

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 100 and 212

USCBP-2007-0084; CBP Dec. 08-41

RIN 1651-AA71

Issuance of a Visa and Authorization for Temporary Admission into the United States for Certain Nonimmigrant Aliens Infected with HIV

AGENCY: Customs and Border Protection; DHS.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security (DHS) is amending its regulations to provide, on a limited and categorical basis, a more streamlined process for nonimmigrant aliens infected with the human immunodeficiency virus (HIV) to enter the United States as visitors on temporary visas (for business or pleasure) for up to 30 days. Nonimmigrant aliens who do not meet the specific requirements of the rule or who do not wish to consent to the conditions imposed by this rule may elect to seek admission under current procedures and obtain a case-by-case determination of their eligibility for a waiver of the nonimmigrant visa requirements concerning inadmissibility for aliens who are infected with HIV.

DATES: This rule is effective on [insert date of publication in the FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

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I. Background and Purpose.

Section 212 of the Immigration and Nationality Act (INA) makes ineligible for admission into the United States any nonimmigrant alien “who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance.” See INA section 212(a)(1)(A)(i); 8 U.S.C. 1182(a)(1)(A)(i); 42 CFR 34.2.¹ The Secretary of Homeland Security may authorize visa issuance and temporary admission of such nonimmigrants

¹ At the time the proposed rule was published, INA section 212(a)(1)(A)(i) specifically listed the etiologic agent that causes acquired immune deficiency syndrome. That language was deleted by the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. 110-293, sec. 305, 122 Stat. 2918 (July 30, 2008). As discussed below, however, the Department of Health and Human Services (HHS) regulatory text implementing the deleted prohibition continues to exist at the time of promulgation of this final rule.

despite existing grounds of inadmissibility, subject to conditions prescribed by the Secretary. See INA section 212(d)(3)(A); 8 U.S.C. 1182(d)(3)(A).

On December 1, 2006, the President directed the Secretaries of State and Homeland Security to initiate a rulemaking action to propose a categorical authorization to allow HIV-positive nonimmigrant aliens to enter the United States through a streamlined process. See White House, Fact Sheet: World AIDS Day 2006, (December 1, 2006), www.whitehouse.gov/news/releases. On November 6, 2007, DHS published a notice of proposed rulemaking proposing a streamlined process for HIV-infected nonimmigrant aliens to more easily enter the United States through a streamlined process. See 72 FR 62593.

This final rule adopts the proposed amendments to the regulations and simplifies the process for authorization of admission with some modifications in light of the public comments received. Under the final rule, DHS will allow aliens who are HIV-positive to enter the United States as visitors (for business or pleasure) for a temporary period not to exceed 30 days, without being required to seek such admission under the current, more complex (individualized, case-by-case) process provided under the current DHS procedures.

The current process requires the Department of State (DOS) to make individual recommendations to DHS, which must make a case-by-case evaluation and decision to authorize the issuance of the visa and the applicant's temporary admission. This process takes significant time. In fiscal year (FY) 2007, the average processing time for DHS to make decisions on such consular nonimmigrant recommendations (for issuance of visas and authorization for temporary admission) was 18 days. This final rule streamlines this

process and will make visa authorization and issuance available to many aliens who are HIV-positive on the same day as their interview with the consular officer.

II. The Final Rule.

An alien who is HIV-positive is currently inadmissible to the United States under INA section 212(a)(1)(A)(i), 8 U.S.C. 1182(a)(1)(A)(i), as implemented through 42 CFR 34.2. As more fully discussed in the proposed rule, such aliens have been, and are currently, able to apply for admission to the United States pursuant to INA section 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A), and applicable DHS regulations (8 CFR 212.4(a)), which allow the Secretary of Homeland Security to authorize issuance of a visa and temporary admission despite certain grounds for inadmissibility. 72 FR 62593, 62594 – 5 (Nov. 6, 2007). These existing processes require specific, individualized action by DHS upon submission of eligibility information by the alien (the same kind of information that is required under the proposed regulations) that must be reviewed, evaluated, and ruled upon on a case-by-case basis. In contrast, the process established in this final rule would authorize a consular officer or the Secretary of State to categorically grant a nonimmigrant visa and authorize the applicant to apply for admission into the United States, notwithstanding an applicant's inadmissibility due to HIV infection, if the applicant meets applicable requirements and conditions, without the additional step of seeking review and decision by DHS prior to the granting of the nonimmigrant visa. This categorical authorization provides a more streamlined and rapid process for obtaining temporary admission under INA section 212(d)(3)(A)(i), 8 U.S.C. 1182(d)(3)(A)(i).

Under current criteria for authorizing admission of otherwise inadmissible nonimmigrant aliens generally, DHS must take into consideration the risk of harm to

society if the applicant is admitted into the United States, the seriousness of any immigration law or criminal law violations (if any), and the nature of the reason for travel. See Matter of Hranka, 16 I&N Dec. 491 (BIA 1978). These are general criteria applicable to any application for authorization of a visa under INA section 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A).

DHS currently allows otherwise inadmissible aliens to apply for admission on a case-by-case basis by employing a balancing test involving several factors that incorporates the criteria required under Hranka (regardless of whether the authorization is applied for before a consular officer, the Secretary of State, or directly to DHS). As discussed in the proposed rule, DHS applies these criteria to HIV-positive aliens seeking admission to the United States on a temporary basis by considering whether: (1) the danger to the public health from admission of the nonimmigrant alien is minimal; (2) the possibility of the transmission of the infection is minimal; and (3) any cost will be incurred by any level of government agency in the United States (local, State, or Federal) without the prior consent of that agency. Consular officers must find (based on evidence provided by the applicant that satisfies reviewing officials) that the first two factors are no more than minimal and that there will not be a cost to an agency absent prior consent.

This final rule incorporates these criteria, as well as additional factors applied under current policy that were developed in a series of instructions from the former Immigration and Naturalization Service (INS) and the Department of Justice (DOJ). Nonimmigrant aliens who are HIV-positive who do not meet the specific circumstances of these clarifying instructions or who do not wish to consent to the conditions imposed by this rule may still elect a case-by-case determination of their eligibility for issuance of

nonimmigrant visas and admission.

This final rule provides an additional avenue for temporary admission of HIV-positive nonimmigrant aliens while minimizing costs to the government and the risk to public health. These goals are accomplished by setting requirements and conditions that govern an alien's admission, affect certain aspects of his or her activities while in the United States (e.g., using proper medication when medically appropriate, avoiding behavior that can transmit the infection), and ensure his or her departure after a short stay. This final rule facilitates the temporary admission to the United States of HIV-positive nonimmigrant aliens.

This final rule is consistent with Congress' humanitarian purpose in enacting the limited waiver of INA section 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A), and complies with the statute regarding aliens inadmissible due to health reasons by prescribing "conditions ... to control and regulate the admission and return of inadmissible aliens applying for temporary admission." INA section 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A). Thus, under the final rule, an HIV-positive applicant for a nonimmigrant visitor visa would be required to satisfy criteria designed to ensure that the risk to the public health is minimized to the greatest reasonable extent and that no cost will be imposed on any level of government in the United States (local, State, or Federal). The short duration of admission under the amended regulation, and the various conditions designed to control the alien's temporary stay and ensure his or her return (departure from the United States), minimize the risk of disease transmission in the United States, as well as the risk of increased burden on our public health resources. HIV-positive aliens not meeting the criteria under the amended regulation would still be able to seek individualized (case-by-

case) consideration for admission pursuant to INA section 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A), under current DHS policy. See 8 CFR 212.4(a) or (b).

The final rule includes specific requirements (based in large part on the existing criteria) discussed in the proposed rule. 72 FR at 62595 – 6. After consultation with the HHS' Centers for Disease Control and Prevention, and National Institutes of Health, and careful consideration of the comments received from the public on the proposed rule, DHS has determined not to change the criteria relating to medical etiology, personal understanding, limited potential health danger, continuity of health care, temporary admission, general enforcement, and general duration. DHS has made several modifications in light of the public comments, as discussed more fully below.

Several commenters questioned whether it was appropriate to impose a waiver of adjustment of status pursuant to a grant of asylum under INA section 208, 8 U.S.C. 1158. After further consideration, DHS agrees that asylees have continued eligibility for permanent resident status; therefore, under the final rule, an alien who has been granted asylum after having been admitted pursuant to the proposed categorical authorization will have continued eligibility to apply to adjust status under the asylum statute and regulations. However, nothing within the rule exempts the alien from the requirement that the alien establish his or her eligibility to adjust under INA section 209, 8 U.S.C. 1159. Specifically, nothing within this rule waives any of the requirements for adjustment of status including, but not limited to, the requirements in 8 CFR part 209.

Additionally, the short duration raised a number of questions about extensions. After further consideration, DHS has decided to permit an additional period or periods of satisfactory departure in exigent circumstances under a provision modeled after the Visa

Waiver Program. See 8 CFR 212.4(f)(5) of this final rule.

Some commenters questioned whether aliens who receive this visa authorization will receive visas that identify them as HIV-positive. The visa will not be annotated in a manner that would allow the public to identify the alien as HIV-positive.

This final rule does not create the provision for temporary admission of HIV-positive aliens; such a provision exists in statute and regulation. This rule merely provides an alternative, quicker process for obtaining admission to the United States under INA section 212(d)(3)(A)(i) 8 U.S.C. 1182(d)(3)(A)(i).²

III. Discussion of Comments.

The proposed rule solicited public comments over a 30-day comment period. DHS received over 700 comments.

A. Objections to the inadmissibility of HIV-positive aliens.

By far the most numerous of all the comments are those objecting to the inadmissibility of HIV-positive aliens. Many of these commenters objected to the proposed rule's process and called for repeal of the governing statute's ban on HIV-positive aliens for various reasons, including the following: it is unnecessary and ineffective to protect the American public; it is discriminatory; it is unconstitutional; it is outdated and does not reflect current medical science. Others among these commenters expressed approval of the proposed process to streamline temporary admission for these aliens as a first step but also stated that the rule does not go far enough to make it easier for these aliens to travel to the United States. These latter commenters called also for the repeal of the statute's HIV admission ban as a next step. One commenter suggested that the United States mirror Australia's approach to admitting HIV-positive aliens (described

² The final rule adopts, without change, the technical amendments to 8 CFR 212.4(e).

only as less restrictive). Several commenters stated that international AIDS conferences are not held in the United States as a result of the inadmissibility of HIV-positive aliens.

Some commenters objected to the governing statute's inadmissibility provision that imposes the travel and immigration ban on HIV-positive aliens and to the proposed rule which, they claimed, creates the impression that the alleged discriminatory statute can be mitigated by the proposed process for temporary admission of these aliens. Some comments called upon the Secretary of Homeland Security and the President to withhold publication of a final rule and support repeal of the statute that imposes this inadmissibility.

Repeal of the statutory inadmissibility provision (the admission ban) applicable to HIV-positive aliens is within the province of Congress as a matter of law, and the President recently signed legislation that removes from applicable law the language requiring that HIV must be included in the list of communicable diseases of public health significance. See Pub. L. No. 110-293, 122 Stat. 2918 (July 30, 2008). The INA, as amended, makes inadmissible to the United States any alien "who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance...." INA section 212(a)(1)(A)(i), 8 U.S.C. 1182(a)(1)(A)(i). Although Public Law 110-293 eliminates the requirement that HIV be included in the list of communicable diseases of public health significance (as defined at 42 CFR 34.2), HIV remains on that list until HHS amends its regulation. See 42 CFR 34.2. HHS has indicated its intention to do so by rulemaking; pending such action, any alien who is HIV-positive is still inadmissible to the United States.

This regulation will permit short-term admission while HHS completes a rulemaking to remove HIV from the list of communicable diseases of public health significance. 42 CFR 34.2.

B. Opposition to admission of HIV-positive aliens.

A few commenters expressed objection to admission of HIV-positive aliens under the discretionary authority provision of the governing statute and urged its repeal.

In the statute that imposed the ban on admission of aliens with communicable diseases of public health significance, Congress also provided for the discretionary exercise of authority to admit these aliens (among others) for a temporary period under certain circumstances. INA section 212(d)(3)(A), 8 U.S.C 1182(d)(3)(A). Congress restricted the availability of this discretionary authority by precluding its application to aliens who are inadmissible due to several of the security and related grounds; Congress imposed no such restriction on aliens inadmissible on other grounds, including health-related reasons. Also, Congress has made available a waiver of inadmissibility for immigrants seeking admission to the United States who are inadmissible due to a communicable disease listed by HHS. INA sections 209(c) and 212(g), 8 U.S.C. 1159(c) and 1182(g).

This rule does not create a new regulatory provision allowing HIV-positive aliens to enter the United States temporarily; the rule merely provides an alternative process in the regulations to streamline issuance of nonimmigrant visas to, and the temporary admission of, HIV-positive aliens under existing statutory authority within the Secretary's discretion. While the existing process provides for case-by-case authorization (by DHS) for issuing visas and authorizing temporary admission, the authorization process provided

in this rule is categorical, i.e., authorization is granted through this rulemaking to any alien applicant who meets the requirements and conditions. The Secretary may exercise his discretion by rulemaking rather than on a case-by-case basis and is doing so here.

Lopez v. Davis, 531 U.S. 230, 243-44 (2001) (quoting American Hosp. Ass'n v. NLRB, 499 U.S. 606, 612 (1999)) (emphasis added); Yang v. INS, 79 F.3d 932, 936 (9th Cir.), cert. denied, 519 U.S. 824 (1996).

The final rule contains several requirements to minimize to the greatest reasonable extent public health risks and risk of cost to any agency of any level of government in the United States. The final rule also imposes conditions to control and regulate the admission and return (to their home countries) of beneficiaries of the categorical authorization.

C. Asylees and the required waiver of adjustment of status.

Several commenters objected to the requirement of the proposed rule that an applicant must waive his right to file for an adjustment of status to that of lawful permanent resident if he applied for and was granted asylum in the United States. Some commenters objected also to the requirement that an applicant must waive his right to file, after entering the United States under the proposed categorical authorization, an application for a change of nonimmigrant status or extension of stay.

DHS agrees that asylees obtain a special status under INA section 208, 8 U.S.C. 1158, that, where possible, should be recognized consistently. Therefore, DHS has modified the adjustment of status waiver in the final rule to clarify that applicants for the categorical authorization will not be required to waive the opportunity to apply for adjustment of status should they be granted asylum after entering the United States via

the categorical process. The final rule will retain the required waivers relating to change of nonimmigrant status, extension of stay, and adjustment of status other than through the asylum process. Any alien who is unwilling to agree to these waivers may apply for temporary admission under the existing process of 8 CFR 212.4(a) which is not conditioned on the making of these waivers. However, this waiver is for admission as a nonimmigrant. These visas are not available for aliens who intend to stay permanently in the United States as immigrants. Aliens seeking permanent resident status must apply for immigrant visas and fulfill the requirement for immigrants set out in the INA.

D. Privacy rights/annotation of visas.

Many commenters expressed concern about the privacy of applicants for the proposed categorical authorization. Primarily, the concern relates to whether the alien's visa (included within his or her passport) would be annotated to indicate admission under the rule's categorical authorization process. These commenters emphasized the stigma attached to HIV status and the risk that annotation could subject these aliens to discrimination. Some of these commenters expressed privacy concerns relative to a DHS database for HIV-positive aliens.

Some commenters questioned whether aliens who receive this visa authorization will receive visas that identify them as HIV-positive. The visa will not be annotated in a manner that would allow the public to identify the alien as HIV-positive.

Section 222(f) of the INA, 8 U.S.C. 1202(f), provides that DOS records pertaining to visa issuance or refusal are confidential, and shall be used only for the formulation, amendment, administration, or enforcement of the immigration and other laws of the United States, with exceptions not relevant here. These confidentiality provisions serve

to protect disclosures made as part of an application for a nonimmigrant visa by an alien who is HIV-positive. Moreover, under the final rule's categorical authorization process, unlike the existing process, there is no need for DHS to make case-by-case determinations on individual recommendations from the DOS. DHS will necessarily create the same records relative to aliens receiving authorization for visa issuance under the process (e.g., electronic records), as DHS normally creates for all aliens with visas who gain temporary admission as nonimmigrants. DHS will not maintain a separate database of aliens who are admitted under the categorical authorization process.

DOS scrupulously adheres to the statutory requirement regarding the confidentiality of information submitted during the consular interview process. Record information on applicants will be maintained by the DOS in accordance with confidentiality and security requirements, as well as any DOS System of Records Notices and Privacy Impact Assessments relative to any applicable systems covering this data collection.

E. Whether the rule is more stringent than the existing process.

Many commenters contended that the requirements and conditions of the proposed process make it more stringent than the existing process. These commenters therefore questioned that it is a "streamlined" process. Some recommended simplifying the process. One commenter suggested that DHS not make any change to the regulations, leaving the existing case-by-case process as the sole option.

The characterization of the categorical authorization process under the proposed rule and this final rule as "streamlined" refers to the fact that the process, unlike the existing process, does not require the alien's application for a visa and temporary admission to be submitted to DHS with the consular officer's recommendation. Under the existing

process, DHS must make a case-by-case evaluation and decision to authorize the issuance of the visa and the applicant's temporary admission. This step in the process necessarily takes time. In FY 2007, the average DHS processing time for all consular nonimmigrant recommendations (for issuance of visas and authorization for temporary admission) was 18 days. The categorical authorization process under this final rule does not require that step, and, therefore, the rule is less cumbersome and permits consular officers to issue visas on the same day the alien applies for the visa in many cases. The process is, therefore, more streamlined.

DHS is authorizing issuance of visas and temporary admission on a categorical basis only to those aliens who meet the rule's specific requirements and conditions. An alien may choose to apply for temporary admission under the existing case-by-case decision process if he or she wishes.

The existing process also imposes conditions that an applicant must meet to gain temporary admission, many of which are the same or similar to the conditions of this final rule's process. The conditions of the existing process have been developed through adjudication (see Matter of Hranka, 16 I&N Dec. 491 (BIA 1978)) and several instructions issued by the former INS. With this final rule, DHS is consolidating into one transparent source, the conditions and instructions applicable to HIV-positive aliens who wish to apply for categorical authorization for admission to the United States; the same conditions that have historically governed discretionary temporary admission under INA section 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A). The process implemented under this final rule retains the same evidentiary requirements as the existing process while providing an alternative to the case-by-case review by DHS that is required under the existing

regulation. The rule, however, adds restrictions on application for extension of stay, change of nonimmigrant status, and adjustment of status to that of permanent resident (other than through asylum). These restrictions are necessary to control the admission and return of these aliens since DHS is not performing a case-by-case review.

F. Sufficient insurance and medication.

Many commenters objected to the requirement in the proposed rule (8 CFR 212.4(f)(2)(v)), that an alien admitted under the proposed process for categorical authorization have possession of or access to an adequate supply of antiretroviral drugs (if medically appropriate) for the length of anticipated stay, and sufficient assets, such as medical insurance, to cover any medical care that may be necessary while in the United States. Some of these commenters mentioned that an alien may not have insurance or enough money to cover a medical event, some referring particularly to aliens from poor countries. Others questioned how an alien could establish adequate assets, some referring again to aliens from poor or third world countries. Still others asked about unanticipated expenses, and objected to requiring assets for these expenses. Lastly, several commenters suggested that this rule is racist because HIV-positive populations from developing countries are less likely to have access to medication and medical insurance.

The requirement to demonstrate availability of assets, such as through proof of insurance, is a reasonable condition meant to ensure that the applicant's short-term visit will not cause a financial burden to the American public and that there will be no cost to any agency of the United States without that agency's prior consent. An alien who is likely to become a public charge is inadmissible to the United States under INA section 212(a)(4), 8 U.S.C. 1182(a)(4). The totality of circumstances must be considered in

determining whether or not a person is likely to become a public charge. The requirement that an alien possess an adequate supply of medication (if medically appropriate), or have access to such a supply in the United States, would reduce this risk. DHS is aware that prescribed medication is not always necessary; the treatment protocol is determined by the patient's medical service provider. As with other medical determinations for visa purposes, the appropriateness of the alien's treatment protocol is subject to review by DOS' panel physicians. The requirement that the applicant not currently be exhibiting symptoms of an active, contagious infection with AIDS is also relevant to this determination.

Another consideration in deciding whether to exercise discretion favorably for an applicant for categorical authorization is whether any cost will be incurred by any agency of the United States (including State and local government) without that agency's prior written consent. Thus, applicants who do not have sufficient assets to cover the cost of their stay will not benefit from this new provision. Any written offer by a United States agency to provide medication and/or funding that is adequate for the applicant's travel will be considered a favorable factor. Any credible offer from any other financially stable source to provide medication and/or funding that is adequate for the applicant's travel will also be considered a favorable factor. In addition, the nature and duration of the applicant's travel plan and his or her present health are factors for consideration.

An applicant may establish that resources are available to cover medical expenses through several means. First, some medical facilities are operated by State or Federal agencies and, as a matter of policy, do not make provisions for collecting fees from patients accepted for treatment. If an applicant establishes, through documentation

provided by a medical facility, that the facility has agreed to provide the applicant services without reimbursement, or that its free services are available to the applicant or to similarly situated persons (such as nonimmigrant aliens) without specific mention of the applicant, the applicant is eligible for visa issuance and temporary admission even if the facility is supported by public funds.

An applicant may have sufficient personal assets to cover anticipated treatment. The assets must be available in the United States within the time frame required for payment by the medical facility. Assets can be established by commonly available documentation. Sponsors (individuals or organizations) may offer to cover potential medical expenses. Such sources should be able to provide documentation of intent and capability to provide that coverage. Finally, short-term medical trip insurance may be available to cover medical costs that the applicant may incur during the relatively short (30-day) period of admission. In every instance above, the applicant must, and should be able to, satisfy the consular officer that assets will be available within the United States to cover anticipated expenses. Again, an alien may seek admission under the existing process if he is unwilling or unable to meet the conditions of this final rule's process. The existing process, through the consular officer interview and DHS review, involves many similar requirements relating to the applicant's health and ability to cover expenses.

Regarding unanticipated medical expenses, the likelihood of such expenses is judged by the totality of circumstances in each applicant's case. Offers of support from individuals and organizations, as well as personal assets, will be given consideration.

DHS and DOS will make every effort to ensure that these regulations are applied consistently without regard to inappropriate considerations, such as an applicant's race.

G. Human rights concerns.

Some commenters pointed out that the United States is one of only a few countries in the world that restricts travel for those who are HIV-positive. These commenters contended that this is a violation of basic human rights (to travel) and that DHS and HHS should remove HIV infection from the list of contagious diseases of public health significance.

As discussed in the proposed rule, historically, Congress clearly expressed its intent that HIV infection be listed as a communicable disease of public health significance in enacting a statute to that effect. Because Public Law 110-293 eliminated a mandatory listing from the INA, HHS has indicated that it is beginning the process of removing HIV from the list of communicable diseases of public health significance by rulemaking. However, while that process is developing, through rulemaking, DHS is providing a streamlined process for these aliens to be granted temporary admission into the United States as an immediate interim option, pending HHS's plan to remove HIV from the list of communicable diseases of public significance.

H. Public health reasons for the rule.

Several commenters contended that the proposed process, with its requirements and conditions, is not supported by medical science, i.e., that the need for the limitations in admitting HIV-positive aliens is not based on sound public health reasons.

The final rule's process was developed in consultation with HHS's Centers for Disease Control and Prevention and National Institutes of Health. DHS relied on those knowledgeable agencies to provide input based on current science. HHS continues to list HIV as a communicable disease of public health significance and DHS must continue to

apply the statutory provisions regarding inadmissibility and discretionary authority for temporary admission in a manner appropriate to safeguard the public from what is still recognized under the current statute and regulation as a disease of public health significance.

I. Disparate treatment applied to contagious diseases.

A few commenters contended that the statutes and regulations pertaining to inadmissibility, discretionary authorization, and process that limit admission to the United States treat HIV infection differently than other communicable diseases, including sexually transmitted diseases (STDs). These commenters questioned the rationale for this disparate treatment and contended that the statute discriminated against aliens who are HIV-positive.

When the statute treated HIV infection (whether or not it is considered a STD) as a communicable disease of public health significance that disqualifies a carrier of the disease from admission to the United States (subject to exception), DHS utilized a lengthy detailed process for determining whether to grant temporary admission. Accordingly, DHS proposed an alternative, streamlined process for HIV-positive aliens to be granted temporary admission into the United States pending completion of HHS rulemaking.

The HHS list does not cover all communicable diseases, but HHS is charged with the responsibility and has the expertise to make distinctions. Some diseases are on the list, including some STDs (HIV, gonorrhea), while others are not. That a given disease is placed on the list while others are not is not, by itself, evidence of discrimination, nor does it show that the disease is wrongfully on the list. Other non-STDs covered include

leprosy (infectious) and tuberculosis (active). Other STDs covered include chancroid, granuloma inguinale, lymphogranuloma venereum, and syphilis (infectious stage). As HIV remains on the HHS list pending further action, publishing a final rule to put into place a streamlined process for temporary admission is appropriate.

J. The 30-day temporary admission limit.

A few commenters objected to the 30-day limit imposed by the rule for HIV-positive aliens entering the United States under the rule's categorical authorization process. These commenters contended that this period is needlessly short.

DHS has previously granted blanket authorizations under INA section 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A), for specific, limited purposes, such as to permit HIV-positive aliens to attend particular events, including the Salt Lake City Olympic games, the United Nations General Assembly Special Session on HIV/AIDS in 2001, various Universal Fellowship of Metropolitan Community Churches events, and the 2006 Gay Games in Chicago. Since 1990, aliens who are HIV-positive have rarely been given blanket authorizations for an admission of greater than 10 days. This new process will allow admissions for up to 30 days, which is in line with 30-day admissions often authorized under the individualized, case-by-case process.

The final rule describes a new (alternative) option for nonimmigrant aliens with HIV who wish to enter the United States in B-1/B-2 status for periods of time that do not exceed 30 days (but a provision for authorization of satisfactory departure in exigent circumstances is included in this final rule). Moreover, the final rule authorizes two applications for admission during the 12-month period of the visa validity. This reasonable condition of visa issuance and admission to the United States applies to the

majority of nonimmigrants traveling to the United States (regardless of particular nonimmigrant status). For those who anticipate traveling in other nonimmigrant categories or for longer than 30 days, the processes described in 8 CFR 212.4(a) and (b) remain available.

Moreover, many of the admissions under the existing process for HIV-positive aliens have been more narrowly limited to periods corresponding to a particular event in the United States, such as a seminar or convention. Typically, these admissions have been for less than 30 days. Admission under the existing discretionary authorization process also has been more restrictive for nonimmigrant aliens seeking to enter the United States for general tourism purposes. In these respects, the final rule's process is more advantageous to HIV-positive aliens seeking to enter the United States.

However, DHS recognizes that emergencies do occur and, accordingly, has added to this final rule a provision for authorizing an additional period or periods of stay, as appropriate and as deemed necessary by appropriate DHS officials, where an alien admitted under the final rule's process experiences exigent circumstances that prevent his or her departure from the United States. This provision is modeled after the "satisfactory departure" provision under the Visa Waiver Program regulations. 8 CFR 217.3(a); see 8 CFR 212.4(f)(5) as adopted in this final rule.

K. Extension of the comment period.

A few commenters requested additional time to file comments on the proposed rule.

The comment period was open for 30 days, and over 700 persons submitted comments. The comments submitted come from a wide variety of persons and appear to cover a wide breadth of relevant issues and objections. DHS concludes that there was

adequate opportunity for public participation and does not see the need to extend the comment period.

L. Vagueness in criteria and medical expertise of consular officers.

One commenter stated that the criteria of the rule's categorical authorization process that must be met are vague and cannot be administered consistently because consular officers are not able to assess the medical conditions the proposal vaguely puts forward. Similarly, four commenters suggested that consular officers are not trained to handle medical issues.

DHS disagrees. DOS has extensive experience processing applications under the existing HIV authorization process. In order to ensure consistent application of the criteria, DOS has issued specific instructions to consular officers regarding how to evaluate applications for admission to the United States, including medical issues such as those in question. In addition, consular officers may consult with panel physicians to assist with medical issues when necessary.

M. Negative impact on United States citizens.

One commenter stated that the proposal would have a negative effect on United States citizens.

DHS disagrees with this comment. This rule only affects nonimmigrant alien visitors to the United States and has no direct effect on United States citizens.

N. Focus on illegal aliens.

One commenter suggested that DHS should focus its resources on the illegal alien population in the United States.

DHS is committed to enforcing the laws within its purview, including those laws that

relate to illegal immigration and those laws that relate to public health concerns.

O. Aliens who are unaware of their HIV status.

One commenter suggested that DHS should focus its resources on those aliens seeking admission to the United States who are not yet aware that they are HIV-positive. Another commenter suggested that DHS focus on education and the prevention of AIDS.

In order to determine whether undiagnosed nonimmigrant aliens are HIV-positive, a medical examination would be required for all nonimmigrant visa applicants. DHS is not proposing to require such an examination as part of this rulemaking. However, the U.S. government is committed to preventing the global spread of AIDS through education and other measures.

P. Appeal of decision.

One commenter objected because the proposed regulation does not specifically provide for appeal of a consular officer's decision. If an alien is denied a visa and temporary admission under the rule's process, he or she may seek admission under the existing process for a case-by-case determination of eligibility.

Q. Future bar due to noncompliance.

One commenter contended that an alien who fails to comply with a condition of admission under the final rule's process should not be barred from seeking authorization under the process in the future.

DHS disagrees and believes that this is a reasonable condition to ensure that nonimmigrant aliens comply with the conditions for admission under this rule's process. In addition, an alien who is ineligible for authorization under these regulations because he or she has previously failed to comply with a condition for admission, or for other

reasons, can still seek authorization under the existing case-by-case process. This is similar to the restriction of previous violators of the Visa Waiver Program (VWP) from being able to use the VWP program again for admission. See INA section 217(a)(7), 8 U.S.C. 1187(a)(7). In both of these situations, the violator may still apply for a visa; he or she is only barred from using the streamlined process of this regulation or VWP, respectively.

R. Effect on naturalization and aliens from Visa Waiver countries.

One commenter expressed concern regarding the effect of the proposed regulations on a permanent resident's ability to become a United States citizen. Several commenters expressed concern regarding the effect of the proposed regulations on travelers from visa waiver countries.

The rule's process does not affect the eligibility of a permanent resident to qualify for naturalization. In addition, these regulations do not change eligibility for aliens seeking admission to the United States under the Visa Waiver Program.

S. Returning permanent residents.

One commenter objected that an HIV-positive alien with permanent resident status could never travel outside the United States because he would not be allowed to return.

An alien with status as a permanent resident of the United States who travels temporarily outside the United States and returns is not considered to be applying for admission for immigration purposes unless one of the six conditions delineated in INA section 101(a)(13)(C), 8 U.S.C. 1101(a)(13)(C), apply. Therefore, absent any of one of the six conditions, a permanent resident alien who travels outside the United States will not be subject to any of the grounds of inadmissibility found at INA section 212(a),

8 U.S.C. 1182(a). If one of the six conditions applies, the permanent resident alien is subject to any applicable ground of inadmissibility.

IV. Statutory and Regulatory Reviews.

A. Administrative Procedure Act.

The Administrative Procedure Act, 5 U.S.C. 553(d), generally requires that a final rule becomes effective no less than 30 days from the date of publication. Rules that grant or recognize an exception or relieve a restriction, however, can be made effective immediately upon publication. This rule does not add new requirements or restrictions; instead it codifies existing criteria for nonimmigrant aliens infected with HIV to obtain a short-term visa authorization. This final rule also removes certain procedural obstacles in the process and provides a more streamlined procedure for HIV-positive aliens to seek admission into the United States. DHS therefore believes that this rule relieves current restrictions on the admissibility to the United States of HIV-positive nonimmigrant aliens. Accordingly, this final rule will become effective immediately upon publication in the **Federal Register**.

B. Regulatory Flexibility Act.

DHS has reviewed the final rule in accordance with the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. The individual non-immigrant aliens to whom this rule applies are not small entities as that term is defined in 5 U.S.C. 601(6). Thus, the RFA does not apply.

C. Unfunded Mandates Reform Act of 1995.

The final rule will not result in the expenditure by State, local, and tribal

governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Executive Order 12866.

This rule has been determined to be a significant regulatory action under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget for review. There are no new costs to the public associated with this rule. This rule does not create any new or additional requirements.

E. Executive Order 13132.

The final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988.

The final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

G. Paperwork Reduction Act.

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all Departments are required to submit to OMB, for review and approval, any reporting and recordkeeping requirements inherent in a rule. This rule does not impose any new reporting or

recordkeeping requirements under the Paperwork Reduction Act.

LIST OF SUBJECTS

8 CFR Part 100

Organization and functions (Government agencies).

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas.

AMENDMENTS TO THE REGULATIONS

For the reasons stated in the preamble, parts 100 and 212 of chapter I of title 8 of the Code of Federal Regulations (8 CFR parts 100 and 212) are amended as follows:

PART 100 — STATEMENT OF ORGANIZATION

1. The general authority citation for part 100 continues to read as follows:

AUTHORITY: 8 U.S.C. 1103; 8 CFR part 2.

2. Section 100.7 is amended by removing the citation “212.4(g)” in the list of parts and sections and replacing it with the citation “212.4(h)”.

PART 212 — DOCUMENTARY REQUIREMENTS; NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

3. The general authority citation for part 212 continues to read as follows:

AUTHORITY: 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108-458).

* * * * *

4. Section 212.4 is amended by:

a. In paragraph (e), removing the citation “212(a)(1)” the first time it appears and replacing it with “212(a)(1)(A)(iii)”, and removing the citation “212(a)(1) of the Act” and

replacing it with “212(a)(1)(A)(iii)(I) or (II) of the Act due to a mental disorder and associated threatening or harmful behavior”;

b. Redesignating paragraphs (f), (g), (h), and (i) as paragraphs (g), (h), (i), and (j) and adding new paragraph (f) to read as follows:

§ 212.4 Applications for the exercise of discretion under section 212(d)(1) and 212(d)(3).

* * * * *

(f) Inadmissibility under section 212(a)(1) for aliens inadmissible due to HIV.

(1) General. Pursuant to the authority in section 212(d)(3)(A)(i) of the Act, any alien who is inadmissible under section 212(a)(1)(A)(i) of the Act due to infection with the etiologic agent for acquired immune deficiency syndrome (HIV infection) may be issued a B-1 (business visitor) or B-2 (visitor for pleasure) nonimmigrant visa by a consular officer or the Secretary of State, and be authorized for temporary admission into the United States for a period not to exceed 30 days, subject to authorization of an additional period or periods under paragraph (f)(5) of this section, provided that the authorization is granted in accordance with paragraphs (f)(2) through (f)(7) of this section. Application under this paragraph (f) may not be combined with any other waiver of inadmissibility.

(2) Conditions. An alien who is HIV-positive who applies for a nonimmigrant visa before a consular officer may be issued a B-1 (business visitor) or B-2 (visitor for pleasure) nonimmigrant visa and admitted to the United States for a period not to exceed 30 days, provided that the applicant establishes that:

- (i) The applicant has tested positive for HIV;
- (ii) The applicant is not currently exhibiting symptoms indicative of an active,

contagious infection associated with acquired immune deficiency syndrome;

(iii) The applicant is aware of, has been counseled on, and understands the nature, severity, and the communicability of his or her medical condition;

(iv) The applicant's admission poses a minimal risk of danger to the public health in the United States and poses a minimal risk of danger of transmission of the infection to any other person in the United States;

(v) The applicant will have in his or her possession, or will have access to, as medically appropriate, an adequate supply of antiretroviral drugs for the anticipated stay in the United States and possesses sufficient assets, such as insurance that is accepted in the United States, to cover any medical care that the applicant may require in the event of illness at any time while in the United States;

(vi) The applicant's admission will not create any cost to the United States, or a state or local government, or any agency thereof, without the prior written consent of the agency;

(vii) The applicant is seeking admission solely for activities that are consistent with the B-1 (business visitor) or B-2 (visitor for pleasure) nonimmigrant classification;

(viii) The applicant is aware that no single admission to the United States will be for a period that exceeds 30 days (subject to paragraph (f)(5) of this section);

(ix) The applicant is otherwise admissible to the United States and no other ground of inadmissibility applies;

(x) The applicant is aware that he or she cannot be admitted under section 217 of the Act (Visa Waiver Program);

(xi) The applicant is aware that any failure to comply with any condition of

admission set forth under this paragraph (f) will thereafter make him or her ineligible for authorization under this paragraph; and

(xii) The applicant, for the purpose of admission pursuant to authorization under this paragraph (f), waives any opportunity to apply for an extension of nonimmigrant stay (except as provided in paragraph (f)(5) of this section), a change of nonimmigrant status, or adjustment of status to that of permanent resident.

(I) Nothing in this paragraph (f) precludes an alien admitted under this paragraph (f) from applying for asylum pursuant to section 208 of the Act.

(II) Any alien admitted under this paragraph (f) who applies for adjustment of status under section 209 of the Act after being granted asylum must establish his or her eligibility to adjust status under all applicable provisions of the Act and 8 CFR part 209. Any applicable ground of inadmissibility must be waived by approval of an appropriate waiver(s) under section 209(c) of the Act and 8 CFR 209.2(b).

(III) Nothing within this paragraph (f) constitutes a waiver of inadmissibility under section 209 of the Act or 8 CFR part 209.

(3) Nonimmigrant visa. A nonimmigrant visa issued to the applicant for purposes of temporary admission under section 212(d)(3)(A)(i) of the Act and this paragraph (f) may not be valid for more than 12 months or for more than two applications for admission during the 12-month period. The authorized period of stay will be for 30 calendar days calculated from the initial admission under this visa.

(4) Application at U.S. port. If otherwise admissible, a holder of the nonimmigrant visa issued under section 212(d)(3)(A)(i) of the Act and this paragraph (f) is authorized to apply for admission at a United States port of entry at any time during the period of

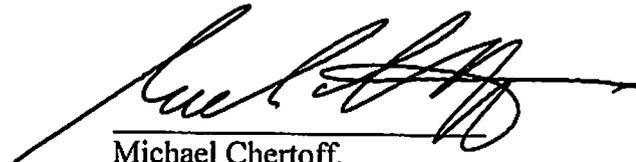
validity of the visa in only the B-1 (business visitor) or B-2 (visitor for pleasure) nonimmigrant categories.

(5) Admission limited; satisfactory departure. Notwithstanding any other provision of this chapter, no single period of admission under section 212(d)(3)(A)(i) of the Act and this paragraph (f) may be authorized for more than 30 days; if an emergency prevents a nonimmigrant alien admitted under this paragraph (f) from departing from the United States within his or her period of authorized stay, the director (or other appropriate official) having jurisdiction over the place of the alien's temporary stay may, in his or her discretion, grant an additional period (or periods) of satisfactory departure, each such period not to exceed 30 days. If departure is accomplished during that period, the alien is to be regarded as having satisfactorily accomplished the visit without overstaying the allotted time.

(6) Failure to comply. No authorization under section 212(d)(3)(A)(i) of the Act and this paragraph (f) may be provided to any alien who has previously failed to comply with any condition of an admission authorized under this paragraph.

(7) Additional limitations. The Secretary of Homeland Security or the Secretary of State may require additional evidence or impose additional conditions on granting authorization for temporary admissions under this paragraph (f) as international (or other relevant) conditions may indicate.

(8) Option for case-by-case determination. If the applicant does not meet the criteria under this paragraph (f), or does not wish to agree to the conditions for the streamlined 30-day visa under this paragraph (f), the applicant may elect to utilize the process described in either paragraph (a) or (b) of this section, as applicable.



Michael Chertoff,
Secretary.

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