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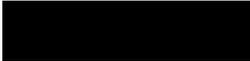
U.S. Citizenship
and Immigration
Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: **AUG 10 2005**

IN RE:

Petitioner:

Beneficiary:



PETITION: Petition for Alien Fiancé(e) Pursuant to § 101(a)(15)(K) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(K)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Acting Director of the Nebraska Service Center denied the nonimmigrant visa petition and certified his decision to the Administrative Appeals Office (AAO). The acting director's decision will be affirmed, for the reasons discussed below, and the petition will be denied.

The petitioner was born in 1962 in Ohio and is a citizen of the United States who seeks to classify the beneficiary, a native and citizen of Germany, as the fiancée of a United States citizen pursuant to § 101(a)(15)(K) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(K). The acting director found that the petitioner, who states that he is a biological male, is unable to conclude a valid marriage for immigration purposes with the beneficiary, a woman, since the petitioner's sex was listed on his birth certificate as female. The acting director pointed out that in the Defense of Marriage Act, Public Law Stat. 2419 (1996), Congress defined the term "marriage" as the legal union between one man and one woman. The acting director stated that Congress has not addressed the issue of the validity of a marriage between two parties born of the same sex, where one party has changed his or her sex after birth. The acting director decided that, because of Congress' silence on this issue, Citizenship and Immigration Services (CIS) cannot recognize a marriage between the petitioner and the beneficiary.

Section 101(a)(15)(K) of the Act, 8 U.S.C. § 1101(a)(15)(K), provides nonimmigrant classification to an alien who:

- (i) is the fiancé(e) of a U.S. citizen and who seeks to enter the United States solely to conclude a valid marriage with that citizen within 90 days after admission;
- (ii) has concluded a valid marriage with a citizen of the United States who is the petitioner, is the beneficiary of a petition to accord a status under section 201(b)(2)(A)(i) that was filed under section 204 by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa; or
- (iii) is the minor child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien.

Section 214(d) of the Act, 8 U.S.C. § 1184(d), states, in pertinent part, that a fiancé(e) petition:

. . . shall be approved only after satisfactory evidence is submitted by the petitioner to establish that the parties have previously met in person within two years before the date of filing the petition, have a bona fide intention to marry, and are legally able and actually willing to conclude a valid marriage in the United States within a period of ninety days after the alien's arrival. . . .

Because the Defense of Marriage Act specifically limits the definition of marriage to the legal union of two persons of opposite sex, and the acting director found that the petitioner and beneficiary were originally of the same sex, the acting director concluded that the proposed marriage between the petitioner and the beneficiary could not be recognized for immigration purposes. In his decision, the acting director referred to persons who change their gender after birth, implying that the petitioner changed his gender after birth, even though there is no evidence on the record to this effect. The evidence indicates that the petitioner is a biological male, notwithstanding his assignation at birth as a female.

The petitioner's Ohio birth certificate lists his sex as female, a designation the petitioner claims is erroneous. In his February 5, 2004 letter filed with the Petition for Alien Fiancé(e), Form I-129F, the petitioner explained that he was born an intersex baby, and that common medical practice at that time (1962) was to list the gender of such infants as female. He wrote that during puberty his true gender manifested itself, and he was able to determine that he was, indeed, of the male sex. He changed his name and eventually married (and later divorced) a woman in the state of Ohio.

The record also contains a letter from [REDACTED] the applicant's physician. [REDACTED] wrote on October 29, 2002 that at the time of the petitioner's birth it was common to list an intersex infant as a female. [REDACTED] stated that the petitioner did not undergo chromosomal or hormonal tests at the time of his birth to determine his sex, but it has since been determined that the petitioner is a biological male.

According to [REDACTED] A. Turkington, *Intersex States*, HealthAtoZ.com, at http://www.healthatoz.com/healthatoz/Atoz/ency/intersex_sttes_pr.jsp (last visited June 14, 2005), "[I]ntersex states are conditions where a newborn's sex organs (genitals) look unusual, making it impossible to identify the sex of the baby from its outward appearance." The website explains further that "[s]ometimes, the genetic sex (as indicated by chromosomes) may not match the appearance of the external sex organs." Regarding the diagnosis of this condition, HealthAtoZ.com states:

When doctors are uncertain about a newborn's sex, a specialist in infant hormonal problems is consulted as soon as possible. Ultrasound can locate a uterus behind the bladder and can determine if there is a cervix or uterine canal. Blood tests can check the levels of sex hormones in the baby's blood, and chromosome analysis (called karyotyping) can determine sex. Explorative surgery or a biopsy of reproductive tissue may be necessary. Only after thorough testing can a correct diagnosis and determination of sex be made.

The AAO recognizes that medical science, policy, and procedure have advanced considerably since 1962, when the petitioner was born. Current medical practice now dictates extensive testing not then existent, along with consultation between the parents and the medical team prior to the assignment of a gender to an intersex infant.

A recent Board of Immigration Appeals (BIA) case, *Matter of Lovo*, 23 I&N Dec. 746 (BIA 2005), is instructional in the instant analysis. Although *Matter of Lovo* dealt with a petitioner who had surgically changed her gender, unlike the petitioner in the case at hand, the BIA's reasoning offers pertinent guidance. In *Matter of Lovo*, the petitioner underwent sex change surgery and subsequently changed the gender designation on her North Carolina birth certificate from male to female. The petitioner concluded a valid marriage in North Carolina with the beneficiary, a male citizen of El Salvador, and she filed a petition to classify the beneficiary as an immediate relative pursuant to § 201(b)(2)(A)(i) of the Act, 8 U.S.C. § 1151(b)(2)(A)(i).

In *Matter of Lovo*, as in the instant case, the director of the Nebraska Service Center denied the petition based on the definition of marriage stated in the Defense of Marriage Act, noting that Congress had not recognized the validity of a marriage between a man and a transsexual woman. The BIA, however, held that the Defense of Marriage Act does not preclude the recognition of a marriage involving a postoperative transsexual if the state in which the marriage was performed recognizes the union as a valid heterosexual marriage. *Id.* at 746.

In *Matter of Lovo*, the BIA rejected Department of Homeland Security counsel's argument that the government should rely only on the spouse's chromosomal pattern or the gender designation on the original birth certificate in determining whether a marriage is heterosexual. The BIA noted that medical experts typically refer to eight criteria in determining a person's sex, including the chromosomal pattern, gonads, internal and external morphological sex, hormones, secondary sexual features, gender of rearing, and the individual's own sexual identity. See *Matter of Lovo, supra*, at 752 (citing Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 Ariz. L. Rev. 265, 278 (1999)). The BIA added that "intersexed individuals may have the normal-appearing external genitalia of one sex, but have the chromosomal sex of the opposite gender." Moreover, the BIA pointed out that many incongruities within the gender-determining criteria are not discovered until the individual in question reaches puberty, "and their bodies develop differently from what would be expected from their assigned gender." *Id.*, at 753. According to the instant petitioner's statement, the latter observation regarding gender development applies perfectly to his own case. It appears then, that for immigration purposes, a corrected gender assignment will be recognized.

In *Matter of Lovo*, the BIA concluded that as long as the state in which the marriage was performed recognizes a valid heterosexual marriage, CIS recognizes the marriage for immigration purposes, even if a sex-change operation and new or revised birth certificate is involved. The petitioner's birth certificate was issued in Ohio, one of the few states that do not allow a postoperative transsexual to change the gender noted on the birth certificate. Ohio also will not issue a marriage license to a transsexual individual in order to contract marriage with a person of that individual's original gender. *In re Applicaton for Marriage License for Nash*, 2003 Ohio 7221 (2003). Nevertheless, as the petitioner in this case is not a postoperative transsexual, and he asserts that the gender listed on his birth certificate was in error, it is well to note that Ohio law allows for correction of data on Ohio birth certificates when the information originally entered was in error. *In re Ladrach*, 32 Ohio Misc. 2d 6, 513 N.E.2d 828 (Ohio Prob. Ct. 1987).

Ohio Revised Code (RC) § 3705.15 states the following regarding the correction of birth records:

Whoever claims to have been born in this state, and whose registration of birth is not recorded, or has been lost or destroyed, or has not been properly and accurately recorded, may file an application for registration of birth or correction of the birth record in the probate court of the county of the person's birth or residence or the county in which the person's mother resided at the time of the person's birth. If the person is a minor the application shall be signed by either parent or the person's guardian.

(A) An application to correct a birth record shall set forth all of the available facts required on a birth record and the reasons for making the application, and shall be verified by the applicant . . . The application shall be supported by the affidavit of the physician in attendance. If an affidavit is not available the application shall be supported by the affidavits of at least two persons having knowledge of the facts stated in the application, by documentary evidence, or by other evidence the court deems sufficient.

The record does not reflect whether the petitioner attempted to correct the error in gender as listed on his birth certificate. In *Matter of Lovo*, the BIA pointed out that the Defense of Marriage Act clearly does not recognize marriages between same-sex couples. *Matter of Lovo*, 23 I & N Dec. at 749. In *Matter of Lovo*, the petitioner had obtained a new birth certificate after her surgery, reflecting her corrected gender. The state of North Carolina therefore recognized her marriage to a man as one between individuals of opposite sexes. The petitioner has not presented any evidence that any state will recognize his marriage to the beneficiary, a woman, as long as his gender is legally recorded as female. In order to obtain a nonimmigrant fiancée visa for the beneficiary, pursuant to § 214(d) of the Act, 8 U.S.C. § 1184(d), the petitioner must demonstrate that he is legally able to conclude a valid marriage with the beneficiary in some jurisdiction. If the petitioner demonstrates that his male gender has been legally (not merely medically) recognized, it appears his marriage to the beneficiary will be amenable to legal recognition.

On certification, the AAO affirms the service center director's denial of the I-129F petition, for the reasons discussed above. If the petitioner provides CIS with evidence that he is legally able to marry a female, by showing that his male gender has been legally recorded, he may file a new I-129F petition.

ORDER: The director's August 16, 2004 decision is affirmed. The petition is denied.