



# U.S. Citizenship and Immigration Services

## RAIO DIRECTORATE – OFFICER TRAINING

### *RAIO Combined Training Course*

# GUIDANCE FOR ADJUDICATING LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND ASYLUM CLAIMS

## TRAINING MODULE

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RAIO Directorate – Officer Training / *RAIO Combined Training Course*

**GUIDANCE FOR ADJUDICATING LESBIAN, GAY, BISEXUAL,  
TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND  
ASYLUM CLAIMS**

**Training Module**

**MODULE DESCRIPTION:**

This module provides guidelines for adjudicating and considering immigration benefits, petitions, protections, or other immigration-related requests by lesbian, gay, bisexual, transgender, and intersex, (LGBTI) individuals. The module addresses the legal analysis of claims that involve LGBTI applicants as well as related interviewing considerations.

**FIELD PERFORMANCE OBJECTIVE(S)**

When interviewing in the field, you (the Officer) will elicit all relevant information from an LGBTI applicant to properly adjudicate and consider the immigration benefit, petition, protection, or other immigration-related request before you.

**INTERIM PERFORMANCE OBJECTIVES**

1. Summarize the developments in U.S. law that focus on LGBTI applicants.
2. Describe the types of harm that may be present in refugee and asylum claims involving LGBTI issues.
3. Describe how membership in a particular social group is analyzed when looking at the refugee or asylum claims involving LGBTI issues.
4. Identify factors to consider when evaluating evidence presented by LGBTI applicants.
5. Identify factors that may hinder an interview of an LGBTI applicant.
6. Identify methods and techniques to put an LGBTI applicant at ease during an interview.

7. Use sensitive questioning and listening techniques that aid in eliciting information from LGBTI applicants.

## INSTRUCTIONAL METHODS

- Interactive presentation
- Discussion
- Practical exercises

## METHOD(S) OF EVALUATION

- Multiple-choice exam
- Observed practical exercises

## REQUIRED READING

1. [\*Matter of Toboso-Alfonso\*](#), 20 I. & N. Dec. 819, 822 - 23 (1990).
2. *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*. United Nations High Commissioner for Refugees (UNHCR), Protection, Policy, and Legal Advice Section. Division of International Protection Services. Geneva, November 21, 2008, *available at* <http://www.unhcr.org/refworld/docid/48abd5660.html>.
3. Memorandum from Don Neufeld, Acting Associate Director, Domestic Operations and Lori Scialabba, Associate Director, Refugee, Asylum, and International Operations, [\*Adjudication of Petitions and Applications Filed by or on Behalf of Transsexual Individuals\*](#) (January 14, 2009).
4. Memorandum from William R. Yates, Associate Director for Operations, USCIS, [\*Adjudication of Petitions and Applications Filed by or On Behalf Of, or Document Requests by, Transsexual Individuals\*](#) (April 16, 2004).

### Division-Specific Required Reading - Refugee Division

### Division-Specific Required Reading - Asylum Division

### Division-Specific Required Reading - International Operations Division

## ADDITIONAL RESOURCES

1. [LGBTI-related Case Law](#)

2. Immigration Equality, *Immigration Equality Asylum Manual*, available at <http://www.immigrationequality.org/issues/law-library/lgbth-asylum-manual/>.
3. Immigration Equality, *Immigration Equality Draft Model LGBT Asylum Guidance*, (2010), available at <http://www.immigrationequality.org/wp-content/uploads/2011/07/ImEq-Draft-Model-LGBT-Asylum-Guidance-2010.pdf>.
4. Human Rights Watch, *They Wanted Us Exterminated: Murder, Torture, Sexual Orientation, and Gender in Iraq*, August 17, 2009, available at <http://www.hrw.org/node/85050>.
5. Matt McAllester, "The Hunted," *New York Magazine*, October 4, 2009, available at <http://nymag.com/news/features/59695>.
6. Jason Burke and Afif Sarhan, "How Islamist Gangs Use Internet to Track, Torture and Kill Iraqi Gays," *The Guardian*, September 13, 2009, available at <http://www.guardian.co.uk/world/2009/sep/13/iraq-gays-murdered-militias>.
7. *Statement by the President on the UN Human Rights Council Resolution on Human Rights, Sexual Orientation, and Gender Identity*. The White House, Office of the Press Secretary, June 17, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/06/17/statement-president-un-human-rights-council-resolution-human-rights-sexu>.
8. Memorandum from David A. Martin, INS General Counsel, *Seropositivity for HIV and Relief From Deportation*, (Feb. 16, 1996).
9. International Gay and Lesbian Human Rights Commission (IGLHRC) *Nowhere to Turn: Blackmail and Extortion of LGBT People in Sub-Saharan Africa* (2011), available at <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/484-1.pdf>.
10. Daniel Ottoson, The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), *State Sponsored Homophobia: A World Survey of Laws Prohibiting Same-Sex Activity between Consenting Adults* (2010), available at [http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2010.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2010.pdf).
11. American Psychiatric Association, *Therapies Focused on Attempts to Change Sexual Orientation: Reparative or Conversion Therapies Position Statement*, March 2000, available at <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200001.aspx>.
12. Victoria Neilson, *Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims*, 16 Stanford Law & Policy Review 417 (2005), available at <http://www.immigrationequality.org/wp-content/uploads/2011/08/Neilson-Website-Version-Lesbian-article.pdf>.

13. Ellen A. Jenkins, *Taking the Square Peg Out of the Round Hole: Addressing the Misclassification of Transgender Asylum Seekers*, 40 Golden Gate U.L. Rev. (2009), available at <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=2008&context=ggulrev>.

**[Division-Specific Additional Resources - Refugee Division](#)**

**[Division-Specific Additional Resources - Asylum Division](#)**

**[Division-Specific Additional Resources - International Operations Division](#)**

## CRITICAL TASKS

SOURCE: The Tasks listed below are from the Asylum Division's 2001 Revalidation. These tasks will need to be modified to reflect the results of the RAIO Directorate – Officer Training Validation study.

Task/ Skill #	Task Description

### SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By

## Table of Contents

<b>1</b>	<b>INTRODUCTION .....</b>	<b>11</b>
<b>2</b>	<b>LEGAL ANALYSIS – OVERVIEW .....</b>	<b>14</b>
<b>3</b>	<b>LEGAL ANALYSIS – NEXUS AND THE FIVE PROTECTED GROUNDS .....</b>	<b>14</b>
3.1	Membership in a Particular Social Group – Defining the Group .....	14
3.1.1	Possession or Imputed Possession of a Protected Characteristic.....	14
3.1.2	Particular Social Group – Immutable or Fundamental Characteristic .....	15
3.1.3	Particular Social Group – Visibility .....	16
3.2	“On Account Of”/Nexus.....	18
3.2.1	The Persecutor’s Motive and the Applicant’s Experience .....	18
3.2.2	Prosecution vs. Persecution .....	19
<b>4</b>	<b>LEGAL ANALYSIS – PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION .....</b>	<b>19</b>
4.1	Types of Harm That May Befall Sexual Minorities .....	20
4.2	Agents of Persecution .....	24
4.3	Internal Relocation .....	24
<b>5</b>	<b>LEGAL ANALYSIS – WELL FOUNDED FEAR .....</b>	<b>25</b>
5.1	Objective Elements.....	25
5.2	Fear of Future Persecution.....	26
5.3	Refugees <i>Sur Place</i> .....	26
<b>6</b>	<b>INTERVIEW CONSIDERATIONS.....</b>	<b>26</b>
6.1	Pre-Interview Considerations .....	27
6.1.1	File Review .....	27
6.1.2	How the Presence of Family and Relatives May Affect the Interview .....	27
6.1.3	How the Presence of Interpreters May Affect the Interview .....	28
6.1.4	Reviewing Biographical Information with the Applicant .....	28
6.2	Suggested Techniques for Eliciting Testimony.....	29
6.2.1	Setting the Tone and Putting the Applicant at Ease .....	29
6.2.2	Explore all possible grounds.....	31
6.2.3	Sample Questions .....	32



<b>7</b>	<b>EVIDENCE ASSESSMENT.....</b>	<b>38</b>
7.1	Credibility Considerations During the Interview .....	39
7.1.1	Plausibility .....	39
7.1.2	Consistency.....	41
7.1.3	Detail.....	43
7.2	Country of Origin Information .....	43
7.3	Corroborating Evidence.....	44
<b>8</b>	<b>CONCLUSION .....</b>	<b>46</b>
<b>9</b>	<b>SUMMARY .....</b>	<b>46</b>
9.1	LGBTI and HIV Terminology.....	46
9.2	Legal Analysis – Nexus and the Five Protected Characteristics .....	47
9.3	Legal Analysis – Types of Persecution .....	47
9.4	Legal Analysis – Well-Founded Fear.....	47
9.5	Legal Analysis – One-Year Filing Deadline (asylum only) .....	48
9.6	Interviewing Considerations.....	48
9.7	Burden of Proof and Evidence – Credibility .....	49
9.8	Burden of Proof and Evidence – Country of Origin Information .....	50
	<b>PRACTICAL EXERCISES.....</b>	<b>51</b>
	<b>OTHER MATERIALS.....</b>	<b>52</b>
	<b>SUPPLEMENT A – REFUGEE AFFAIRS DIVISION .....</b>	<b>60</b>
	Required Reading.....	60
	Additional Resources .....	60
	Supplements .....	60
	<b>SUPPLEMENT B – ASYLUM DIVISION .....</b>	<b>61</b>
	Required Reading.....	61
	Additional Resources .....	61
	Supplements .....	61
	<b>SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION .....</b>	<b>66</b>

Required Reading.....	66
Additional Resources .....	66
Supplements.....	66

Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

## 1 INTRODUCTION

It has been over 20 years since Fidel Armando Toboso Alfonso, a gay man from Cuba, was granted withholding of deportation in the United States based on his sexual orientation.<sup>1</sup> The *Toboso-Alfonso* decision paved the way for hundreds of lesbian, gay, bisexual, and transgender individuals as well as individuals with intersex conditions (LGBTI) to obtain refugee and asylum status in the United States. Recently, the United Nations marked another “significant milestone in the long struggle for equality, and the beginning of a universal recognition that LGBT[I] persons are endowed with the same inalienable rights – and entitled to the same protections – as all human beings”<sup>2</sup> by passing a Resolution on Human Rights, Sexual Orientation, and Gender Identity. The increasing number of refugee and asylum (protection) claims related to LGBTI and HIV-positive status has resulted in the need for greater awareness of the issues involved in these claims and training on their adjudication.<sup>3</sup>

Interviews with LGBTI or HIV-positive refugee and asylum applicants require the individual “to discuss some of the most sensitive and private aspects of human identity and behavior”<sup>4</sup> – sexual orientation, gender identity, and life-threatening illness. These topics may be particularly difficult for applicants to discuss with government officials and may also be uncomfortable for the Interviewer to discuss.<sup>5</sup>

<sup>1</sup> *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 - 23 (1990).

<sup>2</sup> *Statement by the President on the UN Human Rights Council Resolution on Human Rights, Sexual Orientation, and Gender Identity*. The White House, Office of the Press Secretary, June 17, 2011.

<sup>3</sup> *UNHCR Guidance Note On Refugee Claims Relating to Sexual Orientation and Gender Identity*, paragraph 12, UNHCR, Geneva, 20 November 2008.

<sup>4</sup> *Immigration Equality Draft Model LGBT Asylum Guidance*, Immigration Equality 2010.

<sup>5</sup> *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

All Officers in the RAIO Directorate should be familiar with the contents of this training module as it constitutes primary field guidance for interviewing LGBTI applicants and analyzing their claims. This module seeks to: 1) increase awareness about the issues sexual minorities face; 2) foster discussion about LGBTI issues; and, 3) provide consistent legal and interview guidance regarding these issues.

The RAIO LGBTI Training Module is the result of a collaborative effort between USCIS and non-governmental organizations (NGOs).

The module first addresses the legal issues you, the Interviewing Officer, must consider when analyzing cases and making protection determinations. Second, because establishing eligibility for refugee and asylum status presents its own challenges, the lesson will cover the factors you must take into account when interviewing LGBTI individuals. Third, the lesson will address proper techniques for assessing credibility.

### *A Note about Terminology*

The terminology involving LGBTI issues is still evolving. For purposes of this module, the term "sexual minorities" and the acronym "LGBTI" are used interchangeably as umbrella terms to refer to issues involving sexual orientation, gender identity, and intersex conditions. The following are some essential LGBTI definitions. For a more comprehensive set of definitions, please click the hyperlink to the [LGBTI Glossary](#) located in the "Other Materials" section of this module.

The use of the term homosexual is limited in this module. It has a somewhat derogatory connotation within the LGBTI community as it has historically been used in a medical context to describe being gay or lesbian as an illness.<sup>6</sup>

Sexual orientation is the emotional, physical, and romantic attraction a person feels towards another person.<sup>7</sup> The term gay is used to mean men who are attracted to men. The term lesbian is used to mean women who are attracted to women, although homosexual women also sometimes use the term gay to describe themselves. The term heterosexual or straight is used to mean men or women who are attracted to the opposite sex. The term bisexual is used to mean men or women who are attracted to both sexes.

Gender is what society values as the roles and identities of being male or female. Sex is the assignment of one's maleness or femaleness on the basis of anatomy and reproductive organs. Gender and sex are assigned to every individual at birth. Gender identity is an individual's internal sense of being male, female, or something else. Since gender

<sup>6</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

<sup>7</sup> For more information about sexual orientation, see American Psychological Association (APA), *Answers to Your Questions: A Better Understanding of Sexual Orientation and Homosexuality*, (2008), available at <http://www.apa.org/pubinfo/answers.html>.

identity is internal, one's gender identity is not necessarily visible to others. Gender expression is how a person expresses one's gender identity to others, often through behavior, clothing, hairstyles, voice, or body characteristics.<sup>8</sup> Transgender is a term used for people whose gender identity, expression, or behavior is different from those typically associated with their assigned sex at birth. Some transgender people dress in the clothes of the opposite gender; others undergo medical treatment, which may include taking hormones and/or having surgery to alter their gender characteristics.

Intersex refers to a condition in which an individual is born with a reproductive or sexual anatomy and/or chromosome pattern that does not seem to fit typical definitions of male or female. The conditions that cause these variations are sometimes grouped under the terms "intersex" or "DSD" (Differences of Sex Development). Individuals with these conditions were previously referred to as "hermaphrodites," but this term is considered outmoded and should not be used unless the applicant uses it. These conditions may be apparent at birth, may appear at puberty, or may be discovered in a medical examination. Intersex is not the same as transgender, although an intersex person may identify themselves as transgender. Keep in mind that an intersex person may identify as male or female, and as lesbian, gay, bisexual, or heterosexual.<sup>9</sup>

Transgender is a gender identity, not a sexual orientation. Thus, like any other man or woman, a transgender person may have a heterosexual, bisexual or homosexual sexual orientation.

It is also important to be familiar with the issues and terminology related to the Human Immunodeficiency Virus (HIV) and AIDS. USCIS has encountered claims from applicants who fear persecution because they were incorrectly perceived as gay, based on the fact that they were HIV-positive. We have also encountered claims where the persecutor incorrectly assumed that the applicant was HIV-positive based on the fact that the applicant was gay or was perceived to be gay. Because such claims involve overlapping and related issues, they are being addressed within the same module.

A person who was exposed to HIV and developed anti-bodies to the virus is HIV-positive.<sup>10</sup> AIDS, or Acquired Immunodeficiency Syndrome, describes people with HIV who have either experienced certain infections or whose T-cells (infection fighting blood cells) have dropped below 200. Not everyone who is HIV-positive has AIDS, but everyone who has AIDS is HIV-positive.<sup>11</sup> HIV is not spread by casual contact. It is

<sup>8</sup> For more information on transgender identity, see [http://transequality.org/Resources/NCTE\\_TransTerminology.pdf](http://transequality.org/Resources/NCTE_TransTerminology.pdf) and [http://transequality.org/Resources/NCTE\\_UnderstandingTrans.pdf](http://transequality.org/Resources/NCTE_UnderstandingTrans.pdf) (National Center for Transgender Equality.)

<sup>9</sup> For more information on intersex conditions, see the Advocates for Informed Choice website at [www.aiclegal.org](http://www.aiclegal.org).

<sup>10</sup> For more information about HIV see <http://www.gmhc.org/learn/hiv-aids-basics>, (Gay Men's Health Crisis website).

<sup>11</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, Immigration Equality 2004.

only spread through contact with bodily fluids primarily through sex or sharing intravenous needles.

## **2      LEGAL ANALYSIS – OVERVIEW**

This module does not expand the statutory definition of a refugee. The legal criteria used to evaluate an LGBTI applicant's eligibility for asylum or refugee status are the same criteria used in all other protection adjudications. However, because LGBTI applicants' experiences are often different from those of others, it is useful to discuss how these experiences fit into the legal framework of established refugee and asylum law.

## **3      LEGAL ANALYSIS – NEXUS AND THE FIVE PROTECTED GROUNDS**

As explained in greater detail in the RAIO training module, *Nexus and the Five Protected Grounds*, to be eligible for asylum or refugee status, the applicant must establish that the persecution suffered or feared was or will be motivated “on account of” his or her actual or imputed possession of a protected characteristic. This is known as the nexus requirement and it applies equally to LGBTI applicants. The type of harm that may constitute persecution in the context of LGBTI claims will be discussed later in this module.

Depending on the facts of the case, claims relating to sexual orientation and gender identity are primarily recognized under membership in a particular social group (PSG) but may overlap with other grounds, in particular religion and political opinion.<sup>12</sup>

The nexus analysis first requires consideration of whether the persecutor perceives the applicant as possessing a protected characteristic (either because the applicant does possess it or because the persecutor imputes it to the applicant); then whether the persecutor acted or would act against the applicant because of the persecutor’s perception of that protected characteristic.

### **3.1      Membership in a Particular Social Group – Defining the Group**

When deciding if the persecutor perceives in an applicant an actual or imputed characteristic that can define a cognizable PSG, you must first identify the characteristics that the persecutor perceives; then explain why individuals with those characteristics form a PSG within the meaning of the refugee definition. This is often referred to as “framing the PSG.”

#### **3.1.1      Possession or Imputed Possession of a Protected Characteristic**

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<sup>12</sup> See [\*Matter of S-A-\*](#), 21 I & N Dec. 1050; *Pitcherskaia v. INS*, 118 F.3d 641 (9<sup>th</sup> Cir. 1997).

To determine whether a group to which the applicant belongs may be considered a PSG, first determine whether there are any precedent decisions that analyze similar facts and rely on any such decisions to reach a conclusion. As mentioned previously, in 1990, the Board of Immigration Appeals (BIA) in *Matter of Toboso-Alfonso*, recognized persons identified as homosexuals by the Cuban Government as a PSG.<sup>13</sup> Toboso-Alfonso was a gay man who was subjected to detention and forced labor by the Cuban government for being gay.

Four years later, the U.S. Attorney General designated *Toboso-Alfonso* "as precedent in all proceedings involving the same issue or issues."<sup>14</sup>

While the BIA has not specifically ruled on claims by other sexual minorities many U.S. Circuit Courts of Appeals have. Claims involving actual or imputed sexual minority status may qualify under the PSG category and may involve applicants who:

- identify as gay or lesbian<sup>15</sup>
- are viewed as a sexual minority, regardless of whether the persecutor or society involved distinguishes between sexual orientation, gender, and sex.
- are transgender<sup>16</sup> (note that even if a transgender applicant identifies as heterosexual, he or she may be perceived as gay or lesbian)
- are "closeted" gays and lesbians
- test positive for HIV, regardless of their sexual orientation<sup>17</sup>
- are viewed as "effeminate" or "masculine" but identify as heterosexual
- are not actually gay but are thought to be gay by others<sup>18</sup>
- are from throughout the world, not just Cuba<sup>19</sup>

For a comprehensive list of court cases involving LGBTI asylum and refugee issues, click LGBTI-Related Case Law found in the "Other Materials" section of this module.

### 3.1.2 Particular Social Group – Immutable or Fundamental Characteristic

To determine if an applicant is a member of a PSG, you must decide whether:

<sup>13</sup> See *Toboso-Alfonso*.

<sup>14</sup> Attorney General, Order number 1895 (June 19, 1994).

<sup>15</sup> See, e.g., *Karouni v. Gonzales*, 399 F.3d 1163 (9<sup>th</sup> Cir 2005); *Pitcherskaia v. INS*, 118 F.3d 641 (9<sup>th</sup> Cir. 1997); *Nabulawala v. Gonzales*, 481 F.3d 1115 (8<sup>th</sup> Cir. 2007).

<sup>16</sup> *Hernandez-Montiel v. INS*, 225 F.3d 1088 (9<sup>th</sup> Cir. 2000).

<sup>17</sup> *Seropositivity for HIV and Relief From Deportation*, Memorandum. David A. Martin, INS General Counsel. (Feb. 16, 1996).

<sup>18</sup> *Amanfi v. Ashcroft*, 328 F.3d 719 (3<sup>rd</sup> Cir. 2003).

<sup>19</sup> This will depend on country of origin information. LGBTI claims are put forward from all over the world.

the group is comprised of individuals who share a common, innate characteristic – such as sex, color, kinship ties, or past experience – that members cannot change,

or

whether the group is comprised of individuals who share a characteristic that is so fundamental to the members' identity or conscience that they should not be required to change it.<sup>20</sup>

Sexual orientation, gender identity, and having an intersex condition can be classified as either innate or fundamental. They are characteristics that an individual cannot change about him or herself or should not be required to change.<sup>21</sup> Most experts agree that sexual orientation - whether heterosexual, lesbian, or gay - is set in place early in life and is highly resistant to change. Also keep in mind that it has been over 30 years since the American Psychiatric Association (APA) revised its Diagnostic and Statistical Manual (DSM) to remove any references to homosexuality being an illness or a diagnosable mental disorder.<sup>22</sup> In the case of a transgender person, he or she either cannot change or should not be required to ignore the inner feelings that his or her gender identity does not match his or her biological sex at birth. Even if these traits could somehow be changed, they are traits that are so fundamental to a person's identity that he or she should not be required to change them.

Harm imposed because an applicant was mistakenly perceived as belonging to a sexual minority may also qualify as "on account of" a protected ground.

### 3.1.3 Particular Social Group – Visibility

When analyzing the PSG issue, you must not only make a finding regarding immutability or fundamentality, you must also determine social visibility or social distinction, i.e., whether the actual or imputed characteristic is "easily recognizable and understood by others to constitute a social group."<sup>23</sup> Some adjudicators mistakenly believe that social visibility or distinction requires that the applicant "look gay or act gay." See [Burden of Proof and Evidence, Credibility-Plausibility](#) section below. In this context, social visibility or distinction does not mean visible to the eye. Rather, this means that the society in question distinguishes individuals who share this trait from individuals who do not.

<sup>20</sup> [Matter of Acosta](#), 19 I&N Dec. 211 (BIA 1985).

<sup>21</sup> See *Matter of Toboso-Alfonso* at 822.

<sup>22</sup> *Homosexuality and Sexual Orientation Disturbance: Proposed Change in DSM-II*, 6<sup>th</sup> Printing, page 44, Position Statement (retired). American Psychiatric Association, 1973.

<sup>23</sup> [Matter of C-A-](#), 23 I&N Dec. 951 (BIA 2006).



In *Matter of C-A-*, the BIA lists men recognized as homosexuals by the government as an example of a social group that involves a characteristic that is "highly visible and recognizable by others in the country in question."<sup>24</sup> Although *C-A-* was discussing the PSG as formulated in *Toboso-Alfonso*, which involved the applicant's registration as a homosexual by the Cuban government, formal registration or recognition by a government is not required for a PSG.

For purposes of the "social visibility" analysis, you must examine the evidence, including country conditions, to determine whether the society in question distinguishes sexual minorities from other individuals in a meaningful way. While government registration of individuals as homosexuals would establish social visibility, it would not be required. Information about discriminatory attitudes or behavior toward sexual minorities would also be an example of evidence of social visibility.

### **Possible PSG Formulations**

It is important to remember that, in order to conduct an accurate assessment of nexus, a PSG should not be formulated too broadly or too narrowly. Rather, it should refer to the trait that the persecutor perceives the applicant to possess.

Because LGBTI claims involve individuals with a variety of characteristics, and because the persecutors in given cases may perceive the applicants' traits in a variety of ways, the appropriate PSG formulation will depend on the facts of the case, including evidence about how the persecutor and the society in question view the applicant and people like the applicant.

Consider the following as possible ways to formulate the PSG:

- Sexual minorities in Country X. This may be an appropriate PSG in cases where the persecutor in question perceives any sexual minority as "outside the norm" but does not necessarily distinguish between orientation, gender, and sex. It might also be appropriate where there are a variety of traits involved in the claim, but the persecutor's animus toward those different traits stems from a more general animus toward all sexual minorities. This might be the case, for example, in a situation where an applicant has an intersex condition or has undergone Sex Reassignment Surgery (SRS) in the United States after having been harmed in the past for simply being perceived as gay. This prevents the need to analyze past and future harm for two separate PSGs when past and future harm are both based on the applicant's sexual minority status. (Example: "sexual minorities in Mexico" in lieu of "transgender Mexican women perceived as homosexual Mexican men cross dressing as women.");
- Gay, lesbian, transgender, or HIV-positive (choose one) / men or women

<sup>24</sup> [\*Matter of C-A-\*](#) at 960.

(choose one) / from Country X (choose one) (Example: “Lesbian women from Uganda.”); or

- Men or women (choose one) / from Country X (choose one) / imputed to be gay, lesbian, transgender, or HIV-positive (choose one) (Example: “men from Ghana imputed to be gay.”)

## 3.2 “On Account Of”/Nexus

### 3.2.1 The Persecutor’s Motive and the Applicant’s Experience

The “on account of” requirement focuses on the motivation of the persecutor. The persecutor in most LGBTI cases seeks to harm the individual based on the individual's perceived or actual sexual orientation, on the persecutor’s belief that the applicant transgresses traditional gender boundaries, or on the persecutor’s more general animus toward sexual minorities of any kind. In some situations, the persecutor may have been trying to “cure” the applicant of his or her sexual orientation or gender identity.<sup>25</sup> Most persecutors may not have been making the distinction between gay, lesbian, bisexual, transgender, intersex, or HIV-positive. They may simply have harmed or want to harm the applicant based on their perception that the applicant is gay or a sexual minority that is “outside the norm.”

The applicant must provide some evidence, direct or circumstantial, that the persecutor is motivated to act against the applicant because he or she possesses or is believed to possess one or more of the protected characteristics in the refugee definition.<sup>26</sup> For example, in an LGBTI claim, you would consider evidence that the persecutor harmed or tried to correct the applicant because the persecutor knows or believes the applicant belongs to a sexual minority.

This evidence may include the applicant’s testimony regarding:

- what the persecutor said or did to the applicant
- what the persecutor said or did to others similar to the applicant
- the context of the act of persecution (for example, if the applicant was attacked in a gay bar or holding hands with a same-sex partner)
- reliable Country of Origin Information (COI) that corroborates such testimony

It is critical that you ask the applicant questions about what the persecutor may

<sup>25</sup> *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Pitcherskaia v. INS*.

<sup>26</sup> *Elias-Zacarias*, 502 U.S. 478 (1992).

have said to him or her when the harm was inflicted or when the threats were made.

As with other types of refugee or asylum claims, there is no malignant intent required on the part of the persecutor, as long as the applicant experiences the abuse as harm.<sup>27</sup> State and non-state actors may inflict harm on LGBTI persons with the intention of curing or treating them, for example, through what is effectively medical abuse or forced marriage.<sup>28</sup> (*See Types of Harm That May Befall Sexual Minorities, Forced Psychiatric or Other Efforts to “Cure” Homosexuality* below.)

### 3.2.2 Prosecution vs. Persecution

The U.S. Supreme Court has made it clear that intimate sexual activity between consenting adults is a constitutionally protected activity.<sup>29</sup> This Constitutional principle, while not directly applicable to the analysis of an asylum claim, is consistent with the recognition that punishing conduct or sexual activity between consenting adults of the same sex is tantamount to punishing a person simply for being gay. If a law exists in another country that prohibits intimate sexual activity between consenting adults, enforcement of the law itself may constitute persecution and not simply prosecution.

## 4 LEGAL ANALYSIS – PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION

In evaluating whether harm constitutes persecution in an LGBTI-related case, you should consider the same factors as in any other protection case. The relevant considerations are: 1) does the harm rise to the level of persecution; and 2) is the persecutor the government or an individual or entity from which the government is unable or unwilling to provide reasonable protection?

Because the amount of harm that rises to the level of persecution is discussed in detail in the RAIO training module, *Refugee Definition, Definition of Persecution, and Eligibility Based on Past Persecution*, this section focuses on the types of harm directed at sexual minorities.

In asylum processing, if the applicant establishes past persecution on account of one of the five protected grounds, he or she is presumed to have a well-founded fear of persecution in the future. The burden then shifts to USCIS to show that there has been a fundamental change in circumstances or that the applicant can reasonably relocate within the country of origin. If USCIS does not meet this

<sup>27</sup> *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

<sup>28</sup> *Pitcherskaia v. INS*.

<sup>29</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

burden, it must be concluded that the applicant's fear is well-founded.

To be eligible for resettlement as a refugee in the United States, an applicant must establish either past persecution or well-founded fear of persecution on account of a protected ground.<sup>30</sup> Therefore, in general, a refugee applicant who is found to have suffered past persecution but who does not have a well-founded fear of future persecution is still able to establish that he or she meets the refugee definition. There is no rebuttable presumption or burden shifting as there is in asylum processing.

#### 4.1 Types of Harm That May Befall Sexual Minorities

The types of harm directed at LGBTI applicants vary and include the same types of harm that are directed at other applicants. LGBTI individuals, however, may be more vulnerable to some types of harm than other applicants and may be subject to harm unique to them.<sup>31</sup>

When considering whether harm will amount to persecution, you must not only consider the objective degree of harm or whether the harm rises to the level of persecution, but also whether the applicant personally experienced or would experience the act(s) as serious harm.<sup>32</sup> You must evaluate the opinions and feelings of each applicant individually. Because each case is unique and each applicant has his or her own psychological makeup, interpretations of what amounts to persecution vary widely.<sup>33</sup>

While discrimination is often a fundamental part of claims made by LGBTI individuals, applicants also frequently reveal having experienced serious physical and sexual violence. These incidents of harm must be assessed in their totality. They must be analyzed in light of prevailing attitudes with regard to sexual orientation and gender identity in the country of origin.<sup>34</sup>

#### Violation of Fundamental Rights

<sup>30</sup> [INA § 101\(a\)\(42\)](#)

<sup>31</sup> *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*.

<sup>32</sup> See RAIO training module, *Refugee Definition, Definition of Persecution, and Eligibility Based on Past Persecution*, "Whether the Harm Experienced Amounts to Persecution, General Considerations, Individual Circumstances."

<sup>33</sup> *Id* and UNHCR, [Handbook on Procedures and Criteria for Determining Refugee Status](#), paragraphs 40, 51, and 52, reedited Geneva, January 1992.

<sup>34</sup> *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, paragraph 12.

Being compelled to abandon or conceal one's sexual orientation or gender identity, where this is instigated or condoned by the state, may amount to persecution.<sup>35</sup> LGBTI persons who live in fear of being publicly identified often conceal their sexual orientation in order to avoid the severe consequences of such exposure - including the risk of incurring harsh criminal penalties, arbitrary arrests, physical and sexual violence, dismissal from employment, and societal disapproval.

### Criminal Penalties

In some countries, homosexuality is criminalized and, “if discovered by the authorities, a lesbian or gay man may be arrested or imprisoned based on her or his sexual orientation.”<sup>36</sup>

In some countries, individuals accused of consensual sex with a member of the same sex may be subject to prosecution and even death.<sup>37</sup> For example, in Mauritania any Muslim male who engages in a sexual act with another male is subject to death by stoning; in Kenya, the Penal Code explicitly states that engaging in a consensual sexual act between two men is a felony and punishable by up to imprisonment for five years.<sup>38</sup>

In other countries, there may not be laws that actually prohibit homosexuality, but authorities may still persecute people because of their sexual orientation.<sup>39</sup> Thus, applicants have been arrested, detained, beaten, sexually assaulted, and/or forced to pay bribes by police or army officials because of their sexual orientation, even if a non-discriminatory legal basis is used as a pretext for the action.<sup>40</sup>

### Rape and Sexual Violence

Because LGBTI people are often perceived as undermining gender norms, they are at heightened risk for sexual violence in many countries.<sup>41</sup> Rape and sexual assault are types of harm that rise to the level of persecution.<sup>42</sup> Other types of sexual violence, for example being forced to perform sexual acts upon another, may also constitute

<sup>35</sup> *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993); *See also, Karouni v. Gonzales* (9<sup>th</sup> Cir. 2005).and UNHCR *Sexual Orientation Guide Note*, paragraph 12.

<sup>36</sup> *See Immigration Equality Draft Model LGBT Asylum Guidance*, Immigration Equality 2004.

<sup>37</sup> <http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119115.htm>

<sup>38</sup> *State Sponsored Homophobia: A World Survey of Laws Prohibiting Same-Sex Activity between Consenting Adults*. Daniel Ottoson. The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), 2010.

<sup>39</sup> *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

<sup>40</sup> *Maldonado v. Attorney General*, 188 Fed. Appx. 101, 103 (3d Cir. 2006). *See also Nowhere to Turn: Blackmail and Extortion Of LGBT People in Sub-Saharan Africa*. International Gay and Lesbian Human Rights Commission IGLHRC.

<sup>41</sup> *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

<sup>42</sup> *Nabulwala v. Gonzales*.

persecution.<sup>43</sup> Some applicants may have been raped as a measure to “correct” their behavior or status or as a means of punishing them for being gay or “outside the norm.”

### **Beatings, Torture, and Inhumane Treatment**

Many LGBTI people are subjected to severe forms of physical violence. An applicant may have been the victim of repeated physical violence that the police never investigated or that the police themselves perpetrated.<sup>44</sup> Many applicants have been seriously harmed by members of their own family.<sup>45</sup>

Claims made by LGBTI persons often reveal exposure to physical and sexual violence, extended periods of detention, medical abuse, the threat of execution, and honor killing. Generally, these are acts of harm that would rise to the level of persecution.

LGBTI individuals can also experience other forms of physical and psychological harm, including harassment, threats of harm, vilification, intimidation, and psychological violence that can rise to the level of persecution, depending on the individual circumstances of the case and the impact on the particular applicant.

### **Forced Medical Treatment**

The case of an individual with an intersex condition may involve the applicant's fear or history of non-consensual surgery and other non-consensual medical treatment. In other cases, the applicant's fear may involve the lack of medical care in their home country.

### **Forced Psychiatric Treatment or Other Efforts to “Cure” Homosexuality**

Many cultures see homosexuality as a disease, a mental illness, or a severe moral failing. Forced efforts to change an individual's fundamental sexual orientation or gender identity would generally rise to the level of persecution.<sup>46</sup> The American Psychiatric Association (APA) has stated that efforts to “convert” gay people to being heterosexual are unethical and ineffective.<sup>47</sup> Forced institutionalization, electroshock, and forced drug injections could constitute persecution. It is important to remember that there is no requirement that harm be inflicted with the intent to harm the victim.<sup>48</sup> Rather, you should assess whether it is objectively serious harm and was experienced as serious harm by the applicant.

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<sup>43</sup> *Ayala v. U.S. Atty Gen.*, 605 F3d 941 (11Cir. 2010).

<sup>44</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

<sup>45</sup> *Ixtlilco-Morales v. Keisler*, 507 F.3d 651 (8th Cir. 2007). See also *Nabulwala v. Gonzales*

<sup>46</sup> *Pitcherskaia v. INS*.

<sup>47</sup> *Therapies Focused on Attempts to Change Sexual Orientation: Reparative or Conversion Therapies Position Statement*. American Psychiatric Association, March 2000.

<sup>48</sup> See *Matter of Kasinga* and *Pitcherskaia v. INS*.

## Discrimination, Harassment, and Economic Harm

Many LGBTI people are disowned by their families if their sexual orientation or transgender identity becomes known.<sup>49</sup> It is important to consider such mistreatment within the context of the applicant's culture. In many countries it is virtually impossible for an unmarried person to find housing outside of his or her family home. Likewise, in many cultures it would be impossible for a woman to find employment on her own. In such cultures, being disowned by one's family in and of itself could be found to rise to the level of persecution, since it would have such severe consequences.

Some applicants may have been threatened by neighbors or had their property vandalized. Others may have been repeatedly fired from jobs and found it impossible to engage in any form of employment once their sexual orientation became known. While being fired from a job generally is not considered persecution, if an individual can demonstrate that his or her LGBTI status would make it impossible to engage in any kind of gainful employment, this may constitute persecution. For example, in many countries transgender people face such severe discrimination that the only way they can survive is by engaging in prostitution.

Discrimination and harassment may amount to persecution if cumulatively they are sufficiently severe.<sup>50</sup> This may be the case, for example, where an LGBTI person is consistently denied access to normally available services in his or her private life or workplace, such as education, welfare, health, and access to the courts.

## Forced Marriage

LGBTI persons may be unable to engage in meaningful relationships, be forced into arranged marriages, or experience extreme pressure to marry.<sup>51</sup> They may fear that failure to marry will reveal them to be LGBTI to their family and to the public at large. Societal and cultural restrictions that require them to marry individuals in contravention of their sexual orientation may violate their fundamental right to marry and may rise to the level of persecution.<sup>52</sup> For instance, a lesbian who has no physical or emotional attraction to men and is forced to marry a man may experience this as persecution. Likewise, a gay man who is in no way attracted to women who is forced to marry a woman may experience this as persecution.

## Gender-Based Mistreatment

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<sup>49</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

<sup>50</sup> *Kadri v. Mukasey*, 543 F.3d 16 (1st Cir. 2008); *Matter of T-Z-*, 24 I&N Dec. 163, 169-71 (BIA 2007) (adopting the standard applied in *Matter of Laipenieks*, 18 I&N Dec. 433 (BIA 1983), rev'd on other grounds, 750 F.2d 1427 (9th Cir. 1985).

<sup>51</sup> *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* at paragraph 13.

<sup>52</sup> *Id.*



Lesbians often experience harm as a result of their gender as well as their sexual orientation. The types of harm that a lesbian may suffer will frequently parallel the harms in claims filed by women in general more closely than the harms in gay male asylum claims.<sup>53</sup> Likewise, before “[coming out](#),” transgender men are generally raised as girls and may experience the same types of harm. In many parts of the world persecution faced by lesbians may be less visible than that encountered by gay men. Lesbians and transgender women may be particularly vulnerable to rape by attackers who wish to punish them for their sexual identity. This can include retaliation by former partners or husbands.

Transgender individuals may be more visible and may be viewed as transgressing societal norms more than gay men or lesbians. Therefore, they may be subject to increased discrimination and persecution.<sup>54</sup>

## **4.2 Agents of Persecution**

The second step in the analysis of whether harm constitutes persecution is to determine if the agent of persecution is the government or a nongovernment actor. It is well established that an applicant can qualify for refugee or asylum status whether the persecutor is the government or an individual or entity from whom the government is unable or unwilling to provide reasonable protection. In LGBTI cases this may include governmental agents of persecution such as the police, military or militias. Family, relatives, neighbors, and other community members are examples of non-governmental agents of persecution.

## **4.3 Internal Relocation**

The issue of internal relocation arises when determining whether an applicant has established a well-founded fear or, in the context of asylum, whether the presumption of a well-founded fear is rebutted by the reasonable possibility of internal relocation. In the asylum context, once an applicant has established past persecution, the burden then shifts to the Government to show that internal relocation is reasonable. In cases where the persecutor is a government or government sponsored, there is a presumption that internal relocation is not reasonable. In some cases there may be evidence to rebut that presumption, such as, for example, evidence that the government's authority is limited to certain parts of the country.<sup>55</sup> Homophobia, “whether expressed in laws or people’s attitudes and behavior, often tends to exist nationwide.”<sup>56</sup> A law of general application, such as a penal code that criminalizes homosexual conduct, which is enforceable in the

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<sup>53</sup> See Victoria Neilson, *Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims*, 16 Stanford Law & Policy Review 417 (2005).

<sup>54</sup> Ellen A. Jenkins, *Taking the Square Peg Out of the Round Hole: Addressing the Misclassification of Transgender Asylum Seekers*, 40 Golden Gate U.L. Rev. (2009).

<sup>55</sup> *Id.*

<sup>56</sup> UNHCR *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* at paragraph 33.



place of persecution, would normally also be enforceable in other parts of the country of origin.<sup>57</sup>

Where a nongovernmental actor is the persecutor, the government's inability or unwillingness to protect the applicant in one part of the country may also be evidence that it is unwilling or unable to do so in other parts of the country.<sup>58</sup> It is not reasonable to expect an applicant to suppress his or her sexual orientation or gender identity through internal relocation. He or she should not have to depend on anonymity to avoid the reach of the persecutor. While a major capital city "in some cases may offer a more tolerant and anonymous environment, the place of relocation must be more than a 'safe haven.'" The applicant must also be able to access a minimum level of political, civil, and socioeconomic rights.<sup>59</sup> Thus, he or she must be able to access the protection in a genuine and meaningful way. The existence of LGBTI-related nongovernmental organizations does not in itself provide protection from persecution.

## **5 LEGAL ANALYSIS – WELL FOUNDED FEAR**

LGBTI-specific issues may also arise in cases where the applicant has not experienced past persecution but may nevertheless have a well-founded fear of persecution. Because well-founded fear is discussed in detail in the AOBTC and ROTC *Well-Founded Fear* lessons, this section focuses on common well-founded fear issues raised in LGBTI claims.

### **5.1 Objective Elements**

An applicant may qualify for asylum or refugee status even if he or she was not persecuted in the past but has a well-founded fear of future persecution. To establish well-founded fear, the applicant must have a subjectively genuine fear and an objectively reasonable fear of return.

The existence of certain objective elements in a particular claim will not necessarily undermine the applicant's subjective fear or credibility. For example, just because a country permits an LGBTI organization to exist or allows an annual public LGBTI event does not mean that LGBTI people are free from ongoing violence and harm in that country.

Some countries with laws that state that their citizens and nationals are guaranteed religious, political, or other freedoms often do not enforce these protections. Similarly some countries have anti-discrimination laws that seemingly protect LGBTI individuals, but in reality the laws are not enforced or are openly flaunted.

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<sup>57</sup> *Id.*

<sup>58</sup> UNHCR *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* at paragraph 34.

<sup>59</sup> *Id.*

## 5.2 Fear of Future Persecution

LGBTI applicants who were forced to conceal their sexual orientation in their home countries in order to avoid harm might not have experienced injuries that rise to the level of persecution.<sup>60</sup> These applicants need not show that the persecutor knew about their sexual orientation before leaving, only that the persecutor may become aware of it if they return.

## 5.3 Refugees *Sur Place*

A *sur place* claim for refugee status may arise as a consequence of events that have occurred in the applicant's country of origin since his or her departure, or as a consequence of the applicant's activities since leaving his or her country of origin. This may also occur where he or she has been "[outed](#)" to members of his or her family back home or where his or her LGBTI status or views on sexual orientation have been publicly expressed, for example by taking part in advocacy campaigns, demonstrations, or other human rights activism on behalf of LGBTI individuals.

Additionally, LGBTI applicants might have left the country of origin for a reason other than their sexual orientation, for example to pursue employment and educational opportunities in the United States and have "come out" after arrival in the country of asylum or first asylum. These applicants may qualify for refugee or asylum status if they can demonstrate a well-founded fear of future persecution.

You should carefully consider whether the applicant's sexual orientation or gender identity may come to the attention of the authorities or relatives in the country of origin and the ensuing risk of persecution. Keep in mind that in making this analysis, it is not appropriate to assume that an individual who is lesbian, gay, or bisexual could "go back in the closet" or that a transgender individual who is living in their "corrected gender" could go back to "passing."<sup>61</sup>

As with all claims based solely on a fear of future persecution, the claim must meet the four elements in the *Mogharrabi* test. See *RAIO training module Well-Founded Fear*.

In the asylum context, there are some one-year filing deadline issues which may arise specifically in the context of LGBTI *sur place* claims. [See Asylum Supplement - One-Year Filing Deadline below](#).

## 6 INTERVIEW CONSIDERATIONS

It is important to create an interview environment that allows applicants to freely discuss the elements and details of their claims and to identify issues that may be related to

<sup>60</sup> UNHCR *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* at paragraph 23.

<sup>61</sup> *Id.*

sexual orientation or imputed sexual orientation. Like most gender-based claims, LGBTI claims involve very private topics that are difficult for applicants to talk about openly. LGBTI applicants may hesitate to talk about past experiences and may be afraid they will be harmed again because of their actual or perceived sexual orientation or gender identity. For many, it will be very difficult to talk about something as private as sexual orientation, gender identity, or HIV-positive status. Furthermore, you, yourself may feel uncomfortable discussing some of these issues. It is therefore especially important for you to create an interview environment that is open and non-judgmental.<sup>62</sup>

This section should be considered along with the guidance contained in the RAIO *Interviewing* modules, which also address issues related to sexual minorities.

The following may help you interact more meaningfully with LGBTI applicants during an interview.

## **6.1 Pre-Interview Considerations**

### **6.1.1 File Review**

Before the interview, when you review each file, be mindful of any LGBTI-related issues in the claim. Due to the delicate and personal issues that surround sexual abuse, sexual orientation, and gender identity, some applicants may have inhibitions about disclosing past experiences to an interviewer of a particular sex. Some LGBTI applicants may be more comfortable discussing their experiences with Officers of a particular gender, particularly in cases involving rape, sexual abuse, or other sexual violence.

To the extent that personnel resources permit, an applicant's request for an interviewer of a particular sex should be honored. If a pre-interview review of the file indicates that the case may involve sensitive LGBTI-related issues, you may consult with your supervisor or team leader prior to the interview to evaluate whether it would be more appropriate for an Officer of a different sex to conduct the interview.

### **6.1.2 How the Presence of Family and Relatives May Affect the Interview**

For a variety of reasons, the presence of relatives may help or impede an applicant's willingness to discuss LGBTI-related persecutory acts or fears. For example:

- The applicant's relatives may not be aware of the harm he or she experienced. He or she may wish that the relative remain unaware of those experiences or may be ashamed to say what he or she has experienced or fears in front of a relative. In addition, the applicant's claim may be based, in part, on fear of the relative who is present.

<sup>62</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

- Or, the applicant may want a family member or significant other present during the interview. Sometimes having a loved one present can provide support to the applicant when recounting traumatic events.<sup>63</sup>

Therefore, to the extent possible, the choice of whether to be interviewed alone or with a relative present should be left to the applicant. The applicant should be asked his or her preference, when possible, in private, prior to the interview.

If the applicant elects for the relative to be present at the interview, you should exercise sound judgment during the interview, determining whether the presence of the relative is impeding communication. If it appears that relative's presence is interfering with open communication, the relative should be asked to wait in the waiting room.

In some cases, an applicant will bring a partner to the interview to testify as corroboration of the applicant's sexual orientation or gender identity. If you feel that this corroboration would be helpful, the partner should be permitted to testify. Note: in the Asylum context, an Officer may exercise discretion and request that the witness's testimony be submitted in writing.

### 6.1.3 How the Presence of Interpreters May Affect the Interview

Interpreters play a critical role in ensuring clear communication between you and an LGBTI applicant. The actions of an interpreter can affect the interview as much as those of the interviewing Officer. As in all interviews, you should confirm that the applicant and the interpreter fully understand each other.

As explained in greater detail in the RAIO training module *Working with an Interpreter*, an applicant's testimony on sensitive issues such as sexual abuse may be diluted when received through the filter of an interpreter. The applicant may not feel comfortable discussing such LGBTI issues with an interpreter of the same nationality, ethnicity, or clan, etc.

The same holds true for the interpreter; even if the applicant feels comfortable using a particular interpreter, the interpreter may be inhibited about discussing LGBTI-related issues or using certain terms. For example, the interpreter may substitute the word "harm" for "rape" because the interpreter is not comfortable discussing rape due to cultural taboos.<sup>64</sup>

### 6.1.4 Reviewing Biographical Information with the Applicant

For transgender applicants, it is best to ask at the beginning of the interview what pronoun the applicant feels more comfortable with and to ask if there is a name he or she prefers using. For example, if an individual with a female appearance, who has described

<sup>63</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

<sup>64</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

her claim as based on transgender identity, has filled in the biographical information of the application form with an obviously male name, you should ask if there is a name she would prefer that you use.

One of the biographical information questions on the forms is “gender.” Since this issue may be sensitive and go to the heart of the applicant’s claim, it may be better to come back to this question at the end of the interview after the applicant has described the steps he or she has taken to “[transition](#),” rather than at the beginning of the interview. The early part of the interview should be devoted, in part, to putting the applicant at ease. If you immediately question the legitimacy of the “gender” box that he or she has checked off, the applicant may be uncomfortable for the rest of the interview.

When going through the biographical information on the application form at the beginning of the interview, it is appropriate for you to inquire whether the applicant has legally changed his or her name. If yes, you can request the legal name change documents. If no, you should explain why it is necessary to use the legal name on the form, but that during the interview you will refer to the applicant by the name that the applicant feels most comfortable using.<sup>65</sup>

**Note:** If the applicant provides any new name or gender information, additional database systems may need to be updated and further security checks may be required. Please refer to USCIS and division procedures for updating name and gender information.

## 6.2 Suggested Techniques for Eliciting Testimony

### 6.2.1 Setting the Tone and Putting the Applicant at Ease

While you must conduct all of your interviews in a non-adversarial manner, it is crucial when interviewing LGBTI applicants that you set a tone that allows the applicant to testify comfortably and that promotes a full discussion of the applicant's past experiences. You must conduct the interview in an open and nonjudgmental atmosphere designed to elicit the most information from the applicant.

You should be mindful that for many people there is no topic more difficult to discuss with a stranger than matters relating to sexual orientation, gender identity, and serious illness.<sup>66</sup> Furthermore, many applicants have been physically and sexually abused, harassed, tormented, and humiliated over many years because of their actual or perceived sexual orientation or gender identity.

Asking questions about difficult or private issues is a sensitive balancing act you

<sup>65</sup> *Adjudication of Petitions and Applications Filed by or On Behalf Of, or Document Requests by, Transsexual Individuals*. William R. Yates, Associate Director for Operations. U.S. Citizenship and Immigration Services. Washington DC, 16 April 2004.

<sup>66</sup> *See Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

face in all interviews. On the one hand, you need to obtain detailed testimony from the applicant. On the other hand, you do not want to badger or traumatize the applicant. The most important thing to understand is that this may be a difficult topic for the applicant to talk about and to be respectful in discussing sexual orientation, gender identity, and serious illness.<sup>67</sup>

You can help alleviate some of the applicant's reluctance to discuss some of these issues by incorporating the following suggestions into your interviews:

**Remind the applicant that the interview is confidential.** It can also help to ease the applicant's nervousness if you explain confidentiality to the interpreter in the presence of the applicant.

**Be particularly sensitive when questioning the applicant about past sexual assault.** Applicants may be reluctant to talk about actual or perceived sexual orientation or to disclose experiences of sexual violence. This may be especially true for LGBTI applicants who are not "[out of the closet](#)" or where the applicant was sexually assaulted. In many societies, sexual assault is seen as a violation of community or family morality, for which the victim is held responsible. The combination of shame and feelings of responsibility and blame for having been victimized in this way can seriously limit an LGBTI applicant's ability to discuss or even to mention such experiences.<sup>68</sup>

**Explore all relevant aspects of the claim, even if they make you particularly uncomfortable.** While you must be sensitive as you interview an applicant regarding such delicate topics, at the same time you must not shy away from your duty to elicit sufficient testimony to make an informed adjudication. This may include instances involving sexual violence. It is critical that you ask all necessary and relevant follow-up questions to help the applicant develop his or her claim.<sup>69</sup>

It is important to remember that in the PSG analysis, the relevant inquiry is not whether the applicant actually possesses the protected trait. Rather, it is whether the persecutor believes the applicant possesses the trait (either because the applicant does possess it or because the persecutor imputes it to the applicant). Thus, the issue is not whether the applicant actually is LGBTI, but whether the persecutor believes that he or she is, either because the applicant is or because the persecutor imputes it to the applicant.

It is not necessary to probe the details of the applicant's personal life beyond what is necessary to make this specific determination. So, once you have established

<sup>67</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

<sup>68</sup> See RAIO Training Module, *Gender Related Claims*.

<sup>69</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

that the persecutor perceives the applicant to have a protected trait, further inquiry into the specific nature of the applicant's LGBTI status is not necessary to establish inclusion in a PSG.

**Try to use the same language that the applicant has used in his or her own application.** If an applicant refers to himself as “gay,” you should use this term, rather than “homosexual” and vice versa. The most important thing is to understand what a difficult topic this may be for the applicant to discuss and to be respectful.<sup>70</sup>

**Do not assume that being a sexual minority is a lifestyle or a choice.** This will help you avoid asking questions in a way that may put the applicant on the defensive and result in the applicant holding back information rather than imparting it.<sup>71</sup>

**Become familiar with the legal issues, terminology, and questioning techniques specific to the LGBTI community.** You can use this information to help the applicant tell his or her own story.

**Be mindful that the applicant and the interpreter may not be familiar with many of these issues or terms.** While many LGBTI individuals in the United States embrace their LGBTI identity and have a language to talk about these issues, for many LGBTI individuals who come from countries where topics of sexuality are taboo, the way that applicants express themselves may be different from what an interviewer would expect from an LGBTI person in the United States.<sup>72</sup>

The fact that an applicant may be uncomfortable with these terms may be a result of the fact that he or she comes from a culture where there is no word for homosexuality or transgender identity. It may be a result of his or her own ingrained homophobia from growing up in a culture where such terms were the equivalent of insults.<sup>73</sup>

**Become well-versed in country of origin information.** This allows you to ask relevant follow-up questions. The more you know about the applicant's country of origin, the less likely you will be to miss important facts. Additionally, awareness of country conditions may also assist you in conducting the interview with cultural sensitivity and may help you put the applicant at ease during the interview. If the applicant notices that you took the time to try to understand the situation he or she faces in the country of origin as in LGBTI individual, he or she may be more inclined to talk in detail about his or her experiences and fears.

## 6.2.2 Explore all possible grounds

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.



Many LGBTI applicants may not know that their sexual orientation, gender identity, HIV-positive status, or intersex condition is the basis for a protection claim and may be reluctant to talk about these topics because they are so private. This is especially true where applicants are not represented. They may only put forward the elements of their past experiences that their family or members of their communities recommend.

For example, an applicant from Colombia appears before you for an interview. The majority of claims you have adjudicated from Colombia involve fear of the FARC. The applicant tells you about all of the instances he has had contact with the FARC. At the end of the interview you have already begun to analyze the case and despite being credible, your assessment is that the applicant has not established nexus, past persecution, or well-founded fear.

When you ask the applicant if there is any other reason he fears returning to Colombia, he appears to have something more to say, but hesitates. You suspect that there may be an issue that the applicant has not put forward. In this situation it would be appropriate to try to explain to the applicant that there is more than one ground for asylum or refugee status.

“Refugee (or Asylum) status is a case-by-case determination made based on an individual's unique circumstances and is not just for people fleeing because of political opinion. Individuals who are afraid to return because of their religion, sexual orientation, clan membership, or because of domestic violence may also be eligible. Are there any other circumstances affecting you that you would like to tell me about?”

It is important to remember that the applicant would still be required to provide credible testimony regarding past harm and/or fear of future harm on account of one of the five protected grounds.

### 6.2.3 Sample Questions

The following are appropriate types of questions to elicit testimony and assess credibility in LGBTI cases. Please note that these questions are intended as starting points and should not be used as a substitute for all necessary lines of inquiry and follow-up questions during your adjudication. In other words, it is good to have a general outline of questions you need to ask or questions you need the answers to, but not a script. Remember, credible testimony alone may be enough and, other than reliable country of origin information, is often the only other evidence the applicant submits to you.

#### *Sexual Orientation*

##### **Appropriate Lines of Inquiry**



The most common LGBTI claims are based on sexual orientation and involve gay men, and to a lesser extent lesbian women. If the applicant was aware that he or she was lesbian, gay, or bisexual while in the country of origin, he or she should be able to describe his or her personal experiences as well as the lives of gay people in general.<sup>74</sup> The applicant should be able to describe what it was like coming to terms with his or her sexual orientation. Likewise, the applicant should be able to describe his or her first relationship, and the harm he or she suffered or fears in the home country. Keep in mind that this might only be true if the person is "out."

Ask the applicant about his or her experiences in the home country and his or her awareness of the lives of other lesbian, gay, or bisexual people there.<sup>75</sup> These questions focus on the possession or perceived possession of a protected characteristic. You must also ask about past harm and fear of future harm.

The following are some suggested questions when adjudicating claims that involve the applicant's sexual orientation:<sup>76</sup>

- When did you first realize you were gay (or lesbian or bisexual)?
- Did you tell anyone?
- Why/why not?
- If yes, when?
- How did they react?
- Did you know other gay people in your home country?
- If yes, how were they treated?
- Did you hear about other gay people in your home country?
- If yes, how were they treated?
- Have you met any other gay people?
- Where?
- Does your family know you're gay?
- If yes, what was their reaction when you told them?
- Have you ever been in a relationship?
- How did you and your partner meet?
- Are you still together/ in touch?

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<sup>74</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

- How do lesbian [or gay, or bisexual] people meet one another in your country?
- Were you involved in any LGBTI organizations in your country?
- Are you involved in any LGBTI organizations here?
- When you say people in your country want to kill people like you, can you explain what you mean by “people like you?”

### **Inappropriate Lines of Inquiry**

The applicant's specific sexual practices are not relevant to the claim for asylum or refugee status. Therefore, asking questions about "what he or she does in bed" is never appropriate.<sup>77</sup> If the applicant begins to volunteer such information, you should politely tell him or her that you do not need to hear these intimate details in order to fairly evaluate the claim.

### *Transgender Identity*<sup>78</sup>

#### **Appropriate Lines of Inquiry**

A transgender applicant may identify as straight, lesbian, gay, or bisexual and that gender identity has to do with the person's inner feelings about his or her sexual identity.<sup>79</sup> Most transgender people consider themselves to be male or female. Therefore do not think of "transgender" as a gender. Male to female (M to F) transgender individuals were assigned the male gender at birth and consider themselves to be female. They are called transgender women.<sup>80</sup>

Female to male (F to M) transgender individuals were assigned the female gender at birth and consider themselves to be male. They are called transgender men.<sup>81</sup>

Start off with easy questions and gradually ease into asking the more sensitive ones; be cognizant not to put words in the applicant's mouth. It is important to remember that being transgender involves an overall dissatisfaction with the gender assigned at birth; it is not about having one particular surgery. In many cases it will be appropriate to ask the applicant about the steps he or she has taken to transition gender.<sup>82</sup> This question should be framed as one question among many that elicits the applicant's expression of his or

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<sup>77</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

<sup>78</sup> For further reading see *Immigration Law and the Transgender Client*, available at <http://www.immigrationequality.org/template3.php?pageid=1135>

<sup>79</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

<sup>80</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

<sup>81</sup> *Id.*

<sup>82</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

her transgender identity, such that it is perceived by the persecutor and the society in which the applicant lived.<sup>83</sup>

The most important thing to remember is to be respectful and nonjudgmental. If you feel that it is necessary to ask a question that the applicant may perceive as intrusive, you should explain why the answer to the question is legally necessary. If you are confused about the applicant's self-identification, you should respectfully admit to feeling confused and ask the applicant to explain in his or her own words.<sup>84</sup>

The following are some suggested questions that, depending on the facts, may be appropriate when adjudicating a claim that involves the applicant's gender identity:<sup>85</sup>

- When did you first realize you were transgender? Or: When did you first realize that although you were born as a male (female) you felt more like a female (male)?
- How did you realize this?
- Did you know other transgender people in your country? Or: Did you know other people who felt like you in your country?
- If yes, how were they treated?
- Did you hear about other transgender people in your country?
- If yes, how were they treated?
- When did you begin to transition from a man to a woman or woman to a man?
- What steps have you taken to transition?
- Do you now live full-time as a man (or woman?) When did you begin to live full-time as a man (or woman)?
- Does your family know you're transgender?
- If yes, how did they react when they found out?

Many transgender applicants will not have begun to live full-time in their corrected gender until they have come to the United States.<sup>86</sup> In many cases, a person may discuss past mistreatment in terms of perceived sexual orientation. In these cases, it is appropriate to ask questions that pertain to sexual orientation as well as gender identity.

### **Inappropriate Lines of Inquiry**

If an applicant testifies that he or she was not accepted in his or her home country because "people think I look like a girl, but I'm a guy," do not follow up by asking "So,

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<sup>83</sup> *Id.*

<sup>84</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

<sup>85</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

<sup>86</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

what are you?” Furthermore, do not put words in the applicant’s mouth by asking such questions as: “You haven’t had any surgery or anything like that, right? So you’re a male who looks effeminate?”<sup>87</sup>

If the applicant has not indicated that he or she was harmed or fears being harmed for being gay, do not begin by asking the applicant if he or she is homosexual. It is important to remember that gender identity and sexual orientation are two different issues. A transgender applicant may also be gay, lesbian, or bisexual, but that is not necessarily the case. It is also important to remember that even if the applicant is heterosexual, he or she may be perceived as homosexual because he or she does not fit the societal norms for his or her gender. Instead, focus on the problems the applicant experienced in the country of origin and address the issue of sexual orientation later, if necessary.

This approach also ensures that your questioning is tailored to eliciting information that allows you to determine what trait the persecutor, and the society in question, perceives in the applicant. Since this is the evidence required to analyze the nexus requirement and the social distinction of the relevant social group, lines of questioning that focus on what the applicant experienced and how he was or would be viewed will likely be the most effective.

### *HIV Status*

#### **Appropriate Lines of Questioning**

You should be mindful that HIV is a very serious illness and that many individuals, especially those from countries with fewer treatment options, see an HIV diagnosis as a death sentence. It is therefore imperative for you to be extremely sensitive in asking about the applicant’s HIV status.<sup>88</sup>

If an applicant’s case is based in whole or in part on his or her HIV-positive status, you will need to ask questions about this. It is appropriate to ask about the applicant’s state of health, current treatment regimen, and the availability of treatment in the home country.<sup>89</sup>

In some cases, the applicant’s HIV status may be directly related to the persecution, for example, where a lesbian was raped and believes this was her only possible risk for HIV exposure. If the applicant’s HIV status is related to the harm the applicant suffered, it will be relevant for you to ask questions about this as well.

Many cases involve an applicant’s fear of harm based on the fact that his or her HIV-positive status may lead community members to assume, whether correctly or not,

<sup>87</sup> *Id.*

<sup>88</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

<sup>89</sup> *Id.*

that he or she is gay.<sup>90</sup> If a claim is not based on the applicant's sexual orientation or gender identity and HIV status is not mentioned, it is not appropriate for you to ask the applicant if he or she is HIV-positive.

Some cases will involve an applicant's fear of violence, stigma, and extreme discrimination based on his or her HIV-positive status. In other instances, the applicant's primary fear may be the lack of medical care in his or her home country.

It is important to keep in mind that if an applicant's case is based on sexual orientation or gender identity and is not based on his or her HIV status, that you should not presume that he or she is HIV-positive.

### **Inappropriate Lines of Questioning**

Generally, the risk factor for HIV infection is not relevant to the applicant's claim, so it is not appropriate to ask the applicant how he or she thinks that he or she contracted HIV.<sup>91</sup>

In some asylum cases, an applicant's HIV status may also be relevant to a one-year filing deadline exception, for example, if the applicant was extremely ill during his or her first year in the United States or the applicant may not have been diagnosed until several years after entering the United States. ([See Asylum Supplement One-Year Filing Deadline](#), below).

### ***Intersex Conditions***

#### **Appropriate Lines of Inquiry**

When questioning applicants with intersex conditions, use the same type of sensitive questioning techniques suggested for sexual orientation, transgender identity, and HIV-positive status claims.

Some intersex people will never have heard of anyone else like themselves, but others will. There are some intersex conditions that run in families or are more common in certain populations. Where the condition is known in a given culture, an applicant should be able to describe how people like them are treated. Where the condition is known to run in a family (but not throughout the culture), the entire family may face stigma, or family members may be on the lookout for signs of the condition in order to keep the family secret. For example, Androgen Insensitivity Syndrome (AIS) is an inherited condition. People with this condition will have a typical-looking female body, but will be infertile and will have only a shallow vaginal opening or none at all. Female relatives of an affected woman may be carriers and can pass it on to their children. Normally it is not discovered until puberty when the girl does not menstruate.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

Many persons with intersex conditions may have difficulty understanding and articulating their own physical conditions and medical history. Therefore, some of these questions may be more appropriate for parents or families of young intersex children who face persecution.

The following are some suggested questions that, depending on the facts, may be appropriate when adjudicating a claim that involves the applicant's intersex condition:

- When did you first learn about your condition?
- How did you learn about it?
- Did you tell anyone?
- Why/why not?
- If yes, when?
- How did they react?
- Does your family know about your condition?
- If yes, how did they react when they found out?
- Did you go to a doctor or other medical professional?
- Have you ever received medical treatment for your condition?
- What were you told about your condition?
- How much do you understand about your condition?
- Did you know other people with similar conditions in your country? Or did you know other people like you in your country?
- If yes, how were they treated?

## 7 EVIDENCE ASSESSMENT

As explained in greater detail in the RAIO training modules *Eliciting Testimony* and *Evidence Assessment*, while the burden of proof is on the applicant to establish eligibility, equally important is your duty to elicit all relevant testimony. Establishing eligibility means the applicant must establish past persecution or a well-founded fear of future persecution based on actual or imputed (perceived) sexual orientation or gender identity. Your duty includes always recognizing the non-adversarial nature of the adjudication, applying interviewing techniques that best allow you to elicit detailed testimony from an LGBTI applicant, and diligently conducting relevant country of origin information research.

In addition to the applicant's testimony, reliable country of origin information may be the only other type of evidence available to you when you make your decision in a case involving LGBTI applicants. It is important to remember that reliable information

regarding the treatment of LGBTI individuals may sometimes be difficult to obtain and that the absence of such information should not lead you to presume that LGBTI individuals are not at risk of mistreatment.

## **7.1 Credibility Considerations During the Interview**

If an applicant is seeking refugee or asylum status based on his or her sexual orientation, gender identity, intersex condition, or HIV-positive status, he or she will be expected to establish that the persecutor views the applicant as a sexual minority or HIV-positive, either because the applicant actually has such status or because the persecutor imputes it to him or her. Under either basis, the critical point to establish is what trait the persecutor perceived in the applicant.

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. Therefore, your job will be to fully and fairly elicit all testimony with regard to the harm the applicant suffered or fears based on his or her actual status as a sexual minority or perceived status as a sexual minority.

### **7.1.1 Plausibility**

The fact that an applicant testifies about events that may appear unlikely or unreasonable does not mean it is implausible that the events actually occurred. You must take care not to rely on your views of what is plausible based on your own experiences, which are likely to be quite different from the applicant's.

#### **What if the Applicant is Married or Has Children?**

An applicant may have gotten married in his/her home country and/or have children.<sup>92</sup> This, by itself, does not mean that the applicant is not gay. "Many applicants describe enormous social pressure to marry and being forced into a marriage by their family or society. Other applicants, while grappling with their sexual identity, have tried to lead a heterosexual life and 'fit in' within their society."<sup>93</sup>

Even in the United States, it is not uncommon for lesbians or gay men to marry people of the opposite sex in an effort to conform to societal norms.<sup>94</sup> While some lesbians and gay men may feel that they have always known their sexual orientation, many others do not come to terms with their sexual identity until much later in life.

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<sup>92</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

If you have concerns about the credibility of an LGBTI applicant who is married, it may be appropriate to ask the applicant a few questions surrounding the reasons for marriage. If the applicant is able to provide a consistent and reasonable explanation of why he or she is married and/or has children, that portion of the testimony should be found credible.

### **What if the Applicant Does Not Appear to be Familiar With LGBTI Terminology?**

While most Americans are accustomed to reading and hearing about LGBTI issues in the news, these terms may be unfamiliar to applicants from other cultures. “Some countries do not even have words for different sexual orientations other than homophobic slurs. The fact that an applicant may be uncomfortable with these terms may be a result of his or her own ingrained homophobia from growing up in a country where such terms were the equivalent of vile curses.”<sup>95</sup> Therefore, you should not assume that it is implausible for an applicant to be gay, lesbian, or transgender if he or she is not familiar with LGBTI terms.

### **What if The Applicant Does Not “Look” or “Act” Gay?**

Some applicants with LGBTI-related claims will not “look” or “act” gay.<sup>96</sup> If an applicant provides detailed testimony about his or her experiences in the country of origin,<sup>97</sup> it would be inappropriate for you to hold against the applicant the fact that he or she does not fit your notion for how LGBTI people should look or behave.

While there are some individuals who identify as gay who may also consider themselves effeminate and some individuals who identify as lesbian who may also consider themselves masculine, many men who identify as gay will not appear effeminate and many women who identify as lesbians will not appear masculine<sup>98</sup>

For some LGBTI people, the harm they suffer, especially in their youth before accepting their LGBTI identity, may be related to their feminine characteristics (for males) or their masculine characteristics (for females). Regardless of whether the applicant was “out” at the time he or she was harmed, this harm should be considered related to their LGBTI status.<sup>99</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> *Shahinaj v. Gonzales*, 481 F.3d 1027 (8th Cir. 2007), remanding case to new Immigration Judge in part because IJ had improperly relied on his own stereotypes and found an Albanian applicant’s claim to be gay not credible because he did not exhibit gay “mannerisms”, “dress” or “speech.”; *Razkane v. Holder*, 562 F.3d 128 (10th Cir. 2008), rejecting IJ’s finding that applicant’s appearance was not gay enough for persecution to be likely to occur; See also *Ali v. Mukasey*, 529 F.3d 478 (2nd Cir. 2008), rejecting IJ’s conclusion that a “dangerous criminal” could not be identified as a “feminine . . . homosexual” in his native Guyana.

<sup>97</sup> (See Credibility-Detail below for appropriate credibility considerations).

<sup>98</sup> See *Hernandez-Montiel v. INS*, 225 F.3d 1088 (9<sup>th</sup> Cir. 2000).

<sup>99</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.



In some cases, an applicant will testify that he or she was harmed or fears future harm because his or her appearance makes his or her LGBTI identity apparent, that is, he or she fits the accepted stereotype for LGBTI people in his or her culture. Cultural signals about a person's sexual orientation or gender identity may vary between individuals from other countries and your own. Thus, an applicant may tell you that he or she appears obviously LGBTI, but the applicant may not fit stereotypes you have formed of LGBTI people according to your own cultural norms.

Whether or not an applicant claims that his or her LGBTI identity is apparent, it is appropriate for you to elicit testimony about why the applicant fears harm. For example, in many countries, the fact that a person is unmarried or childless after young adulthood may make him or her suspect. In other countries, the only way for LGBTI people to meet other LGBTI people is to go to gay clubs, or parks, which may put them at risk of exposure. For transgender applicants, having identity documents that do not match their name or outward gender appearance, may put them at risk. (See *Interviewing Considerations* above for appropriate lines of questioning to determine credibility.)

As discussed above, it is important to remember that transgender identity and sexual orientation are distinct concepts. While it may be obvious from the appearance of some transgender individuals that they are transgender, other transgender individuals may "pass," or blend in quite well as their corrected gender. By way of contrast, transgender people who are at the beginning of their transition also may not "look transgender."<sup>100</sup> In these cases, as in other categories of protection cases, you should not base your decision on the applicant's outward appearance. Instead, you should elicit relevant testimony about the applicant's identity and, if appropriate, request corroborating evidence.

### **What if Country of Origin Information Does Not Address LGBTI Issues?**

The fact that little or no corroboration of mistreatment against LGBTI individuals is included in reports that generally address human rights violations does not render the applicant's claim of past harm or fear of future harm implausible in light of country of or inconsistent with country of origin information.<sup>101</sup> The weight to be given to the fact that country conditions information fails to corroborate a claim will depend on the specific allegations, the country, and the context of the claim.

## **7.1.2 Consistency**

### **Claims Not Initially Put Forth**

An LGBTI individual may initially assert a claim based on another protected ground such as political opinion or religion and later reveal that he or she was harmed or fears harm based on his or her sexual orientation. This may be because the applicant was reluctant

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<sup>100</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

<sup>101</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

to talk about his or her sexual orientation or gender identity or because he or she was unable to articulate a connection to a particular protected ground.

There may be situations where the applicant does not initially put forward a claim based on sexual orientation or gender identity but does so later on. For example, a newly arrived applicant may not feel comfortable or safe revealing his or her sexual orientation or gender identity to an Immigration Officer during primary or secondary inspection or an Asylum Officer during a Credible Fear interview at the Port of Entry. Then, he or she may subsequently reveal this information on his or her asylum application.

In the case of Dominic Moab, a gay asylum seeker from Sierra Leone, the IJ denied the case and the BIA affirmed, in part because Mr. Moab “failed to mention his homosexuality to the immigration officers at the airport or to the examining official during his credible fear interview.”<sup>102</sup> The Seventh Circuit remanded the case, finding that the BIA had not considered the fact that, for several reasons, “airport interviews are not always reliable indicators of credibility.”

In overseas refugee processing, an applicant may not initially tell the referring agency, such as UNHCR or the Resettlement Support Center (RSC) about being gay or transgender, but then subsequently tell the USCIS Interviewing Officer about his or her LGBTI status. If you are confronted with such a scenario, do not automatically assume the applicant is not credible but follow the guidance above about what information the application should generally be able to relay.

It is important to take into account all of the factors mentioned in this module in assessing the applicant's ability to articulate his or her claim. When exploring these claims, remember that the applicant may have other grounds upon which he or she may qualify for refugee status or asylum. If a claim can clearly be established on another ground, that may form the basis for the decision.

As with all other credibility determinations, you must give the applicant the opportunity to explain any inconsistencies or omissions in his or her case. In a situation where an applicant does not initially mention his or her sexual orientation or gender identity and later does as a basis for protection, you would ask for an explanation:

“Help me understand. Why do you tell me this now, but did not mention it to the Officer at the airport? Or to UNHCR or the RSC?”

### **Seemingly Inconsistent Use of LGBTI Terms**

If the application form states in one place that the applicant is bisexual, but he or she testifies that he or she is homosexual, do not assume this is a contradiction and do not

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<sup>102</sup> *Moab v. Gonzales*, 500 F. 3d 656, 657 (7<sup>th</sup> Cir. 2007).

pursue a line of questioning such as: “Homosexual? Your application says bisexual. Well, which is it homosexual or bisexual?”

### 7.1.3 Detail

An essential component of an LGBTI claim is that the applicant must establish that the persecutor perceived him or her to be a sexual minority. This perception can be based on the applicant’s actual status, or on a status imputed to the applicant. Where the persecutor’s perception is based on a status that the applicant in fact has, appropriate details about the applicant’s experience as LGBTI may help to substantiate the claim.

It is important to remember however, that the ultimate legal question is whether the persecutor targets the victim because the persecutor perceives a protected trait in the victim. Questions about the applicant’s sexual orientation should be filtered through that lens. The purpose of establishing LGBTI is to show why the persecutor perceived this trait in the individual. In a claim based on imputation of the protected trait, the reasons why the persecutor viewed the applicant as having that trait will be different, and it would be those different reasons that the applicant would have to establish.

As with any other type of refugee or asylum case, an applicant’s detailed, consistent, credible testimony may be sufficient to prove his or her sexual orientation.

The applicant should be able to describe his or her “coming out” experience. He or she should be able to explain when he or she first began to feel attracted to members of the same sex, if and when he or she first engaged in a romantic or sexual relationship with a member of the same sex, how this made him or her feel, whether he or she told other people or kept this aspect of his or her identity secret, etc.<sup>103</sup>

Acceptable lines of questioning to develop the applicant’s claim and to test credibility are listed above in *Sample Questions*.

## 7.2 Country of Origin Information

Country of origin information on LGBTI issues can sometimes be more difficult to find than on other issues.<sup>104</sup> You should not conclude that if these issues are not mentioned that no problems exist. Many organizations that report on human rights issues lack sufficient contacts within local LGBTI communities to know what LGBTI individuals experience in their countries, or do not have the resources to investigate and/or monitor all types of human rights violations in a particular country.

Often the countries where homosexuality is most taboo have the least country conditions information available. In many countries, for example those with conservative, religious

<sup>103</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2004.

<sup>104</sup> See *Id.*

governments, there is little or no mention of the existence of LGBTI citizens in any media. This may also be true in countries with antidemocratic, authoritarian governments, where LGBTI groups may not be allowed to exist.

Where there is a lack of sufficiently specific country of origin information, you may have to rely on the applicant's testimony alone to make your decision.<sup>105</sup>

Useful resources in gathering information LGBTI claims include:

- The AsylumLaw.org Sexual Minorities and HIV status website at [http://www.asylumlaw.org/legal\\_tools/index.cfm?category=116&countryID=233](http://www.asylumlaw.org/legal_tools/index.cfm?category=116&countryID=233)
- The *International Gay and Lesbian Human Rights Commission* at <http://www.iglhrc.org/cgi-bin/iowa/home/index.html>
- The Amnesty International *Out Front* program at [www.amnestyusa.org/outfront](http://www.amnestyusa.org/outfront)
- The International Lesbian and Gay Association (<http://ilga.org/>) website, which contains a legal survey where you can search legal codes and country conditions.
- The Human Rights Watch LGBT division and HIV division at [www.hrw.org/en/category/topic/lgbt-rights](http://www.hrw.org/en/category/topic/lgbt-rights)
- Refugee, Asylum, and International Operations Directorate (RAIO) Virtual Library at <http://raiovl/docushare/dsweb/HomePage>
- Council on Global Equality at <http://www.globalequality.org/>
- UNHCR's Ref World at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain>

### 7.3 Corroborating Evidence

In some situations, where it is necessary to establish that the persecutor perceived a protected trait in the applicant, you may ask the applicant to provide evidence that corroborates his or her sexual orientation, gender identity, or HIV-positive status. Pursuant to amendments to INA section 208 made by the REAL ID Act of 2005, an applicant for asylum must provide this evidence unless he or she does not have the evidence and cannot reasonably obtain the evidence. Although the REAL ID Act amendments to INA section 208 do not directly apply to overseas refugee processing, which is governed by INA section 207, you may ask the applicant to produce corroborating evidence if it is reasonably available and is necessary for the adjudication of the claim.

<sup>105</sup> UNHCR *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*.

It is very important to remember, however, that because of the different ways overseas refugee and asylum applicants obtain interviews with USCIS, the evidence that refugee applicants can reasonably obtain compared with the corroborating evidence some asylum seekers can reasonably obtain varies greatly.

### **Corroborating Sexual Orientation**

You may ask the applicant to provide evidence that corroborates his or her sexual orientation as a means of establishing that the persecutor perceived or would perceive the protected trait in the applicant. The applicant must provide this evidence unless he or she does not have the evidence and cannot reasonably obtain the evidence. Again, it is important to remember that the evidence refugee applicants can reasonably obtain varies greatly compared with the evidence some asylum applicants can reasonably obtain. Examples include a letter from a current or ex-partner; a letter from a friend with whom the applicant has discussed his or her sexual orientation; a letter from a family member; proof that he or she is involved in an LGBTI political or social organization; or a psychological evaluation, etc.<sup>106</sup>

There may be situations where the applicant will not be able to provide any corroboration, for example, if he or she is no longer in contact with an ex-partner in his or her country, where his or her family has disowned him or her, and where he or she does not yet know any LGBTI people in the United States or the country of first asylum. As in any other case, the applicant should not automatically be denied for lack of corroboration. Rather, it is reasonable for you to question the applicant about why corroboration is unavailable, and factor this explanation into your decision-making process.

### **Corroborating Transgender Identity**

Again you may ask the applicant to provide evidence that corroborates his or her transgender identity as a means of establishing that the persecutor perceived or would perceive the protected trait in the applicant. The applicant's detailed, consistent, credible testimony may be sufficient to establish this status. The applicant should be able to describe his or her "coming out" process as a transgender individual. That is he or she should be able to explain when he or she first started to feel "different" or uncomfortable with the gender he or she was assigned at birth; ways in which his or her behavior and feelings differed from gender norms; steps he or she has taken to express the gender that he or she feels comfortable with, etc.

It may be appropriate to elicit information about what steps the applicant has taken in his or her transition but remember how personal and difficult it will be for the applicant to talk about these issues.

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<sup>106</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

A number of transgender individuals receive necessary medical treatment to help their outward appearance correspond with their internal identity. Bear in mind, however, that the treatment plan for every transgender person is different. There is not a single surgery which transforms a transsexual from one gender to another. If a transgender applicant is receiving treatment from a medical doctor or mental health professional (such as counseling, hormones, implants, or other surgeries), it is reasonable to expect corroboration of this treatment.<sup>107</sup>

Many transgender individuals do not receive ongoing treatment, however. Some transgender individuals self-administer hormones, while others identify with their chosen gender without undergoing any medical treatment as part of their transition. Many others would like to access transition-related medical care but cannot, because of immigration status or lack of financial resources. In any event, an applicant should be able to corroborate any treatment he or she has received from a medical professional or explain why such corroboration is not available.<sup>108</sup>

### **Corroborating HIV-Positive Status**

An applicant who is requesting refugee or asylum status in whole or in part based on being HIV-positive, should generally be able to provide some external corroboration that he or she is HIV-positive, such as a letter from a doctor or the results of an HIV test. You may ask for such corroboration as a means of determining that the persecutor did or would perceive this trait in the applicant. Again, this expectation may vary in the context of overseas refugee processing.

## **8 CONCLUSION**

Adjudicating LGBTI refugee and asylum claims presents certain unique challenges. It is important to remember to be sensitive to the issues, familiar with the terminology, and familiar with relevant country of origin information. By definition, these claims involve the most private of matters – sexual orientation, gender identity, and sometimes serious illness. Always remain respectful and nonjudgmental, don't be afraid to acknowledge your discomfort to yourself and to the applicant. Familiarize yourself with the legal nuances involved in these types of cases and do your best to elicit all relevant details without re-traumatizing the applicant or being insensitive.

## **9 SUMMARY**

### **9.1 LGBTI and HIV Terminology**

<sup>107</sup> See *Immigration Equality Draft Model LGBT Asylum Guidance*, 2010.

<sup>108</sup> *Id.*

Becoming familiar with relevant terminology helps you become more aware of the nuances involved in adjudicating LGBTI refugee and asylum claims. It is important to be familiar with the terminology but also to keep in mind that the applicant may come from a culture where sensitivity to these issues is not as high as in other countries and may not be familiar with the terms himself or herself. The terms "sexual minorities" and LGBTI are used in this module interchangeably to refer to issues that involve sexual orientation and gender identity.

## 9.2 Legal Analysis – Nexus and the Five Protected Characteristics

LGBTI refugee and asylum claims are primarily analyzed under the ground membership in a PSG. Sexual orientation, gender identity (or the right to live in one's "corrected gender"), and having an intersex condition can be classified as either innate or so fundamental to an individual's identity that the individual should not be required to change them. Social visibility does not require that the trait be literally visible to the eye.

Ways to formulate the PSG have included "sexual minority from Russia," "gay man from Columbia," "lesbian from Iran," or "transgender female from Mexico." Ask questions about what the persecutor may have said to him or her and about the circumstances surrounding the harm inflicted on or threats made against the applicant.

## 9.3 Legal Analysis – Types of Persecution

The two questions you must ask yourself to determine whether the applicant suffered or fears persecution are: 1) did the harm rise to the level of persecution; and, 2) did the applicant experience the incident as harm? Examples of harm that LGBTI applicants may have faced or fear and that may rise to level of persecution include: physical and sexual violence; execution; imprisonment; forced marriage; long-term, systemic discrimination; threats of violence and to "out" the applicant; and forced psychiatric treatment.

Lesbians may have suffered the harms that befall many women in addition to harms that befall members of the LGBTI community. Transgender individuals may be more visible and may be more commonly viewed as transgressing societal norms than gay men or lesbians. They may be subjected to increased discrimination and persecution.

## 9.4 Legal Analysis – Well-Founded Fear

The fact that LGBTI organizations are permitted to hold a parade once a year or the mere existence of LGBTI organizations does not mean that LGBTI people are free from ongoing violence and harm in that country.

An applicant who was forced to conceal his or her sexual orientation or gender identity in the home country in order to avoid harm and did not suffer harm that rose to the level of persecution may still qualify for refugee or asylum status if he or she has a well-founded fear of future persecution. In some cases, the experience of having to conceal sexual



orientation or gender identity may itself result in suffering severe enough to constitute persecution. Some LGBTI applicants come to the United States for work or study and subsequently "come out" to themselves and to others.

## **9.5 Legal Analysis – One-Year Filing Deadline (asylum only)**

In many instances an individual does not "come out" as lesbian, gay, bisexual, or transgender until he or she is in the country where he or she sees that it is possible to live an open life as an LGBTI person. If an individual has recently "come out" this may qualify as an exception to the one-year filing deadline based on changed circumstances.

An individual may qualify for a one-year exception based upon serious illness, for example being diagnosed as HIV-positive.

LGBTI individuals who suffer from internalized homophobia and transphobia or who may have been subjected to coercive mental health treatment to "cure" them in their home countries may find it especially difficult to access the mental health treatment they may need to proceed with their applications. Also many LGBTI asylum seekers in the United States live with extended family members or with members of the very community they fear.

## **9.6 Interviewing Considerations**

It is important to create an interview environment that allows applicants to freely discuss the elements and details of their claims. LGBTI claims involve very private topics that are difficult for the applicants to talk openly about and may sometimes make you uncomfortable.

You may help to set the applicant at ease by reminding him or her that the interview is confidential. You may also specifically remind the interpreter, in the presence of the applicant, that the interpreter must also keep all information confidential.

The early part of the interview should be devoted, in part, to putting the applicant at ease, while reviewing the biographical information on the application. For transgender applicants, it may be better to come back to the question about "gender" at the end of the interview as this issue may be sensitive and go to the heart of the claim.

It is important to conduct the interview in an open and nonjudgmental atmosphere. Try to use the same language that the applicant has used. For example if the applicant refers to himself as gay, you should use this term rather than homosexual and vice versa. Become familiar with the legal issues, terminology, and country of origin information to help the applicant to his or her own story.

Keep in mind that while you have familiarized yourself with LGBTI- related terms neither the applicant nor the interpreter may be as familiar with them as you are. You may then have to adjust the formulation of your questions accordingly.



It is never appropriate to ask questions about the applicant's specific sexual practices or about "what he or she does in bed." If the applicant begins to testify graphically about sexual practices, you should politely tell him or her that you do not need to hear these intimate details in order to fairly evaluate the claim.

If the applicant was "out" as lesbian, gay, or bisexual in the home country, he or she should be able to provide details about his or her experiences there; his or her awareness of the lives of other gay people there; what it was like coming to terms with his or her sexual orientation; and, if relevant, to describe his or her first relationship.

Keep in mind that sexual orientation and gender identity are two different concepts. A transgender applicant may identify as straight, lesbian, gay, or bisexual. Being transgender involves an overall dissatisfaction with the gender assigned at birth; it is not about having one particular surgery. If you were confused about an applicant's self identification, you should respectfully admit to feeling confused and asked the applicant to explain in his or her own words.

When interviewing an applicant who is HIV-positive be mindful that it may be appropriate to ask about the applicant's state of health, current treatment regimen, and the availability of treatment in the home country. DO NOT ask the applicant where he or she may have contracted HIV.

## **9.7 Burden of Proof and Evidence – Credibility**

An applicant's credible testimony may be the only evidence available for you to take into consideration when adjudicating LGBTI- related refugee and asylum claims. If the applicant is seeking refugee status or asylum based on his or her sexual orientation, gender identity, or HIV-positive status, he or she will be expected to establish that the persecutor perceived this protected trait in him or her. In some cases, the reason for the persecutor's perception is that the applicant is actually gay, lesbian, or bisexual, transgender, or HIV-positive. In other cases, where the applicant does not identify as gay, lesbian, or bisexual but is only imputed to be, he or she will need to establish the other reasons why he or she was perceived that way.

The fact that an applicant was married or has children does not mean that it is impossible that the applicant is gay. Even in the United States, it is not uncommon for lesbians or gay men to marry people of the opposite sex in an effort to conform to societal norms.

Do not assume that an applicant must conform to a particular stereotype in order to be lesbian or gay. A man may identify as gay and not appear or consider himself effeminate. A woman may identify as lesbian and not appear or consider herself masculine. This does not mean that it is not plausible that he or she is gay or lesbian.

If an applicant does not initially tell the first official he or she comes into contact with about his or her sexual orientation or gender identity and subsequently reveals this in his

or her claim, do not automatically assume that the applicant is not credible. Instead follow the guidance about what testimony such an applicant should reasonably be expected to provide and try to elicit that information.

## **9.8 Burden of Proof and Evidence – Country of Origin Information**

For various reasons, detailed, reliable country of origin information may be difficult to obtain. This does not render the applicant's claim of past harm or fear future harm implausible in light of or inconsistent with country of origin information.

**PRACTICAL EXERCISES**

NOTE: Practical Exercises will be added at a later date.

**Practical Exercise # 1**

- **Title:**
- **Student Materials:**

## OTHER MATERIALS

### LGBTI Terminology/Glossary<sup>109</sup>

There are a number of terms that may be used by LGBTI applicants in their protection claims. Although not all LGBTI applicants will use these terms, it will be important for you to be familiar with these terms prior to conducting an interview. The glossary is divided into sections that distinguish between sexual orientation terms and gender identity terms, and also includes medical and legal terms. This glossary is comprised of terms generally used by the LGBTI community and others in the United States.

Please note: The definition of the term intersex sometimes overlaps with sexual orientation, gender identity, and medical issues and is therefore found in its own separate section.

### **Sexual Orientation Terms<sup>110</sup>**

**Bisexual** – (noun or adjective) a man or woman who has an enduring emotional and/or physical attraction to both sexes. It is important to understand that although bisexual individuals may feel attraction to members of either sex, they cannot “choose” whom (or which gender) to feel attracted to any more so than a heterosexual or homosexual individual can.

**“Closeted”** – (adjective) describes a person who keeps his or her sexual orientation secret. Also, “living in the closet.”

**“Come Out”** – (verb) the process by which an individual comes to terms with his or her sexual orientation. For most people this process first involves self-acceptance (“coming out” to one’s self) and then may involve telling other people (“coming out” to others.) It is important to remember, however, that some people choose not to “come out” to others for fear of their safety. Some people realize as children that they are lesbian or gay, whereas others may not come out to themselves until they are adults. Many lesbian and gay people enter into opposite sex marriages before coming to terms with their sexual orientation.

**Gay** – (adjective) a man who has an enduring emotional and/or physical attraction to men. Some women who are attracted to women use the term gay to describe themselves as well.

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<sup>109</sup> Immigration Equality and HIAS Refugee Trust of Kenya.

<sup>110</sup> For more general information about sexual orientation, see <http://www.apa.org/pubinfo/answers.html> on the American Psychological Association website.

**Heterosexual** – see “Straight” below

**Homosexual** – (noun or adjective) an individual who has an enduring emotional or physical attraction to members of the same sex. This term is often considered clinical with a slightly derogatory connotation within the LGBTI community.

**Homophobia** – (noun) deeply ingrained feelings of prejudice toward lesbian, gay and bisexual people; the irrational fear, based upon myths and stereotypes, of homosexuals or those perceived to be homosexual.

**Lesbian** – (noun or adjective) a woman who has an enduring emotional or physical attraction to women; homosexual women also sometimes use the term “gay” to describe themselves.

**“Out”** – (verb) the involuntary disclosure of a person’s lesbian or gay sexual orientation. For example, an applicant may say, “My cousin saw me with my partner and then he ‘outed’ me to the whole community.”

**Sexual Orientation** – (noun) an umbrella term that describes an individual’s enduring romantic and/or physical attraction to those of a particular sex; an aspect of human identity developed in the early stages of a person’s life that is highly resistant to change.

**Straight** – (noun) (also heterosexual) or an individual’s enduring romantic and/or physical attraction to individuals of the opposite sex.

## **Gender Identity Terms<sup>111</sup>**

**Birth Sex** – (noun) the gender that an individual was assigned at birth which is usually indicated on his or her original birth certificate.

**"Corrected Gender"** – (noun) the gender with which a transgender individual identifies. For example, for an MTF transgender woman, female would be her “corrected gender.”

**FTM** – (noun) a female to male transsexual; that is, an individual assigned the female gender at birth who now identifies as male. Also referred to as a transgender man or transman.

**Gender** – (noun) the social construction of what society values as the roles and identities of being male or female; assigned at birth to every person; does not always align with gender identity.

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<sup>111</sup> For more information about transition see the World Professional Association for Transgender Health website <http://www.wpath.org/documents/Med%20Nec%20on%202008%20Letterhead.pdf>

**Gender Identity** – (noun) a person’s inner sense of being male or female, both, or neither, resulting from a combination of genetic and environmental influences.

**Gender Roles** – (noun) what a given society considers “masculine” or “feminine” behaviors and attitudes; how individuals express their assigned gender or the gender they identify with. For example, a traditional gender role for a man is to be competitive, athletic, and aggressive. A traditional gender role for a woman is to want to have and take care of children. Gender roles in many societies have expanded in recent years for both men and women.

**Heterosexism** – (noun) the assumption that everyone is or ought to be heterosexual and that a person’s gender identity will be fixed at birth in accordance to his or her birth sex.

**Hormone Therapy** – (noun) one medical step that a transgender person may take to transition. For transgender men this involves taking testosterone. For transgender women this involves taking estrogen.

**MTF** – (noun) a male to female transsexual, that is an individual assigned the male gender at birth who now identifies as female. Also referred to as a transgender woman or transwoman.

**“Passing”** – (verb) a transgender person living in his or her corrected gender without it being readily apparent that he or she is transgender.

**Sex** (noun) – biological maleness or femaleness; the division of male and female on the basis of reproductive organs.

**Sex Reassignment Surgery (SRS)** – (noun) refers to any of more than two dozen potential surgeries that a transgender person may undergo. Not all transsexuals choose or can afford SRS. This is a preferred term to “sex change operation.”

**Transgender**<sup>112</sup> – (noun) an umbrella term for people whose gender identity and/or gender expression differs from the sex they were assigned at birth or the stereotypes associated with that sex. The term may include transsexuals and others who do not conform to gender stereotypes. Many people who fit the definition of “transsexual” below, continue to refer to themselves as transgender. Transgender is a gender identity, not a sexual orientation. Thus, like any other man or woman, a transgender person may have a heterosexual, bisexual, or homosexual orientation.

**Transition** – (verb) the process of changing a gender expression from one gender to another. This process may be very different for different people. It may involve “coming

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<sup>112</sup> National Center for Transgender Equality, *Teaching Transgender*, January 2009, available at [http://transequality.org/Resources/NCTE\\_Teaching\\_Transgender.pdf](http://transequality.org/Resources/NCTE_Teaching_Transgender.pdf).

out” as transgender to one’s self and to others; living in one’s chosen gender; changing legal documents; and/or accessing necessary medical treatment.

The medical treatment that transgender people receive is specific to each individual. There is no one specific procedure that changes a person’s gender. Rather, medical transition is a process which may include any number of possible treatments such as: hormone therapy, electrolysis, and surgeries such as, hysterectomy, mastectomy, and genital reconstruction.

**Transsexual** – (noun) is a term used for people who seek to live in a gender different from the one assigned to them at birth. They may seek medical treatment to “transition.” It is important to note, however, that being “transsexual” does not necessarily mean that a person has undergone any particular surgery or treatment.

**Transvestite or “Cross-Dresser”** (noun) - means an individual who chooses to wear clothes generally associated with the opposite sex. Sometimes this is related to transgender identity, and sometimes it is not. Note, however, that Spanish language articles often refer to transgender people as “travestis” which translates to “transvestites.” “Transvestite” is considered an outmoded term and should not be used by the interviewer unless the applicant himself or herself uses it.

**Transphobia** (noun) – deeply ingrained feelings of prejudice toward transgender people; the irrational fear, based on myths and stereotypes, of people who are transgender or are perceived to be a transgender person.

## Intersex Terms

**Intersex**<sup>113</sup> (noun, adjective) – Intersex refers to a condition in which an individual is born with a reproductive or sexual anatomy and/or chromosome pattern that does not seem to fit typical definitions of male or female. The conditions that cause these variations are sometimes grouped under the terms “intersex” or “DSD” (Differences of Sex Development). These conditions include androgen insensitivity syndrome, some forms of congenital adrenal hyperplasia, Klinefelter’s syndrome, Turner’s syndrome, hypospadias, and many others. Individuals with this condition were previously referred to as “hermaphrodites,” but this term is considered outmoded and should not be used unless the applicant uses it.

## Legal Terms

**Civil Union** – formal recognition of committed same-sex relationships recognized by some states and foreign countries. Similar to but not the same as marriage. Civil unions confer many of the same rights, benefits, and privileges enjoyed by opposite sex marriages such as estate planning or medical decisions.

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<sup>113</sup> For more information on intersex issues, see the Advocates for Informed Choice website, [www.aiclegal.org](http://www.aiclegal.org)

**Domestic Partnership** – A civil or legal contract recognizing a partnership or a relationship between two people which confers limited benefits to them by their employer.

**Sodomy Laws** – laws that prohibit consensual, adult, private, noncommercial sex. Used mostly against gays and lesbians.

## **Medical Terms Related to HIV**

**AIDS or Acquired Immunodeficiency Syndrome** - is the medical term used for people with the HIV virus who have either experienced certain opportunistic infections (such as PCP pneumonia or Kaposi's Sarcoma), or whose T-cells (infection fighting blood cells) have dropped below 200.

**CD4 Count or T-Cell Count** – this is a test used to measure the well-being of the immune system of an individual who is HIV-positive. People with healthy immune systems generally have between 800-1200 T-cells. If T-cells drop below 200, a person is considered to have AIDS.

**HIV-Positive** <sup>114</sup> – means that a person has been exposed to the Human Immunodeficiency Virus (HIV) and developed anti-bodies to the virus. Once a person has tested positive for HIV, he or she will always test positive for HIV, regardless of his or her health.

Not everyone who is HIV-positive has AIDS, but everyone who has AIDS is HIV-positive. HIV is transmitted through the transfer of bodily fluids from an infected individual to an uninfected individual. People are primarily infected with HIV through sexual contact which involves the exchange of bodily fluids; from sharing intravenous drug paraphernalia; during childbirth and breast-feeding; and from receiving contaminated blood transfusions. There is no risk of HIV transmission from casual contact, such as shaking hands or sharing a drinking glass.

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<sup>114</sup> For more information about HIV see <http://www.gmhc.org/> on the Gay Men's Health Crisis website.



## **LGBTI-Related Case Law**<sup>115</sup>

### **2011**

[\*Castro – Martinez v. Holder\*](#), 641 F.3d 1103 (9th Cir. 2011) (amended by [\*Castro – Martinez v. Holder\*](#), WL 6016162, Dec. 5, 2011 (9<sup>th</sup> Cir. 2011) (gay man from Mexico)

### **2010**

[\*Todorovic v. Att’y Gen. of the U.S.\*](#), 621 F.3d 1318 (11th Cir. 2010) (gay man from Serbia)

[\*Ayala v. Att’y Gen. of the U.S.\*](#), 605 F.3d 941 (11th Cir. 2010) (gay, HIV+ man from Venezuela)

[\*Eneh v. Holder\*](#), 601 F.3d 943 (9th Cir. 2010) (man living with AIDS from Nigeria)

[\*Aguilar-Mejia v. Holder\*](#), 616 F.3d 699 (7th Cir. August 6, 2010) (HIV+ man from Mex./Guatemala)

### **2009**

[\*N-A-M- v. Holder\*](#), 587 F.3d 1052 (10th Cir. 2009) (M to F transsexual woman from El Salvador)

[\*Martinez v. Holder\*](#), 557 F.3d 1059 (9th Cir. 2009) (gay man from Guatemala)

[\*Pangilinan v Holder\*](#), 568 F.3d 708 (9th Cir. 2009) (transsexual woman from the Philippines)

[\*Manani v. Filip\*](#), 552 F.3d 894 (8th Cir. 2009) (HIV+ woman from Kenya)

### **2008**

[\*Razkane v. Holder\*](#), 562 F.3d 1283 (10th Cir. 2008) (gay man from Morocco)

[\*Bromfield v. Mukasey\*](#), 543 F.3d 1071 (9th Cir. 2008) (gay man from Jamaica)

[\*Eke v. Mukasey\*](#), 512 F.3d 372 (7th Cir. 2008) (gay man from Nigeria)

[\*Bosede v. Mukasey\*](#), 512 F.3d 946 (7th Cir. 2008) (HIV+ man from Nigeria)

[\*Ali v. Mukasey\*](#), 529 F.3d 478 (2nd Cir. 2008) (gay man from Guyana)

[\*Kadri v. Mukasey\*](#), 543 F.3d 16 (1st Cir. 2008) (gay man from Indonesia)

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<sup>115</sup> In descending order by year.

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## 2007

[\*Jean-Pierre v. Att’y Gen. of the U.S.\*](#), 500 F.3d 1315 (11th Cir. 2007) (HIV+ man from Haiti)

[\*Morales v. Gonzales\*](#), 478 F.3d 972 (9th Cir. 2007) (transgender woman from Mexico)

[\*Nabulwala v. Gonzales\*](#), 481 F.3d 1115 (8th Cir. 2007) (lesbian woman from Uganda)

[\*Shahinaj v. Gonzales\*](#), 481 F.3d 1027 (8th Cir. 2007) (gay man from Albania)

[\*Ixtlilco-Morales v. Keisler\*](#), 507 F.3d 651 (8th Cir. 2007) (gay man from Mexico)

[\*Moab v. Gonzales\*](#), 500 F.3d 656 (7th Cir. 2007) (gay man from Liberia)

[\*Lavira v. Att’y Gen. of the U.S.\*](#), 478 F.3d 158 (3d Cir. 2007) (HIV+ man from Haiti)

[\*Joaquin-Porras v. Gonzales\*](#), 435 F.3d 172 (2d Cir. 2006) (gay man from Costa Rica)

## 2006

[\*Ornelas Chavez v. Gonzalez\*](#), 458 F.3d 1052 (9th Cir. 2006) (transgender woman from Mexico)

[\*Maldonado v. Att’y Gen. of the U.S.\*](#), 188 Fed. Appx. 101, 103 (3d Cir. 2006) (unpublished)(gay man from Argentina)

## 2005

[\*Salkeld v. Gonzales\*](#), 420 F.3d 804 (8th Cir. 2005) (gay man from Peru)

[\*Boer-Sedano v. Gonzales\*](#), 418 F.3d 1082 (9th Cir. 2005) (gay man with AIDS from Mexico)

[\*Karouni v. Gonzales\*](#), 399 F.3d 1163 (9th Cir. 2005) (gay, HIV+ man from Lebanon)

[\*Kimumwe v. Gonzales\*](#), 431 F.3d 319 (8th Cir. 2005) (gay man from Zimbabwe)

[\*Galicia v. Ashcroft\*](#), 396 F.3d 446 (1st Cir. 2005) (gay man from Guatemala)

## 2004

[\*Reyes-Reyes v. Ashcroft\*](#), 384 F.3d 782 (9th Cir. 2004) (gay man with female sexual identity from El Salvador)

[\*Gebremaria v. Ashcroft\*](#), 378 F.3d 734 (8th Cir. 2004) (HIV+ woman from Ethiopia)

[\*Molathwa v. Ashcroft\*](#), 390 F.3d 551 (8th Cir. 2004) (gay man Botswana)

### **2003**

[\*Amanfi v. Ashcroft\*](#), 328 F.3d 719 (3rd Cir. 2003) (man imputed to be gay from Ghana)

### **1990-2000**

[\*Hernandez-Montiel v. INS\*](#), 225 F.3d 1084 (9th Cir. 2000) (gay man with female sexual identity from Mexico)

[\*Pitcherskaia v. INS\*](#), 118 F.3d 641 (9th Cir. 1997) (lesbian woman from Russia)

[\*Matter of Toboso-Alfonso\*](#), 20 I&N Dec. 819 (BIA 1990) (gay man from Cuba)

## **SUPPLEMENT A – REFUGEE AFFAIRS DIVISION**

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

### **REQUIRED READING**

*Medical Examination of Aliens – Removal of Human Immunodeficiency Virus (HIV) Infection from Definition of Communicable Disease of Public Health Significance.*

Centers for Disease Control and Prevention (CDC) and U.S. Department of Health and Human Services (HHS). 74 FR 56547-62 (Nov. 2, 2009). Final rule, January 4, 2010, available at <http://www.cdc.gov/immigrantrefugeehealth/laws-regs/hiv-ban-removal/final-rule.html>.

### **ADDITIONAL RESOURCES**

See [Additional Resources](#) listed at the beginning of this module.

### **SUPPLEMENTS**

There are no RAD supplements for this training module.

## **SUPPLEMENT B – ASYLUM DIVISION**

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

### **REQUIRED READING**

See [Required Reading](#) listed at the beginning of this module.

### **ADDITIONAL RESOURCES**

See [Additional Resources](#) listed at the beginning of this module.

### **SUPPLEMENTS**

#### **ASM Supplement – 1**

##### **Legal Analysis – One-Year Filing Deadline**

This module does not alter the legal criteria used to evaluate the one-year filing deadline. There are, however, some factual scenarios that may arise specifically in the context of LGBTI claims that are useful to discuss within the legal framework of established guidance on the one-year filing deadline.

##### **Changed Circumstances Specific to LGBTI Applicants**

###### **Changed Country Conditions**

As with any other type of asylum claim, if conditions in the applicant's country of origin have changed substantially, this may form the basis for an exception to the one year filing deadline.<sup>116</sup> For example, a fundamentalist government may have just come to power and instituted criminal sanctions for consensual homosexual activity.

###### **“Coming Out” as LGBTI**

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<sup>116</sup> See Victoria Neilson and Aaron Morris, *The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal*, 8 New York City Law Review 233 (Summer 2005), available at <http://www.asylumlaw.org/docs/sexualminorities/GayBar091798.pdf>.

In many instances an individual does not feel comfortable accepting himself or herself as LGBTI until he or she is in a country where the applicant can see that it is possible to live an open life as an LGBTI person. If an individual has recently “come out” as lesbian, gay, bisexual, or transgender, this may qualify as an exception based on changed circumstances.

### **Recent Steps in Gender Transitioning**

As noted above, transitioning from the gender assigned at birth to the gender with which the applicant identifies is a process which may involve many steps. At some point during this process, the applicant may realize that he or she could no longer “pass” as his or her birth gender and therefore may become more fearful of returning to his or her country of origin. For example, a transgender woman (MTF) may have recently had breast implants which would now make it impossible to “pass” as male.

### **Recent HIV Diagnosis**

Some individuals will apply for asylum only after they have been diagnosed with HIV. For some applicants, the claim will be based wholly on his or her HIV status and the fear of persecution upon return to the country of origin. For other individuals who may also be LGBT, the HIV diagnosis may be “the last straw,” causing the applicant to realize that returning to the country of origin would be a “death sentence.” Many countries do not have confidentiality laws protecting HIV status, so some LGBT people fear that their HIV status could become widely known. In many countries, being HIV-positive is equated with being LGBT, and so their LGBT identity would become known.

In *Manini v. Filip* 552 F.3d 894, (8<sup>th</sup> Cir. 2009), a Kenyan woman entered the U.S. in October 2001, was diagnosed with HIV in January 2003, and filed affirmatively for asylum in May 2004. The Asylum Office accepted her recent HIV diagnosis as a “changed circumstance,” but found that the 16 month delay in filing after the diagnosis fell outside the “reasonable period of time” required by law. The BIA upheld the decision and the Eight Circuit found that it lacked jurisdiction to review the one year issue. See also *Ixtlilco-Morales v. Keisler*, 507 F.3d 651 (8<sup>th</sup> Cir. 2007), where the Eight Circuit also accepted the applicant’s recent HIV diagnosis as a changed circumstance but upheld the BIA and IJ decisions to deny the case on other grounds.

The following are some suggested lines of questioning when adjudicating a claim that involves the applicant's HIV status:<sup>117</sup>

- When did you learn that you are HIV-positive?

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<sup>117</sup> *Id.*

- How did you feel when you received your diagnosis?
- Does your family know that you're HIV-positive?
- How did they react?
- Have you experienced any HIV-related symptoms?
- Have you ever been hospitalized because of HIV?
- Are you taking any HIV-related illnesses?
- When did you begin taking them?
- Do you experience any side effects from the medications?
- Have you ever seen a mental health provider because of your diagnosis?

### **Extraordinary Circumstances Specific to LGBTI**

#### **HIV-Positive Status**

Applicants who are HIV-positive may exhibit life-threatening symptoms and require hospitalization. An individual may qualify for a one year exception based upon serious illness. Additionally, many individuals living with HIV experience extreme depression and other mental health issues as a result of their diagnosis which may affect the applicant's ability to timely file and/or may affect what period of time is "reasonable" to file after an HIV diagnosis.

#### **PTSD or Other Mental Health Issues**

As with any other asylum seekers, LGBTI applicants may suffer from Post Traumatic Stress Disorder (PTSD) or other mental health issues which make it difficult to file within a year of entry into the United States. LGBTI individuals who suffer from internalized homophobia and transphobia, or who have been subjected to coercive mental health treatment to "cure" them in their home countries, may find it especially difficult to access the mental health treatment that they may need to proceed with their applications.

Many LGBTI individuals will have fled to the United States leaving behind a partner. Under current immigration law, there is no way for a refugee or asylee to sponsor a same-sex partner for immigration benefits, so the applicant may also be dealing with the possible permanent loss of a partner by coming to the United States.

Example: The applicant, a transgender male from Honduras, suffered severe and continuous sexual and other physical abuse for many years as well as familial and societal discrimination and ostracism on account of his sexual orientation. He last entered the US in 2003 but did not file for asylum until 2009. The applicant credibly explained that he felt isolated and was afraid to come forward sooner

because he was ashamed and fearful of ostracism by friends and colleagues and society in general. According to medical reports he submitted, he suffered from PTSD as a result of the years of trauma he suffered in Honduras. His PTSD can be seen as an extraordinary circumstance related to the delay in filing during the year after he arrived; the 5-year delay afterwards may also be considered reasonable based on that medical condition.<sup>118</sup>

### **Severe Family or Community Opposition or Isolation**

Many LGBTI people who arrive in the United States stay with extended family members or with other members of their community. Being surrounded by family or community members may make it impossible for the LGBTI applicant to timely file for fear that if the family member learns of the applicant's LGBTI identity, he or she will be thrown out of the home, the applicant's family at home will be told, and/or the applicant and his or her family will be disgraced.

Extreme isolation within a particular immigrant community may qualify as an exception. It is common for foreign nationals who have newly arrived in the United States to be steered to immigration attorneys from within their own cultural community. While some applicants may be aware that they can seek asylum in the United States based on their political beliefs or religion, many foreign nationals (and, indeed, many U.S. immigration attorneys) are not aware that sexual orientation or transgender identity might form the basis of an asylum claim.<sup>119</sup> This problem may be compounded for LGBTI individuals who come to the U.S. and immediately take up residence in an immigrant community with people from their own country. Often an LGBTI applicant would be fearful of disclosing his or her LGBTI status to any community member, and so might be informed by an immigration attorney that his or her only option to legalize would be to marry.

For example, a gay Tunisian man who was admitted to the United States on a non-immigrant visa is helped by men from Egypt and other Arab immigrant communities to find housing and employment. These men are not aware that the applicant is gay and tell him that asylum is generally not a means for legalizing one's status in the United States. It is not until the applicant meets a gay man from the United States that he becomes aware that he may be a refugee under U.S. law.

<sup>118</sup> See AOBTC *One-Year Filing Deadline lesson plan, Section VII, Credibility, Subsection B, Totality of the Circumstances, Subsection c, Extraordinary Circumstances*.

<sup>119</sup> See *Explore All Possible Grounds* in Section 6, *Interview Considerations*, and *Claims Not Initially Put Forward* in Section 7, *Burden of Proof and Evidence* above.





### **SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION**

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

#### **REQUIRED READING**

See [Required Reading](#) listed at the beginning of this module and [Required Reading](#) in the RAD Supplement.

#### **ADDITIONAL RESOURCES**

See [Additional Resources](#) listed at the beginning of this module.

#### **SUPPLEMENTS**

There are no IO supplements for this module.