



Submitted via Federal eRulemaking Portal

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Samantha Deshommes
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

RE: RIN 1615-ZB87, USCIS-2021-0004: Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services; Request for Public Input

Dear Ms. Deshommes:

Immigration Equality respectfully submits the following comment (“Comment”) in response to the United States Citizenship and Immigration Services’ (“USCIS” or the “Agency”) Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services; Request for Public Input, 86 Fed. Reg. 20398 (Apr. 19, 2021) (the “Request”)¹.

Organization

Immigration Equality is a national organization that advocates for LGBTQ and HIV-positive (collectively, “LGBTQ/H”) immigrants. For 25 years, we have worked to secure safe haven and equality for immigrants facing persecution based on their sexual orientation, gender identity, or HIV status. To this end, we provide free legal services and advocacy through our in-house attorneys and nationwide network of pro bono partners. Through this program, we currently represent approximately 650 LGBTQ/H individuals in affirmative and defensive proceedings for asylum, withholding of removal, and relief under the Convention Against Torture (“CAT”), and related applications and petitions. Immigration Equality’s asylum program has maintained a remarkable 97-99% success rate.

¹ We request that the Agency review this Comment, including any footnotes and attachments, in its entirety. Where this Comment includes linked material in footnotes, we request that the Agency review the linked material in its entirety.



In addition, Immigration Equality helps thousands of LGBTQ/H asylum seekers every year through the provision of pro se advice and materials, and via our online inquiry system and telephone hotline. Immigration Equality also offers assistance, support, and training to other attorneys on LGBTQ/H immigration issues, publishes a comprehensive manual on the preparation of asylum claims related to sexual orientation, gender identity, or HIV-status, and has provided training on the adjudication of LGBTQ asylum cases to Asylum Officers within the U.S. Department of Homeland Security (“DHS”) and Immigration Judges in New York.

Response to the Request for Public Input

This Comment will identify some of the barriers that LGBTQ/H immigrants and families face when applying for benefits and services before USCIS.²

I. Asylum Applications and Adjudications for LGBTQ/H Asylum Seekers

a. The Affirmative Asylum Backlog is a barrier to obtaining asylum, petitioning for family members, and accessing much needed benefits for asylees

Thousands of asylum seekers, including LGBTQ/H asylum seekers, face years-long delays in a backlog - the largest among the applications USCIS adjudicates - of 394,101 applications yet to be processed as of the 1st quarter of FY2021. In January 2018, the Agency began implementation of the last-in, first-out (“LIFO”) policy to adjudicate affirmative asylum applications.³ Although this policy has allowed for many recently filed cases to be adjudicated in a timely manner, asylum seekers who had already been waiting

² In addition to the recommendations provided on rules, regulations, and policies identified as barriers in this Comment, USCIS and DHS should also, at a minimum, rescind or otherwise revoke the following rules in their entirety:

1. Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38532 (Jun. 26, 2020) (effective Aug. 25, 2020);
2. Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applicants, 85 Fed. Reg. 37502 (Jun. 22, 2020) (effective Aug. 21, 2020);
3. Procedures for Asylum and Bars to Asylum Eligibility, 85 Fed. Reg. 67202 (Oct. 21, 2020); and
4. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274 (Dec. 11, 2020).

These rules create significant barriers for, and deny humanitarian protection to, LGBTQ/H asylum seekers, and run contrary to the United States’ obligations under domestic and international law to safeguard refugees seeking protection.

³ USCIS, “Affirmative Asylum Interview Scheduling” (Jan. 26, 2018), *available at* <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/affirmative-asylum-interview-scheduling> (last visited May 18, 2021).

for years have been forced to wait even longer to have an opportunity to present their case. Some cases have been pending since as far back as 2015. The number of cases in the backlog has increased since the implementation of the LIFO policy, since any cases that have been pending for more than 21 days are given the lowest priority for interview scheduling purposes.⁴ Asylum applicants who filed their applications with USCIS over the course of the COVID-19 pandemic, are also now in the backlog since their applications have been pending for over 21 days. These delays have substantially increased the time asylum seekers remain separated from their families, as they cannot petition for their family members to receive follow-to-join benefits until they obtain asylum. LGBTQ/H asylum seekers have to wait even longer to be reunified with their families, as described in this Comment. This causes considerable stress that can lead to re-traumatization and hinder the healing of asylum seekers who have survived traumatic experiences.

Salim,⁵ an Immigration Equality client, is a gay man living with HIV from Saudi Arabia. When Salim's family found his HIV medication, he was forced to reveal his sexual orientation to them. Upon learning of his sexual orientation, Salim's father violently beat him and his uncle threatened to kill him. Scared, Salim fled to the United States in 2015 and timely filed an application for asylum. Salim's case has now been pending for over five years and he is deep in the backlog. Salim does not have any support network in the United States. Additionally, given the persecution he suffered, Salim suffers from severe mental health issues, which have worsened because of the instability of his immigration status. Moreover, the looming threat of potentially being returned to a homophobic country where same-sex relationships are punishable by death has compounded his struggles. In fact, the situation has become so dire that Salim has contemplated suicide.

Salim's situation is, unfortunately, not unique. Another Immigration Equality client, Zainab, is a lesbian woman from Kuwait, who was severely beaten and verbally assaulted in Kuwait on account of her sexual orientation. She entered the United States on a B2 visa in 2015 and timely filed an application for asylum. She waited for years for her asylum interview, but was never scheduled and she was placed in the backlog. Unable to bear the uncertainty of her immigration status, and facing pressure from her family, Zainab returned to Kuwait, where she has been forced back into the closet and has been separated from her life partner. Her movements and communications are being monitored by her persecutors and her life is in danger.

⁴ *Id.*

⁵ All of our clients' names have been changed to protect their privacy.



The affirmative asylum backlog is especially harmful to LGBTQ/H asylum seekers, who often lack support networks in the United States. Moreover, without an end date in sight, many LGBTQ/H asylum seekers feel as if there is no escape. Some LGBTQ asylum seekers, are so terrified that they will be outed and harmed if returned to their countries of origin that they stay closeted until their applications are adjudicated. For applicants in the backlog, that can mean years of repressing their sexual orientation or gender identity, resulting in trauma and serious mental health consequences. One Immigration Equality client, a gay man from Lebanon, decided to not date other men or attend LGBTQ events for fear of his sexual orientation becoming known in Lebanon. Another Immigration Equality client, a transgender woman from El Salvador, decided to not take steps to medically transition, fearful that if she were forced to return to El Salvador, she would not be able to hide. Both of these clients are now in the backlog. Not being able to fully express themselves, even after having escaped persecution, has caused these clients to be retraumatized, and they now suffer from severe anxiety and depression.

Recommendations:

- The Biden Administration’s FY2022 discretionary funding request allocates \$345 million for USCIS to address naturalization and asylum backlogs; it must be a priority to quickly and efficiently implement this funding to develop fairer adjudication processes for those in the backlog, fund and train additional Asylum Officers, modernize Asylum Office processes with electronic filings and a transparent interview scheduling system, and promote transparency by providing regular, public updates on Asylum Officer interview schedules.
- USCIS must create a three-track system that allocates priority and resources based on the types of new and pending cases at each Asylum Office. The first track must be for cases in the backlog, beginning with those pending for the longest; the second track would be a continuation of unaccompanied children as required under the Trafficking Victims Protection Reauthorization Act (TVPRA); and the third track would be a continuation of the last-in, first-out (LIFO) policy currently in place while ensuring the applicant has the ability to easily request and obtain additional time when needed. Although LIFO has caused further and unfair delays for those who have already been waiting for an asylum interview for years, it is an example of how the system should eventually function.
- Asylum Offices should also expand the use of shortlists. Asylum applicants should be allowed to let the Asylum Office know that they are ready to be called for an interview on short notice, i.e., that they should be placed on the shortlist. If

interview slots become available (e.g., due to rescheduling or cancellation of interviews), Asylum Offices should make these slots available to those on the shortlist. Shortlists should be available at all Asylum Offices.

- The administration has authority to lead policy changes in agencies outside USCIS that will help shift resources from inhumane border practices--such as rapid adjudication of claims at the border--towards addressing the asylum backlog. Immigration and Custom Enforcement (ICE) and Custom and Border Protection (CBP) have discretion as to whether to place individuals seeking asylum in expedited removal. The discontinuation of expedited removal for asylum seekers would make moot the need for Asylum Officers to conduct fear interviews at the border thereby allowing USCIS to redirect Asylum Officers to working on cases on the backlog.
- Retention of staff is also important in decreasing the backlog. This can be attained by reducing vicarious trauma for those who serve vulnerable populations, as well as Asylum Officers who listen to details of trauma. Retention could also be improved by adequately staffing all funded USCIS Asylum Office positions in order to decrease caseloads and employee burnout. For instance, in FY 2020, USCIS was authorized to employ up to 1,296 Asylum Officers, but as of April 2020, had only 866 on staff.
- USCIS should also build incentives for Asylum Officers to prioritize backlogged cases. First, USCIS should consider authorizing overtime pay for Asylum Officers who volunteer to help clear the backlog of affirmative cases, as was done for Asylum Officers who volunteered to implement the Migrant Protection Protocols (MPP) under the Trump Administration. Second, USCIS should facilitate and streamline the re-hiring of Asylum Officers who resigned or moved to other U.S. government positions over the last four years. Third, USCIS should undertake restorative efforts for staff who left or were forced to leave their positions due to matters of conscience and burnout over the last four years, as recommended by the AFIGE Local 1924 Asylum Officers' union. Adjudicators need support from USCIS to maximize their well-being and ability to effectively decide cases involving matters of life or death.

b. Proof of LGBTQ Identity

Accepting one's LGBTQ identity is often a complex and complicated process. To protect themselves, many people selectively hide their LGBTQ identity into adulthood, even from

those close to them. It is not unusual for the “coming out” process to take years—nor is it unusual for people to never come out to certain members of their family or their community, particularly if they grew up in a culture or country where their LGBTQ identity may provoke a negative, and indeed, deadly, reaction. Some LGBTQ individuals live closeted lives in the United States because of the trauma they suffered in their countries of origin. Given this, proving LGBTQ identity for purposes of an asylum claim can be difficult for applicants who have only recently come out to themselves, who have never come out to anyone else, or who have only come out to very few people.

One Immigration Equality Client, Valentina, only ever revealed that she is a lesbian to one person, her partner, in Kyrgyzstan. Despite this, she was publicly outed and, as a result, suffered horrific persecution, including blackmail, sexual and physical assault, forced conversion therapy, and death threats on account of her sexual orientation. Valentina fled to the United States and applied for asylum. Traumatized by her experiences in Kyrgyzstan, Valentina decided that, for her safety, she would not be open about her sexual orientation in the United States. Consequently, she did not have much proof of her sexual orientation apart from her affidavit and an affidavit from a contact in Kyrgyzstan. During her asylum interview, the Asylum Officer did not believe that Valentina is a lesbian because she had not dated anyone in the United States and repeatedly asked Valentina how it was possible that she had not dated women in the United States if she is a lesbian. The officer pursued improper lines of questioning by asking Valentina about the women she finds attractive and her sexual preferences. The officer also insinuated that Valentina was not a lesbian because she had revealed her sexual orientation to only a select few people in the United States and because she did not volunteer for LGBTQ organizations. Valentina’s attorneys wrote to the Asylum Office director relaying their concerns about the Asylum Officer’s improper lines of questioning, impermissible stereotypes of LGBTQ individuals, and their misunderstanding of the coming out process. Despite this, citing insufficient proof of sexual orientation, the Asylum Office denied Valentina’s claim for asylum and referred her case to the Immigration Court.

The fact that a person recently came out, or has not come out to others, does not make them any less LGBTQ. Requiring specific types of proof of sexual orientation or gender identity forces people to come out even though some people might not be ready, or it might not be safe for them to do so. Another Immigration Equality client, a lesbian woman from Jamaica, who had only recently realized her sexual orientation, was forced to come out to her mother because she did not have any proof of her sexual orientation besides her own testimony. When the client came out to her mother, she was subjected to verbal and emotional abuse, and she was outed to community members in Jamaica. If the client’s application for asylum is denied and she is forced to return to Jamaica, she will be at an

increased risk of persecution. In order to ensure that meritorious applications for these asylum seekers are not denied, USCIS should ensure that all Asylum Officers receive detailed and intensive competency training on LGBTQ issues, including the coming out process, and the LGBTQ asylum and withholding process. Officers should also be reminded that credible, consistent, and competent testimony alone is sufficient to establish someone's LGBTQ identity and that no specific type of documentation or evidence is required.⁶

c. Discretionary Analysis for LGBTQ and HIV-positive Applicants

Many LGBTQ people are refused access to education, family or community support, and legal employment because of their sexual orientation and/or gender identity. Often, the worst perpetrators of LGBTQ disenfranchisement are the families of LGBTQ people. This happens both abroad and in the United States. Without access to the resources necessary to survive, and exclusion from the formal economy, some LGBTQ people are forced to resort to crimes of survival to meet their basic needs. Current laws and regulations do not allow asylum seekers to even apply for an Employment Authorization Document for 365 days after they submit their applications for asylum.⁷ The lack of authorization to lawfully work in the United States further pushes LGBTQ asylum seekers to resort to crimes of survival.

For instance, Lily, a transgender woman from Guatemala, was unable to apply for an EAD for several months after she was released from detention. Without an EAD, she was unable to find employment. Lily does not have a support network in the United States. Unable to afford food or a place to stay, Lily resorted to sex work. Unfortunately, Lily was subsequently arrested in a sting operation for being a sex worker. When Lily applies for adjustment of status, USCIS will engage in a discretionary analysis to determine whether she “merits a favorable exercise of discretion in order to receive the benefit.”⁸ She will also likely be found inadmissible and USCIS will require her to file an application to waive the inadmissibility. Lily was unable to support herself through other means because current

⁶ See USCIS, “Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, And Intersex (LGBTI) Refugee and Asylum Claims,” 39 (Dec. 28, 2011), *available at* <https://www.uscis.gov/sites/default/files/document/guides/RAIO-Training-March-2012.pdf> (last visited May 18, 2021) (“Credible testimony alone may be enough to satisfy the applicant’s burden. Sexual minority or imputed sexual minority claims tend to rely heavily on the applicant’s own testimony to establish all of the elements of the claim”).

⁷ 8 C.F.R. § 208.7(a)(1)(ii); *see also*, Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38532 (Jun. 26, 2020) (effective Aug 25., 2020) *available at* <https://www.federalregister.gov/documents/2020/06/26/2020-13544/asylum-application-interview-and-employment-authorization-for-applicants> (last visited May 19, 2021).

⁸ USCIS, 1 USCIS POLICY MANUAL pt. E, ch. 8, *available at* <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8> (last visited May 18, 2021).

rules and regulations do not take into consideration the basic daily needs of asylum seekers. Lily should not be faulted for wanting to survive.

Survival crimes, such as sex work, petty theft, or self-medication should not be weighed as a negative factor in a discretionary analysis, even if the crimes of survival took place in the United States. Additionally, convictions under arcane HIV-criminalization laws⁹ should never be considered in a discretionary decision. USCIS should issue clear guidance to this effect. USCIS should also not consider working without authorization as a negative factor in a discretionary analysis, given that currently, asylum seekers cannot even apply for a work authorization document until 365 calendar days after their application for asylum is received by USCIS.

d. USCIS Should Automatically Issue Electronic Form I-94s to All Newly Granted Asylees

With certain exceptions, CBP tracks and provides proof of the arrival of individuals who are not U.S. citizens or lawful permanent residents by means of the Form I-94 Departure/Arrival Record (Form I-94). Upon the arrival of a resettled refugee to the United States through the USRAP process, CBP automatically creates an electronic Form I-94.¹⁰ Thereafter, refugees may access their Form I-94 anytime through the CBP website.

In contrast, the government does not automatically create a Form I-94 for individuals when they receive asylum status, nor does the government issue asylees electronic Form I-94s. Instead, for asylees granted status through the USCIS Asylum Offices, the asylees receive a paper I-94 with the letter informing them of their asylum grant. For asylees who receive status from an immigration court, the asylee generally must make an appointment with their local USCIS Field Office through the InfoPass system to request a paper Form I-94 in person.¹¹ Not all asylees are aware of the need to make this appointment, and even those asylees who are aware may not know how to do so. Asylees also often need to take off

⁹ See The Center for HIV Law and Policy, *HIV Criminalization in the United States: A Sourcebook on State and Federal HIV Criminal Law and Practice* (May 2020), available at <https://www.hivlawandpolicy.org/sites/default/files/HIV%20Criminalization%20in%20the%20U.S.%20A%20Sourcebook%20on%20State%20Fed%20HIV%20Criminal%20Law%20and%20Practice%20050520.pdf> (last visited May 18, 2021).

¹⁰ Definition of Form I-94 To Include Electronic Format, 8 Fed. Reg. 18457 (Mar. 27, 2013), available at <https://www.govinfo.gov/content/pkg/FR-2013-03-27/pdf/2013-06974.pdf> (last visited May 18, 2021).

¹¹ See USCIS, “Post-Order Instructions for Individuals Granted Relief or Protection from Removal by Immigration Court” (Dev. 6, 2019), available at <https://www.uscis.gov/sites/default/files/document/guides/PostOrderInstructions.pdf> (last visited May 19, 2021).



work and pay for transportation to obtain this document. As such, many asylees never apply for or receive the form.

Before the COVID-19 pandemic, even asylees who knew how to navigate the InfoPass system struggled to obtain the Form I-94. The pandemic worsened the situation. USCIS representatives often failed to call back asylees seeking to obtain a Form I-94. Furthermore, USCIS representatives repeatedly told callers that asylees could only obtain a Form I-94 if they produced an original signed order granting asylum from an Immigration Judge, or they were told to file Form I-102 with USCIS, even though no asylee I-94 had ever been issued.

Without a Form I-94, asylees generally cannot update their Social Security cards, which in turn causes a host of issues related to both accessing federal benefits, such as Medicaid, and demonstrating work authorization (for individuals without work permits). It also makes obtaining employment more expensive for an asylee than it should have to be. Without a Form I-94, and without an unrestricted Social Security card (which requires a Form I-94 to obtain), an asylee generally needs an EAD to demonstrate work authorization and complete a separate form, the Form I-9. An EAD costs \$410 to request.

George, a gay man from El Salvador, won asylum in 2020. He called the USCIS customer service hotline several times to set up an InfoPass appointment to obtain his I-94. USCIS failed to call him back each time. He was finally able to obtain an appointment, but was then told that USCIS could not help him because they had to request his file from central storage before they could issue an I-94. George was told that USCIS would reach out to him when they had his file. George did not hear from USCIS for 5 months. George then called USCIS again, and is still encountering difficulties in setting up an appointment to obtain an I-94. Without the I-94, George has not been able to get an unrestricted social security card or a driver's license card without annotation. George has had to apply for an asylee EAD in order to prove that he has the authorization to work in the United States even though he has already been granted relief.

USCIS should work with CBP and EOIR to create a system to automatically provide electronic Form I-94s to all newly granted asylees. This system should provide electronic Form I-94s to individuals who receive asylum in an Asylum Office as well as individuals who receive asylum in immigration court, once the grant of asylum is administratively final.¹²

¹² In Immigration Court, if the Immigration Judge issues a grant of asylum but ICE appeals the judge's decision, the individual seeking asylum is not yet entitled to a Form I-94 showing their updated status until the decision is administratively final.

e. USCIS Should Issue Automatic Fee Waivers to All Asylees Seeking to Adjust Status and Naturalize

In June 2007, USCIS published a final rule adjusting the fees for immigration benefit applications and petitions.¹³ The agency opted to exempt refugees from filing fees for adjustment of status applications, but chose to continue to charge fees to asylees for adjustment of status applications. While we applaud and agree with USCIS’ decision to exempt resettled refugees from fees for adjustment of status, asylees should be afforded the same treatment.

Asylees are eligible to request a waiver for the naturalization fee, but USCIS often rejects fee waivers without justification. Moving to a system of automatic fee waivers will help future asylees avoid this issue, and it will reduce the administrative burden of dealing with fee waiver applications.

For example, Vladimir, a gay man from Russia, applied for, and was granted asylum. Vladimir was diagnosed with a brain tumor in 2018, and had to undergo emergency brain surgery and chemotherapy. Because of the treatment for the brain tumor, Vladimir had to be hospitalized and he lost his job. Having suffered severe persecution in Russia on account of his sexual orientation, Vladimir did not want to be associated with Russia and wanted to apply for adjustment of status. Vladimir’s attorneys prepared all the forms and a fee waiver application. As proof of income and expenses, the attorneys attached affidavits from Vladimir, his brother, and his doctors, and also attached hospitalization records and bills, insurance information, and proof of monthly expenditures. Despite the abundant evidence of financial hardship and of income below 150% of the Federal Poverty Guidelines, USCIS denied Vladimir’s application for a fee waiver, claiming that Vladimir had not attached proof of income and expenses. As the attorneys began work on resubmitting his application, Vladimir lost his battle to brain cancer.

The lack of a fee waiver for asylees also contravenes the 1951 Convention, which provides a framework for both the initial resettlement and the long-term integration of refugee populations. The 34th article of the Convention indicates “[c]ontracting States shall as far as possible facilitate the assimilation and naturalization of refugees,” going so far as to say that they must “reduce as far as possible the charges and costs of such . . . proceedings.”¹⁴

¹³ Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule, 72 Fed. Reg. 29851 (May 30, 2007), available at <https://www.federalregister.gov/documents/2007/05/30/E7-10371/adjustment-of-the-immigration-and-naturalization-benefit-application-and-petition-fee-schedule> (last visited May 19, 2021).

¹⁴ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, available at www.refworld.org/docid/3be01b964.html (last visited May 18, 2021).



Adjusting status and naturalization is an integral part of the “assimilation and naturalization” process, and therefore the United States has an obligation to reduce the costs as much as possible.

USCIS should extend automatic fee waivers to asylees applying for adjustment of status and naturalization.

II. Gender Markers and Proof of Gender Identity

a. Need for inclusive gender markers

Generally, USCIS only uses “male” and “female” gender markers.¹⁵ These gender markers are not accurate for many people, including those who are non-binary. Similarly, many transgender people are issued Employment Authorization Documents (“EADs”) with incorrect gender designations because of burdensome and unnecessary requirements to establish or change gender markers. Forcing individuals to use documentation with incorrect gender designations can traumatize them, especially those who have faced persecution on account of their gender identity.

For some immigrants, EADs and other USCIS documents are the only forms of identification that can reflect the immigrant’s true gender identity. Thus, it is critically important that individuals have access to ID documents that correctly reflect gender to ensure access to benefits and to avoid discrimination.

USCIS’s current gender marker policy is not only inaccurate, it is also harmful and discriminatory. Accordingly, USCIS should immediately change its policy and update all application forms to include more accurate gender designations. Specifically, USCIS should add an “other” option under gender. This will allow all applicants to answer the question regarding gender more accurately. USCIS already uses an “other” option in the Applicant Information Worksheet that applicants are required to fill out when they attend their ASC biometrics appointments. USCIS should expand this practice to all immigration forms where gender information is required.

¹⁵ USCIS, 11 USCIS POLICY MANUAL pt. A, ch. 2, available at <https://www.uscis.gov/policy-manual/volume-11-part-a-chapter-2> (last visited May 18, 2021) (“USCIS-issued documents that display gender or sex identifiers are limited to indicating only female or male”).



For example, in the EAD context, for people who select “other,” USCIS should issue EAD cards with an “X” gender marker. Additionally, USCIS should update the instructions for Form I-765 to make clear that:

- an individual who identifies as male and wants an “M” marker on their EAD card, should select “Male”;
- an individual who identifies as female and wants an “F” marker on their EAD card, should select “Female”; and
- an individual who identifies as neither and wants an “X” marker on their EAD card should select “Other” and may write in their gender (e.g., non-binary, agender, etc.).

Please note that some transgender people may identify specifically as transgender, while others may identify as male, female, or in another way. This change in policy along with clear instructions will ensure that documents issued to transgender people are more accurate.

b. Proof of Gender Identity to Change Gender Markers

With respect to *changing* gender markers, USCIS currently requires either a letter from a licensed healthcare professional or a court order in order to effect a change.¹⁶ Both of these options can prove burdensome for applicants who do not have access to medical professionals or may not have the resources to pursue a court order. Moreover, individuals with inaccurate gender designations on IDs are often subjected to negative treatment, including discrimination, harassment, denial of services, and even physical violence.

In fact, some Asylum Offices have imposed even more burdensome requirements for proof of gender identity. One Immigration Equality client, Veronica, a transgender woman from Honduras, was issued a Request for Evidence stating that the Asylum Office would only recognize the client’s gender change “claim” if the applicant presented either an amended passport, birth certificate, or court order recognizing the new gender, or a Medical certification of the change in gender from a Doctor of Medicine (M.D.) or a Doctor of Osteopathy (D.O.).¹⁷ Despite the fact that Veronica had already submitted a letter from a physician’s assistant and provided proof of gender affirming surgery, the Asylum Office

¹⁶ See *id.*; see also, USCIS, 1 USCIS POLICY MANUAL pt. E, ch. 5, available at <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-5> (last visited May 18, 2021).

¹⁷ Please see a copy of the Request for Evidence, attached as **Appendix A**.

issued this request for evidence as it would not accept a letter from licensed counselors, nurse practitioners, physician assistants, psychologists, social workers, and therapists, in direct contradiction to USCIS policy.

As noted above, many transgender immigrants do not have the resources available to access medical care from an M.D. or a D.O. or to obtain a court order recognizing the new gender. Additionally, getting an amended birth certificate or passport is not a possibility for most asylum seekers, who have fled persecution from their countries of origin *on account of* their gender identity.

Lily, is a transgender woman from Guatemala who is currently in removal proceedings. She applied for asylum and is currently living in Nevada. Lily cannot get a letter from a doctor in Nevada because she cannot afford to pay a doctor for gender-affirming care. Additionally, she fears that she would not be treated well by a doctor because of her gender identity. Lily applied for an EAD card and explained that she is a transgender woman. Despite her self-attestation, USCIS issued an EAD card with an “M” gender marker. Having fled persecution, Lily finds the male gender marker on her EAD extremely traumatizing. Additionally, she feels that employers don’t provide her with opportunities when they notice that she presents as a woman while her ID docs refer to her as male.

USCIS should change the burdensome evidentiary requirements currently in place by allowing applicants to self-identify their gender identity as applicants are in the best position to report their own gender. Indeed, USCIS should follow the lead of 20 states and the District of Columbia, which only require a self-attestation to change gender markers on driver’s licenses.¹⁸

III. Protection for LGBTQ/H Families

a. Same-sex partners of asylum seekers, asylees, and refugees

LGBTQ asylum seekers often flee their countries of origin due to persecution on account of their sexual orientation and/or gender identity. In nearly 70 countries, same sex relationships are criminalized. Additionally, most nations of the world do not recognize marriage equality, or do not make it safe for LGBTQ people to marry. Many asylum seekers fleeing persecution, who are in lifelong committed relationships, but who cannot marry, have to leave their same-sex partners behind. LGBTQ families are frequently split apart when one partner obtains asylum in the U.S.

¹⁸ Movement Advancement Project, “Equality Maps: Identity Document Laws and Policies,” *available at* https://www.lgbtmap.org/equality-maps/identity_document_laws (last visited May 18, 2021).



Because fiancé visas are available only to U.S. citizens, an LGBTQ asylee must wait years after being granted asylum in order to apply for their life partner to join them in the U.S. This prolonged separation tears LGBTQ families apart and causes asylum seekers severe mental and emotional distress.

One of Immigration Equality’s clients, Sid, fled homophobic and transphobic persecution in Jamaica, and came to the United States to apply for asylum. Sid left their long-term partner in Jamaica because their partner was unable to get a visa to enter the United States. Since leaving Jamaica, Sid has been in depressed and traumatized because they are indefinitely separated from their support system. Sid and their partner were unable to get married in Jamaica, as Jamaica does not recognize same-sex marriages. Sid will therefore not be able to petition their partner for follow-to-join benefits. Fortunately, Sid was recently able to find attorneys who will file their application for asylum soon. However, since Asylum Offices are not yet operating at full capacity, Sid will likely be placed in the backlog where they may remain indefinitely. Even if Sid is granted asylum, they will have to wait for years till they become a lawful permanent resident of the United States, let alone a U.S. citizen. Currently, USCIS takes over three years to adjudicate applications for adjustment of status based on a grant of asylum.¹⁹ After Sid is granted lawful permanent residence, they will have to wait another four years before he can even apply for citizenship. Only after Sid becomes a U.S. citizen can they petition for their life partner. In the long time that it will take for Sid to become a U.S. citizen, Sid will remain separated from their partner.

Refugee and asylee same-sex couples will suffer substantial and continuing harm if their relationships are not recognized by USCIS. First, foreclosing spousal benefits to a same-sex life partner results in family separation. Not only is such an outcome harmful to the family, but it also undermines a long-standing U.S. priority of preserving family unity.²⁰ Second, a partner who does not receive derivative refugee or asylee status will likely remain indefinitely in a dangerous situation. The predominant reason LGBTQ people seek refuge in the United States is to escape persecution based on their LGBTQ identity. Granting refugee or asylee status to one same-sex partner, but disqualifying the other

¹⁹ This data was obtained from USCIS’ Check Case Processing Times web tool, *available at* <https://egov.uscis.gov/processing-times/> (last visited May 18, 2021).

²⁰ During his presidential campaign, President-elect Biden promised to “support family-based immigration by preserving family unification as a foundation of our immigration system.” *See* “The Biden Plan for Securing our Values as a Nation of Immigrants,” *available at* <https://joebiden.com/immigration> (last visited May 19, 2021); *see also*, 103 Cong. Rec. 15,498 (1957) (statement of Sen. John F. Kennedy referring to amendments to the INA) (“[T]hese provisions are designed to clarify or adjust existing provisions of law in the interest of reuniting broken families . . .”).

partner undermines the spirit of the Refugee Convention. If one partner is in danger on the basis of their LGBTQ identity, the other partner is certain to face similar risk. Furthermore, it is contradictory for the U.S. to protect an LGBTQ refugee from persecution based on their sexual orientation, but then to defer to the persecutor nation’s discriminatory determination as to the validity of an LGBTQ couple’s relationship.

President Biden has acknowledged this problem in the refugee context, and has asked DHS (of which USCIS is an agency) to consider taking actions to recognize same-sex life partners as spouses for purposes of derivative status.²¹ USCIS has the legal authority and the moral obligation to extend spousal benefits to life partners, and should do so for asylees, refugees, and asylum seekers.

If the Agency declines to include same-sex life partners of refugees, asylees, and asylum seekers in the definition of “spouse,” it should ensure ready availability of humanitarian parole to such same-sex partners.

i. Same-Sex Partners of Refugees

USCIS should grant spousal benefits to same-sex life partners of refugees. If USCIS is unable to do so, it should grant life partners of refugees humanitarian parole for one year. During this time, a refugee should be able to marry their same-sex partner in the United States. Once the couple is married, USCIS should grant *nunc pro tunc* any derivative status the partner could have gotten had the couple been previously able to marry. It is important to note that, because this alternative approach would create additional procedural, evidentiary, and monetary burdens on same-sex couples, and because it would necessarily create lengthy family separation, it is not an equivalent alternative to extending spousal benefits to life partners.

USCIS has the authority to grant humanitarian parole to individuals located outside of the U.S. In fact, in certain circumstances, USCIS already considers a same-sex partner’s inability to marry in their country of origin when evaluating eligibility for humanitarian parole.²² Generally, USCIS “may . . . parole into the United States temporarily under such

²¹ Rebuilding and Enhancing Programs To Resettle Refugees and Planning for the Impact of Climate Change on Migration, Exec. Order No. 14013, 86 Fed. Reg. 8839 (Feb. 9, 2021), *available at* <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/04/executive-order-on-rebuilding-and-enhancing-programs-to-resettle-refugees-and-planning-for-the-impact-of-climate-change-on-migration> (last visited May 18, 2021).

²²USCIS, “Guidance on Evidence for Certain Types of Humanitarian or Significant Public Benefit Parole Requests: to Come to the United States for Protection from Targeted or Individualized Harm,” *available at*

conditions as [it] may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States”²³ The Immigration and Nationality Act (“INA”) does not define “humanitarian reasons” or “significant public benefit.” However, USCIS evaluates a variety of factors to make humanitarian parole determinations. When deciding whether parole is merited for humanitarian reasons, USCIS looks at a non-exhaustive list of factors including “whether or not the [parole applicant’s] circumstances are pressing, the effect of the circumstances on the individual’s welfare and wellbeing, and the degree of suffering that may result if parole is not authorized.”²⁴

Furthermore, USCIS acknowledges that people often seek humanitarian parole to escape persecution they experience abroad. When this is the case, USCIS already considers whether the beneficiary of the humanitarian parole request has a same-sex partner who was granted asylum or refugee status.²⁵ USCIS notes this may involve situations in which the parole beneficiary “is from a country where same-sex marriage is not legal and, therefore, the parole beneficiary could not [receive derivative refugee or asylee status].”²⁶ USCIS should clarify that the inability to marry is sufficient, by itself, to warrant humanitarian parole.

Once in the U.S, the couple will be able to marry. At that point, USCIS should consider the couple married *nunc pro tunc* and extend derivative refugee status to the spouse.

For refugees seeking to reunite with a same-sex partner, USCIS should assume that a non-immigrant visa is not available to them. It should waive any requirement that the partner be denied a visa prior to applying for humanitarian parole. Additionally, the fee associated with a humanitarian parole request should be automatically waived for same-sex refugee partner reunification.

<https://www.uscis.gov/humanitarian/humanitarian-parole/guidance-on-evidence-for-certain-types-of-humanitarian-or-significant-public-benefit-parole-requests> (last visited May 18, 2021).

²³ INA §212(d)(5).

²⁴ USCIS, “Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States,” available at <https://www.uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-for-individuals-outside-the-united-states> (last visited May 18, 2021).

²⁵ USCIS, “Guidance on Evidence for Certain Types of Humanitarian or Significant Public Benefit Parole Requests: to Come to the United States for Protection from Targeted or Individualized Harm,” available at <https://www.uscis.gov/humanitarian/humanitarian-parole/guidance-on-evidence-for-certain-types-of-humanitarian-or-significant-public-benefit-parole-requests> (last visited May 18, 2021).

²⁶ *Id.*

USCIS should also create a unit dedicated to processing humanitarian parole requests from a refugee with a same-sex partner. If needed, USCIS should hire additional personnel to ensure effective and timely request processing. At the very least, same-sex couple family-reunification humanitarian parole requests should be prioritized. At the same time, a refugee officer abroad who is assessing a principal refugee's claim should also assess and grant humanitarian parole to a refugee's life partner.

ii. Same-Sex Partners of Asylees

Asylees are in a very similar predicament as same-sex refugee couples when it comes to derivative benefits. USCIS should extend derivative and follow-to-join asylee status to permanent life partners of asylees just as it should to refugees.

For LGBTQ asylum seekers who were unable to marry in their country of origin, USCIS should recognize same-sex couples as spouses and allow a non-principal same-sex partner to receive derivative asylee status. An alternative is to expeditiously grant humanitarian parole to an asylee's same-sex partner, so that the partner can come to the United States and marry the asylee. Once the couple is married, USCIS should recognize the marriage *nunc pro tunc* and grant derivative asylee status to the non-asylee partner. Another nation's refusal to provide marriage to same-sex couples should not prevent life partners from being recognized as having a spousal relationship.

LGBTQ asylum seekers who could not marry in their country of origin, and who, as a practical matter, still cannot access marriage in the United States, should nevertheless be construed as spouses for derivative asylee benefits. For example, if one of the partners is placed in immigration detention during the pendency of their asylum proceedings, marriage is next to impossible - especially for non-English speakers. If one of the partners is granted asylum by USCIS, and the couple subsequently marries, USCIS should recognize the marriage *nunc pro tunc* and grant the non-asylee partner asylum status.

iii. Same-sex Partners of Asylum Seekers

USCIS should grant humanitarian parole to life partners of asylum seekers whose applications have not yet been adjudicated. Humanitarian parole should be issued to enable life partners to marry in the United States, and then be included as derivative beneficiaries in the pending asylum application. This would ensure family unity for LGBTQ asylum seekers whose cases are in the asylum backlog.

b. Birthright Citizenship

After the Supreme Court overturned the Defense of Marriage Act, the Obama Administration worked closely with Immigration Equality to ensure that married same-sex couples would be treated the same as different-sex couples. However, there is at least one area of citizenship policy that requires immediate reform. For children born abroad in wedlock, Section 301 of the Immigration and Nationality Act entitles parents to confer U.S. citizenship at birth to their children as long as (1) at least one of the parents is a U.S. citizen and (2) that parent fulfills certain residency requirements. For children born out of wedlock, INA Section 309 applies.

However, the State Department and parts of USCIS refuse to recognize the birthright citizenship of the children of many married same-sex couples born abroad.²⁷ The agencies do so by defining a parent for citizenship purposes, as *only* a biological parent. However, the INA has no such requirement for married couples. Because of its erroneous understanding of the law, the agencies treat marital children as if they were born out of wedlock, and deny that they are citizens. This policy is in clear violation of the statute and Supreme Court precedent as it differentiates a same-sex marriage from a different-sex marriage.

In fact, every federal court that has heard this issue has found that acquisition of citizenship at birth *does not* require a biological relationship to a U.S. citizen parent for children born in wedlock. Those courts include the Second and Ninth Circuits, and district courts in the District of Columbia, Maryland, and Georgia.²⁸ And, while USCIS must follow federal court decisions in the jurisdictions where those courts sit, USCIS's national policy is not otherwise consistent with the law.

USCIS should immediately update its internal and public policy to clarify that for married parents, the INA does not require a biological connection to a U.S. citizen in order for a parent to pass citizenship to a child. For children who applied for a certificate of citizenship, and were denied on a previous misinterpretation of the law, USCIS should waive any new application fee.

²⁷ U.S. Department of State, "U.S. Citizenship Transmission and Assisted Reproductive Technology," available at <https://www.state.gov/u-s-citizenship-transmission-and-assisted-reproductive-technology/> (last visited May 18, 2021).

²⁸ *Jaen v. Sessions*, 899 F.3d 182 (2d. Cir. 2018) (holding no biological relationship); *Dvash-Banks v. Pompeo*, 2019 U.S. Dist. LEXIS 30525 (9th Cir. 2019) (same, and later also denying the government's petition for rehearing en banc); *Sabra v. Pompeo*, 453 F. Supp. 3d 291 (D.D.C. 2020) (same); *Kiviti v. Pompeo*, 467 F. Supp. 3d 293 (D. Md. 2020) (same); *Mize v. Pompeo*, 482 F. Supp. 3d 1317 (N.D. Ga. 2020) (same).

On May 18, 2021, the U.S., Department of State issued a press release indicating that it was updating its policy regarding the “interpretation and application of Section 301 of the INA, which establishes the requirements for acquisition of U.S. citizenship at birth.” Specifically, the press release stated that “[c]hildren born abroad to parents, at least one of whom is a U.S. citizen and who are married to each other at the time of the birth, will be U.S. citizens from birth if they have a genetic or gestational tie to at least one of their parents and meet the INA’s other requirement.” We applaud this step and encourage USCIS to similarly update its policy. However, we note that the INA does not require a biological relationship of any kind.

c. Parole in Place

For many LGBTQ/H people living in the United States, consular processing may be very dangerous or fundamentally unfair. *First*, nearly 70 nations make it a crime to be in a same-sex relationship, some of which carry the death penalty. Requiring an LGBTQ person to return to a country where they may be persecuted or tortured because of who they love is dangerous and unnecessary. *Second*, for people living with HIV, being asked to leave the U.S. for an extended period of time in order to consular process often interrupts an individual’s life-saving healthcare.²⁹ *Third*, because of the unconstitutional prohibition on same-sex marriage mandated by the Defense of Marriage Act, some foreign nationals had no choice but to enter the U.S. without inspection in order to keep their families together.

For individuals in one of the above categories, USCIS should make parole in place an option in lieu of consular processing. This would ensure the health and safety of many LGBTQ and HIV-positive people, and help to right a long-standing civil rights violation created by the federal government.

²⁹ The length of stay outside of the U.S. required by consular processing can be much, much longer for people living with HIV than for the general population. This is in part because the State Department requires people living with HIV to undergo lengthy sputum testing to prove that they do not have active tuberculosis, a process which can take several months. We are aware of instances in which residence applicants ran out of HIV medication while waiting for their sputum tests abroad, which is both dangerous for an individual’s health, but also for the public health as interruptions in medication may encourage drug resistance in HIV. We are also aware of at least one instance in which a residence applicant was granted humanitarian parole by USCIS to return to the U.S. to seek HIV treatment. While that was a happy result, it really illustrates why USCIS should front-load parole by offering it in place.



Conclusion

Thank you for the opportunity to submit a comment in response to the Request for Public Input.

Please do not hesitate to contact Bridget Crawford at bcrawford@immigrationequality.org and Amitesh Parikh at aparikh@immigrationequality.org to obtain further information.

Sincerely,

Immigration Equality



APPENDIX A



, 2020

File Number:

REQUEST FOR EVIDENCE

Please submit the requested material to the office shown below at the time and place indicated in connection with an official matter.

OFFICE LOCATION	New York Asylum Office 1065 Stewart Avenue, Suite 200 Bethpage, NY 11714 FAX: 516-261-0141
DATE AND HOUR	All documents due by @ 2:pm. By mail or Fax is acceptable.
REASON	<p>The Asylum Office will recognize an individual's gender change claim, if the applicant presents the following:</p> <ul style="list-style-type: none"> - Either an amended birth certificate, passport, or court order recognizing the new gender OR - Medical certification of the change in gender from a licensed physician (a Doctor of Medicine (M.D.) or Doctor of Osteopathy (D.O.)). The medical certification should include the following information: <ul style="list-style-type: none"> o Physician's full name; o Medical license or certificate number; o Issuing state, country, or other jurisdiction of medical license/certificate; o Drug Enforcement Administration registration number assigned to the doctor or comparable foreign registration number, if applicable;

	<ul style="list-style-type: none"> ○ Address and telephone number of the physician; ○ Language stating that that the individual has had appropriate clinical treatment for gender transition to the new gender (male or female); ○ Language stating that the physician has either treated the applicant in relation to the applicant’s change in gender or has reviewed and evaluated the medical history of the applicant in relation to the applicant’s change in gender and that he/she has a doctor/patient relationship with the applicant. <p>Please submit one of the above if applicable.</p>
TO BE SUBMITTED	<p><u>Please submit TWO (2), double-hole-punched sets of copies of above-mentioned evidence. Please ensure that the holes are 2 ¾ -inch apart, and that both sets of copies are collated and organized to reflect the proper order of each exhibit.</u></p>

Sincerely,

Asylum Officer

CC: