

LGBT immigrants still face hurdles, Part one



by [Gretchen Rachel Hammond](#)

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Immigration attorney Michael Jarecki. Photo by Gretchen Rachel Hammond

President Barack Obama announced an executive action Nov. 20 designed to take a step toward fixing the U.S. immigration system. It was a partial overhaul to what a majority of Americans and even party leaders on both sides of the aisle believe is a crippled policy. Yet reform has remained stagnant in an increasingly divided Congress.

The executive action potentially affects 5 million immigrants (including 4 million who are undocumented) via enhancements to the Deferred Action for Childhood Arrivals (DACA) program, as well as increased options and protections for parents of children who are U.S. citizens, and working professionals.

However, national immigrant-advocacy groups have stated Obama's action affords little or no protections for LGBT immigrants. "We are deeply concerned for the millions left out, especially the vast majority of LGBT immigrants who remain at risk of deportation to fundamentally unsafe places," stated the New York based non-profit Immigration Equality in a press release. "The president's choice to require formal familial ties to qualifying citizens and lawful permanent residents appears to exclude LGBT immigrants from accessing legal protections."

"Many LGBTQ undocumented immigrants, especially transgender immigrants, will probably not qualify," echoed the Chicago-based Association of Latinos/as Motivating Action (ALMA). "That's because only a small percentage of all LGBTQ undocumented immigrants are parents."

Meanwhile, Republicans in Congress have vowed to demolish the President's action using any means necessary.

Land of promise

According to the National Archives, on July 25, 1785—from his Mount Vernon, Virginia, estate—George Washington penned a letter to his friend and aide-de-camp David Humphries. "Rather than quarrel [about] territory," Washington wrote, "let the poor, the needy and oppressed of the Earth; and those who want land resort to the fertile plains of our Western country, to the second land of promise, and there dwell in peace, fulfilling the first and greatest Commandment."

In 2013, a woman—who asked only to be identified as "America" during a telephone interview with Windy City Times—was startled awake at 6:30 a.m. in the morning by a thunderous hammering on her front door. She had come to the U.S. from Mexico years earlier and started her own shipping business that operated from the second floor of her Chicago home, where she lived with her son.

Within seconds of her answering the door, America stated that 15 to 20 U.S. Immigration and Customs Enforcement (ICE) agents showed up and barged into her home. After going through all her tax information, business paperwork and her computer, they arrested America as an undocumented immigrant.

America said that she spent the next 10 months in detention, completely cut off from her family and friends. With no access to any legal help, she received little information about her case or, ultimately, what her fate

was going to be. All she could do was wait and endure each of the 7,300-plus hours with only the mental image and memories of her son as solace. Meanwhile, America said that she was subjected to physical abuse from fellow inmates while the guards at the jail looked the other way. She had come to the U.S. to dwell in peace. The turmoil that instead engulfed America broke her both physically and mentally.

As of 2010, the American Census Bureau (ACS) tallied the numbers of naturalized citizens, lawful permanent residents, foreign students, refugees and undocumented migrants living in the U.S. at 40 million (13% of the population). A Pew Research project authored by Jeffrey S. Passell and D’Vera Cohn stated that, as of March 2011, the total numbers of unauthorized immigrants stood at 11.1 million.

In March 2013, the Center for American Progress published a report entitled “Living in Dual Shadows.” Citing estimates from the Williams Institute at UCLA, the report noted that—of the 904,000 total LGBT adult immigrants in the United States—30 percent of them are undocumented. However, authors Crosby Burns, Ann Garcia and Phillip E. Wolgin urged a sense of caution when reviewing the data.

“These calculations are inherently conservative and take into account under-reporting by self-identified LGBT undocumented individuals particularly among people who are reluctant to identify as such,” they wrote. “Thus, these total figures represent the lower-bound estimates of the true LGBT undocumented population of this country. Furthermore, it does not account for the undocumented immigrants under the age of 18 who identify as LGBT.”

Michael Jarecki is principal of the Chicago-based Law Office of Michael R. Jarecki which, according to his website, offers “comprehensive legal representation throughout the country in the areas of United States Immigration and Nationality Law.”

“The number one thing that strikes me about LGBT immigrants is the fact that they’ve always faced some sort of discrimination,” Jarecki told Windy City Times. “Throughout the history of immigration, until the 1990’s, homosexuals—as different laws called the LGBTQ community—were excluded from immigrating to the United States.”

Those laws date back to the 1875 Page Act. Focusing on Chinese immigrants, it formed the basis of federal government control of immigration policy and planted the seeds of sexual monitoring of potential immigrants. The Immigration Act passed in 1917 grouped homosexuals with a long list of “undesirables” from “idiots” to “any person suffering attacks of insanity” and barred them from entering the United States. 1965 legislation used the term “sexual deviants” as a basis for denial. In 1980, the Immigration and Naturalization Service (INS) sought to bar a British tourist named Carl Hill. He had told an immigration officer that he was a homosexual, doing so—according to court documents—“as a matter of principal.” Seven years later, the Helms Amendment excluded entry to people infected with HIV/AIDS.

In 1990, Congress repealed exclusions for gay and lesbian immigrants. Two decades later, the ban on those with HIV/AIDS was revoked. But the problems for LGBTQ immigrants are far from over, even with the 2013 repeal of section three of the Defense of Marriage Act (DOMA). As a result of that Supreme Court ruling, the federal government said it would recognize marriages in states where it was legal for people of the same sex to marry. This allowed binational same-sex couples to receive immigration benefits.

“The opening up of federal laws for same-sex couples in the immigration context is not a silver bullet for all foreign nationals who are LGBT,” Jarecki explained. “Anyone who entered the United States without a visa can get married to their same-sex partner but they cannot get their green card from within the United States because they have to get a different waiver, leave the country and then come back.”

The waiver relates to a 10-year bar from re-entry for someone who has been undocumented in the U.S. for more than one year.

“Some families can apply for that waiver from within the United States so it’s less scary when the foreign national leaves,” Jarecki added. “If there is any reason to believe [on the part of adjudicating immigration officers] that they will be inadmissible, they have to leave and then apply for the waiver abroad which assures family separation and creates a lot of anxiety and uncertainty because a person can be denied a waiver.”

During any marriage-based application for permanent residency, each couple must appear before an immigration officer with the United States Citizenship and Immigration Services (USCIS) division of the Department of Homeland Security (DHS) and present evidence of their lives together and commitment to each other.

“Some of the things that LGBT people do to survive and maintain their privacy are contrary to what immigration requires for individuals to prove the good faith nature of their relationships,” Jarecki said. “I have clients who are fearful of letting their friends or family members know that they are gay [such as] those from Hispanic, Middle Eastern communities or some Asian communities where Islam is the predominant religion. So, they maintain separate residences from their partners. That is a red flag to an immigration officer because, on its face, it looks like they are living apart and in a marriage of convenience. They can find themselves in the fraud unit, can be denied and they can be completely mischaracterized. The burden [of proof] is on the applicant so much that it becomes a source of anxiety for individuals to have to explain ‘I’m doing this because I’m not yet out’.”

Jarecki said he has heard anecdotal stories posted on list-serves which detail questions from USCIS immigration officers that allegedly cross the line between respectful and downright invasive. “Two lesbians went into an interview in San Francisco without an attorney and apparently the officer was asking a lot of questions of an explicit sexual nature like ‘how do you lesbians have sex?’ and ‘Can you explain intimacy

[between] two lesbians?” That is egregiously offensive. What does that have to do with proving the bona-fide nature of a relationship?”

Jarecki noted that the USCIS has since begun distributing training materials to their officers detailing how to adjudicate LGBT couples using correct terminology.

Then there are the “oppressed of this earth” who seek asylum in the U.S. because they face significant danger to their lives or liberty in the countries of their birth.

The International Lesbian, Gay, Bisexual, Trans, and Intersex Association (ILGA) currently lists more than 70 countries worldwide where homosexuality is illegal and punishable by imprisonment or the death penalty.

Karen Zwick is a managing attorney for the Heartland Alliance National Immigrant Justice Center (NIJC), which is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees and asylum seekers. Celebrating its thirtieth anniversary in 2014, according to their website, the NIJC’s work has affected the lives of hundreds of thousands of immigrants and provided services to more than 10,000 individuals each year. Zwick manages the organization’s LGBT Immigration Rights Initiative.

“We have had a project devoted to LGBT issues for more than 20 years,” Zwick explained to Windy City Times. “Initially, when we were starting to do this work, only asylum was available to us as an option but, as the legal landscape and options for LGBT people have evolved, our work has grown into all kinds of immigration services for LGBT people.”

The NIJC has assisted LGBT asylum seekers from across the world. According to Zwick, the current majority of people are coming from Nigeria, Guatemala, Honduras, Macedonia and other former Soviet block countries such as the Ukraine.

“We are presenting clients from 30 countries right now,” she said. “They come in waves. It seems to me that a lot of people who find out about us do so from other openly gay immigrants. We have clients, such as activists in their home countries who were arrested by police. There are those who were sexually assaulted throughout their entire childhood. We have seen lesbian women who have been forced into marriages and been raped during the course of that marriage.”

Although asylum laws in the United States apply equally to all, problems occur when an applicant misses the one-year filing deadline. “Anyone who arrives in the United States needs to apply for asylum within one year or the burden changes and you have to seek a waiver,” Jarecki explained. “When LGBT individuals are coming from extremely homophobic countries, it’s very hard for them to arrive in the United States and

immediately come out as LGBT. For many of us who were born here, it's a long process that isn't always accomplished in a year."

"There's still a substantial amount of shame and embarrassment that not only comes from being LGBT itself but also in talking about it with a professional," Zwick added. "Say you go to an immigration lawyer looking for options; you wouldn't necessarily think that [being LGBT] is something you can bring up."

Some asylum seekers in Chicago live with family or friends who do not know of their sexual orientation or gender identity and keep them from resources such as the Center on Halsted or the Howard Brown Health Center. So the immigrants remain silent and essentially run down their own clocks on eligibility to apply.

"There are ways around the one-year filing deadline," Zwick said. "Changes in your personal circumstances or changes in political circumstances in a place like Russia can lead to a judge excusing a failure to file. We've successfully argued that getting married to a same-sex partner is a changed circumstance. For our transgender clients, beginning medical procedures or taking hormones can be argued. The standard is whether or not it materially affects the likelihood of your winning the case."

"Another problem for LGBT individuals is just getting into the country," Jarecki asserted. "If you're from Iran, Malaysia, Nigeria or Russia for example, you need to get a visa [before entry]. Once you are here, claiming asylum and building your case is vital."

Once again, these immigrants must face a USCIS officer who is scrutinizing them for even a microscopic shred of dishonesty in their "story."

"For applicants, it sometimes takes a team of experts like lawyers and therapists to package their story together," Jarecki said. "Then you need country conditions experts to prove that persecution is going on. Transgender individuals are some of the most persecuted in the world. Some societies see trans* people as sex objects, of the lowest class and easy to abuse and take advantage of."

"I see a lot of clients who are afraid to come out about their sexual orientation and are keeping it secret," Zwick noted. "It's getting better but there's still a substantial amount of ignorance about the fact that you can receive asylum based on your sexual orientation. So people don't bring it up because they don't think it's relevant and they don't know that it's a basis for seeking asylum."

Those escaping violence who do cross the U.S. border without a visa and are caught by ICE agents could be detained during the entire course of their case. Those cases are extraordinarily complex. Although they may have lived in their home countries under the threat of torment from society or even fellow family members,

asylum seekers must prove that there were no government resources or capacities on hand to protect them. For those leaving countries slowly transitioning from hostility to acceptance of LGBT individuals, matters become even more perplexing.

“These countries may have small pockets [of acceptance],” Jarecki noted. “So the government could say ‘well yes, in this small town in Mexico you might face persecution but can you move to Mexico City or Puerto Vallarta and seek safety?’”

No matter how a person may legally try to attain residency in the United States, the cost in application fees and representation can be exorbitant and often completely unattainable to the “poor or needy.”

“A lot of times, financial reasons cause LGBT individuals to hold back,” Jarecki explained. “They’re afraid to talk to attorneys because they already know that they may not be able to afford it. But the important thing that people need to understand is that there are great non-profit organizations that will help them through the process.”

Jarecki cited the NIJC as one such organization.

“LGBT immigrants are facing a lot of the same issues that LGBT homeless youth in the United States face,” Jarecki added. “They are cut off from their families, they face discrimination all along the way and it’s not that they don’t want to work but they’re closed off from opportunities.”

Even if an immigrant is employed, even the highest salary will not help them if they are undocumented.

“I will often have an employer come to my office with their star employee who does not have a Green Card or is undocumented,” Jarecki said. “If that employee is without status and doesn’t have any qualifying family members, there’s nothing under the law that person can do. Even if they went home, they wouldn’t qualify for a waiver to the 10-year [re-entry] bar.”

Republicans have often countered attempts at immigration reform with assertions that undocumented people are “flaunting the law and need to play by the rules.” This begs the question for LGBTQ immigrants as to how this can be accomplished when the laws affecting them are so indistinct and unevenly applied.

“A lot of the opponents [to reform] are saying ‘just navigate the system and do it legally’ but there’s no way to do it right when someone is out of status,” Jarecki said. “The whole system has got to be fixed.”

For more information about the NIJC, visit www.immigrantjustice.org/.

To reach the Law Office of Michael R. Jarecki, visit www.jareckilaw.com/.

Coming in part two: A Nigerian immigrant speaks out about his home country. America's story in detail and Immigration law expert Roberto Romero-Perez and longtime activist Julio Rodriguez weigh in on the issue.

Series links:

LGBT immigrants still face hurdles, part one of series. windycitytimes.com/lgbt/LGBT-immigrants-still-face-hurdles-Part-one-/50226.html.

Immigration and LGBTQs: Immigrants tell their stories, part two of series.
windycitytimes.com/lgbt/Immigration-and-LGBTQs-Immigrants-tell-their-stories/50272.html.

Immigration and the LGBT community: Inside ICE detention, part three of series
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Immigration and LGBTQs: Inside ICE detention, part four of the series.
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