

# Immigration Law & Transgender People

A resource publication of:



[www.immigrationequality.org](http://www.immigrationequality.org)  
(212) 714-2904

[www.transgenderlawcenter.org](http://www.transgenderlawcenter.org)  
(415) 865-0176

## What does being transgender have to do with immigration?

In many immigration situations, your gender identity<sup>1</sup> has very little to do with your ability to immigrate. If you are applying for most immigration benefits, your gender identity will be relevant only so far as it affects your ability to get an immigration document in the correct name and with the correct gender marker.

However, in two significant cases, your gender identity can significantly affect your ability to immigrate to the United States.

(1) If you are seeking asylum because you were harmed or fear harm in your home country because of your gender identity.

(2) If you are in a bi-national relationship (one partner is a U.S. citizen or permanent resident and the other isn't), your gender identity, or that of your partner, may affect the ability of the non-U.S. partner to immigrate based on a marriage or engagement.

## Immigration Documents

The Citizenship and Immigration Service (CIS) has a written policy about immigration documents. These documents can include such things as a visa, a work permit, a green card, and/or a naturalization certificate. CIS has explicitly stated that any of these documents can reflect your gender identity if you can provide CIS with the appropriate documentation. This means that your post-transition name and gender can be listed on your immigration identity documents.

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<sup>1</sup> "Gender identity" is a characteristic that we all have. For transgender people, our gender identity in some way does not match the sex we are assigned at birth or the stereotypes attached to that sex.

The current written policy states that the name and gender you are using when you are applying for an immigration benefit or document is the one that should be listed on your records. The policy does mention that if the name or gender is different from that at birth (or the one listed in previous documents), you must provide evidence that it is the correct name and gender marker.

The easiest way to do this is through a court ordered name change and a surgeon's letter. If you do not have one or both of these, contact one of our offices and we can discuss your options with you.

If you want to replace an existing document like a green card or a naturalization certificate, the official policy is that you will need to demonstrate that you have changed your birth certificate from your home country. However, many people who were unable to change their birth certificate in their home country, especially refugees or asylees, have been able to update their documents simply with a court order and surgeon's letter.

## **Asylum**

Many transgender people, who fear that they will be harmed if they return to their home country because of their gender identity, have been able to stay in the United States as asylees. Applying for asylum is a complicated process which can lead to deportation if you lose. Before applying for asylum, you should speak with one of our offices or an experienced immigration attorney.

Asylum allows people to obtain legal status in the U.S. if they have been harmed or fear future harm by the government in their home country or by people in their home country that the government is unable or unwilling to control. While not all kinds of harm qualify a person for asylum, many transgender asylum applicants have been successful with gender identity-based applications for asylum.

Asylum applications generally must be filed within one year of the applicant's last entry into the U.S. There are exceptions to this rule, but it is much more difficult to win after missing the filing deadline. Contact one of our organizations or a knowledgeable local immigration attorney to discuss your options as soon as possible.

## **Marriage Based Immigration**

Many people immigrate to the United States every year because they have married or are engaged to a U.S. citizen or permanent resident. This option should be open to transgender people as well. For years and years, it was.

To fully understand how marriage based immigration works, it is important to understand how marriage works in the U.S. In general, marriage is defined by state law, and the federal government recognizes marriages which are valid in the state or country where they took place.

If a state allows transgender people to get married based on their post-transition gender (for instance, the ability of someone who transitioned from female-to-male to marry a non-transgender woman) then the U.S. federal government should respect that marriage as one that is opposite sex.

Until 2002, the Citizenship and Immigration Service (CIS) would look to the law of the state or country where the marriage was entered into, and, generally approve the applications. However, beginning in 2002, the Immigration Service attempted to change its policy on this issue.

In a number of cases, CIS refused to recognize a person's ability to change their sex and therefore claimed that the marriage was a same-sex marriage (i.e. stating that someone who is female-to-male is really a woman whose marriage to another woman is not valid for immigration purposes). And the federal government does not recognize any "same-sex" marriage as valid for federal purposes, including immigration.

At the time of the publication of this pamphlet, legal challenges to this policy are underway. In at least three cases, the the Board of Immigration Appeals (BIA), has ruled against the CIS's policy and found that in particular cases marriages in which one spouse is transgender can be valid for purposes of immigration. Despite the BIA's rulings, the Immigration Service has yet to formally change its policy but a number of applications have been approved.

If you, your spouse, or your fiancé(e) are in this position, contact one of our organizations. We can provide you with basic updates on CIS's position and work with your attorney to file a complete application for you.

Of course, if you are attempting to marry someone whose sex is the same as your gender identity (i.e. you have transitioned from male-to-female and you want to marry a non-transgender woman), it may seem that the Immigration Service would have to recognize your marriage as an opposite sex marriage (given their view of transgender people).

While this may be technically true under the current policy (or under the marriage laws of certain states), the reality is more complicated. If you find yourself in this situation, we also recommend that you contact one of our organizations before moving forward with an application.

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**The information in this fact sheet is not meant to substitute for advice from an attorney or appropriate agency. Because of the changing nature of the law, we cannot be responsible for any use to which it is put and strongly recommend consulting a qualified attorney before filing any application.**

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