



U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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Memorandum

TO: EXECUTIVE LEADERSHIP

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SUBJECT: Public Law 110-293, 42 CFR 34.2(b), and Inadmissibility Due to Human Immunodeficiency Virus (HIV) Infection

1. Purpose

The purpose of this memorandum is to direct USCIS officers to hold in abeyance any waiver application and associated benefit request (such as adjustment of status or refugee), which would be denied under current law, if the only ground of inadmissibility is that the applicant has been diagnosed with HIV infection. It is not necessary to hold such a case, however, if the alien is eligible for a waiver of inadmissibility and USCIS determines that, as a matter of discretion, the waiver should be granted. This guidance is provided in response to the Department of Health and Human Services' (HHS) publication on July 2, 2009, of a proposed rule to remove HIV from the list of communicable diseases of public health significance and is effective as of the date of this memo. The guidance provided in the first memorandum on this issue, Public Law 110-293 and Inadmissibility due to HIV Infection, published on August 26, 2008, is rescinded as of the date of this second memorandum.

2. Background

In an August 26, 2008, memorandum, USCIS advised officers that the President had signed into law the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis and Malaria Reauthorization Act of 2008, Public Law No. 110-293. Section 305 of P.L. 110-293 amends section 212(a)(1)(A)(i) of the Immigration and Nationality Act so that the Secretary of HHS is no longer *required* to designate HIV infection as a “communicable disease of public health significance.” The August 26, 2008, memorandum also advised officers that unless and until HHS amends 42 CFR 34.2(b), to remove HIV infection from the list of diseases that qualify as a “communicable disease of public health significance,” officers must continue to consider HIV as a communicable disease of public health significance for which a waiver is required.

On July 2, 2009, HHS published a proposed amendment to 42 CFR 34.2(b) in the *Federal Register* at 74 *Fed. Reg.* 31798. The amendment proposes to remove HIV infection from the list of communicable diseases of public health significance. If the proposal is adopted as an interim or final rule, HIV infection will no longer make an alien inadmissible.

3. Guidance

An applicant’s admissibility is determined based on the law in effect at the time of the final decision. *See Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). Therefore, the current version of 42 CFR 34.2(b) continues to apply until such time as HHS has published a final rule amending the regulations. HIV testing will continue to be part of the medical assessment for aliens who are applying for an immigrant visa, refugee status or adjustment of status, and officers deciding any case before the rule becomes final must continue to find applicants who test positive for HIV infection inadmissible. As stated in the August 26, 2008, memorandum, applicants found to be inadmissible due to an HIV infection may file the appropriate waiver application.

If the applicant applies for a waiver, the USCIS officer should continue following existing practices and policy guidance. That is, if USCIS finds that the alien qualifies for the waiver, and that, as a matter of discretion, the waiver should be granted, USCIS may approve the waiver and, if eligible, any benefits application.

If no waiver was filed, but the applicant is HIV positive and may be eligible for a waiver, the officer will still issue a request for evidence (RFE) for the waiver application. The RFE should articulate the inadmissibility finding based on HIV infection and advise the applicant that the Secretary of Health and Human Services has proposed removing HIV infection from the list of communicable diseases of public health significance. 74 *Fed. Reg.* 31798 (2009). The RFE should also advise that if HHS adopts this proposal as a final rule, the applicant may no longer be inadmissible due to HIV infection. Until such time, however, USCIS cannot approve the adjustment of status application absent a waiver, and therefore the delay may be significant. In the interim, applicants who wish to receive a decision before HHS makes a final decision on whether to remove HIV infection from the list of communicable diseases of public health significance may apply for a waiver, with fee. The RFE should also advise that if the applicant chooses to file the waiver application before HHS promulgates a final rule, USCIS will not refund the filing fees.

If the applicant files a waiver application, and USCIS finds both that the alien qualifies for the waiver and that, as a matter of discretion, the waiver should be granted, USCIS may approve the waiver and, if eligible, any pending adjustment or refugee application. Since the waiver makes the case approvable, whether HHS adopts a final rule or not, there is no need to hold the case for the final HHS rule. If the applicant does not respond to the RFE, officers should not deny the case as abandoned. Rather, the case should be placed on hold pending the publication of the HHS interim or final rule.

In light of the HHS proposed rule, USCIS will not deny any adjustment, refugee, or other benefit application if the sole ground of denial of the application would be based on inadmissibility due to HIV infection. Nor will USCIS deny any waiver application if the sole ground of inadmissibility is HIV infection. If the applicant's sole ground of inadmissibility is HIV infection, and the officer finds either that the alien does not qualify for a waiver, or that a waiver is not warranted as a matter of discretion, all written decisions should state that the case will be placed on hold and automatically reexamined by USCIS, pending the outcome of the rule. The hold is only for cases where the application would be approved, but for the HIV infection. If the applicant is inadmissible on other grounds unrelated to HIV infection, or ineligible for adjustment of status or refugee status for other reasons, USCIS officers should enumerate all applicable grounds of inadmissibility in the written decision, including HIV.

Should the HHS rule be adopted as interim or final, additional guidance will be issued and the Adjudicator's Field Manual will be updated, accordingly.

4. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications for adjustment of status. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

5. Contact Information

Questions regarding this memorandum and USCIS policy regarding the medical examination of aliens may be directed through supervisory channels to OFO AOS and Legalization Mailbox, Timothy Schäffer, Service Center Operations, Family & Status Branch, Whitney Reitz, Chief of the International Operations Division Programs Branch, Pamela G. Williams, Policy and Regulation Management, or Roselyn Brown-Frei, Office of Policy & Strategy.