id.
If you have concerns about the credibility of an LGBTI applicant who is married, it may be appropriate to ask the applicant a few questions surrounding the reasons for marriage. If the applicant is able to provide a consistent and reasonable explanation of why he or she is married and/or has children, that portion of the testimony should be found credible.

**What if the Applicant Does Not Appear to be Familiar With LGBTI Terminology?**

While most Americans are accustomed to reading and hearing about LGBTI issues in the news, these terms may be 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.”95 Therefore, you should not assume that it is implausible for an applicant to be gay, lesbian, or transgender if he or she is not familiar with LGBTI terms.

**What if The Applicant Does Not “Look” or “Act” Gay?**

Some applicants with LGBTI-related claims will not “look” or “act” gay.96 If an applicant provides detailed testimony about his or her experiences in the country of origin,97 it would be inappropriate for you hold against the applicant the fact that he or she does not fit your notion for how LGBTI people should look or behave.

While 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, many men who identify as gay will not appear effeminate and many women who identify as lesbians will not appear masculine98

For some LGBTI people, the harm they suffer, especially in their youth before accepting their LGBTI identity, may be related to their feminine characteristics (for males) or their masculine characteristics (for females). Regardless of whether the applicant was “out” at the time he or she was harmed, this harm should be considered related to their LGBTI status.99

95 *Id.*

96 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 found an Albanian applicant’s claim to be gay not credible 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 IJs conclusion that a “dangerous criminal” could not be identified as a “feminine . . .homosexual” in his native Guyana.

97 (See Credibility-Detail below for appropriate credibility considerations).

98 *See Hernandez-Montiel v. INS, 225 F.3d 1088 (9th Cir. 2000).*

99 *See Immigration Equality Draft Model LGBT Asylum Guidance, 2010.*
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 LGBTI identity apparent, that is, he or she fits the accepted stereotype for LGBTI people in his or her culture. Cultural signals about a person’s sexual orientation or gender identity may vary between individuals from other countries and your own. Thus, an applicant may tell you that he or she appears obviously LGBTI, but the applicant may not fit stereotypes you have formed of LGBTI people according to your own cultural norms.

Whether or not an applicant claims that his or her LGBTI identity is apparent, it is appropriate for you 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 may make him or her suspect. In other countries, the only way for LGBTI people to meet other LGBTI people is to go to gay clubs, or parks, which may put them at risk of exposure. For transgender applicants, having identity documents that do not match their name or outward gender appearance, may put them at risk. (See Interviewing Considerations above for appropriate lines of questioning to determine credibility.)

As discussed above, it is important to remember that transgender identity and sexual orientation are distinct concepts. While it may be obvious from the appearance of some transgender individuals that they are transgender, other transgender individuals may “pass,” or blend in quite well as their corrected gender. By way of contrast, transgender people who are at the beginning of their transition also may not “look transgender.”\(^{100}\) In these cases, as in other categories of protection cases, you should not base your decision on the applicant’s outward appearance. Instead, you should elicit relevant testimony about the applicant’s identity and, if appropriate, request corroborating evidence.

**What if Country of Origin Information Does Not Address LGBTI Issues?**

The fact that little or no corroboration of mistreatment against LGBTI individuals is included in reports that generally address human rights violations does not render the applicant’s claim of past harm or fear of future harm implausible in light of country of or inconsistent with country of origin information.\(^{101}\) The weight to be given to the fact that country conditions information fails to corroborate a claim will depend on the specific allegations, the country, and the context of the claim.

### 7.1.2 Consistency

**Claims Not Initially Put Forth**

An LGBTI individual may initially assert a claim based on another protected ground such as political opinion or religion and later reveal that he or she was harmed or fears harm based on his or her sexual orientation. This may be because the applicant was reluctant

\(^{100}\) See Immigration Equality Draft Model LGBT Asylum Guidance, 2010.

to talk about his or her sexual orientation or gender identity or because he or she was unable to articulate a connection to a particular protected ground.

There may be situations where the applicant does not initially put forward a claim based on sexual orientation or gender identity but does so later on. For example, a newly arrived applicant may not feel comfortable or safe revealing his or her sexual orientation or gender identity to an Immigration Officer during primary or secondary inspection or an Asylum Officer during a Credible Fear interview at the Port of Entry. Then, he or she may subsequently reveal this information on his or her asylum application.

In the case of Dominic Moab, a gay asylum seeker from Sierra Leone, the IJ denied the case and the BIA affirmed, in part because Mr. Moab “failed to mention his homosexuality to the immigration officers at the airport or to the examining official during his credible fear interview.”102 The Seventh Circuit remanded the case, finding that the BIA had not considered the fact that, for several reasons, “airport interviews are not always reliable indicators of credibility.”

In overseas refugee processing, an applicant may not initially tell the referring agency, such as UNHCR or the Resettlement Support Center (RSC) about being gay or transgender, but then subsequently tell the USCIS Interviewing Officer about his or her LGBTI status. If you are confronted with such a scenario, do not automatically assume the applicant is not credible but follow the guidance above about what information the application should generally be able to relay.

It is important to take into account all of the factors mentioned in this module in assessing the applicant's ability to articulate his or her claim. When exploring these claims, remember that the applicant may have other grounds upon which he or she may qualify for refugee status or asylum. If a claim can clearly be established on another ground, that may form the basis for the decision.

As with all other credibility determinations, you must give the applicant the opportunity to explain any inconsistencies or omissions in his or her case. In a situation where an applicant does not initially mention his or her sexual orientation or gender identity and later does as a basis for protection, you would ask for an explanation:

“Help me understand. Why do you tell me this now, but did not mention it to the Officer at the airport? Or to UNHCR or the RSC?”

**Seemingly Inconsistent Use of LGBTI Terms**

If the application form states in one place that the applicant is bisexual, but he or she testifies that he or she is homosexual, do not assume this is a contradiction and do not

---

102 Moab v. Gonzales, 500 F. 3d 656, 657 (7th Cir. 2007).
pursue a line of questioning such as: “Homosexual? Your application says bisexual. Well, which is it homosexual or bisexual?”

7.1.3 Detail

An essential component of an LGBTI claim is that the applicant must establish that the persecutor perceived him or her to be a sexual minority. This perception can be based on the applicant’s actual status, or on a status imputed to the applicant. Where the persecutor’s perception is based on a status that the applicant in fact has, appropriate details about the applicant’s experience as LGBTI may help to substantiate the claim.

It is important to remember however, that the ultimate legal question is whether the persecutor targets the victim because the persecutor perceives a protected trait in the victim. Questions about the applicant’s sexual orientation should be filtered through that lens. The purpose of establishing LGBTI is to show why the persecutor perceived this trait in the individual. In a claim based on imputation of the protected trait, the reasons why the persecutor viewed the applicant as having that trait will be different, and it would be those different reasons that the applicant would have to establish.

As with any other type of refugee or 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. He or she should be able to explain when he or she first began to feel attracted to members of the same sex, if and 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.103

Acceptable lines of questioning to develop the applicant’s claim and to test credibility are listed above in Sample Questions.

7.2 Country of Origin Information

Country of origin information on LGBTI issues can sometimes be more difficult to find than on other issues.104 You should not conclude that if these issues are not mentioned that no problems exist. Many organizations that report on human rights issues lack sufficient contacts within local LGBTI communities to know what LGBTI individuals experience in their countries, or do not have the resources to investigate and/or monitor all types of human rights violations in a particular country.

Often the countries where homosexuality is most taboo have the least country conditions information available. In many countries, for example those with conservative, religious

104 See Id.
governments, there is little or no mention of the existence of LGBTI citizens in any media. This may also be true in countries with antidemocratic, authoritarian governments, where LTBTI groups may not be allowed to exist.

Where there is a lack of sufficiently specific country of origin information, you may have to rely on the applicant’s testimony alone to make your decision.105

Useful resources in gathering information LGBTI claims include:

- The Amnesty International Out Front program at www.amnestyusa.org/outfront
- The International Lesbian and Gay Association (http://ilga.org/) website, which contains a legal survey where you can search legal codes and country conditions.
- The Human Rights Watch LGBT division and HIV division at www.hrw.org/en/category/topic/lgbt-rights
- Refugee, Asylum, and International Operations Directorate (RAIO) Virtual Library at http://raiovl/docushare/dsweb/HomePage
- UNHCR’s Ref World at http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain

7.3 Corroborating Evidence

In some situations, where it is necessary to establish that the persecutor perceived a protected trait in the applicant, you may ask the applicant to provide evidence that corroborates his or her sexual orientation, gender identity, or HIV-positive status. Pursuant to amendments to INA section 208 made by the REAL ID Act of 2005, an applicant for asylum must provide this evidence unless he or she does not have the evidence and cannot reasonably obtain the evidence. Although the REAL ID Act amendments to INA section 208 do not directly apply to overseas refugee processing, which is governed by INA section 207, you may ask the applicant to produce corroborating evidence if it is reasonably available and is necessary for the adjudication of the claim.

---

105 UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity.
It is very important to remember, however, that because of the different ways overseas refugee and asylum applicants obtain interviews with USCIS, the evidence that refugee applicants can reasonably obtain compared with the corroborating evidence some asylum seekers can reasonably obtain varies greatly.

**Corroborating Sexual Orientation**

You may ask the applicant to provide evidence that corroborates his or her sexual orientation as a means of establishing that the persecutor perceived or would perceive the protected trait in the applicant. The applicant must provide this evidence unless he or she does not have the evidence and cannot reasonably obtain the evidence. Again, it is important to remember that the evidence refugee applicants can reasonably obtain varies greatly compared with the evidence some asylum applicants can reasonably obtain. Examples include a letter from a current or ex-partner; a letter from a friend with whom the applicant has discussed his or her sexual orientation; a letter from a family member; proof that he or she is involved in an LGBTI political or social organization; or a psychological evaluation, etc.106

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 LGBTI people in the United States or the country of first asylum. As in any other case, the applicant should not automatically be denied for lack of corroboration. Rather, it is reasonable for you to question the applicant about why corroboration is unavailable, and factor this explanation into your decision-making process.

**Corroborating Transgender Identity**

Again you may ask the applicant to provide evidence that corroborates his or her transgender identity as a means of establishing that the persecutor perceived or would perceive the protected trait in the applicant. The applicant’s detailed, consistent, credible testimony may be sufficient to establish this status. 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.

---

A number of transgender individuals receive necessary medical treatment to help their outward appearance correspond 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.\textsuperscript{107}

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 from a medical professional or explain why such corroboration is not available.\textsuperscript{108}

**Corroborating HIV-Positive Status**

An applicant who is requesting refugee or asylum status in whole or in part based on being HIV-positive, should generally 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. You may ask for such corroboration as a means of determining that the persecutor did or would perceive this trait in the applicant. Again, this expectation may vary in the context of overseas refugee processing.

8 **CONCLUSION**

Adjudicating LGBTI refugee and asylum claims presents certain unique challenges. It is important to remember to be sensitive to the issues, familiar with the terminology, and familiar with relevant country of origin information. By definition, these claims involve the most private of matters – sexual orientation, gender identity, and sometimes serious illness. Always remain respectful and nonjudgmental, don't be afraid to acknowledge your discomfort to yourself and to the applicant. Familiarize yourself with the legal nuances involved in these types of cases and do your best to elicit all relevant details without re-traumatizing the applicant or being insensitive.

9 **SUMMARY**

9.1 **LGBTI and HIV Terminology**


\textsuperscript{108} Id.
Becoming familiar with relevant terminology helps you become more aware of the nuances involved in adjudicating LGBTI refugee and asylum claims. It is important to be familiar with the terminology but also to keep in mind that the applicant may come from a culture where sensitivity to these issues is not as high as in other countries and may not be familiar with the terms himself or herself. The terms "sexual minorities" and LGBTI are used in this module interchangeably to refer to issues that involve sexual orientation and gender identity.

9.2 Legal Analysis – Nexus and the Five Protected Characteristics

LGBTI refugee and asylum claims are primarily analyzed under the ground membership in a PSG. Sexual orientation, gender identity (or the right to live in one's "corrected gender"), and having an intersex condition can be classified as either innate or so fundamental to an individual’s identity that the individual should not be required to change them. Social visibility does not require that the trait be literally visible to the eye.

Ways to formulate the PSG have included “sexual minority from Russia,” “gay man from Columbia,” “lesbian from Iran,” or “transgender female from Mexico.” Ask questions about what the persecutor may have said to him or her and about the circumstances surrounding the harm inflicted on or threats made against the applicant.

9.3 Legal Analysis – Types of Persecution

The two questions you must ask yourself to determine whether the applicant suffered or fears persecution are: 1) did the harm rise to the level of persecution; and, 2) did the applicant experience the incident as harm? Examples of harm that LGBTI applicants may have faced or fear and that may rise to level of persecution include: physical and sexual violence; execution; imprisonment; forced marriage; long-term, systemic discrimination; threats of violence and to "out" the applicant; and forced psychiatric treatment.

Lesbians may have suffered the harms that befall many women in addition to harms that befall members of the LGBTI community. Transgender individuals may be more visible and may be more commonly viewed as transgressing societal norms than gay men or lesbians. They may be subjected to increased discrimination and persecution.

9.4 Legal Analysis – Well-Founded Fear

The fact that LGBTI organizations are permitted to hold a parade once a year or the mere existence of LGBTI organizations does not mean that LGBTI people are free from ongoing violence and harm in that country.

An applicant who was forced to conceal his or her sexual orientation or gender identity in the home country in order to avoid harm and did not suffer harm that rose to the level of persecution may still qualify for refugee or asylum status if he or she has a well-founded fear of future persecution. In some cases, the experience of having to conceal sexual
orientation or gender identity may itself result in suffering severe enough to constitute persecution. Some LGBTI applicants come to the United States for work or study and subsequently "come out" to themselves and to others.

9.5 **Legal Analysis – One-Year Filing Deadline (asylum only)**

In many instances an individual does not "come out" as lesbian, gay, bisexual, or transgender until he or she is in the country where he or she sees that it is possible to live an open life as an LGBTI person. If an individual has recently "come out" this may qualify as an exception to the one-year filing deadline based on changed circumstances.

An individual may qualify for a one-year exception based upon serious illness, for example being diagnosed as HIV-positive.

LGBTI individuals who suffer from internalized homophobia and transphobia or who may 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 they may need to proceed with their applications. Also many LGBTI asylum seekers in the United States live with extended family members or with members of the very community they fear.

9.6 **Interviewing Considerations**

It is important to create an interview environment that allows applicants to freely discuss the elements and details of their claims. LGBTI claims involve very private topics that are difficult for the applicants to talk openly about and may sometimes make you uncomfortable.

You may help to set the applicant at ease by reminding him or her that the interview is confidential. You may also specifically remind the interpreter, in the presence of the applicant, that the interpreter must also keep all information confidential.

The early part of the interview should be devoted, in part, to putting the applicant at ease, while reviewing the biographical information on the application. For transgender applicants, it may be better to come back to the question about "gender" at the end of the interview as this issue may be sensitive and go to the heart of the claim.

It is important to conduct the interview in an open and nonjudgmental atmosphere. Try to use the same language that the applicant has used. For example if the applicant refers to himself as gay, you should use this term rather than homosexual and vice versa. Become familiar with the legal issues, terminology, and country of origin information to help the applicant to his or her own story.

Keep in mind that while you have familiarized yourself with LGBTI-related terms neither the applicant nor the interpreter may be as familiar with them as you are. You may then have to adjust the formulation of your questions accordingly.
It is never appropriate to ask questions about the applicant's specific sexual practices or about "what he or she does in bed." If the applicant begins to testify graphically about sexual practices, you should politely tell him or her that you do not need to hear these intimate details in order to fairly evaluate the claim.

If the applicant was "out" as lesbian, gay, or bisexual in the home country, he or she should be able to provide details about his or her experiences there; his or her awareness of the lives of other gay people there; what it was like coming to terms with his or her sexual orientation; and, if relevant, to describe his or her first relationship.

Keep in mind that sexual orientation and gender identity are two different concepts. A transgender applicant may identify as straight, lesbian, gay, or bisexual. Being transgender involves an overall dissatisfaction with the gender assigned at birth; it is not about having one particular surgery. If you were confused about an applicant's self identification, you should respectfully admit to feeling confused and asked the applicant to explain in his or her own words.

When interviewing an applicant who is HIV-positive be mindful that it may be appropriate to ask about the applicant's state of health, current treatment regimen, and the availability of treatment in the home country. DO NOT ask the applicant where he or she may have contracted HIV.

9.7 Burden of Proof and Evidence – Credibility

An applicant's credible testimony may be the only evidence available for you to take into consideration when adjudicating LGBTI-related refugee and asylum claims. If the applicant is seeking refugee status or asylum based on his or her sexual orientation, gender identity, or HIV-positive status, he or she will be expected to establish that the persecutor perceived this protected trait in him or her. In some cases, the reason for the persecutor’s perception is that the applicant is actually gay, lesbian, or bisexual, transgender, or HIV-positive. In other cases, where the applicant does not identify as gay, lesbian, or bisexual but is only imputed to be, he or she will need to establish the other reasons why he or she was perceived that way.

The fact that an applicant was married or has children does not mean that it is impossible that the applicant is gay. 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 societal norms.

Do not assume that an applicant must conform to a particular stereotype in order to be lesbian or gay. A man may identify as gay and not appear or consider himself effeminate. A woman may identify as lesbian and not appear or consider herself masculine. This does not mean that it is not plausible that he or she is gay or lesbian.

If an applicant does not initially tell the first official he or she comes into contact with about his or her sexual orientation or gender identity and subsequently reveals this in his
or her claim, do not automatically assume that the applicant is not credible. Instead follow the guidance about what testimony such an applicant should reasonably be expected to provide and try to elicit that information.

9.8 Burden of Proof and Evidence – Country of Origin Information

For various reasons, detailed, reliable country of origin information may be difficult to obtain. This does not render the applicant's claim of past harm or fear future harm implausible in light of or inconsistent with country of origin information.
NOTE: Practical Exercises will be added at a later date.

**Practical Exercise # 1**

- **Title:**
- **Student Materials:**
OTHER MATERIALS

LGBTI Terminology/Glossary

There are a number of terms that may be used by LGBTI applicants in their protection claims. Although not all LGBTI applicants will use these terms, it will be important for you to be familiar with these terms prior to conducting an interview. The glossary is divided into sections that distinguish between sexual orientation terms and gender identity terms, and also includes medical and legal terms. This glossary is comprised of terms generally used by the LGBTI community and others in the United States.

Please note: The definition of the term intersex sometimes overlaps with sexual orientation, gender identity, and medical issues and is therefore found in its own separate section.

Sexual Orientation Terms

Bisexual – (noun or adjective) a man or woman who has an enduring emotional and/or physical attraction 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.

“Closeted” – (adjective) describes a person who keeps his or her sexual orientation secret. Also, “living in the closet.”

“Come Out” – (verb) 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 lesbian or gay, 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.

Gay – (adjective) a man who has an enduring emotional and/or physical attraction to men. Some women who are attracted to women use the term gay to describe themselves as well.


110 For more general information about sexual orientation, see http://www.apa.org/pubinfo/answers.html on the American Psychological Association website.
**Heterosexual** – see “Straight” below

**Homosexual** – (noun or adjective) an individual who has an enduring emotional or physical attraction to members of the same sex. This term is often considered clinical with a slightly derogatory connotation within the LGBTI community.

**Homophobia** – (noun) deeply ingrained feelings of prejudice toward lesbian, gay and bisexual people; the irrational fear, based upon myths and stereotypes, of homosexuals or those perceived to be homosexual.

**Lesbian** – (noun or adjective) a woman who has an enduring emotional or physical attraction to women; homosexual women also sometimes use the term “gay” to describe themselves.

“Out” – (verb) the involuntary disclosure of a person’s lesbian or gay sexual orientation. For example, an applicant may say, “My cousin saw me with my partner and then he ‘outed’ me to the whole community.”

**Sexual Orientation** – (noun) an umbrella term that describes an individual’s enduring romantic and/or physical attraction to those of a particular sex; an aspect of human identity developed in the early stages of a person’s life that is highly resistant to change.

**Straight** – (noun) (also heterosexual) or an individual’s enduring romantic and/or physical attraction to individuals of the opposite sex.

**Gender Identity Terms**

**Birth Sex** – (noun) the gender that an individual was assigned at birth which is usually indicated on his or her original birth certificate.

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

**FTM** – (noun) a female to male transsexual; that is, an individual assigned the female gender at birth who now identifies as male. Also referred to as a transgender man or transman.

**Gender** – (noun) the social construction of what society values as the roles and identities of being male or female; assigned at birth to every person; does not always align with gender identity.

---

111 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
**Gender Identity** – (noun) a person’s inner sense of being male or female, both, or neither, resulting from a combination of genetic and environmental influences.

**Gender Roles** – (noun) what a given society considers “masculine” or “feminine” behaviors and attitudes; how individuals express their assigned gender or the gender they identify with. For example, a traditional gender role for a man is to be competitive, athletic, and aggressive. A traditional gender role for a woman is to want to have and take care of children. Gender roles in many societies have expanded in recent years for both men and women.

**Heterosexism** – (noun) the assumption that everyone is or ought to be heterosexual and that a person’s gender identity will be fixed at birth in accordance to his or her birth sex.

**Hormone Therapy** – (noun) one medical step that a transgender person may take to transition. For transgender men this involves taking testosterone. For transgender women this involves taking estrogen.

**MTF** – (noun) a male to female transsexual, that is an individual assigned the male gender at birth who now identifies as female. Also referred to as a transgender woman or transwoman.

**“Passing”** – (verb) a transgender person living in his or her corrected gender without it being readily apparent that he or she is transgender.

**Sex** (noun) – biological maleness or femaleness; the division of male and female on the basis of reproductive organs.

**Sex Reassignment Surgery (SRS)** – (noun) refers to any of more than two dozen potential surgeries that a transgender person may undergo. Not all transsexuals choose or can afford SRS. This is a preferred term to “sex change operation.”

**Transgender** – (noun) an umbrella term for people whose gender identity and/or gender expression differs from the 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. Transgender is a gender identity, not a sexual orientation. Thus, like any other man or woman, a transgender person may have a heterosexual, bisexual, or homosexual orientation.

**Transition** – (verb) 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.

**Transsexual** – (noun) 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”** (noun) - 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.

**Transphobia** (noun) – deeply ingrained feelings of prejudice toward transgender people; the irrational fear, based on myths and stereotypes, of people who are transgender or are perceived to be a transgender person.

**Intersex Terms**

**Intersex** (noun, adjective) – Intersex refers to a condition in which an individual is born with a reproductive or sexual anatomy and/or chromosome pattern that does not seem to fit typical definitions of male or female. The conditions that cause these variations are sometimes grouped under the terms “intersex” or “DSD” (Differences of Sex Development). These conditions include androgen insensitivity syndrome, some forms of congenital adrenal hyperplasia, Klinefelter’s syndrome, Turner’s syndrome, hypospadias, and many others. Individuals with this condition were previously referred to as “hermaphrodites,” but this term is considered outmoded and should not be used unless the applicant uses it.

**Legal Terms**

**Civil Union** – formal recognition of committed same-sex relationships recognized by some states and foreign countries. Similar to but not the same as marriage. Civil unions confer many of the same rights, benefits, and privileges enjoyed by opposite sex marriages such as estate planning or medical decisions.

---

113 For more information on intersex issues, see the Advocates for Informed Choice website, [www.aiclegal.org](http://www.aiclegal.org)
**Domestic Partnership** – A civil or legal contract recognizing a partnership or a relationship between two people which confers limited benefits to them by their employer.

**Sodomy Laws** – laws that prohibit consensual, adult, private, noncommercial sex. Used mostly against gays and lesbians.

**Medical Terms Related to HIV**

**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.

**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.

**HIV-Positive**[^1] – 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 his or her health.

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.

**LGBTI-Related Case Law**\(^{115}\)

### 2011


### 2010

- **Todorovic v. Att’y Gen. of the U.S.**, 621 F.3d 1318 (11th Cir. 2010) (gay man from Serbia)
- **Ayala v. Att’y Gen. of the U.S.**, 605 F.3d 941 (11th Cir. 2010) (gay, HIV+ man from Venezuela)
- **Eneh v. Holder**, 601 F.3d 943 (9th Cir. 2010) (man living with AIDS from Nigeria)
- **Aguilar-Mejia v. Holder**, 616 F.3d 699 (7th Cir. August 6, 2010) (HIV+ man from Mex./Guatemala)

### 2009

- **N-A-M- v. Holder**, 587 F.3d 1052 (10th Cir. 2009) (M to F transsexual woman from El Salvador)
- **Martinez v. Holder**, 557 F.3d 1059 (9th Cir. 2009) (gay man from Guatemala)
- **Pangilinan v Holder**, 568 F.3d 708 (9th Cir. 2009) (transsexual woman from the Philippines)
- **Manani v. Filip**, 552 F.3d 894 (8th Cir. 2009) (HIV+ woman from Kenya)

### 2008

- **Razkane v. Holder**, 562 F.3d 1283 (10th Cir. 2008) (gay man from Morocco)
- **Bromfield v. Mukasey**, 543 F.3d 1071 (9th Cir. 2008) (gay man from Jamaica)
- **Eke v. Mukasey**, 512 F.3d 372 (7th Cir. 2008) (gay man from Nigeria)
- **Bosede v. Mukasey**, 512 F.3d 946 (7th Cir. 2008) (HIV+ man from Nigeria)
- **Ali v. Mukasey**, 529 F.3d 478 (2nd Cir. 2008) (gay man from Guyana)
- **Kadri v. Mukasey**, 543 F.3d 16 (1st Cir. 2008) (gay man from Indonesia)

---

\(^{115}\) In descending order by year.
2007

Jean-Pierre v. Att’y Gen. of the U.S., 500 F.3d 1315 (11th Cir. 2007) (HIV+ man from Haiti)

Morales v. Gonzales, 478 F.3d 972 (9th Cir. 2007) (transgender woman from Mexico)

Nabulwala v. Gonzales, 481 F.3d 1115 (8th Cir. 2007) (lesbian woman from Uganda)

Shahinaj v. Gonzales, 481 F.3d 1027 (8th Cir. 2007) (gay man from Albania)

Ixtilco-Morales v. Keisler, 507 F.3d 651 (8th Cir. 2007) (gay man from Mexico)

Moab v. Gonzales, 500 F.3d 656 (7th Cir. 2007) (gay man from Liberia)

Lavira v. Att’y Gen. of the U.S., 478 F.3d 158 (3d. Cir. 2007) (HIV+ man from Haiti)

Joaquin-Porras v. Gonzales, 435 F.3d 172 (2d. Cir. 2006) (gay man from Costa Rica)

2006

Ornelas Chavez v. Gonzalez, 458 F.3d 1052 (9th Cir. 2006) (transgender woman from Mexico)


2005

Salkeld v. Gonzales, 420 F.3d 804 (8th Cir. 2005) (gay man from Peru)

Boer-Sedano v. Gonzales, 418 F.3d 1082 (9th Cir. 2005) (gay man with AIDS from Mexico)

Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005) (gay, HIV+ man from Lebanon)

Kimumwe v. Gonzales, 431 F.3d 319 (8th Cir. 2005) (gay man from Zimbabwe)

Galicia v. Ashcroft, 396 F.3d 446 (1st Cir. 2005) (gay man from Guatemala)

2004

Reyes-Reyes v. Ashcroft, 384 F.3d 782 (9th Cir. 2004) (gay man with female sexual identity from El Salvador)

Gebremaria v. Ashcroft, 378 F.3d 734 (8th Cir. 2004) (HIV+ woman from Ethiopia)
Molathwa v. Ashcroft, 390 F.3d 551 (8th Cir. 2004) (gay man Botswana)

2003

Amanfi v. Ashcroft, 328 F.3d 719 (3rd Cir. 2003) (man imputed to be gay from Ghana)

1990-2000

Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000) (gay man with female sexual identity from Mexico)

Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997) (lesbian woman from Russia)

SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING


ADDITIONAL RESOURCES

See Additional Resources listed at the beginning of this module.

SUPPLEMENTS

There are no RAD supplements for this training module.
SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

See Required Reading listed at the beginning of this module.

ADDITIONAL RESOURCES

See Additional Resources listed at the beginning of this module.

SUPPLEMENTS

ASM Supplement – 1

Legal Analysis – One-Year Filing Deadline

This module does not alter the legal criteria used to evaluate the one-year filing deadline. There are, however, some factual scenarios that may arise specifically in the context of LGBTI claims that are useful to discuss within the legal framework of established guidance on the one-year filing deadline.

Changed Circumstances Specific to LGBTI Applicants

Changed Country Conditions

As with any other type of asylum claim, if conditions in the applicant’s country of origin have changed substantially, this may form the basis for an exception to the one year filing deadline.\(^{116}\) For example, a fundamentalist government may have just come to power and instituted criminal sanctions for consensual homosexual activity.

“Coming Out” as LGBTI

In many instances an individual does not feel comfortable accepting himself or herself as LGBTI until he or she is in a country where the applicant can see that it is possible to live an open life as an LGBTI person. If an individual has recently “come out” as lesbian, gay, bisexual, or transgender, this may qualify as an exception based on changed circumstances.

**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 therefore 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.

**Recent HIV Diagnosis**

Some individuals will apply for asylum only after they have been diagnosed with HIV. For some applicants, the claim will be based wholly on his or her HIV status and the fear of persecution upon return to the country of origin. For other individuals who may also be LGBT, the HIV diagnosis may be “the last straw,” causing the applicant to 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 so their LGBT identity would become known.

In *Manini v. Filip* 552 F.3d 894, (8th Cir. 2009), a Kenyan woman entered the U.S. in October 2001, was diagnosed with HIV in January 2003, and filed affirmatively for asylum in May 2004. The Asylum Office accepted her recent HIV diagnosis as a “changed circumstance,” but found that the 16 month delay in filing after the diagnosis fell outside the “reasonable period of time” required by law. The BIA upheld the decision and the Eight Circuit found that it lacked jurisdiction to review the one year issue. See also *Ixtlilco-Morales v. Keisler*, 507 F.3d 651 (8th Cir. 2007), where the Eight Circuit also accepted the applicant’s recent HIV diagnosis as a changed circumstance but upheld the BIA and IJ decisions to deny the case on other grounds.

The following are some suggested lines of questioning when adjudicating a claim

---

117 *Id.*

118 See AOBTC One-Year Filing Deadline lesson plan, Section VII, Credibility, Subsection B, Totality of the Circumstances, Subsection c, Extraordinary Circumstances.

119 See Explore All Possible Grounds in Section 6, Interview Considerations, and Claims Not Initially Put Forward in Section 7, Burden of Proof and Evidence above.
that involves the applicant's HIV status:¹¹⁷

- When did you learn that you are HIV-positive?
- How did you feel when you received your diagnosis?
- Does your family know that you’re HIV-positive?
- How did they react?
- Have you experienced any HIV-related symptoms?
- Have you ever been hospitalized because of HIV?
- Are you taking any HIV-related illnesses?
- When did you begin taking them?
- Do you experience any side effects from the medications?
- Have you ever seen a mental health provider because of your diagnosis?

**Extraordinary Circumstances Specific to LGBTI**

**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.

**PTSD or Other Mental Health Issues**

As with any other asylum seekers, LGBTI applicants may suffer from Post Traumatic Stress Disorder (PTSD) or other mental health issues which make it difficult to file within a year of entry into the United States. LGBTI 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 may need to proceed with their applications.

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

Example: The applicant, a transgender male from Honduras, suffered severe and continuous sexual and other physical abuse for many years as well as familial and
societal discrimination and ostracism on account of his sexual orientation. He last entered the US in 2003 but did not file for asylum until 2009. The applicant credibly explained that he felt isolated and was afraid to come forward sooner because he was ashamed and fearful of ostracism by friends and colleagues and society in general. According to medical reports he submitted, he suffered from PTSD as a result of the years of trauma he suffered in Honduras. His PTSD can be seen as an extraordinary circumstance related to the delay in filing during the year after he arrived; the 5-year delay afterwards may also be considered reasonable based on that medical condition.  

Severe Family or Community Opposition or Isolation

Many LGBTI people who arrive in the United States stay with extended family members or with other members of their community. Being surrounded by family or community members may make it impossible for the LGBTI applicant to timely file for fear that if the family member learns of the applicant’s LGBTI 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.

Extreme isolation within a particular immigrant community may qualify as an 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. While some applicants may be aware that they can seek asylum in the United States 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 LGBTI individuals who come to the U.S. and immediately take up residence in an immigrant community with people from their own country. Often an LGBTI applicant would be fearful of disclosing his or her LGBTI 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.

For example, a gay Tunisian man who was admitted to the United States on a non-immigrant visa is helped by men from Egypt and other Arab immigrant communities to find housing and employment. These men are not aware that the applicant is gay and tell him that asylum is generally not a means for legalizing one’s status in the United States. It is not until the applicant meets a gay man from the United States that he becomes aware that he may be a refugee under U.S. law.
SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

See Required Reading listed at the beginning of this module and Required Reading in the RAD Supplement.

ADDITIONAL RESOURCES

See Additional Resources listed at the beginning of this module.

SUPPLEMENTS

There are no IO supplements for this module.
April 10, 2012

PM-602-0061

Policy Memorandum

SUBJECT: 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)

Purpose
This Policy Memorandum (PM) and accompanying revisions to the AFM articulate USCIS policy regarding assigning appropriate gender designations on documents issued to transgender individuals and the adjudication of benefits applications involving the marriage of transgender individuals. The memorandum supersedes the following: 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); and Adjudication of Petitions and Applications Filed by or on Behalf of Transsexual Individuals (January 14, 2009).

Scope
Unless specifically exempted herein, this PM applies to and binds all USCIS employees.

Authority

Background
The 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) had been previously superseded, in part, with respect to issues of marriage by the memorandum on Adjudication of Petitions and Applications Filed by or on Behalf of Transsexual Individuals (January 14, 2009). The policy with respect to other documents was never updated, however. To clarify and unify the standards being applied to document issuance, as well as eligibility for benefits based upon marriage, the entire memo is now superseded and replaced with more comprehensive guidance on the same topics.

In 2005, the Board of Immigration Appeals (Board) issued the precedent decision Matter of Lovo-Lara, 23 I&N Dec. 746 (BIA 2005). The case involved a petitioner born in North Carolina who underwent sex reassignment surgery and then amended her birth certificate, reflecting her
transition from male to female. Subsequently, she 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 gender to marry each other. The petitioner legally amended her birth certificate to reflect her change in gender designation, and the evidence the petitioner submitted to the Board included her amended birth certificate. Consequently, the Board found North Carolina considered the petitioner to be female under its laws and deemed her marriage to the beneficiary to be a valid heterosexual marriage. Although evidence of sex reassignment surgery was submitted in the Lovo-Lara case, the Board’s decision does not require submission of evidence of surgery in order to establish a valid heterosexual marriage. Rather, the reasoning underlying the Board’s decision suggests that the federal government should defer to how the state/local jurisdiction in which a claimed marriage takes place recognizes a legal change in gender for purposes of heterosexual marriage.

In 2009, USCIS issued guidance to the field to implement Lovo-Lara. This guidance required, in the case of a spousal Form I-130 or I-129F involving the claimed marriage between two persons of the same birth sex, the submission of evidence showing that one of the individuals had in fact undergone sex reassignment surgery to show a change of gender. Not all states or foreign jurisdictions that recognize a legal change of gender require the completion of gender reassignment surgery before an individual can legally change his or her gender. For this reason, USCIS is superseding previous guidance relating to transgender individuals to reflect the broader range of clinical treatments that can result in a legal change of gender under the law of the relevant jurisdiction.

**Policy**
USCIS officers will follow the policy stated in the Adjudicator’s Field Manual, as amended by this PM, in adjudicating petitions or applications filed by or on behalf of transgender individuals.

**Implementation**
The *Adjudicator’s Field Manual* (AFM) is amended as follows:

1. A new Chapter 10.22 is added to read as follows:

Chapter 10  An Overview of the Adjudication Process

**10.22 Document Issuance Involving Status and Identity for Transgender Individuals**

USCIS issues a variety of documents that show identity and immigration status in the United States. These include, but are not limited to, Employment Authorization Documents, Refugee Travel Documents, Permanent Resident Cards, and Naturalization Certificates. Applicants who claim to have changed their gender may seek issuance of these types of documents reflecting the new gender. While some of these documents indicate the individual’s gender, and the applicant’s gender may sometimes have bearing on underlying issues of eligibility for
immigration benefits (such as an approval of a Petition for Alien Relative, derivative spouse status, or marriage to a U.S. citizen for section 319(a) naturalization), the purpose of the document itself is to document the individual’s identity and immigration status. Therefore, USCIS will issue an initial or amended document reflecting the individual’s post-transition gender if the individual presents the following:

- An amended birth certificate, passport, or court order recognizing the new gender; or
- Medical certification of the change in gender from a licensed physician (a Doctor of Medicine (M.D.) or Doctor of Osteopathy (D.O.)). This is based on standards\(^1\) and recommendations\(^2\) of the World Professional Association for Transgender Health who are recognized as the authority in this field by the American Medical Association.\(^3\) Medical certification of gender transition received from a licensed physician (an M.D. or D.O.) is sufficient documentation, alone, of gender change. Additional information about medical certifications:
  - For the purposes of this chapter, only an M.D. or a D.O. qualifies as a licensed physician. Officers may accept medical certifications from any number of specialties as well as from general practitioners.
  - Statements from persons who are not licensed physicians, such as psychologists, physician assistants, nurse practitioners, social workers, health practitioners, chiropractors, are not acceptable.
  - The medical certification should include the following information:
    - Physician’s full name;
    - Medical license or certificate number;
    - Issuing state, country, or other jurisdiction of medical license/certificate;
    - Drug Enforcement Administration registration number assigned to the doctor or comparable foreign registration number, if applicable;
    - Address and telephone number of the physician;
    - Language stating that the individual has had appropriate clinical treatment for gender transition to the new gender (male or female);
    - Language stating that he/she has either treated the applicant in relation to the applicant’s change in gender or has reviewed and evaluated the medical history of the applicant in relation to the applicant’s change in gender and that he/she has a doctor/patient relationship with the applicant; and

- The applicant must submit evidence that any name change was completed according to the relevant state or foreign law;
- The applicant may also be asked to submit acceptable evidence of identity in the new gender, if available. State law and foreign laws vary as to whether a driver’s license or other form of government issued identity document may be issued reflecting a gender change. If evidence of change of gender in the identity documents is not obtainable because of state, local or foreign requirements, the document may still be issued in the new gender based on the medical certification; and

\(^1\) Standards of Care, 7th Version
\(^2\) Identity Recognition Statement
\(^3\) http://www.tgender.net/taw/ama_resolutions.pdf
A recent facial photograph that reflects a good likeness of, and satisfactorily identifies the applicant must be submitted. The photograph must agree with the submitted identification evidence and reflect the applicant’s current and true appearance. This can be submitted with the application or provided through biometrics collection at an ASC.

**NOTE:** Proof of sex reassignment surgery is **not** required to issue the requested document in the new gender and evidence of such surgery will not be requested. If such surgery has taken place, a statement to that effect in the medical certification is sufficient to establish the fact. USCIS will not ask for records relating to any such surgery.

As in all adjudications, if an officer finds significant substantive discrepancies, has reason to question the accuracy or authenticity of documents submitted, or finds other indicators of fraud, the case may be referred to FDNS in accordance with current national and local policies.

2. Chapter 21.3(a)(2)(J) is amended to read as follows.

### 21.3 Petition for Spouse.

(a) Petition by Citizen or LPR for a Spouse.

* * * * *

(2) Adjudicative issues.

* * * * *

(J) Transgender issues and marriage.

Benefits based upon marriage may be approved on the basis of a marriage between a transgender individual and an individual of the other gender if the Petitioner/Applicant establishes 1) the transgender individual has legally changed his or her gender and subsequently married an individual of the other gender, 2) the marriage is recognized as a heterosexual marriage under the law where the marriage took place (Matter of Lovo-Lara, 23 I&N Dec. 746 (BIA 2005)), and 3) the law where the marriage took place does not bar a marriage between a transgender individual and an individual of the other gender.

While a timely registered heterosexual marriage certificate from the appropriate civil authority is prima facie evidence of the validity of a marriage, when an officer determines, based on the

---

4 Note that subsequent marriage is at issue when looking at an initial marriage based benefit. For an individual who transitioned gender subsequent to a grant of conditional permanent residence, adjudication of a Petition to Remove the Conditions on Residence does not require the validity of the marriage at the time of filing or adjudication, rather the adjudication is dependent upon whether the marriage was valid and bona fide at inception and time of obtaining conditional permanent residence. The same does not hold true, however, for 319(a) adjudications which require that the marriage continues to be valid.
record or through interview or other means, that a party to a petition has changed gender, the officer must ascertain that the marriage is a valid heterosexual marriage under the laws of the jurisdiction in which it was contracted.

The validity of the marriage must be established by the preponderance of the evidence. As with most administrative immigration proceedings, the petitioner bears the “preponderance of the evidence” burden. Thus, even if there is some doubt, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is “probably true” or “more likely than not,” the applicant or petitioner has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining “more likely than not” as a greater than 50 percent probability of something occurring). As such, officers should be satisfied that this burden is met if the marriage is recognized in the jurisdiction in which it was contracted as a heterosexual marriage. USCIS will presume the validity of the marriage involving a transgender individual in the absence of jurisdictional law and/or precedent that would place the validity of such marriage in doubt. Only in jurisdictions where a specific law or precedent either prohibits or sets specific requirements for a legal change of gender for purposes of that jurisdiction’s marriage laws is the individual required to demonstrate that he or she has met the specific requirements needed to establish the legal change of gender and the validity of the marriage. The individual may also show, in an appropriate case, that the law barring a legal change of gender for purposes of marriage has changed and that the marriage is valid under current law.

Where an individual claims to have legally changed his or her gender, USCIS will recognize that such individual’s gender changed based upon the following documentation:

- Amended birth certificate; or
- Other official recognition of new gender, such as a passport, court order, certificate of naturalization or citizenship, or driver’s license (note that some jurisdictions may have a lower threshold for issuing a driver’s license than to establish a legal change of gender for purposes of the marriage laws, and USCIS would require additional evidence that the individual met the threshold for marriage, if applicable); or
- Medical certification of the change in gender from a licensed physician (a Doctor of Medicine (M.D.) or Doctor of Osteopathy (D.O.)). This is based on standards and recommendations of the World Professional Association for Transgender Health, who are recognized as the authority in this field by the American Medical Association. Medical certification of gender transition received from a licensed physician (an M.D. or D.O.) is sufficient documentation, alone, of gender change. If the physician certifies the gender transition, USCIS will not “go behind” the certificate by asking for specific information about the individual’s treatment. Additional information about medical certifications:
  - For the purposes of this chapter only an M.D. or a D.O. qualifies as a licensed physician. Officers may accept medical certifications from any number of specialties as well as from general practitioners.

---

5 Standards of Care, 7th Version
6 Identity Recognition Statement
7 http://www.tgender.net/taw/ama_resolutions.pdf
PM-602-0061: 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)
Page 6

- Statements from persons who are not licensed physicians, such as psychologists, physician assistants, nurse practitioners, social workers, health practitioners, chiropractors, are not acceptable.
- The medical certification should include the following information:
  - Physician’s full name;
  - Medical license or certificate number;
  - Issuing state, country, or other jurisdiction of medical license/certificate;
  - Drug Enforcement Administration registration number assigned to the doctor or comparable foreign registration number, if applicable;
  - Address and telephone number of the physician;
  - Language stating that the individual has had appropriate clinical treatment for gender transition to the new gender (male or female);
  - Language stating that he/she has either treated the applicant in relation to the applicant’s change in gender or has reviewed and evaluated the medical history of the applicant in relation to the applicant’s change in gender and that he/she has a doctor/patient relationship with the applicant

Sex reassignment surgery is not required in order for USCIS to approve a Form I-130 to establish a legal change of gender unless the law of the place of marriage clearly requires sex reassignment surgery in order to accomplish a change in legal gender. The fact of sex reassignment surgery, however, would generally be reflected in the medical certification. USCIS will not ask for records relating to any such surgery.

These documents are listed in order of evidentiary preference. Officers must recognize, however, that the personal circumstances and jurisdictions involved in an individual’s case will affect availability of specific types of documentation. As evidence of the new gender, officers should treat an amended birth certificate as carrying the same weight as USCIS would normally give to other timely registered primary evidence.

This guidance also applies to the adjudication of all immigration benefits based upon marriage, including but not limited to a Petition for Alien Fiancé(e). In the case of a proposed marriage involving a transgender individual, the petition may be approved assuming the same conditions are met for legal gender change and validity of the marriage as described above. If the record indicates the parties’ specific intent to marry in a jurisdiction where the marriage would not be valid, the officer will issue an intent to deny in which the petitioner is informed that the marriage would not be valid for immigration purposes and why. USCIS will provide the petitioner the opportunity to submit evidence that USCIS’s interpretation of the jurisdiction’s law and/or precedent is incorrect or provide an affidavit attesting that the intended marriage will take place in a jurisdiction where the marriage will be valid for immigration purposes.

The same principles for determining the validity of a marriage involving a transgender individual for a spousal Petition for Alien Relative apply to those who may derive an immigrant or nonimmigrant benefit by virtue of a spousal relationship.

If an officer has questions about the validity of a marriage involving a transgender individual, the officer should contact local USCIS counsel.
As in all adjudications, if an officer finds significant substantive discrepancies, has reason to question the accuracy or authenticity of documents submitted, or finds other indicators of fraud, the case may be referred to FDNS in accordance with current national and local policies.

***

3. The AFM Transmittal Memorandum button is revising by adding, in numerical order, a new entry to read:

| AD 12-02       | Chapter 10.22; Chapter 21.3(a)(2)(J) | Provides guidance on the adjudication of applications and petitions for immigration benefits filed by or in behalf of transgendered individuals.
| 04/10/2012     |                                      |

Use
This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information
Questions or suggestions regarding this PM should be addressed through appropriate channels to the Field Operations Directorate or the Service Center Operations Directorate and the Office of Chief Counsel and Office of Policy and Strategy.