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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:	)	
	)	
Gia Teresa Ciccone-Lovo,	)	
Petitioner on behalf of	)	
	)	IN RE: VISA PETITION
Jose Mauricio Lovo-Lara,	)	PROCEEDINGS
Beneficiary	)	
	)	ORAL ARGUMENT
A95-076-067	)	REQUESTED
(Nebraska Service Center)	)	
_____	)	

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITIONER'S APPEAL

INTRODUCTION

On November 18, 2004, counsel for Petitioner Gia Teresa Ciccone-Lovo filed a motion for leave to file a supplemental brief in support of petitioner's appeal from the denial of the visa application she filed on behalf of her husband. To petitioner's knowledge, the Board has not yet ruled on petitioner's motion for leave. Petitioner submits this supplemental brief in the hope that her motion for leave will be granted.

STATEMENT OF FACTS

Petitioner Gia Teresa Ciccone-Lovo ("Petitioner") married Beneficiary Jose Mauricio Lovo-Lara on September 1, 2002. On November 20, 2002, she filed a petition with the United States Citizenship and Immigration Services ("BCIS") to classify her husband as her spouse under Section 201(h) of the Immigration and Nationality Act ("INA"), as amended. On August 3, 2004, the Service Center Director ("Director") denied her petition on the grounds that Petitioner's marriage was not valid for purposes of federal immigration law because she had undergone sex reassignment surgery from male to female on September 14, 2001. Citing the federal Defense of Marriage Act ("DOMA"), Pub. L. No. 104-199, 110 Stat. 2419 (1996), the Director correctly stated that marriages by same-sex couples are not recognized for purposes of federal immigration law. The Director went further, however, and ruled that, under DOMA, only a marriage between one person designated male at birth and one person designated female at birth would be considered valid for immigration purposes. Petitioner filed a notice of appeal on August 9, 2004, in which she provided a one-paragraph hand-written statement

explaining that the Director had incorrectly classified her as a man and her marriage as a same-sex marriage under DOMA. At that time, Petitioner also requested oral argument before the Board. The government filed a one-paragraph memorandum in response to Petitioner's appeal, incorporating the reasoning of the Director's decision by reference.

Shortly after receiving the Filing Receipt for Appeal from CIS Decision, dated November 3, 2004, Petitioner retained counsel. On November 18, 2004, counsel filed a Notice of Entry of Appearance as Attorney or Representative before the Board (EOIR-27), and a motion for leave to file a supplemental brief in support of petitioner's appeal. On December 6, 2004, the government filed a supplemental brief in support of its argument that the decision of the Service Center Director should be affirmed. *See* Supplemental Brief on Behalf of United States Citizenship and Immigration Services (hereinafter "Gov't Supp. Br."). Petitioner now files this supplemental brief, in the hope that the Board will grant her motion for leave.

STANDARD OF REVIEW AND REQUEST FOR THREE-MEMBER PANEL

The Board of Immigration Appeals ("Board") has jurisdiction on petitioner filed in accordance with Section 204 of the Immigration and Nationality Act. 8 C.F.R. § 1003.1(b)(5). The Board may review all questions arising in appeals from decisions issued by Service officers *de novo*. *Id.* § 1003.1(d)(3).

Cases are reviewed by a single Board member unless case presents circumstance requiring review by a three-member panel. One of those circumstances is the need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedent. *Id.* § 1003.1(e)(6)(iii). Review by a three-member

panel is also appropriate where a case presents an issue of national import. *Id.* § 1003.1(e)(6)(iv). This is such a case.

In this case, the Director misapplied the law by refusing to recognize the validity of Petitioner's marriage. In doing so, the Director ignored the plain language of the INA, the relevant caselaw interpreting this Act, and the longstanding practice of the BCIS (formerly Immigration and Naturalization Service) to honor marriages that are valid where enacted. In addition, the Director's actions violated Petitioner's constitutional rights to due process and equal protection. The BCIS policy that dictated this result not only violates the Constitution but also was promulgated in violation of the notice-and-comment procedures of the Administrative Procedures Act, thus rendering this policy null and void.

Accordingly, the Board should exercise de novo review in this case and assign this matter to a three-member panel to review the legal errors made by the Director and the BCIS in this case, pursuant to 8 C.F.R. § 1003.1(e)(6)(iii).

SUMMARY OF ARGUMENT

The Director's decision to declare Petitioner's marriage invalid for purposes of federal immigration law is based on an interpretation of DOMA that extends far beyond the language and the legislative intent of that statute. DOMA was passed to prevent same-sex couples from accessing the benefits and protections of marriage. Petitioner has entered into a valid marriage under the laws of North Carolina, and there is no federal authority that would support the Director's decision not to recognize that marriage as valid. The Director's decision should be reversed as an erroneous exercise of the

agency's authority. Both the Director's decision, and any agency rule purporting to ratify the outcome in this case, are constitutionally suspect and should not be credited by the Board. Finally, the BCIS's attempt to create a new rule regarding the treatment of transsexual people's marriages violates the notice-and-comment requirements of the Administrative Procedures Act ("APA").

ARGUMENT

I. DOMA Does Not Answer the Question of Whether Petitioner's Marriage Is Valid for Purposes of Immigration Law.

The government's argument that DOMA determines the outcome in this case is a red herring. By enacting DOMA, Congress clearly intended to make explicit that the marriages of same-sex couples would not be recognized for purposes of federal law. Nothing in DOMA remotely addresses the validity of heterosexual marriages where one member of the married couple is transsexual. Contrary to the government's suggestion, a marriage between two people of the opposite sex is an opposite-sex marriage for purposes of Section 7 of DOMA, irrespective of the fact that one member of the couple has undergone a sex reassignment surgery.

Congress intended for DOMA to serve two purposes: (1) "to defend the institution of traditional heterosexual marriage" and (2) "to protect the right of the states to formulate their own public policy regarding the legal recognition of same-sex unions, free from federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses." 142 Cong. Rec. S4851-02, available at 1996 WL 233584. The specific language of Section 7 of DOMA reflects Congress' intentions by providing that "the word 'marriage' means only a legal

union between one man and one woman as husband and wife." 1 U.S.C. § 7. *See also* Pub. Law 104-199.

Furthermore, the legislative history of DOMA also confirms this conclusion. DOMA was enacted in response to a decision from the Hawaii Supreme Court suggesting that homosexual couples should be allowed to marry. House Conf. Report 104-464, 104th Cong., 2d Sess. 1996, 1996 WL 391835 ("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.") (emphasis added). Likewise, the legislative history is replete with references to the term "same-sex" and "homosexuals." *Id.* In fact, these terms are used interchangeably throughout the legislative history. *Id.* Based on DOMA's text and legislative history, it is clear that Congress was only concerned with preventing homosexual or same-sex couples from accessing the protections and benefits of marriage.

While defining marriage as an institution limited to heterosexual couples, DOMA did not define the terms "man" or "woman." There is no indication that Congress intended to restrict these categories to those individuals "born" as a particular sex. *Id.*[1] There is no reason for this panel to import additional provisions into the statute when it is clear that Congress had the capacity to do so but chose not to. In other contexts, Congress has demonstrated its ability to address and/or restrict the ways in which laws will apply to transsexual people. *See, e.g.,* 42 U.S.C. § 12211(b)(1) (Americans with

[1] A lone statement in DOMA's legislative history that we are all "born a man or a woman" does not transform a restriction on same-sex marriage into a law regarding the legal gender of transsexuals or the validity of their marriages. As the Supreme Court has noted, "[i]solated statements . . . are not impressive legislative history." *Garcia v. United States*, 469 U.S. 70, 78 (1984).

Disabilities Act); 29 U.S.C. § 706(8)(F)(i) (Rehabilitation Act) (excluding any conditions related to gender-identity disorder or transsexuality from the definition of the term "disability"). In DOMA, by contrast, there is no mention whatsoever regarding the treatment of transsexual marriages or regarding state laws that recognize change of sex by post-operative transsexuals. For all of these reasons, the Board should decline the government's invitation to expand DOMA's scope far beyond anything that the language could reasonably be said to contemplate.

Both before and after the passage of DOMA, the relevant standard for determining the validity of a marriage under federal immigration law is the two-part test delineated in *Adams v. Howerton*, 673 F.2d 1036 (9th Cir.1982). An adjudicator must first determine whether the marriage was legal under the laws of the relevant state, and then must turn to the question of whether the state-approved marriage qualifies under the INA. *Id.* at 1038. DOMA provides no guidance with respect to these questions, and the government's efforts to confuse the relevant legal issues in this case should be rebuffed.

II. Petitioner and Her Husband Entered into a Valid Opposite-Sex Marriage Under the Laws of North Carolina, and No Federal Law Indicates Otherwise.

The legal standard governing this case is well settled. The Board of Immigration Appeals has held that the validity of a marriage is governed by the law of the place of celebration. *In re Gamero*, 14 I & N. Dec. 674 (B.I.A. 1974). Under *Adams v. Howerton*, the two relevant questions are whether the marriage is valid under state law and whether the state-approved marriage qualifies under the INA. 673 F.2d at 1038. Because the Director failed to give this case proper consideration under the correct legal standard, the Board should reverse and remand for further proceedings.

A. Petitioner Has Entered into a Valid Marriage Under the Laws of North Carolina.

Petitioner and her spouse presented all of the necessary documentation required to obtain a marriage license in North Carolina, and were married on September 1, 2002. Accordingly, Petitioner's marriage easily satisfied the first prong of the *Adams v. Howerton* test.

The government attempts to call the validity of this marriage into question by suggesting that it is a same-sex marriage precluded by the North Carolina Defense of Marriage Act. This argument completely ignores the fact that, under the laws of North Carolina, Petitioner is legally a female. On April 17, 2001, pursuant to Chapters 101 and 103A of the North Carolina General Statutes, Petitioner obtained a court order changing her name and birth certificate to reflect that her sex is female. On December 21, 2001, the State of North Carolina issued a birth certificate listing her sex as female. *See* N.C. Gen. Stat. § 130A-118. On April 4, 2002, the State issued Petitioner a driver's license designating her legal sex as female. And on April 30, 2003, the United States Department of State issued Petitioner a passport reflecting that her sex is female.

North Carolina is one of approximately twenty-five states that authorize the issuance of a new birth certificate to a transsexual person who has undergone surgical treatment. *See In re Heilig*, 816 A.2d 68, 83 n.8 (Md. 2003). States like North Carolina have determined that it would be irrational to permit transsexual persons to undergo this medical treatment and then withhold legal recognition of their post-operative sex.[2] Such

[2] Transsexualism is a serious medical condition and is recognized as such by health care professionals around the world. It is listed in the International Classification of Diseases and Statistical Manual on Mental Disorders. *See* World Health Organization, International Statistical Classification of Diseases and Related Health Problems: Tenth Revision (ICD-10) (1992); American Psychiatric Association, DSM-IV (4th ed. 1994).

a policy would create innumerable practical and legal difficulties, both for the transsexual individual and for society. By contrast, recognizing a person's post-operative sex avoids these difficulties by establishing a single clear standard for determining the person's sex for all purposes.

The government has presented no authority to contradict the clear evidence demonstrating that Petitioner and her husband were married in accordance with the laws of North Carolina.[3] Therefore, the first prong of the *Adams v. Howerton* test is clearly satisfied.

B. Petitioner's Marriage Is a "Qualifying Marriage" Under the INA.

The INA defines a "qualifying marriage" as one that "was entered into in accordance with the laws of the place where the marriage took place." INA § 216(d)(1)(A)(i)(I). The INA does not define the terms "spouse," "wife," or "husband," except to state that these terms do not include "a spouse, wife or husband by reason of any marriage ceremony where the contracting parties thereto are not physically in the presence of each other, unless the marriage shall have been consummated." INA

Transsexual people have a deep-seated identification with the opposite sex; as a result, they experience extreme distress about their anatomical sex and extreme discomfort in the gender role of their birth sex. *See* Harry Benjamin International Gender Dysphoria Association, HGIGDA Standards of Care for Gender Identity Disorders 3-4 (6th ed. 2001) (available at www.hbigda.org). To avoid the harm that can result from leaving this condition untreated, the medically recommended course for a transsexual person is sex-reassignment, which permanently alters the primary and secondary sex characteristics to that of the other gender. *Id.* This treatment is highly effective in alleviating the painful incongruity between the person's body and his or her internal identification. It is also effective in enabling the person to live as a productive member of society.

[3] Courts and commentators have universally concluded that when a jurisdiction permits a transsexual person to obtain a new birth certificate, the person must be permitted to marry in his or her new gender as well. Any contrary authorities are from jurisdictions that do not permit the issuance of a new birth certificate for a transsexual person.

§ 101(a)(35). In the absence of any statutory language authorizing the BCIS to exclude marriages involving transsexual people from this rule, the BCIS has no authority to do so. *Dabaghian v. Civiletti*, 607 F.2d 868 (9th Cir. 1979).

In *Dabaghian,* the Ninth Circuit held that the definition of spouse "includes the parties to all marriages that are legally valid and not a sham," and that the Immigration and Naturalization Service (hereinafter "legacy INS") (now known as BCIS) could not deem a legally valid marriage invalid on any other basis. *Id.* at 871. The court held that the legacy INS could not determine the legality of a marriage by adding a substantive requirement that was not authorized by, and was inconsistent with, the statute. *Id.* ("There is no exception for marriages that the INS thinks are 'factually dead' at the time of adjustment."). *See also Saldana v. INS*, 762 F.2d 824 (9th Cir. 1985) (holding that INS had no authority to disregard a legal, bona fide marriage solely because it was entered into at the "eleventh hour," where statute did not authorize any such limitation); *Palmer v. Reddy*, 622 F.2d 463, 464 (9th Cir. 1980) (rejecting INS' requirement that applicants must prove that stepchildren are part of "close family unit" to be eligible for visa preference, where "unqualified language" of the statute provides no such requirement).

Where the language of the statute is clear, there is no need for further inquiry. *INS v. Phinpathya*, 464 U.S. 183 (1984). As the INA does not on its face exclude transsexuals from marrying, the BCIS may not read such an exclusion into the statute. The suggestion that, absent a uniform federal standard regarding how to treat the marriages of transsexuals, BCIS cannot recognize Petitioner's marriage is simply incorrect as a matter of law. With few exceptions, Congress has left the role of defining

who may enter into a valid marriage up to individual state legislatures. In *Matter of Hosseinian*, 191 I. & N. Dec. 453, 455 (BIA 1987), the BIA rejected the argument that courts should establish a federal standard pertaining to foreign divorces that superseded California law on the subject. *See also United States v. Gomez-Orozco*, 188 F.3d 422 (7th Cir. 1999) (relying on state law to determine the validity of a common law marriage).

The government's only remaining avenue for refusing to recognize Petitioner's marriage is by questioning her gender. Neither the INA nor any other federal statute defines a person's legal gender. Rather, as with most other questions concerning an individual's personal characteristics and family relationships, this question is left to the states. *Loughran v. Loughran*, 292 U.S. 216 (1934). This is particularly appropriate in the case of gender because the states maintain birth records, which are the primary means of assigning a person's legal gender. As demonstrated *supra*, Petitioner is legally female under the relevant state law in North Carolina.

Moreover, to the extent there are specific federal policies addressing a transsexual person's legal gender, they strongly and unambiguously support recognizing Petitioner as legally female. First, she would be defined as legally female under the Model State Vital Statistics Act (MSVSA), which was promulgated by the Department of Health, Education and Welfare (DHEW) in 1977. Specifically, the MSVSA includes a provision authorizing the issuance of a new birth certificate for a transsexual person who has undergone sex-reassignment. *See In re Heilig*, 816 A.2d at 82-83 (describing history of the Model Act). This provision was retained without modification when the Model Act was revised in 1992. *Id.* Second, Petitioner has been issued a passport recognizing her

as female, pursuant to the State Department's policy of changing the gender designation on a passport to reflect a transsexual person's post-operative identity as male or female. Finally, Petitioner has informed the Social Security Administration of her sexual reassignment surgery, and has been issued a new social security card with her name as Gia Teresa Ciccone.[4]

For its part, the BCIS has no explicit policy on determining the legal gender of a transsexual person. In its brief, however, it suggests a series of arbitrary definitions of gender based either on chromosomal composition or the ability either to "perform[] the fertilizing function" or to "bear[] young." There is absolutely no basis in the INA or any other federal law for these definitions. We all know men who cannot "perform the fertilizing function" and women who cannot "bear young," yet we have no trouble accepting them as men and women. The arbitrariness of these definitions is made obvious by the government's need to riddle them with exceptions regarding naturally-occurring chromosomal variations as well as an individual's physical capacity or willingness to have children. *See* Gov't Supp. Br. at nn.1-2. The government's position in this case epitomizes arbitrary, capricious agency action, as well as an abuse of discretion.

Based on her gender reassignment surgery, her North Carolina birth certificate and driver's license, and her U.S. passport and social security card, Petitioner is legally female and must be recognized as such by the BCIS. The government has produced no rational argument in favor of disregarding this fact, nor does any exist. Therefore, the

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[4] *See* Social Security Administration Policy RM 00203.210(C) ("Clinic or medical records or other combination of documents showing the sex change surgery has been completed." All documents must clearly identify the NH [number holder].").

only relevant consideration in this case is that the INA nowhere excludes the marriages of transsexual people from the definition of "marriage" for immigration purposes. The government's attempt to import any such additional provision is contrary to the law and should be rejected by the Board.

III. Any Policy Purporting to Preclude Recognition of All Marriages Involving Transsexual People Would Be Constitutionally Invalid, and Cannot Be Countenanced by the Board.

Both the Director's ruling, and the agency memoranda upon which the Director relied, create significant due process and equal protection concerns.[5] The Board can easily avoid these murky constitutional waters by remanding this case with instructions that the Service Center Directors follow the well-established test delineated in *Adams v. Howerton*. *See, e.g., Solid Waste Agency v. United States Army Corp. of Eng'rs*, 531 U.S. 159 (2001) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *see also id.* ("This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.").

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[5] There are two BCIS memoranda regarding the agency's treatment of marriages involving transsexual people. The first memorandum, issued on March 20, 2003, amended Chapter 21 of the Adjudicator's Field Manual, and provided that "the 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 second memorandum was issued on April 16, 2004, and provided that "CIS personnel *shall not* recognize the marriage . . . between two individuals where one or both of the parties claims to be a transsexual." *See* Gov't Supp. Br. Exh. A (emphasis added). The Director did not explicitly cite either of these memoranda in his decision, but the Director was presumably aware of, and in fact followed, the directive contained in both of these documents. The government

The Director's decision and the BCIS memoranda mandating that result violate Petitioner's substantive due process rights. "[T]he touchstone of due process is protection of the individual against arbitrary action of the government, whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Here the government has imposed its own defintion of gender on Petitioner, one that is not based on federal law, is contrary to her own gender identity, is contrary to her primary and secondary sex characteristics, is contrary to the determination of her own personal physician, and is contrary to court orders from the State of North Carolina. Such action is the very epitome of arbitrariness and cannot be constitutional government action, especially where it also substantially burdens Petitioner's "autonomy of self" that is protected by the Due Process Clause. *See Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

The Director's decision in this case, and the BCIS memoranda regarding the treatment of marriages involving transsexual people, also violate the constitutional guarantee of equal protection because they irrationally and arbitrarily exclude transsexual people from the statutory rights and protections that are available to others. Under its current policy, the BCIS would not recognize any marriage to which Ms. Ciccone-Lovo, or any other transsexual person, was a party. This restriction not only burdens the exercise of a fundamental right, *see Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Shapiro v. Thompson*, 394 U.S. 618 (1969), but also cannot be justified by any legitimate or compelling government interest. A policy that has no justification other than

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specifically cites the April 16, 2004 memorandum in support of the Director's decision. *See* Gov't Supp. Br. at 5.

disapproval of a targeted group (i.e., transsexuals) cannot withstand any level of constitutional scrutiny. *See Romer v. Evans*, 517 U.S. 620 (1996).

Finally, a BCIS policy mandating the denial of all visa applications pertaining to a transsexual person's marriage contradicts the guarantee that each person shall receive an individual determination of her application. The U.S. Supreme Court has held that failure to make an individualized determination in a particular case is an unlawful exercise of power. *INS v. Nat'l Center for Immigrants' Rights*, 502 U.S. 183, 194 (1991); *see also Carlson v. Landon*, 342 U.S. 524, 538 (1952). For all of the reasons outlined above, the Director failed to make an individualized determination of the facts and law as required by *Adams v. Howerton*. Specifically, the Director did not apply the relevant statutory law to determine whether Petitioner's marriage to her husband is a "qualifying marriage" under the INA. Not all states allow individuals to change their legal sex, and not all states will recognize as valid marriages involving a transsexual person. In this case, however, Petitioner lives in a state where her change of sex and subsequent marriage are legally valid. A policy treating all marriages involving transsexuals as invalid not only contradicts *Adams v. Howerton* but also denies applicants their right to an individualized determination of their petition.

IV. The BCIS Cannot Promulgate New Rules Without Engaging in the Notice-and-Comment Procedure Outlined in the APA.

An agency must comply with the notice-and-comment procedures of the APA when it promulgates a substantive rule that divests agency officials of their discretion. *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1341-42 (4th Cir. 1995). In this case, the BCIS issued two memoranda to its Service Center Directors, instructing them not to

recognize any marriage including a transsexual person for federal immigration purposes. *See supra* note 5. The officials adjudicating such applications no longer have any discretion in these matters. *See* Gov't Supp. Br. Exh. A ("CIS personnel *shall not* recognize the marriage. . . .") (emphasis added). Such action qualifies as rule-making under the APA. *See* 5 U.S.C. § 551(4) (defining "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency").

Prior to these memoranda, there was no law or agency policy requiring the blanket disqualification of visa petition applications involving transsexual people. Given the substantive change effected by the new policy, the BCIS was required to comply with the notice-and-comment requirements of the APA, which it indisputably did not do. *See* 5 U.S.C. §§ 551(5), 553.[6] For this reason, the agency policy upon which the Director relied in reaching his decision is invalid.

[6] Should the Board disregard the mandatory language in the BCIS memoranda and construe these documents as merely providing guidance to Service Center Directors, the Director's decision should still be reversed as contrary to federal law and as an abuse of discretion for the reasons noted above.

CONCLUSION

The decision of the Service Center Director is contrary to law and an abuse of discretion. Accordingly, the Board should reverse and remand with instructions that the Petitioner's visa application shall be approved.

Respectfully submitted this 17th day of December, 2004,

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CERTIFICATE OF SERVICE

I hereby certify that I mailed a copy of Petitioner's Motion for Leave to File Supplemental Brief in Support of Petitioner's Notice of Appeal on December 16, 2004, via UPS for overnight delivery addressed to:

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