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OPEN WINDOW: MATTER OF LOVO'S IMPLICATIONS FOR TRANSSEXUAL AND IMMIGRANT COMMUNITIES

By Grisella Martinez, Esq.*

A valid marriage was defined under federal law in the passage of the Defense of Marriage Act (“DOMA”) in 1996,¹ as one between a man and a woman. Many legal advocates recognized this legislation as a door slamming shut the possibility of legal recognition of same-sex marriages. However, the DOMA failed to define the terms “man” and “woman.” Presumably this omission occurred because federal legislators and America’s heterosexual dominant culture did not contemplate scenarios involving men and women who had undergone sexual reassignment. Congress’ failure to define these terms opened a window where marriage between a man and a post-operative transsexual woman,² or vice-versa, could be classified as a valid marriage under federal law, thereby providing a basis for conferring immigration and other federal benefits. The Board of Immigration Appeals’ (“BIA”) affirmed this basis for immigration benefits in *Matter of Lovo*, which firmly established immigration benefits could be conferred on a spouse in a marriage where the other spouse was a postoperative transsexual.

MATTER OF LOVO: AN OVERVIEW

The BIA³ held in *Lovo*⁴ that the DOMA “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.” In addition, the BIA held that “a marriage between a postoperative transsexual and a person of the opposite sex may be the basis for [spousal immigration] benefits...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.” The Immigration and Nationality Act (“INA”) states that U.S. citizens may file beneficiary petitions for “alien relatives” who are “immediate family members.” Immediate family members, who qualify as “beneficiaries” of a petition, include spouses, as well as parents, and children. The INA does not define who constitutes a “spouse” for purposes of immigration law.

The petitioner in *Lovo* was a postoperative transsexual U.S. citizen woman who married a male citizen of El Salvador. The couple wed in North Carolina, and the petitioner subsequently filed a visa petition for her husband so that he could apply for lawful permanent resident status and acquire his “green card.” The petitioner provided the United States Citizenship and Immigration Service (“the Service”) with: 1) her North Carolina birth certificate showing her sex as “female;” 2) an affidavit from her physician attesting to her sexual reassignment surgery; 3) a North Carolina court order demonstrating her change of name;

4) her North Carolina marriage certificate; and 5) her North Carolina driver’s license showing her name and her current sex as a female.

During its investigation, the Service discovered that the Petitioner was born a male in North Carolina, and had undergone sexual reassignment surgery to become a female. The Service erroneously denied her visa petition stating that a valid marriage for purposes of immigration law was a federal question; therefore, her marriage was invalid because it was not between one man and one woman. The Service found that the beneficiary was ineligible for immigration benefits as a spouse. The petitioner filed a Notice of Appeal to the BIA.

On appeal, the BIA stated that its analysis involved “determining first whether the marriage is valid under [s]tate law and then whether the marriage qualifies under the [Immigration and Nationality] Act.”⁵ The BIA concluded that under the statutory laws of North Carolina,⁶ a valid marriage is one between a male and a female (although these terms were undefined in the statute) and that the law expressly prohibited same-sex marriages. The BIA also discussed provisions of North Carolina’s statutes that set forth requirements for amending birth certificates.⁷ These statutes explicitly permit the changing of an individual’s sex on the birth record after sexual reassignment surgery and when proof of such surgery is provided from a licensed physician. Based on these facts, the BIA determined that the petitioner and beneficiary had entered into a valid marriage under the laws of the State of North Carolina.

The BIA next addressed the second issue of whether the marriage qualified as a valid marriage under current immigration law. It noted the absence of any language in the INA defining “spouse” and the failure of the DOMA to elaborate on the definition of “spouse” other than to state that “the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”⁸ The BIA also closely examined the failure of the DOMA and federal law to address the specific issue of postoperative transsexuals entering into marriage. In addressing this failure, the BIA looked to several sources of statutory construction and interpretation including the text of the DOMA, its legislative history, and relevant case law.

Citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁹ the BIA followed the well-settled canon of statutory construction that “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.’” It found that the legislative history and plain text of the DOMA clearly applied to marriages between a man and a woman and not

to same-sex couples. It also found that the House Committee Conference Report used the terms “same sex” and “homosexual” interchangeably and repeatedly addressed the repercussions of allowing homosexual couples to marry. The BIA highlighted the fact that Congress never addressed the issue of marriage by post-operative transsexuals in any legislative proceedings and found this failure to be remarkable in light of various state statutes recognizing transsexual marriage.¹⁰ The BIA held that:

[T]he 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.¹¹

Of even greater interest is the BIA’s conclusion that Congress did not intend to overrule long-standing case law that provides for state dominion in determining the validity of marriage. The BIA held that the recognition of such a marriage deemed valid under state law did not require Congressional authorization for the purposes of immigration.¹²

However, the Service argued against this interpretation and asked the BIA to give the terms “man” and “woman,” as used in the DOMA, their “common meaning” when evaluating the validity of a marriage. Arguing that chromosomal patterns conclusively established “sex” because of their immutability, the Service contended that females with XX chromosomes and males with XY chromosomes could never change their sex, even if they underwent sexual reassignment surgery. The BIA rejected this argument, citing the great debate within the medical community concerning determinations of an individual’s sex.¹³

Additionally, the BIA also recognized that not all individuals are born with strictly XX or XY chromosomes and that “[a] chromosomal pattern [was] not always the most accurate determination of an individual’s gender.”¹⁴ Furthermore, the BIA declared an individual’s original birth certificate did not provide an accurate method for determining gender. The “incongruities” and “ambiguities” in medical criteria for determining a person’s sex using purely physical markers at birth supported this finding.¹⁵ The BIA ended its analysis by reaffirming its position that, “for immigration purposes,” it is appropriate to use a current birth certificate “to determine an individual’s gender.”¹⁶

RECOGNITION OF THE ABILITY TO CONFER IMMIGRATION BENEFITS ON A TRANSSEXUAL SPOUSE AS A TWO-FOLD PRECEDENT

Lovo raises many issues, not only for the transsexual immigrant community, but the greater transsexual community at large. The primary importance of the BIA’s holding is that the Department of Homeland Security and the Department of Justice are bound by this precedent in adjudicating visa petitions and depor-

tation and removal proceedings involving transsexual immigrants. On a broader scale, this holding is significant because it suggests that other agencies within the federal government may recognize the validity of transsexual marriages in conferring federal benefits on spouses.

IMMIGRATION BENEFITS

The full implication of *Lovo* has yet to be established. To date, the Service has not adjudicated *Lovo*’s petition on remand from the BIA, but in theory, the Service cannot deny the petition solely because the petitioner or beneficiary is a transsexual. However, this does not preclude the Service from denying the visa petition on other grounds. The most relevant example of this situation is the case of Donita Ganzon (a U.S. citizen Filipino male to female transsexual) and her husband Jiffy Javellana (a Filipino male immigrant).

Donita Ganzon immigrated to the United States in the 1970s. In 1981, she underwent sexual reassignment surgery. Subsequently, she legally changed her name and sought recognition of her sex change through the California state courts. The state of California issued her a California driver’s license and allowed her to change her nursing license to reflect her sex as female.¹⁷ When she became a U.S. citizen six years later, her Certificate of Citizenship listed her current name and her sex as female. In addition, the United States State Department issued her a passport which listed her sex as female.

In 2000, Ms. Ganzon met Jiffy Javellana in the Philippines. Approximately one year later she filed a fiancé visa for him with legacy INS¹⁸ and he entered the United States. They married in Nevada a few months later.¹⁹ During their interview with the Service for Mr. Javellana’s green card, Ms. Ganzon revealed that she was a transsexual. Shortly thereafter, the Service denied her husband’s application for permanent resident status based on the invalidity of his marriage to Ms. Ganzon. The couple filed suit in U.S. District Court for the Western Division of California²⁰ seeking a declaratory judgment against the Department of Homeland Security. While the suit was pending, Mr. Javellana filed a second application for adjustment of status and hoped that the BIA’s ruling in *Lovo* would preclude the Service from denying him a green card based on the alleged invalidity of his marriage to a transsexual. In October 2005, the Service denied Mr. Javellana’s application “in the exercise of discretion,” stating that Ms. Ganzon and Mr. Javellana had failed to prove that they entered into their marriage in good faith and that the marriage was “bona fide.”²¹

This case illustrates how future effects of *Lovo* have yet to be realized in the context of visa petitions and adjustment applications. It remains to be seen whether the Service will grant the petition or deny it on another “discretionary” ground. Regardless of the outcome, *Lovo* endures as precedent in immigration law and potentially allows transsexual spouses to claim immigra-

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tion benefits in other contexts aside from family-based visa petitions. Under *Lovo*, the opportunities for transsexual spouses to claim immigration benefits extend to employment-based visa petitions, non-immigrant visa petitions, asylum applications, and deportation and removal proceedings.

For example, aliens sponsored for an immigrant visa by a United States employer may also file for derivative permanent resident status for their spouses and children. Again, as with family-based immigrant visas, there is no definition of “spouse” and the couple need only prove that they entered into a valid and bona fide marriage. *Lovo* also potentially applies to visa petitions for non-immigrants. This includes applicants for student visas, employment visas, diplomatic visas, and other special non-immigrant visa categories. As long as a benefit is given to the visa holder’s spouse it could appropriately be considered under the BIA’s ruling. Likewise, an alien filing for asylum, if granted, may also pass on benefits to qualifying “derivatives.”²² In the case of a spouse, the only requirement for the spouse to receive benefits based on asylum (such as permanent resident status) is that the asylee married their spouse prior to receiving a grant of asylum.

In deportation and removal proceedings,²³ an immigrant may request various forms of relief from removal based on marriage to a U.S. citizen or legal permanent resident. For example, when an “out-of-status”²⁴ alien has continuously remained in the United States for over ten years, the alien may request cancellation of removal based on “extreme hardship” to the U.S. citizen or legal permanent resident spouse. Again, the statutes and regulations²⁵ discussing cancellation of removal do not define “spouse” nor do they impose any other prerequisites on the marriage, other than it be bona fide. Therefore, it is possible, under *Lovo*, that a transsexual spouse could claim or confer the benefit of marriage as a basis for relief from removal.

To better illustrate this point, imagine the following: a U.S. citizen male to female transsexual legally marries a male immigrant who is out-of-status. He has resided in the United States continuously for over ten years prior to the commencement of his removal proceedings. They have two adopted minor U.S. citizen children, but have no other immediate or extended family members in the United States. The U.S. citizen wife does not work and the husband is the sole source of financial income for the entire family. They own real property together and various other assets. Under this set of facts, the Immigration Court is bound by the determination of the BIA in *Lovo* to allow the husband to apply for cancellation of removal based on extreme hardship to his U.S. citizen spouse and children. Although the grant of the application is still a discretionary decision made by the immigration judge, the husband could not be precluded from applying for cancellation of removal before the Court based on an “invalid” transsexual marriage. In addition, if the judge denies the application, the husband could appeal to the BIA, which would have the power to remand the case to the Immigration Court for a decision consistent with its holding in *Lovo*.

Therefore, the extent to which the BIA’s holding in *Lovo*

affects transsexual spouses has yet to manifest before the Service or the Immigration Court. The uncertainties involved in the ability of transsexual spouses to confer benefits as U.S. citizens or to receive them as immigrants has great potential for litigation in federal courts and before administrative agency adjudicatory bodies.

FEDERAL BENEFITS

If the DOMA does not preclude a transsexual spouse from conferring an immigration benefit on their legal spouse, then it follows that it would not preclude any transsexual spouse from conferring *any* federal benefit on their legal spouse. This conclusion stems from the implication, drawn from *Lovo*, that a valid marriage under state law where a spouse is transsexual may serve as the basis for receiving or conferring federal benefits on the other spouse, regardless of the DOMA.

The arena of federal health benefits is a prime example of the potential benefits for married couples. The federal government currently employs more than two million people.²⁶ The Office of Personnel Management (“OPM”), the self-proclaimed “human resources agency” of the government is responsible for administering the Federal Employees Health Benefit Program (“FEHB”) and several other benefits programs.²⁷

Under the FEHB Program, federal employees and their family members are eligible for health coverage. The enacting statute for the FEHB states that a “‘member of family’ means the spouse of an employee” as well as certain categories of children.²⁸ The statute does not provide a definition of the term “spouse.” The accompanying regulation offers no further clarification other than to state that the term “member of family” has the meaning set forth in the statute given above.²⁹ Aside from the applicable statute and regulations, the only other source of guidance is the FEHB Handbook which reiterates that “[f]amily members eligible for coverage under your self and family enrollment are your spouse (including a valid common law marriage [in accordance with applicable state law]) and children.”³⁰

There are no publicized cases where a federal employee attempted to confer health benefits on a transsexual spouse or where a transsexual federal employee attempted to confer benefits on a spouse. There is no reliable data on how many transsexuals are residing in the United States,³¹ but probability dictates that someone will inevitably raise a claim based on the ability to confer federal benefits to a spouse, in which one of the parties is a transsexual. The OPM does have an adjudicatory board (the Merit System Protection Board) for handling various administrative issues, but they do not review health benefit issues.³² Under the FEHB’s enacting statute “[t]he district courts of the United States have original jurisdiction, concurrent with the United States Court of Federal Claims, of a civil action or claim against the United States[.]”³³ Therefore, the federal employee would have the right to file an action against the government in federal court immediately.

CONCLUSION

Lovo opens the door to analyzing multiple types of potential “federal benefits” conferred on transsexual spouses, including, but not limited to, Social Security, tax and veterans benefits. However, the factual dynamics of *Lovo* are very narrow and may raise other issues that potentially complicate the rights of those who do not fall into the same category. This is because *Lovo* did not contemplate the numerous other possible permutations of transsexual marriage. The BIA did not identify the possible outcomes if both spouses had been transsexuals. It also did not take into account for the marriage of a transsexual woman to a biological man.³⁴ Nor did it consider the applicability of its ruling to transsexuals trying to confer benefits but whom were unable to legally change their sex, were married in states that

did not legally recognize changes of sex, or were already married prior to having sexual reassignment surgery. Therefore, while the BIA clearly recognized that there were potentially “anomalous results” in refusing to recognize legal changes of sex, the BIA did not fully address the consequences of its holding on a broader scale.³⁵

In the final analysis, *Lovo* is an important and precedential case not only in the immigration context, but also as a step forward for the transsexual community as a whole. Although the DOMA closed an important door for the lesbian, gay, bisexual, and transgendered community, the BIA’s holding in *Lovo* seems to have opened a window in the fight for transsexual rights. It will take time and litigation in both the administrative and judicial arenas to determine exactly how far these rights extend.

ENDNOTES

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¹ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

² See Sarah Leinicke, *Post Operative Transsexuals Right to Marriage*, 1 MODERN AM. 18 (Spring 2005), available at <http://wcl.american.edu/modernamerican/01/1sleinicke.pdf> (providing a more comprehensive discussion of transsexual marriages).

³ The BIA is an administrative appellate body in the Executive Office of Immigration Review, U.S. Department of Justice. It is responsible for adjudication of appeals of family-based visa petitions (among other areas) filed with the U.S. Citizenship and Immigration Services, Department of Homeland Security. Decisions by the BIA in these matters are considered final agency determinations.

⁴ In re *Lovo*, 23 I&N Dec. 746 (BIA 2005).

⁵ *Id.* at 748 (citing *Adams v. Howerton*, 673 F. 2d 1036, 1038 (9th Cir. 1982)).

⁶ N.C. GEN. STAT. § 51-1.2 (2004).

⁷ N.C. GEN. STAT. § 130A-118(b)(4) (2004).

⁸ *Lovo*, 23 I&N at 749.

⁹ 467 U.S. 8376, 843 (1984).

¹⁰ *Lovo*, 23 I&N at 750 (stating that at the time of its review 22 States and the District of Columbia had passed laws recognizing transsexual marriages).

¹¹ *Id.* at 751.

¹² *Id.* at 752.

¹³ *Id.* at 752 (listing eight criteria generally used within the medical community to determine sex to prove the complexity of the argument as: 1) genetic or chromosomal sex, 2) gonadal sex, 3) internal morphologic sex, 4) external morphologic sex, 5) hormonal sex, 6) phenotypic sex, 7) assigned sex and gender of rearing, and 8) sexual identity).

¹⁴ *Id.*

¹⁵ *Id.* at 753.

¹⁶ *Id.*

¹⁷ Vrinda Normand, *Gender Bender*, METRO, Mar. 23, 2005, available at <http://www.metroactive.com/papers/metro/03.23.05/empaqu-0512.html>.

¹⁸ The Immigration and Naturalization Service (INS) was moved from the jurisdiction of the Department of Justice to the newly created Department of Homeland Security and is now called the U.S. Citizenship and Immigration Services. Agency proceedings prior to this change are often referred to as those under the “legacy INS.”

¹⁹ See Normand, *supra* note 17.

²⁰ Jiffy Javellana et al. v. John Ashcroft et al, No. 2:04-cv-09672-DT-RC.

²¹ Yong B. Chavez, *Transgender Spouse is Denied Green Card Again*, PACIFIC NEWS, Oct. 20, 2005, available at http://news.pacificnews.org/news/view_article.html?article_id=62a7b0ce817d740a7d9fb0f496fe93f.

²² Derivatives include children and spouses.

²³ Deportation and Removal proceedings are adjudicated by the Immigration Court, Executive Office of Immigration Review, under the Department of Justice. Deportation proceedings are distinguished from removal proceedings as proceedings which commenced prior to September 30, 1996, subsequent to the amendments of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). All actions commencing after this time are removal proceedings. ²⁴ “Out of status” refers to an alien who is no longer in legal immigrant or non-immigrant status.

²⁵ See NACARA 203 Relief, U.S. Citizenship and Immigration Services, http://uscis.gov/graphics/services/residency/nacara_howapply_ins.htm.

²⁶ See STRATEGIC MANAGEMENT OF HUMAN CAPITAL SECOND QUARTER FY 2005 UPDATE, <http://apps.opm.gov/humancapital/stories/2005/Quarter2.cfm>.

²⁷ Such as the Federal Employees Group Life Insurance Program (FGLI), the Federal Long Term Care Insurance Program (FLTCIP) and the Federal Employees Retirement Benefits (FERS) program

²⁸ See Government Organization and Employees 5 U.S.C. § 8901(5) “Definitions.”

²⁹ See Federal Employees Health Benefits Program 5 C.F.R. 890.101(a).

³⁰ See FEHB Handbook, U.S. Office of Personnel, www.opm.gov/insure/handbook/fehb01.htm, at 153.

³¹ Varied estimates place the number from 30,000-40,000 while others postulate that the number may be as high as 3 million.

³² See *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (1985) (stating that The Merit System Protection Board’s jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation); see also *Trotter v. Office of Personnel Management*, 50 M.S.P.R. 267, 269 n.2 (1991) (stating that the Board lacks jurisdiction to review OPM determinations concerning the denial of health insurance benefits).

³³ See Government Organization and Employees 5 U.S.C. § 8912.

³⁴ See *Littleton v. Prange*, 9 S.W.3d 233 (Tex. App. 1999) (refusing to recognize the marriage of a transsexual woman to a biological man because they were chromosomally the same sex, which requires recognizing the marriage of same-sex couples where one partner is a transsexual).

³⁵ *Lovo* 23 I&N at 753, n. 5 (noting the potentially anomalous results of this refusal and providing examples of ambiguity).