U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: Esperanza Martinez Widener **A95-347-685**

Date of this notice: 09/21/2004

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

F.F. Kr

Frank Krider
Acting Chief Clerk

Enclosure

Panel Members:
MOSCATO, ANTHONY C.
OSUNA, JUAN P.
PAULEY, ROGER

File: A95 347 685 - Nebraska Service Center Date: SEP 21 2004

In re: ESPERANZA MARTINEZ WIDENER, Beneficiary of visa petition
filed by Jacob Allen Widener, Petitioner

IN VISA PETITION PROCEEDINGS

APPEAL

ON BEHALF OF PETITIONER: Jose F. Monge, Esquire

ON BEHALF OF DHS: Elizabeth Posont, Service Center Counsel

APPLICATION: Petition to classify status of alien relative for issuance of immigrant visa

ORDER:

The petitioner applied for classification of the beneficiary, Esperanza Martinez, as the spouse of a United States citizen under section 204(a) of the Immigration and Nationality Act. The Nebraska Service Center denied the petition, finding that the male petitioner's marriage to the beneficiary, a male-to-female transsexual, did not meet the definition of "marriage" and "spouse" in section 3 of the Defense of Marriage Act, Public Law No. 104-199, 110 Stat. 2419 (1996), codified at 1 U.S.C. §7 (Supp. V. 2000). The petitioner appeals the denial of the visa petition. We sustain the petitioner's appeal and remand the record for further proceedings.

I. BACKGROUND.

A. Facts.

The undisputed facts are that the beneficiary, Esperanza Martinez, was born "Barry Rommel De Sena Martinez" in the Philippines in 1966. Although born male, the beneficiary has had sex reassignment surgery and in May 2001 a Filipino court officially recognized the beneficiary's change of sex from male to female. The beneficiary's Philippine birth certificate now reflects that, pursuant to court order, the name at birth is changed to Esperanza de Sena Martinez and the sex from male to female. The petitioner and beneficiary have provided a certificate of marriage indicating that they were legally married in the Philippines on July 7, 2001. The Philippine certificate of marriage records the petitioner's sex as male and the beneficiary's sex as female.

The record contains a copy of the Decision from the Regional Trial Court of Manila granting the beneficiary's petition for a change of name and sex in the birth certificate. The Decision reflects that the beneficiary testified to having felt like a woman in a man's body since childhood, that breast augmentation

surgery was done in 1988, followed by the removal of testicles in 1990, and that sexual conversion surgery, a sexual reassignment, was done in January 2000. The presiding judge in the case heard from a medical practitioner and plastic surgeon who testified that physical examination of the beneficiary indicated that the beneficiary had the external genitalia of a female including a vagina, clitoris, labia majora and minora, but that the beneficiary would not be capable of pregnancy. The judge, after considering the evidence found that

> [t]his Court believes that the granting of the petition, more than its denial, would be more in consonance with the principles of justice and equity. With the sexual reassignment, the petitioner does not only think, feel, and act like a woman, but now looks like a woman. That she has no ovary and cannot conceive does not make her less of a woman, in the same manner that a woman who cannot bear a child ceases to be a woman.

Certified Copy of Decision in Civil Case No. 00-99337, at 2. Based on these findings, the court granted the request for a name change and for a change of sex from male to female.

B. The Service Center Decision.

The Service Center found that the definitions of "marriage" and "spouse" in the Defense of Marriage Act, Public Law No. 104-199, 110 Stat. 2419 (1996), preclude recognition of the marriage in this case for immigration purposes. Section 7 of the Defense of Marriage Act (DOMA), defines the word "marriage" as "a legal union between one man and one woman as husband and wife" and the word "spouse" as "a person of the opposite sex who is a husband or a wife."

The Service Center noted in its decision that some states and countries have enacted laws that permit a person who has undergone sex change surgery to legally change the person's sex from one to the other, but that Congress has not addressed the issue. The Service Center concluded that, without legislation from Congress, it lacked a legal basis on which to recognize a change of sex so that a marriage between two persons born of the same sex could be recognized for immigration purposes. The Service Center therefore concluded that the marriage between the petitioner and beneficiary was invalid for immigration purposes and denied the visa petition.

C. Relevant Statutory Provisions.

Under the immigration law, a United States citizen may petition for an "immediate relative" immigrant visa for a "spouse." Section 201(b)(2)(A)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. §1151(a)(2)(B)(i). The INA does not define the terms "spouse," "wife," or "husband," except to state that these terms do not include "a spouse, wife or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated." Section 101(a)(35) of the Act.

In 1996, Congress enacted the Defense of Marriage Act to provide the following definitions of "marriage" and "spouse" for purposes of federal law.

> Sec. 7. Definition of 'marriage' and 'spouse.' In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word *'marriage'* means only a legal union between one man and one woman as husband and wife, and the word *'spouse'* refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. §7, (Supp. V. 2000). The DOMA also specifies that states need not recognize same-sex marriages that may have been validly performed in another state. 28 U.S.C. §1738C (Supp. V. 2000).

II. ISSUE.

The issue on appeal is whether the petitioner's marriage to the beneficiary is "a legal union between one man and one woman as husband and wife" and whether his spouse is "a person of the opposite sex who is a ... wife" under section 7 of the DOMA when the beneficiary was born male, but has undergone a change of sex that has been legally recognized by a court in the place of marriage.

III. ANALYSIS

The resolution of this case turns on whether the petitioner and the beneficiary are of the "opposite sex" within the meaning of the DOMA. Neither the text of DOMA nor its legislative history addresses the issue of the sex of post-operative transsexuals. Although DOMA prohibits federal benefits based on same-sex marriages, it does not provide guidance on how to determine whether a marriage involving a post-operative transsexual should be considered a same-sex or an opposite sex marriage. We therefore turn to basic principles of statutory construction to determine the intent of Congress. As discussed below, we find that the state of the law concerning change of sex and transsexual marriage at the time of passage of the DOMA and its explicit focus on preventing federal recognition of "homosexual" marriages, lead to the conclusion that the petitioner's marriage may be considered a marriage between persons of the "opposite sex" under section 7 of the DOMA.

A. Legal recognition of change of sex and transsexual marriages at the time of DOMA.

We begin by examining the law as to legal recognition of sex changes and recognition of transsexual marriage at the time of consideration and passage of the DOMA. As discussed below, by the time Congress considered the DOMA in 1996 the Department of Health, Education, and Welfare (HEW), and a number of state legislatures had directly addressed the issue of legal recognition of change of sex after surgical procedure. State courts had also begun to address the issue of transsexual marriages, and at least one state court had specifically recognized a transsexual marriage as a legal marriage between persons of the opposite sex.

The first American court decision to directly address the validity of a transsexual marriage is *M.T. v. J.T.*, 355 A.2d 204 (N.J. 1976). There, the husband sought an annulment on the ground that his wife was a male-to-female transsexual. In refusing the annulment, the court upheld the validity of the marriage. The court began its analysis by accepting the "fundamental premise ... that a lawful marriage requires the ceremonial marriage of two persons of the opposite sex, a male and a female," 355 A.2d at 207, and that New Jersey law would not permit recognition of a marriage between persons of the same sex. 355 A.2d at 208. The court then directly confronted the issue "whether the marriage between a male and a postoperative transsexual, who has surgically changed her external sexual anatomy from male to female, is to be regarded as a lawful marriage between a man and a woman." *Id.*

The court in *M.T., supra*, rejected the view taken in a 1970 English decision, ***Corbett v. Corbett***, 2 W.L.R. 1306, 2 All E.R. 33 (P.D.A. 1970), that sex for purposes of marriage should be determined by "chromosomal, gonadal, and genital" tests alone and could not be changed from the determination made at the time of birth. The New Jersey court found that other factors including the anatomical and genital features" and the person's gender identity were also important. In the case of a post-operative transsexual, the court concluded that "for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards." Id. at 209. The court concluded that

> A transsexual in a proper case can be treated medically by certain supportive measures and through surgery to remove and replace existing genitalia with sex organs which will coincide with the person's gender. If such sex reassignment surgery is successful and the postoperative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as a male or female, as the case may be, we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person's identification at least for purposes of marriage to the sex finally indicated.

Id. at 210-211. On this basis, the court affirmed the finding of the trial court that the post-operative male to female transsexual was a female at the time of her marriage and entered into a valid marriage.

In the year after the decision in *M-T- v. J-T-, supra*, the Department of Health, Education, and Welfare prepared a Model State Vital Statistics Act to encourage the creation of a centralized system in each state for the collection and certification of vital records. The 1977 Model Act specifically addressed legal recognition of changes of sex by surgical procedure, as follows:

> Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating the sex of an individual born in this State has been changed by surgical procedure and whether such individual's name has been changed, the Secretary shall amend the certificate of birth of the individual as prescribed by regulation.

Section 21(e) of the 1977 Model Act; Section 21(d) of the 1992 Model State Vital Statistics Act. For a detailed discussion of the sex change provisions of the HEW Model Act, see *In re Heilig*, 372 Md. 692, 717, 816 A.2d 68, 83 (Ct. App. Md. 2003).

By 1996, at the time of consideration of the DOMA, several states had enacted legislation patterned after Model Code section 21(e) to provide a mechanism for a court order recognizing a change of sex by surgical procedure and for a means of amending the birth certificate to reflect a change of sex. See, e.g., Ariz. Rev. Stat. §36-326 (2001) (enacted 1975, now at §36-337 (2004)); Cal. Health & Safety Code. § 103425, 103430 (2002 Supp.) (Added by Stat. 1995, c.415 (S.B. 1360 §4)); Haw. Rev. Stat. §338-17.7 (2002) (enacted 1993); La. Rev. Stat. Ann. §40:62 (2002), (enacted 1979); Mich Comp. Laws §333.2831 (2002) (enacted June 1996); Neb. Rev. Stat. §71-604.01 (2002) (enacted 1994). A recent review of state legislation indicates that 22 states and the District of Columbia have now enacted provisions specifically permitting legal recognition of changes of sex by post-operative transsexuals. *See In re Heilig, supra* (collecting the relevant statutory provisions). See also, Brown, "Sex Changes and 'Opposite-Sex' Marriage: Applying the Full Faith and Credit Clause to Compel Interstate Recognition of Transgendered Persons Amended Legal Sex for Marital Purposes," 38 San Diego L. Rev. 1113, 1129-30 (2001).

B. The DOMA's focus and purposes.

The DOMA was introduced in May 1996 in response to a 1993 decision of the Hawaii Supreme Court in *Baehr v. Lewin*, 74 Haw 530, 852 P.2d 44, *reconsideration granted in part*, 74 Haw. 650, 875 P.2d 225 (Haw. 1993) (remanding for application of strict scrutiny under Hawaii equal protection clause to question of denial of marriage licenses to same-sex couples). See House Conference Report 104-464, 104th Cong., 2d Sess. 1996, at 2, 1996 WL 391835 (Leg. Hist.), 1996 U.S.C.C.A.N. 2905, at 2906. The DOMA had two primary purposes: (1) "to defend the institution of traditional heterosexual marriage" and (2) "to protect the right of the states to formulate their own public policy regarding the legal recognition of same-sex unions, free from federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses." 142 Cong. Rec. S4851-02, 1996 WL 233584 (May 8, 1996).

Section 7 of the DOMA makes clear that federal benefits for spouses could not include marriages between "same-sex" couples. In this regard, throughout the Conference Report, the terms "same sex" and "homosexual" are used interchangeably. The Conference Report repeatedly refers to the consequences of "permitting *homosexual couples* to marry." There is no mention of the treatment of transsexual marriages or of state laws recognizing change of sex by post-operative transsexuals.

The House Report's section-by-section analysis states the following in regard to the DOMA's definition of marriage:

> Prior to the Hawaii lawsuit, *no State has ever permitted homosexual couples to marry.* Accordingly, federal law could rely on state determinations of who was married without risk of inconsistency or endorsing same-sex marriage. (emphasis supplied).

Given this statement, it seems apparent that the DOMA was not directed at the New Jersey decision in *M-T- v. J-T-, supra*, recognizing the validity of a transsexual marriage, or with marriages that might rely upon a legal change of sex recognized by one of the several states that had, by 1996, enacted legislation adopting the provision of the HEW Model Code regarding the legal recognition of sex changes by transsexuals.

Rather its focus, as indicated by its consistent reference to homosexuals in the floor discussions and in the Conference Report, was fixed on and limited to the issue of homosexual marriage. The DOMA therefore does not preclude recognition of the marriage at issue in this case for purposes of federal law. We find, therefore, that this case must be remanded for further proceedings.

C. Issues on Remand.

It is well settled that a foreign marriage is deemed lawful for immigration purposes if valid where performed,[1] unless it contravenes a strong public policy of the state where the parties reside (or where one of them resides, and they intend to make their home). *See, e.g.*, *Matter of Da Silva*, 15 I & N Dec. 778 (BIA 1976); *Matter of H*, 9 I & N Dec. 640 (BIA 1962). The precise showing needed to establish that a marriage would violate a state's public policy is, however, not entirely clear. *See, e.g.*, *Matter of G*, 6 I & N Dec. 337 (BIA 1954)(valid foreign uncle/niece marriage will not support visa petition where such marriage void and renders parties liable to prosecution in state); *Matter of E*, 4 I & N Dec. 239 (BIA 1951)(valid foreign uncle/niece marriage will support visa petition where, although such marriage void and renders parties liable to prosecution, attorney general of state advises that parties will not be prosecuted).

It appears from the petitioner's biographic information accompanying his petition that he is a resident of South Carolina. We note that South Carolina is not among the 22 states mentioned in Part B above that specifically permit legal recognition of changes of sex by post-operative transsexuals. However, that fact alone does not mean that South Carolina would not recognize the instant marriage as valid or has such a strong public policy against such marriages as would render the marriage invalid for immigration purposes.[2] These issues may be addressed on remand.

IV. CONCLUSION

Given the facts in this case, including the legal determination by the Philippine court that the beneficiary has undergone an irreversible change of sex from male to female, the amendment to the beneficiary's Philippine birth certificate to reflect the legal determination of change of sex, and the Philippine certificate of marriage reflecting an opposite-sex marriage, we find that the respondent's marriage is an opposite-sex marriage for purposes of section 7 of the DOMA.

We therefore vacate the decision of the Service Center and remand for further proceedings consistent with this decision.

FOR THE BOARD

[1] The petitioner has the burden of showing such validity. *E.g.*, *Matter of Soleimani*, 20 I & N Dec. 99 (BIA 1989)(foreign law must be proved).

[2] Some state courts have declined to recognize transsexual marriages in the absence of state legislation. *See, e.g.*, *Kantaras v. Kantaras*, 2004 WL 1635003 (Fla. App. 2 Dist.)(collecting cases).