



## **Proposed Rule on Issuance of a Visa and Authorization for Temporary Admission into the United States for non-immigrants (temporary travelers into the United States) with HIV.**

On December 1, 2006 (World AIDS Day) the White House announced that the President would “direct the Secretary of State to request and the Secretary of Homeland Security to initiate a rulemaking that would propose a categorical waiver for HIV-positive people seeking to enter the United States on short-term visas.”

While it was clear from the outset that the proposed rule would, would not rescind the entry ban on travelers with HIV or remove HIV as grounds for inadmissibility to the United States, almost 11 months passed before details of the Department of Homeland Security (DHS) proposal were released.

In addition to upholding and explicating existing provisions of the current regulation, the DHS proposal introduces some new and troubling criteria. Gay Men’s Health Crisis and the Coalition to Lift the Bar will be submitting comments prior to the December 6<sup>th</sup> deadline (details on how to do this follow this document). In an effort to help our colleagues in other organizations formulate their own responses to the proposal, we offer this breakdown on what this new rule would change, what would remain the same, with particular emphasis on new and ongoing areas of concern.

### **The basics**

The proposed rule does not change Section 212(a)(1)(A)(i) – (HIV Inadmissibility Clause) of the Immigration and Nationality Act which has, for 20 years, barred HIV+ immigrants already in the U.S. from attaining any recognized legal status except in extremely limited circumstances; barred HIV+ people from coming to the U.S. to immigrate; and barred HIV+ people who are not U.S. citizens or legal permanent residents from traveling to or transiting through the U.S.

Under the proposed rule, **immigrants with HIV would still be rendered inadmissible** and subject to the 212(g) waiver requirements (need for a family member, private health insurance, etc.).

As is true with the current policy, under the new rule **HIV-positive travelers** seeking a waiver would be limited to admission on a B-1 (entering for a short business related reason) or B-2 visa (visitors for pleasure) for visits of 30 days or less. However, under the new rule, they would be able to apply for a waiver to allow them admission into the United States without prior approval by the Secretary of Homeland Security. In other words, the determination on their application could be made at the consular officer level in their home countries rather than by the Department of Homeland Security. The “visa stamp” would be valid for 12 months or less; and the traveler would be allowed into the U.S. for 2 “visits” not to exceed 30 days. **Waiver applicants would still be allowed to apply under the current system (i.e., through DHS) even if the new rule is adopted.**

## The limits of “categorical”

The 2006 White House announcement used the term “categorical waiver.” Similarly, the DHS proposal speaks of “categorical authorization.” This has led to some confusion. “Categorical” here does not mean “absolute” nor is the waiver under discussion even available to all individuals within the given category of HIV-positive prospective travelers to the U.S. The application process would remain an individual one, with each applicant required to provide assorted evidence related to their HIV status; their assets, and their knowledge of transmission. All that is “categorical” here is the authorization DHS is giving to consular officers in an HIV-positive person’s country of origin to determine whether or not he or she may be admissible to the U.S. without having to send the paperwork to DHS for approval.

## Criteria for entry

To quote from the DHS notice: “DHS is proposing this categorical authorization to allow application for admission to the United States under B-1 (business visitor) or B-2 (visitor for pleasure) status for a period not to exceed thirty days if the applicant establishes specific facts and meets certain conditions.” As noted above, this is nothing new. The type of visa, the maximum length of stay, and the requirement that the applicant ensures a minimized risk to public health and that no cost will be imposed on local, state, or federal government without prior consent is true under the current system. Nevertheless, there are several red flags arise when we get to the details of the new rule:

- Controlled state of HIV In the past, waiver applicants had to demonstrate that they were asymptomatic. Under the new rule, they would have to “show a controlled state of HIV such that there is no anticipated need for additional medical care” while in the U.S. The proposed rule defines a “controlled state” as existing when there are no symptoms of “an active, AIDS-related condition that is contagious or that requires urgent treatment.” What is not specified is how the absence of symptoms will be demonstrated? Will a provider’s letter suffice? What about travelers coming from medically underserved areas who may not be able to secure recent medical documentation?
- Evidence Applicants must also provide the consular officer with evidence that (a) the danger to the public health is minimal; (b) the possibility of transmission of HIV is minimal; (c) no cost will accrue to any government agency without prior consent. Again, the question arises, what will count as evidence? It is a near certainty that applicants from under-resourced countries, as well as low-income applicants from all countries, will face the greatest difficulties in supplying the requisite proof.
- Drug supply Under the proposed rule, applicants would have to establish that they have an adequate supply of antiretrovirals (ARVs) to last for the duration of their trip to the U.S. This new provision demonstrates a profound lack of understanding of HIV and AIDS, as there is always a chance that an individual’s treatment regimen may need to be adjusted. Furthermore, many asymptomatic HIV+ people are not on medication. Who is going to check if a traveler has an “adequate supply” of their meds? Customs and Border Patrol at the port of entry? The consular officer? Neither have expertise in HIV treatment. What happens if the luggage with the ARVs is lost? Does that put the traveler out of compliance?
- Expertise and authority Consular officers currently evaluate much of the criteria listed above, but the question remains: Are they truly equipped to make determinations regarding medical etiology, medication, transmission, public health, etc.? There is no provision in the DHS proposal for any type of training for consular officers. What’s more, as is currently the case, **there is no mechanism to appeal a consular officer’s determination.**

- Knowledge of HIV Applicants must show that they have been counseled on and are aware of the communicability and routes of transmission of HIV. This is the case currently, but again the proposed rule offers no clarity on what counts as evidence of this understanding. What is new is the inclusion that applicants demonstrate that they know they cannot donate blood or blood components.
- Assets Applicants would also have to prove they have sufficient assets (such as insurance) to cover any medical care they may need while in the U.S. This is the case now and poses a barrier to low-income travelers, those with insurance that is not recognized by U.S. facilities, and those who are entirely without insurance owing to the medical care delivery system in their home countries.
- Visa Waiver Program This allows travelers from certain countries\* (primarily European) to enter the U.S. without a visa provided they are not “inadmissible.” HIV-positive travelers from these countries are considered “inadmissible” and have always been required to get a visa. The new rule upholds and makes explicit their inadmissibility under the Visa Waiver Program.

Because HIV-negative travelers from these countries do not need a visa, they are not required to prove that they have sufficient assets to cover medical care should the need arise while they are in the U.S. While HIV-negative travelers from countries where visas are required to travel to the U.S. may or may not be asked if they have such assets at the discretion of the consular officer during the interview process, no such attestation is demanded on the application form itself. In contrast, the proposed rule implies that HIV-positive travelers would be out of compliance if, due to unforeseen circumstances, they required medical care, including emergency room care that exceeded their assets.

## Compliance and consequences

- Extension of stay and/or change in status The current policy does not address this issue at all. Its inclusion in the DHS proposal is one of the most disturbing elements of the new rule. Waiver seekers would be required, to forgo, in writing, the opportunity to apply for an extension of their stay, a change in nonimmigrant status, or an adjustment of status to that of permanent resident (DHS is also considering whether it would be sufficient to have consular office simply advise applicants, orally or in writing, that they are surrendering this opportunity). As written, this would mean:
  1. Travelers would not be permitted to extend their stays in the U.S. beyond 30 days, should the need arise.
  2. Should an applicant have the opportunity to apply for a work visa, they would have to return home to do so and would probably be denied.
  3. Applicants would not be allowed to apply for a green card within the United States if entering under this waiver.

While this provision may not foreclose on the ability of an individual who enters the U.S. under this new process to apply for asylum, a literal reading of this provision suggests that he or she would never be able to get a green card. Unable to attain legal permanent residency status, this person would remain in limbo indefinitely, barred from a host of services, benefits, and employment opportunities. There is another option: If an applicant

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\* There are 27 Visa Waiver Program countries: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.

elects to go through the waiver process that is currently in place instead of the “streamlined” process in the proposed DHS rule, the opportunity to extend his or her stay or to apply for a change of status would not have to be relinquished.

- Failure to comply If a traveler does not comply with the conditions set out in the new rule, he or she would be permanently ineligible for admission under the proposed regulations. The stakes here are high for an HIV-positive individual. What happens if an individual becomes symptomatic during the course of his or stay in the U.S.? Or if he or she gets the flu or has an accident on Day 28 in the U.S. and cannot travel for two weeks? What if they need to change their drug regimen (see above)? Would this individual thereafter be barred from entering the U.S.?

## Other considerations

- Accidental violations Decisions by the consular officers are not binding on the Customs and Border Patrol (CBP) and *vice versa*. In other words, CBP could stamp a person’s papers as valid for 60 days when the consular officer only authorized 30 (the maximum for the HIV waiver). Travelers may unintentionally violate the provisions of their visa if they are not careful.
- Proof of HIV status The proposed rule adds the requirement that applicants establish that they are HIV-positive, though it does not indicate what would be accepted as proof.
- Waiver stamped on passport The practice of branding people's passports with a marker of waiver will continue.

In addition to addressing the issues outlined above, we intend to include in our formal comments that the U.S. HIV entry bar is a violation of human rights as enumerated by the International Covenant on Civil and Political Rights, the UN Declaration of Human Rights, and the UN human rights guidelines on HIV/AIDS and that it has been acknowledged by the American Medical Association, the American Public Health Association, and two Secretaries of Health and Human Services as being unjustifiable on public health grounds.

Comments must be received by December 6, 2007. We are sending along a pdf of the proposed rule which includes information on how and where to submit them.

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