IMMIGRATION ISSUES FOR LG BT STUDENTS

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Nations where same sex marriage is recognized as of November 1, 2015:

- United States of America: all 50
- Argentina
- Belgium
- Brazil
- Britain
- Canada
- Denmark
- Finland (March 2017)
- France
- Iceland

- Ireland
- Luxembourg
- Netherlands
- New Zealand
- Norway
- Portugal
- South Africa
- Spain
- Sweden
- Uruguay

Slovenia - (Case U-11 1/5) In a 5/4 decision, the court is allowing a national referendum on Same Sex Marriage.
Reciprocity of Recognition

Where each nation recognizes or has legalized same sex marriage, the marriage is prima facie lawful in each country, but as in “all marriages”, there are possible challenges to legitimacy:

- Countries and U.S. states have different levels of consanguinity for the validity of marriage. For example, where a nation forbids marriage between relatives closer than fourth cousins that nation does not have to recognize a foreign marriage between third cousins.

- Plural marriages are lawful in many countries, but countries that do not recognize plural marriages are not required to recognize a foreign plural marriage.

- This concept is equally true with same sex marriage. In law this is frequently called the doctrine of Comity, i.e., where policies/ laws are consistent or do not violate what a country deems to be fundamental, the marriage is likely to be deemed valid and therefore recognized.
High Risk Nations for LGBT:

- Same sex marriage is NOT lawful in a majority of nations; this remains overwhelmingly true as of November 1, 2015
- L.G.B.T as either a “status” or an “act” remains criminal in much of the world
- **Uganda: Anti-Homosexuality Act**: A person who purports to contract a marriage with another person of the same sex commits the offense of homosexuality and shall be liable, on conviction, to imprisonment for life.
- **Russian Federation: “Promoting non-traditional relationships”**
  This act is ostensibly designed to protect children from all sorts of concerns such as pornography, offensive language, etc., but is actually a basis for suppression of L.G.B.T status, e.g., demonstrating on behalf of L.G.B.T issues could be “viewed” by children so is subject to sanction; “appearing” to be L.G.B.T could result in sanction, but perhaps more dangerously, police brutality and brutality by public that is ignored by authorities.
- Study Abroad? Traveling abroad?
### Even Higher Risk Nations....

- At least thirteen nations have the Death Penalty for Homosexual Acts:
  - Afghanistan (in areas still controlled by the Taliban)
  - Brunei (No stoning since 1957, but Sharia law became effective in 2014 and allow it)
  - Iran
  - Iraq
  - Mauritania
  - Nigeria
  - Pakistan (under Sharia Law since 1990)
  - Qatar
  - Saudi Arabia
  - Somalia
  - Sudan
  - United Arab Emirates
  - Yemen

- LG.B.T persons in the U.S. from these countries **may** have a basis to seek “asylum” under the Immigration Code.
  - Asylum generally must be sought within one year of arrival in U.S., and an applicant must “demonstrate actual mistreatment in home country” or “persistent actions/culture of persecution in home country”.
  - If asylum is granted, a “green card” (permanent resident card) can be obtained one year later.

- Study Abroad? Traveling abroad?
The Dirty Little Secret of U.S. Immigration Law: “It is designed to Exclude not to Include.”

- One may seek admission to the U.S. in a number of ways, e.g., visitor visa, student visa, investor visa, etc. A background check will always take place although these are “non-immigrant” visas.

- Immigrant Visas for L.G.B.T. persons for purpose of our discussion are:
  
  **K-1 Fiancé Visa:**
  
  A. Intend to marry U.S. Citizen,
  
  B. Have met intended spouse within two years (waived for hardship/culture),
  
  C. Legally able to marry.

  **Must meet U.S. legal marriage standards:**
  
  1. Age
  
  2. Consanguinity
  
  3. Mental Capacity
  
  4. Certified proof of decree if either party has been divorced.

- The U.S. citizen/permanent resident will be the one who in effect becomes the sponsor of the Fiancé and will need to be able to prove U.S. citizenship/permanent resident status as part of the application process and financial support.
The Dirty Little Secret of U.S. Immigration Law: “It is designed to exclude not to include.” continued

What can go wrong?

- The Fiancé may be excluded because of: Crimes of Fraud, Moral Turpitude, Tax Evasion, Perjury, Disease, etc.
- Crimes do not require an actual conviction, but merely sufficient factual basis to establish the elements of the offense. Police reports may be used, whereas they are generally not admissible as evidence in Courts.
- Immigration does not apply standards of “beyond a reasonable doubt” for purposes of exclusion or denial of entry.
- Immigration is highly “form” oriented and perfection in the application is required. A minor error such as forgetting a middle initial/name or leaving a space blank can lead to rejection.
U.S. Student has same sex marriage to International Student: Legal Ramifications

- An International Student in the U.S. is on a “non-immigrant” visa as a general rule. J-1 or F-1

- J-1 Visa holder will generally have to return for two years to home country despite being married to U.S. Citizen; U.S. spouse can file petition but waivers are possible: hardship, U.S. agency wants you to stay for work, hardship for spouse and the factors related to asylum which may be compelling for same sex couples.

- F-1 Visa holder can adjust visa status once lawfully married without leaving U.S. Use form 1-130 and permission to work 1-765.(Green Card) Initial goal is “permanent resident” status.

- THERE IS NO SUCH THING AS AUTOMATIC CITIZENSHIP!
Impact of Divorce

- Divorce alone does not, in and of itself, stop the investigation of the application for permanent residence status. If it was a “sham” marriage, both spouses could be subject to severe perjury penalties if they confess to the falsity of the marriage. Thus, there is an incentive not to tell the truth.

- Legitimacy of marriages are always investigated.
  - Was it a paid for deal? Or was it a bona fide personal relationship?
  - If the latter, then divorce will not destroy application for permanent residence and possible eventual citizenship.

- Interview by I.C.E. will usually mean at least a two year wait, thus divorce is possible as marriages are frequently of short duration.
  - Both former spouses must cooperate and appear at the interview, or success is less than likely.
  - A transcript of the divorce hearing may be needed as it may establish the personal relationship and therefore the bona fide marriage.
Transgender Issues: Passports & Visas

- A valid passport is a prerequisite to obtaining a Visa to enter another country when that country requires a visa. Visitors often do not have to obtain a formal visa.

- Obtaining a Visa to enter the U.S. as a Transgender person should not theoretically be difficult as this is a “non-immigrant” visa.
  - The U.S. consulate will require proof of foreign citizenship-status/home country passport/and purpose of Visa, i.e., Student Visa, Visitor Visa, etc.
  - The ID needs to accurately reflect current appearance.

- Obtaining a foreign Visa for a transgender person can be much, much more complicated. The countries where same sex marriage is not recognized and where Homosexuality or acts remain crimes (with varying degrees of enforcement and punishment) are generally NOT legally friendly toward transgender.
  - Where the U.S. Passport reflects complete transition, certified by Physician, a ten year Passport should be issued. This also assumes you have obtained a legal name change and have supplied the proof.
  - Where a Physician certifies “transition in process”, a two year Passport is available.
Transgender Immigration Issues

- A U.S. citizen/resident can use a Fiancé visa for a Transgender fiancé; both parties can be transgender.
- Keep in mind that a Fiancé Visa is an “immigrant visa” so the marriage is subject to the tests and bona fides of any other marriage where permanent residence is the goal.
- The strongest application will be where there has been gender reassignment for both persons.
- $$$$$$$ Investor Visas. Money of substantial amounts to be legitimately invested in the U.S. make all aspects of Immigration easier regardless of L.G.B.T., race or country of origin.
Each country has forms that ask about age, gender, education, schools attended in Visa application.

Some will ask for
- Every address lived at from birth,
- Parents' names and jobs,
- Even personal references
- Name at Birth,
- Present Name, and
- Photo.

ID used needs to match current appearance.

For long-term stays abroad a deeper background check is likely to take place and Visa application tends to be more extensive, i.e., working abroad, investing abroad, etc.
Why It Is Important To Get the Gender Marker Changed

- If living as a transgender person, do not travel out of country without your gender changed on your passport, passcard or other official ID.
- Even in those countries where you will not be killed or seriously injured if you are homosexual, persons who are transgender may not have any right to anything but confusion and misunderstanding at this point.
- These people’s lives may depend upon the passport gender marker matching the lifestyle and the choices in gender identified actions they undertake.
In order to have your passport reflect your current gender, you must have the gender marker changed on your birth certificate, or if an international student, on your passport.

The gender marker on your birth certificate will be the one shown on your passport. (You must ask for the change on your passport after changing your birth certificate.)

If there is any question about your proper use of gender-limited facilities, the birth certificate for persons born in the United States is the key document upon which your gender assignment is based.

Can this be changed? It is up to the state in which you were born as to whether and how you can have your gender changed on your birth certificate.
Lambda Legal Defense Fund has the most current and the easiest website to understand. [http://www.lambdalegal.org/know-your-rights/transgender/changing-birth-certificate-sex-designations](http://www.lambdalegal.org/know-your-rights/transgender/changing-birth-certificate-sex-designations)

- There is a state-by-state list with links to a summary of:
  
  1. The documents you need
  2. The legal citations
  3. Regulations of that state whether the gender marker on the birth certificate can be changed.

- Currently the states in the category of “will not change” the gender marker on the birth certificate or “will not issue an amended birth certificate” with the correct gender are KANSAS, IDAHO, OHIO, and TENNESSEE.

  - Tennessee specifically prohibits gender marker change on the birth certificate for a person who is transgender.
Changing The Gender Marker on Your Birth Certificate

- Depending on your state, you may need a court order directing the change to the birth certificate.
- Some states specify that the court order will state whether the birth certificate will be marked “amended” or not.
- Before the gender marker can be changed, most states require either:
  - A court order to change the gender marker, or
  - An affidavit from the physician who has performed the sex reassignment surgery (also referred to as sex change operation).

  This is provided to the office that records/keeps the birth certificate.
- Only a few states will allow the change with merely a statement of a medical or behavioral health provider that appropriate therapies or treatments have been provided to the person warranting a change in the gender on the birth certificate.
Some states will change the birth certificate but will then only issue an **amended birth certificate**.

- Of those states, some will indicate the portion or section of the birth certificate that was amended.

- Maine requires a court order to amend the certificate and that the evidence upon which the gender change was ordered **must be attached to the original and any certified copy of the original birth certificate**.

- Passports do not have a way to indicate such additional information.
  
  - This information is at least limited to the birth certificate in the public record, and a passport is usually accepted in place of the birth certificate for most purposes.
What can you do if a public official, legally authorized to make the change, refuses to make the change, claiming to exercise their discretion?

- Several states allow the public official in charge of the birth certificate change to use their discretion to require additional investigation.
- This does not mean they should be able to block the change.
- If you run into issues:
  - Be prepared to use a private attorney to help you through the process.
  - Reach out to Lambda Legal Defense Fund for referrals.
  - Choose an attorney who is willing to call upon Lambda Legal’s expertise to coordinate your case. You want them to:
    - Protect you from undue invasion of your privacy,
    - Obtain advocacy for change in the law,
    - Get your story out if you think it will help to save others from this in the future.
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