Transgender Issues

Background Materials

Trans Definitions
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Trans Definitions

Gender Identity – A person's sense of self as male/female or masculine/feminine... (legal): A person's actual or perceived sex, including a person's identity, appearance, expression or behavior, whether or not that identity, appearance, expression or behavior is different from that traditionally associated with the person's sex at birth.

Transgender – Self-identification or perception by others that a person is or appears to be transgressing gender stereotypes. Can include people who are transsexual, cross-dressing, gender variant, intersexual and/or those who otherwise express their gender in atypical ways.

Transsexual – The state of having a persistent gender identity that is fundamentally at odds with one's gender assignment at birth, and desiring to reconcile this incongruity through physical and social gender transition.

Cross Dress – To (periodically) express one's gender in ways that are associated with the traditional clothing and appearance of the "other" gender. In this culture, usually associated with feminine appearance and clothing of presumed "male" individuals.

Transition – The process of social, legal, psychological and physiological at6tribute change that leads to greater congruity of a person's gender identity and these attributes.

Operative Status – The condition of expectation and/or completion of surgical interventions supporting a person's transition. Sometimes the primary options are listed as pre-operative, post-operative and non-operative, but surgical interventions can be incremental and/or optional, so there may be a continuum of actual statuses for people. In most cases, a person's operative status is irrelevant to others and is not determinate of their legal status and rights.

Male to Female – To transition from a status of birth-assigned male gender to female identity and expression. Sometimes written as M2F or MTF, these individuals may be referred to as "trans women" for whom female names and pronouns are appropriate.

Female to Male - To transition from a status of birth-assigned female gender to male identity and expression. Sometimes written as F2M or FTM, these individuals may be referred to as "trans men" for whom male names and pronouns are appropriate.

Intersexual – The condition of having been born with conflicting and/or atypical primary sexual characteristics, including genetic, physiological, hormonal and/or psychological components. Intersex people are usually birth assigned as male or female, without regard for their gender identity, so they may transition in later life as well.

Accommodation – Making appropriate space and/or arrangements to include those whose characteristics or status require reasonable modifications of standard facilities or procedures.

Documentation for Trans People

Although there is no strictly prescribed order to the documentation changes which trans people may seek, a number of substantiating documents are commonly acquired and carried.

1) **Carry letter** – An individual may obtain a letter from a qualified therapist or counselor which explains their involvement in the course of consultation and treatment regarding their gender identity issues. They may also (or in alternative) obtain a certifying letter or membership card from a transgender support group.

2) **DMV License** – An individual may contact the DMV to revise the gender marker on their driver's license or official state ID. The individual must present a letter to the DMV that they are under the care of a DMV-qualified therapist, and are living full time in their adopted gender.

3) **Court Ordered Name Change** - A court ordered name change is one where a judge approves a request to change one's name. The process begins for an individual by picking up the proper forms, filling them out, and submitting them at the county court house. They pay a fee and wait for six weeks. In a few limited cases, a judge can waive this requirement.

4) **Court Ordered Sex Change** – A court ordered sex change is in response to an individual's petition to the court, using a very similar process to that used for name changes (in fact, they can be simultaneous). Usually, the court will request some written evidence from a qualified physician stating that the person has completed "sex reassignment surgical procedures." This may indicate that the person has completed genital surgery, but this is not always the case – sometimes, especially with FTM individuals, surgical reassignment may not include genital reconstruction.

5) **Birth Certificate** – In Oregon and most other states, an individual can petition the state to reissue their birth certificate with the appropriate revision of their birth sex. Usually, the state requires verification of the legal name and sex change, along with evidence from a qualified physician that sex reassignment surgery has been performed.

6) **Social Security ID** – The Social Security Administration will re-issue an individual a social security card that includes their new legal sex, usually requiring evidence similar to that for Court Ordered Sex Change.

7) **Passport** – The Federal government can re-issue an individual's passport bearing their revised sex designation, using required substantiating documents.

Inconsistency & Priority

You may encounter individuals who present documents at apparent odds with the gender of their public presentation, or those whose documents may not be entirely congruent. Keep in mind that the gender transition process is slow and incremental as described above, and that they have rights under law not dependent on complete document congruity.

Recommendations for Gendered Address

1. Recognize that we live and/or work in a very diverse area, and that a part of the diversity of this area is the presence of transgendered or gender-different people. Their rights are protected under law, and the County and City of Portland have enacted laws to treat them with the same rights as any other citizens.
2. Learn the basic terminology that applies to trans and gender variant people, and the issues to which they are sensitized from their life experiences.
3. Address all citizens with respect, and if there is an occasion to refer to them directly, use nouns and pronouns that are appropriate to their gender expression.
4. Use a person's current name as their valid identifier, even if you are aware of previous names or titles they may have had.
5. If there is some confusion about the expressed gender of preference of an individual, remember their possible sensitivities about respectful address. Try to confirm their self-identity and intentions if you can do so discreetly.
6. If there is still some doubt as to the gender with which the individual identifies, find polite and respectful ways of inquiring about their preference. Examples might be: "I'm sorry, but I'm a bit unsure about how you'd like to be addressed. Can you help me out so I can do so respectfully?"
7. If you are aware of any documentation of the individual's gender status, this may be of some explanation, but there is still some possibility that the person's gender identity may be incongruent with their current identification documents.
8. Do not expose any person to unnecessary inquiries about their gender status. They may be highly sensitive to this issue, and may be in the process of gender change. Limit public disclosure or discussion about this issue, to respect the individual's feelings of privacy and personal safety.
9. Do not attempt to confirm your assumptions about a person's physical (esp. genital) status.
10. Remember that anyone can make a mistake about another person's gender; if you are respectful and sincere, you can probably apologize and move on. Use good sense in good faith and you can recover from unintentional slips, even if they are repeated.
11. Look for ways to make your interactions a success and share your insights with others to develop consistent best practices. You can turn possible distrust into positive cooperation.

CHANGE OF NAME

33.410 Jurisdiction; grounds. Application for change of name of a person may be heard and determined by the probate court or, if the circuit court is not the probate court, the circuit court if its jurisdiction has been extended to include this section pursuant to ORS 3.275 of the county in which the person resides. The change of name shall be granted by the court unless the court finds that the change is not consistent with the public interest. [Amended by 1967 c.534 §11; 1975 c.733 §1]

33.420 Notice of application and judgment; notice for change of name of minor child. (1) Before entering a judgment for a change of name, except as provided in ORS 109.360, the court shall require public notice of the application to be given, that all persons may show cause why the same should not be granted. The court shall also require public notice to be given of the change after the entry of the judgment.

(2) Before entering a judgment for a change of name in the case of a minor child the court shall require that, in addition to the notice required under subsection (1) of this section, written notice be given to the parents of the child, both custodial and noncustodial, and to any legal guardian of the child.

(3) Notwithstanding subsection (2) of this section, notice of an application for the change of name of a minor child need not be given to a parent of the child if the other parent of the child files a verified statement in the change of name proceeding that asserts that the minor child has not resided with the other parent and that the other parent has not contributed or tried to contribute to the support of the child. [Amended by 1983 c.369 §6; 1997 c.872 §22; 2001 c.779 §12; 2003 c.576 §308]

CHANGE OF SEX

33.460 Jurisdiction; grounds; procedure. (1) A court that has jurisdiction to determine an application for change of name of a person under ORS 33.410 and 33.420 may order a legal change of sex and enter a judgment indicating the change of sex of a person whose sex has been changed by surgical procedure.

(2) The court may order a legal change of sex and enter the judgment in the same manner as that provided for change of name of a person under ORS 33.410 and 33.420.

(3) If a person applies for a change of name under ORS 33.410 and 33.420 at the time the person applies for a legal change of sex under this section, the court may order change of name and legal change of sex at the same time and in the same proceeding. [1981 c.221 §1; 1997 c.872 §23; 2003 c.576 §309]

SURETIES

State and Local Laws
Regarding Gender Identity in Employment

State of Oregon
The state of Oregon provides the following protection for **transsexualism**:

> Notwithstanding any other provision of ORS 659A.100 to 659A.145, an employer may not be found to have engaged in an unlawful employment practice solely because the employer fails to provide reasonable accommodation to a person with a disability arising out of transsexualism. (659A.118(2)).
>
> An employer may not be found to have engaged in an unlawful employment practice solely because the employer fails to provide reasonable accommodation to a person with a disability arising out of transsexualism. However, an employer may not refuse to hire or promote or bar or discharge from employment or discriminate in compensation, terms, conditions or privileges of employment because a person is transsexual when the person is otherwise qualified (OAR 839-006-0206).

This rule refers to the Oregon Civil Rights of Disabled Persons Act, which covers actual, history, or perception of disability, however, transsexualism is not defined.

The following municipalities provide broader protection, including the right to reasonable accommodation for gender identity.

Benton County
In 1998, Benton County, Oregon passed a nondiscrimination ordinance that includes the following section regarding employment:

> Discrimination in Employment Prohibited.
> It shall be an unlawful employment practice for an employer to discriminate on the basis of an individual's sexual orientation, source of income, gender identity or familial status, by committing against any such individual any of the acts already made unlawful under ORS 659.030 when committed against the categories of persons listed herein (Ord. 98-0139, §28.105).

"Gender identity" in the Benton County Ordinance is defined to include "the status of being transsexual or transgender" (Ord. 98-0139, §28.005).

City of Portland
In 2001, the City of Portland passed a more expansive ordinance because of its definition of gender identity stating:

> Discrimination in Employment Prohibited.
> It shall be unlawful to discriminate in employment on the basis of an individual's sexual orientation, gender identity, source of income or familial status, by committing against any such individual any of the acts already made unlawful under ORS 659.030 when committed against the categories of persons listed therein (§23.01.050).

The City of Portland's ordinance defines "gender identity" as "A person's actual or perceived sex, including a person's identity, appearance, expression or behavior, whether or not that identity, appearance, expression or behavior is different from that traditionally associated with the person's sex at birth" (§23.01.030).

Multnomah County

Also in 2001, Multnomah County passed an ordinance adopting the same gender identity definition stating:

> Discrimination in Employment Prohibited.
> It is unlawful to discriminate in employment on the basis of an individual's sexual orientation, gender identity, source of income or familial status, by committing against any such individual any of the acts already made unlawful under ORS 659.030 when committed against the categories of persons listed therein (Ord. 969 §15.343).

The Multnomah County ordinance defines "gender identity" as "A person's actual or perceived sex, including a person's identity, appearance, expression or behavior, whether or not that identity, appearance, expression or behavior is different from that traditionally associated with the person's sex at birth" (Ord. 969 §15.342)

City of Salem

In 2002, the City of Salem passed revisions to their Human Rights law adopting a similar definition of gender identity stating:

> It shall be an unlawful employment practice:
> For any employer to discriminate on the basis of an individual's race, religion, color, sex, national origin, marital status, age, disability, sexual orientation, gender identity, source of income, domestic partnership or familial status, by committing against any such individual any of the acts made unlawful under ORS 659A.006(2), 659A.030, 659A.100 to 659A.139, 659A.142(1) or 659A.142(2)
> (97.020)

The City of Salem defines "gender identity" as "A person's actual or perceived sex, including a person's identity, appearance, expression, or behavior with respect to actual or perceived sex, whether or not that identity, appearance, expression or behavior is different from that traditionally associated with the person's sex at birth" (97.010).

The City of Portland, Multnomah County, and the City of Salem ordinances allow for an employer dress code that "provides on a case-by-case basis, for reasonable accommodation based on the health and safety needs of persons protected on the basis of gender identity" (§23.01.040 (Portland), Ord. 969 §15.346 (Multnomah County, 97.085 (Salem)). These ordinances also specify that employers must provide "reasonable and appropriate accommodations permitting all persons access to restrooms consistent with their expressed gender" (§23.01.040 (Portland), Ord. 969 §15.346 (Multnomah County), 97.085 (Salem)).

The information provided in this packet is, we believe, an accurate statement of the law, but is not intended to substitute for confirming legal advice from your lawyer.

As of August 2003, 63 jurisdictions in the US have non-discrimination laws that protect people based on gender identity, including California, Minnesota, New Mexico, and Rhode Island. Many private employers have amended their non-discrimination policies to include gender identity.

- Benton County, OR, adopted gender identity non-discrimination protections in 1998. The City of Portland passed a more expansive law in January 2001. Multnomah County also adopted a civil rights ordinance including protections for gender identity in December 2001. The City of Salem passed a similar law in 2002. For employers, whether or not covered by the laws in these areas, signing the Fair Workplace Pledge can assist your company in complying with the human rights ordinances.
- Major corporations such as Nike, Lucent Technologies and Apple Computers have adopted non-discrimination policies that include gender identity. Sample policies are included in the Fair Workplace Project packet.
- As of August 2003, 68 million people (24% of the U.S. population) live within jurisdictions with non-discrimination laws that apply to transgender/transsexual people.

Which bathroom should a transgender employee use at work?

The Portland, Multnomah County, and Salem civil rights ordinances specify that employers must provide "reasonable and appropriate accommodations permitting all persons access to restrooms consistent with their expressed gender" (§23.01.040, Ord. 969 §15.346). Employees should not be forced to use bathrooms that do not correspond to their gender identity. Like all employees, transgender people need access to safe and dignified restroom facilities.

What if employees don't want to share a restroom with a transgender coworker?

Numerous employers have successfully solved issues about restroom usage and comfort. Options to ensure safe and appropriate restroom access to all employees include allowing employees to choose which gendered bathroom is most suitable for them, providing single seat unisex restrooms, or

Gender Identity Workplace Fairness Policies Frequently Asked Questions

What is gender identity? Is this the same as gender or sex, or sexual orientation?

No, gender identity is defined in local ordinances (Portland and Multnomah County) as "a person's actual or perceived sex, including a person's identity, appearance, expression or behavior, whether or not that identity, appearance, expression or behavior is different from that traditionally associated

How common is intersex?

To answer this question in an uncontroversial way, you'd have to first get everyone to agree on **what counts as intersex** —and also to agree on what should count as strictly male or strictly female. That's hard to do. How small does a penis have to be before it counts as intersex? Do you count "sex chromosome" anomalies as intersex if there's no apparent external sexual ambiguity?[1] (Alice Dreger explores this question in greater depth in her book **Hermaphrodites and the Medical Invention of Sex**.)

Here's what we do know: If you ask experts at medical centers how often a child is born so noticeably atypical in terms of genitalia that a specialist in sex differentiation is called in, the number comes out to about 1 in 1500 to 1 in 2000 births. But a lot more people than that are born with subtler forms of sex anatomy variations, some of which won't show up until later in life.

Below we provide a summary of statistics drawn from an article by Brown University researcher Anne Fausto-Sterling.[2] The basis for that article was an extensive review of the medical literature from 1955 to 1998 aimed at producing numeric estimates for the frequency of sex variations. Note that the frequency of some of these conditions, such as congenital adrenal hyperplasia, differs for different populations. These statistics are approximations.

Not XX and not XY	one in 1,666 births
Klinefelter (XXY)	one in 1,000 births
Androgen insensitivity syndrome	one in 13,000 births
Partial androgen insensitivity syndrome	one in 130,000 births
Classical congenital adrenal hyperplasia	one in 13,000 births
Late onset adrenal hyperplasia	one in 66 individuals
Vaginal agenesis	one in 6,000 births
Ovotestes	one in 83,000 births
Idiopathic (no discernable medical cause)	one in 110,000 births
Iatrogenic (caused by medical treatment, for instance progestin administered to pregnant mother)	no estimate
5 alpha reductase deficiency	no estimate
Mixed gonadal dysgenesis	no estimate
Complete gonadal dysgenesis	one in 150,000 births
Hypospadias (urethral opening in perineum or along penile shaft)	one in 2,000 births
Hypospadias (urethral opening between corona and tip of glans penis)	one in 770 births
Total number of people whose bodies differ from standard male or female	one in 100 births
Total number of people receiving surgery to "normalize" genital appearance	one or two in 1,000 births

[1] Dreger, Alice Domurat. 1998. **Ambiguous Sex—or Ambivalent Medicine? Ethical Issues in the Treatment of Intersexuality**. Hastings Center Report, 28, 3: 24-35.

[2] Blackless, Melanie, Anthony Charuvastra, Amanda Derryck, Anne Fausto-Sterling, Karl Lauzanne, and Ellen Lee. 2000. **How sexually dimorphic are we? Review and synthesis.** *American Journal of Human Biology* 12:151-166.

In re Jose Mauricio LOVO-Lara, Beneficiary of a visa petition filed by Gia Teresa LOVO-Ciccone, Petitioner

File A95 076 067 - Nebraska Service Center

Decided May 18, 2005

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

(1) The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), does not preclude, for purposes of Federal law, recognition of a marriage involving a postoperative transsexual, where the marriage is considered by the State in which it was performed as one between two individuals of the opposite sex.

(2) A marriage between a postoperative transsexual and a person of the opposite sex may be the basis for benefits under section 201(b)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1151(b)(2)(A)(i) (2000), where the State in which the marriage occurred recognizes the change in sex of the postoperative transsexual and considers the marriage a valid heterosexual marriage.

FOR PETITIONER: Sharon M. McGowan, Esquire, New York, New York

FOR THE DEPARTMENT OF HOMELAND SECURITY: Allen Kenny, Service Center Counsel

BEFORE: Board Panel: GRANT, HESS and PAULEY, Board Members.

GRANT, Board Member:

In a decision dated August 3, 2004, the Nebraska Service Center ("NSC") director denied the visa petition filed by the petitioner to accord the beneficiary immediate relative status as her husband pursuant to section 201(b)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1151(b)(2)(A)(i) (2000). The petitioner has appealed from that decision. The appeal will be sustained.

I. FACTUAL AND PROCEDURAL HISTORY

The petitioner, a United States citizen, married the beneficiary, a native and citizen of El Salvador, in North Carolina on September 1, 2002. On November 20, 2002, the petitioner filed the instant visa petition on behalf of the beneficiary based on their marriage. The record reflects that when the petitioner was born in North Carolina on April 16, 1973, she was of the male

sex. However, an affidavit from a physician reflects that on September 14, 2001, the petitioner had surgery that changed her sex designation completely from male to female.

In support of the visa petition, the petitioner submitted, among other documents, her North Carolina birth certificate, which lists her current name and indicates that her sex is female; the affidavit from the physician verifying the surgery that changed the petitioner's sex designation; a North Carolina court order changing the petitioner's name to her current name; the North Carolina Register of Deeds marriage record reflecting the marriage of the petitioner and the beneficiary; and a North Carolina driver's license listing the petitioner's current name and indicating that her sex is female.

On August 3, 2004, the NSC director issued his decision denying the instant visa petition. In support of his denial, the NSC director stated that defining marriage under the immigration laws is a question of Federal law, which Congress clarified in 1996 by enacting the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) ("DOMA"). Pursuant to the DOMA, in order to qualify as a marriage for purposes of Federal law, one partner to the marriage must be a man and the other partner must be a woman. In his decision the NSC director stated as follows:

> While some states and countries have enacted laws that permit a person who has undergone sex change surgery to legally change the person's sex from one to the other, Congress has not addressed the issue. Consequently, without legislation from Congress officially recognizing a marriage where one of the parties has undergone sex change surgery . . . , this Service has no legal basis on which to recognize a change of sex so that a marriage between two persons born of the same sex can be recognized.

The NSC director concluded that "since the petitioner and beneficiary were born of the same sex, their marriage is not considered valid for immigration purposes and the beneficiary is not eligible to be classified as the spouse of the petitioner under section 201(b) of the Act."

The petitioner filed a timely Notice of Appeal (Form EOIR-29) and subsequently filed a brief in support of her appeal. The Department of Homeland Security ("DHS") Service Center Counsel also filed a brief in support of the NSC director's decision.

II. ISSUE

The issue presented by this case is whether a marriage between a postoperative male-to-female transsexual and a male can be the basis for benefits under section 201(b)(2)(A)(i) of the Act, where the State in which the marriage occurred recognizes the change in sex of the postoperative transsexual and considers the marriage valid.

III. ANALYSIS

In order to determine whether a marriage is valid for immigration purposes, the relevant analysis involves determining first whether the marriage is valid under State law and then whether the marriage qualifies under the Act. *See Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1982). The issue of the validity of a marriage under State law is generally governed by the law of the place of celebration of the marriage. *Id.* at 1038-39.

In this case, the petitioner and the beneficiary were married in North Carolina. Section 51-1 of the General Statutes of North Carolina provides that "[a] valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other." The terms "male" and "female" are not defined in the statute, but section 51-1 makes it clear by its terms that the State of North Carolina does not permit individuals of the same sex to marry each other. *See also* N.C. Gen. Stat. § 51-1.2 (2004).

Section 130A-118 of the General Statutes of North Carolina governs the amendment of birth certificates. That statute provides, in relevant part, as follows:

> A new certificate of birth shall be made by the State Registrar when:
>
> . . .
>
> (4) A written request from an individual is received by the State Registrar to change the sex on that individual's birth record because of sex reassignment surgery, if the request is accompanied by a notarized statement from the physician who performed the sex reassignment surgery or from a physician licensed to practice medicine who has examined the individual and can certify that the person has undergone sex reassignment surgery.

N.C. Gen. Stat. § 130A-118(b)(4) (2004).

As noted above, the documents submitted by the petitioner reflect that she underwent sex reassignment surgery. Consequently, the State of North Carolina issued her a new birth certificate that lists her sex as female and registered her marriage to the beneficiary, listing her as the bride. In light of the above, we find that the petitioner's marriage to the beneficiary is considered valid under the laws of the State of North Carolina. We also note that neither the NSC director nor the DHS counsel has asserted anything to the contrary on this point.

The dispositive issue in this case, therefore, is whether the marriage of the petitioner and the beneficiary qualifies as a valid marriage under the Act. Section 201(b)(2)(A)(i) of the Act provides for immediate relative classification for the "children, spouses, and parents of a citizen of the United States." The Act does not define the word "spouse" in terms of the sex of the parties. However, the DOMA did provide a Federal definition of the terms "marriage" and "spouse" as follows:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

DOMA § 3(a), 110 Stat. at 2419 (codified at 1 U.S.C. § 7 (2000)).

Neither the DOMA nor any other Federal law addresses the issue of how to define the sex of a postoperative transsexual or such designation's effect on a subsequent marriage of that individual. The failure of Federal law to address this issue formed the main basis for the NSC director's conclusion that this marriage cannot be found valid for immigration purposes. As stated above, the NSC director found that because Congress had not addressed the issue whether sex reassignment surgery serves to change an individual's sex, there was no legal basis on which to recognize a change of sex. Accordingly, he concluded that he must consider the marriage between the petitioner and the beneficiary to be a marriage between two persons of the same sex, which is expressly prohibited by the DOMA.

In determining the effect of the DOMA on this case, we look to the rules of statutory construction. The starting point in statutory construction is the language of the statute. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987); *INS v. Phinpathya*, 464 U.S. 183, 189 (1984). If the language of the statute is clear and unambiguous, judicial inquiry is complete, as we clearly "must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). We find that the language of section 3(a) of the DOMA, which provides that "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife," is clear on its face. There is no question that a valid marriage can only be one between a man and a woman. Marriages between same-sex couples are clearly excluded.

This interpretation is further supported by the legislative history of the DOMA. The House Report specifically states that the DOMA was introduced in response to a 1993 decision of the Hawaii Supreme Court that raised the issue of the potential legality of same-sex marriages in Hawaii. *See* H.R. Rep. No. 104-664, at 2-6 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906-10, 1996 WL 391835 (Leg. Hist.) (citing *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (remanding for application of strict scrutiny under the Hawaii equal protection clause to the question of the denial of marriage licenses to same-sex couples)). Throughout the House Report, the terms "same sex" and "homosexual" are used interchangeably. The House Report also repeatedly refers to the consequences of permitting *homosexual couples* to marry.

However, with regard to one of the specific issues we are facing in this case, i.e., whether the DOMA applies to invalidate, for Federal purposes, a marriage involving a postoperative transsexual, it is notable that Congress did

not mention the case of *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976), which recognized a transsexual marriage.[1] Nor did it mention the various State statutes that at the time of consideration of the DOMA provided for the legal recognition of a change of sex designation by postoperative transsexuals. Rather, Congress's focus, as indicated by its consistent reference to homosexuals in the floor discussions and in the House Report, was fixed on, and limited to, the issue of homosexual marriage.

Furthermore, a specific statement in the House Report's section-by-section analysis provides support for the conclusion that Congress did not consider transsexual marriages to be per se violative of the DOMA. According to that statement, "*Prior to the Hawaii lawsuit*, no State has ever permitted homosexual couples to marry. Accordingly, federal law could rely on state determinations of who was married without risk of inconsistency or endorsing same-sex 'marriage.'" H.R. Rep. No. 104-664, at 30 (emphasis added). As noted above, *M.T. v. J.T.*, *supra*, and the statutory provisions in several States recognizing a legal change of sex after surgery were in existence at the time the House Report was issued.

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[1] The case of *M.T. v. J.T.*, *supra*, was decided by the New Jersey Superior Court and involved a case where a wife had filed a complaint seeking support and maintenance from her husband. Her husband responded with the defense that his wife was actually a male-to-female transsexual and therefore their marriage was void. In rejecting his defense, the court upheld the validity of the marriage. The court began its analysis by accepting the "fundamental premise . . . that a lawful marriage requires the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female," and that New Jersey law would not permit recognition of a marriage between persons of the same sex. *Id.* at 207. The court then directly confronted the issue "whether the marriage between a male and a postoperative transsexual, who has surgically changed her external sexual anatomy from male to female, is to be regarded as a lawful marriage between a man and a woman." *Id.* at 208. The court concluded that "for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards." *Id.* at 209. On this basis, the court affirmed the finding of the trial court that the postoperative male-to-female transsexual was a female at the time of her marriage and entered into a valid marriage. *Id.* at 211.

In 1977, the Department of Health, Education, and Welfare prepared a Model State Vital Statistics Act that specifically provided for the amendment of a birth certificate upon proof of a change of sex by surgical procedure in section 21(e). *See In re Heilig*, 816 A.2d 68, 82-83 (Md. 2003). By 1996, at the time of consideration of the DOMA, several States had enacted legislation patterned after section 21(e) to provide a mechanism for amending a person's birth certificate to reflect a change of sex upon submission of a court order recognizing a sex change by surgical procedure. *See, e.g.*, Ariz. Rev. Stat. § 36-337 (2005) (previously at § 36-326); Cal. Health & Safety Code §§ 103425, 103430 (West 2005); Haw. Rev. Stat. § 338-17.7 (2003); La. Rev. Stat. Ann. § 40:62 (2004); Mich. Comp. Laws § 333.2831 (2005); Neb. Rev. Stat. § 71-604.01 (2004). A recent review of State legislation indicates that 22 States and the District of Columbia have now enacted provisions specifically permitting legal recognition of changes of sex by postoperative transsexuals. *See In re Heilig*, *supra*, at 83 & n.8 (collecting the relevant statutory provisions).

We therefore conclude that the legislative history of the DOMA indicates that in enacting that statute, Congress *only* intended to restrict marriages between persons of the same sex. There is no indication that the DOMA was meant to apply to a marriage involving a postoperative transsexual where the marriage is considered by the State in which it was performed as one between two individuals of the opposite sex.[2]

There is also nothing in the legislative history to indicate that, other than in the limited area of same-sex marriages, Congress sought to overrule our long-standing case law holding that there is no Federal definition of marriage and that the validity of a particular marriage is determined by the law of the State where the marriage was celebrated. *See Matter of Hosseinian*, 19 I&N Dec. 453, 455 (BIA 1987). While we recognize, of course, that the ultimate issue of the validity of a marriage for immigration purposes is one of Federal law, that law has, from the inception of our nation, recognized that the regulation of marriage is almost exclusively a State matter. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371 (1971); *Sherrer v. Sherrer*, 334 U.S. 343 (1948).[3] Interestingly, with regard to this point, the House Report stated the following:

> If Hawaii or some other State eventually recognizes homosexual "marriage," Section 3 will mean simply that that "marriage" will not be recognized as a "marriage" for purposes of federal law. *Other than this narrow federal requirement*, the federal

[2] Our conclusion in this regard is consistent with an April 16, 2004, Interoffice Memorandum from William R. Yates, Associate Director for Operations of the United States Citizenship and Immigration Services ("CIS"), respecting the "Adjudication of Petitions and Applications Filed by or on Behalf of, or Document Requests by, Transsexual Individuals." That memorandum acknowledges that "neither the DOMA nor any other Federal statute addresses whether a marriage between (for example) a man and a person born a man who has undergone surgery to become a woman should be recognized for immigration purposes or considered invalid as a same-sex marriage."

[3] In deference to this fundamental aspect of our system of government, Federal statutes purporting to outlaw certain types of marriage are few and far between, and no Federal statute affirmatively authorizing a type of marriage appears to exist. Apart from the DOMA, the only other Federal statutory provisions purporting to outlaw certain types of marriage that our research has discovered are found at section 101(a)(35) of the Act, 8 U.S.C. § 1101(a)(35) (2000), which, in defining the terms "spouse," "husband," and "wife" for purposes of the Act, specifically excludes recognition of so-called proxy marriages "where the contracting parties thereto are not physically in the presence of each other, unless the marriage shall have been consummated," and in the Mann Act, which was construed by the Supreme Court to prohibit the interstate transportation of women for purposes of engaging in polygamy. *See Cleveland v. United States*, 329 U.S. 14 (1946); *see also* section 212(a)(10)(A) of the Act, 8 U.S.C. § 1182(a)(10)(A) (2000) (rendering inadmissible any immigrant coming to the United States to practice polygamy). Section 3(a) of the DOMA would also appear to have as an incidental effect the declaration of invalidity of polygamy, as it provides that "the word 'marriage' means only a legal union between *one man and one woman* as husband and wife." (Emphasis added.)

> government will continue to determine marital status in the same manner it does under current law.

H.R. Rep. No. 104-664, at 31 (emphasis added). Therefore, we also conclude that Congress need not act affirmatively to authorize recognition of even an atypical marriage before such a marriage may be regarded as valid for immigration purposes, assuming that the marriage is not deemed invalid under applicable State law.[4]

The DHS counsel appears to argue that in determining whether a particular marriage is valid under the DOMA, we must look to the common meanings of the terms "man" and "woman," as they are used in the DOMA. Counsel asserts that these terms can be conclusively defined by an individual's chromosomal pattern, i.e., XX for female and XY for male, because such chromosomal patterns are immutable. However, this claim is subject to much debate within the medical community. According to medical experts, there are actually eight criteria that are typically used to determine an individual's sex. They are as follows:

1. Genetic or chromosomal sex – XX or XY;
2. Gonadal sex – testes or ovaries;
3. Internal morphologic sex – seminal vesicles/prostate or vagina/uterus/fallopian tubes;
4. External morphologic sex – penis/scrotum or clitoris/labia;
5. Hormonal sex – androgens or estrogens;
6. Phenotypic sex (secondary sexual features) – facial and chest hair or breasts;
7. Assigned sex and gender of rearing; and
8. Sexual identity.

See Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 Ariz. L. Rev. 265, 278 (1999).

While most individuals are born with 46 XX or XY chromosomes and all of the other factors listed above are congruent with their chromosomal pattern, there are certain individuals who have what is termed an "intersexual condition," where some of the above factors may be incongruent, or where an ambiguity within a factor may exist. *Id.* at 281. For example, there are individuals with a chromosomal ambiguity who do not have the typical 46 XX or XY chromosomal pattern but instead have the chromosomal patterns of XXX, XXY, XXXY, XYY, XYYY, XYYYY, or XO. *Id.* Therefore, because a chromosomal pattern is not always the most accurate determination of an individual's gender, the DHS counsel's reliance on chromosomal patterns as the ultimate determinative factor is questionable.

[4] This conclusion is entirely consistent with *Adams v. Howerton*, *supra*, relied on by the DHS. In that case, the court held that even if a homosexual marriage between an American citizen and an alien was valid under Colorado law, the parties were not "spouses" under section 201(b) of the Act. The court reached its result through an interpretation of section 201(b) itself and the term "spouse" as used therein, not by finding a general Federal public policy against the recognition of such marriages.

Moreover, contrary to the suggestion of the DHS counsel, reliance on the sex designation provided on an individual's original birth certificate is not an accurate way to determine a person's gender.[5] Typically, such a determination is made by the birth attendant based on the appearance of the external genitalia. However, intersexed individuals may have the normal-appearing external genitalia of one sex, but have the chromosomal sex of the opposite gender. *Greenberg, supra*, at 283-92. Moreover, many incongruities between the above-noted factors for determining a person's sex, and even some ambiguities within a factor, are not discovered until the affected individuals reach the age of puberty and their bodies develop differently from what would be expected from their assigned gender. *Id.* at 281-92.

We are not persuaded by the assertions of the DHS counsel that we should rely on a person's chromosomal pattern or the original birth record's gender designation in determining whether a marriage is between persons of the opposite sex. Consequently, for immigration purposes, we find it appropriate to determine an individual's gender based on the designation appearing on the current birth certificate issued to that person by the State in which he or she was born.

IV. CONCLUSION

We have long held that the validity of a marriage is determined by the law of the State where the marriage was celebrated. The State of North Carolina considers the petitioner to be a female under the law and deems her marriage to the beneficiary to be a valid opposite-sex marriage. We find that the DOMA does not preclude our recognition of this marriage for purposes of Federal law. As the NSC director did not raise any other issues regarding the validity of the marriage, we conclude that the marriage between the petitioner and the beneficiary may be the basis for benefits under section 201(b)(2)(A)(i) of the Act. Accordingly, the petitioner's appeal will be sustained, and the visa petition will be approved.

ORDER: The petitioner's appeal is sustained, and the visa petition is approved.

[5] We note that there could be anomalous results if we refuse to recognize a postoperative transsexual's change of sex and instead consider the person to be of the sex determined at birth in accordance with the DHS's suggestion. For example, the marriage of a postoperative male-to-female transsexual to a female in a State that recognizes marriages between both opposite-sex and same-sex couples would be considered valid, not only under State law, but also under Federal law, because, under the DHS's interpretation, the postoperative transsexual would still be considered a male, despite having the external genitalia of a female.

GENDER QUEST[1]

When and how did you first decide your gender?
What do you think caused your gender?
How do you know what your real gender is? Are you sure?
Is there a reason you on insist on associating your gender with your biological sex?
Could you be transgendered if you just tried hard enough?
Have you thought about the impact that being open about your gender could have on your career?
Do you think anyone will want to date you knowing your gender?
At what point in a relationship do you disclose your gender?
Why are traditionally gendered people so obsessed with conforming to gender norms?
Have your thoughts about your gender been evaluated by a medical professional?
What do your genitals look like? Can I see? How do you have sex?
To whom have you disclosed your gender status?
Is it possible your gender status stems from a neurotic fear of transitioning?
Would you want your children to be traditionally gendered knowing the problems they will face?
Is there a reason you feel compelled to pick one and only one gender for your whole life?
Could you trust a traditionally gendered therapist to be objective?

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[1] These questions are taken from a document prepared by the Transgender/Identity Resource Center at OUTSIDEIN.