



HUMAN  
RIGHTS  
CAMPAIGN

December 4, 2007

Border Security Regulations Branch  
Customs and Border Protection  
1300 Pennsylvania Avenue NW (Mint Annex)  
Washington, DC 20229

**RE: Comments on Proposed Rule regarding issuance of a visa and authorization for temporary admission into the United States for certain nonimmigrant aliens infected with HIV, 8 CFR Parts 100 and 212**

To Whom It May Concern:

On behalf of the Human Rights Campaign's more than 700,000 members and supporters nationwide, we write to voice our concerns to Customs and Border Protection (CBP) and the Department of Homeland Security (DHS) regarding the Proposed Rule published November 6, 2007, that would provide a "streamlined" process to authorize short-term, nonimmigrant visas for aliens inadmissible solely due to their infection with HIV.

HRC deplores the categorical inadmissibility of foreign nationals living with HIV and AIDS under the Immigration and Nationality Act (INA) as discriminatory and unjustified by any public health rationale and calls on Congress for its immediate repeal. However, we acknowledge that only action by Congress can fully remedy this injustice and applaud DHS and CBP for attempting, through the regulatory process, to provide a method for providing temporary admission to nonimmigrant aliens with HIV.

However, in reviewing the proposed regulations, we have identified several provisions, outlined below, that could make the procedure for obtaining a waiver more onerous for HIV-positive nonimmigrant aliens than the existing process. Although the proposed regulations would continue to allow these individuals to apply for a waiver through the case-by-case determination currently available (pursuant to 8 CFR 212.4(a) and (b)), the vast majority of nonimmigrant aliens with HIV will likely choose to follow the process specifically laid out for HIV-related waivers. Therefore, it is crucial that the proposed regulations provide for a fair and transparent process, easily understood by both the waiver applicant and the consular officer reviewing that application.

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## **SPECIFIC COMMENTS:**

*Criteria for Entry:* Unlike the current case-by-case determination, the proposed regulations lay out a series of criteria that an HIV-positive nonimmigrant alien must satisfy in order to obtain temporary admission. Although HRC is encouraged by the use of criteria related to public health—rather than the absolute discretion of DHS—in determining whether a waiver is to be granted, we remain strongly concerned both about the substance of the criteria and the qualifications of those assessing whether those criteria are satisfied in a waiver application.

Many of the criteria outlined in 212.4(f)(2) of the proposed regulations involve an assessment of the applicant's HIV status and access to appropriate treatment. For example, an applicant must establish that his or her HIV infection is in “a controlled state,” that it “poses a minimal risk of danger of transmission” and that he or she “has, or will have access to, an adequate supply of antiretroviral drugs if medically appropriate”. The proposed regulations do not, however, provide further guidance as to what constitutes sufficient evidence of these factors. It is unclear, for example, if a statement from the applicant's physician would satisfy the criterion regarding a “controlled state” of HIV infection.

The lack of further guidance regarding these criteria is exacerbated by the fact that under these proposed regulations the determination whether the requirements of the waiver application have been satisfied will be made by consular officers. It is highly unlikely that these individuals will have the medical or public health expertise to independently assess the nature of and appropriate treatment for an HIV-positive applicant. For example, the criterion in 212.4(f)(2)(v) requires an adequate supply of antiretroviral medication, if medically appropriate, but provides no guidance as to how a consular officer would determine what regimen is medically necessary, and appears to presume that antiretroviral therapy will be the norm for HIV-positive applicants in the range of U.S. consulates worldwide.

HRC strongly urges CBP and DHS to provide further guidance, in the regulations or supplementary information, for consular officers assessing whether an applicant has satisfied the conditions for the waiver. At the very least, the regulations should make clear that the opinion of an applicant's physician or other qualified health care provider should carry substantial weight when a consular officer reviews a waiver application.

*Lack of Mechanism for Appeal:* Compounding the concern that consular officers will be assessing criteria involving complex medical and public health questions with little guidance is the fact that the proposed regulations provide no mechanism for appealing the denial of a waiver. The INA's far-reaching ban on HIV-positive aliens makes the short-term nonimmigrant visas available under the proposed rule one of these individuals' few avenues for access to the United States. Coupled with the concerns regarding the application criteria and those assessing them described above, the gravity of the potentially arbitrary denial of a waiver by a consular officer strongly demonstrates the need for a review or appeal process.

HRC strongly urges CBP and DHS to include in the regulations a clear, timely process by which an applicant may appeal the denial of a waiver application, either to the State Department or DHS.

*Inability to Adjust Status:* The proposed regulations also require waiver applicants to affirmatively waive the right to apply for an extension of nonimmigrant stay or any other change of immigration status upon admission to the United States under the waiver. Although HRC understands that the waivers under the proposed regulations are designed solely to permit temporary, nonimmigrant visits, we think it unnecessarily harsh to require an applicant, judged by the waiver application to be no particular danger to public health, to sign away the opportunity to seek an extension of the temporary admission or other change of status, the need for which he or she may not be able to anticipate at the time of the waiver application. In light of the INA's sweeping judgment of inadmissibility for HIV-positive aliens, it is unlikely that most nonimmigrant visitors admitted under the proposed regulations would even have a means to adjust their status.

HRC understands that CBP and DHS are bound by the restrictions for HIV-positive aliens under the INA, but urges them not to place this unnecessary condition on waiver applications.

The Human Rights Campaign appreciates having the opportunity to weigh in on these regulations. Thank you for considering our comments. If you have any questions regarding our comments, please do not hesitate to contact Dena Wigder on my staff at 202.216.1564.

Sincerely,

A handwritten signature in cursive script that reads "Allison Herwitt". The signature is written in black ink and is positioned above the typed name and title.

Allison Herwitt  
Legislative Director