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Department of Homeland Security
111 Massachusetts Avenue, NW, 3rd Floor
Washington, DC 20529

RE: DHS Docket No. USCBP– 2007–0084

Dear Sir/Madam:

The American Immigration Lawyers Association (AILA) hereby submits comments to the proposal of the Department of Homeland Security (DHS) to modify its procedure for processing non-immigrant waiver applications for individuals who are HIV-positive.

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. Our mission includes the advancement of law pertaining to immigration and naturalization, and the facilitation of justice in the field. Our members represent countless foreign nationals and employers in applications for non-immigrant visas to the United States. We are therefore well positioned to comment on the proposed rule.

AILA opposes the proposed rule because it does not accomplish what it set out to do – streamline the process for individuals with HIV to obtain non-immigrant visas to the United States. AILA opposes the HIV ban on immigration and supports efforts to broaden the scope of HIV waivers.¹ Unfortunately, rather than make travel to the United States simpler for foreign nationals with HIV, the proposed rule merely codifies existing policy and adds additional burdens to HIV-positive applicants for visitor visas.

¹*Resolution Regarding Policy on HIV Ban/Waiver*, American Immigration Lawyers Association Board of Governors Meeting Minutes, January 20, 2007, AILA InfoNet Doc. No. 07030150.

President Bush's World AIDS Day Speech

Last year on World AIDS Day, December 1, 2006, President Bush stated that he intended to issue an Executive Order which would provide a “categorical waiver” for HIV-positive non-immigrants seeking entrance into the United States which could be valid for up to 60 days.² Instead of a presidential Executive Order, DHS issued the proposed rule, which while retaining the word “categorical,” continues the onerous burden on intending visitors with HIV to provide evidence about the state of their illness and about their ability to pay for any complications which may arise. There are no similar requirements for foreign nationals who suffer from any other disease.

HIV Infection and Stigma

In a Fact Sheet issued by the White House, on the same day as President Bush's speech the heading discussing the proposed changes to policy for foreign travelers with HIV is, “The President Is Dedicated To Ending Discrimination Against People Living With HIV/AIDS.”³ The Fact Sheet continues by stating that the President supports a “streamlined process” for a “categorical waiver” for individuals living with HIV. The rationale cited for the importance of this policy change is “[t]he President considers the participation of people living with HIV/AIDS a critical element in the global HIV/AIDS response.”⁴

The MAC AIDS Fund recently conducted a comprehensive survey in nine countries and determined that stigma and shame related to HIV continue to be primary contributors to the spread of the illness.⁵ The White House Fact Sheet essentially admits that current immigration policy is discriminatory and that the president is committed to “ending discrimination” by permitting travelers with HIV to enter the United States and participate in the global response to AIDS. Yet, the proposed rule continues to treat HIV differently from all other illnesses. Moreover, by adding additional evidentiary burdens and limiting entry to thirty days, the proposed rule makes it virtually financially impossible for individuals from the developing countries hardest hit by the pandemic to qualify for a waiver to travel to the United States.

²President George W. Bush, *President discusses World AIDS Day*, December 1, 2006, <http://www.whitehouse.gov/news/releases/2006/12/20061201-3.pod.a.mp3>. See also, Paul Kidd, *US plans to ease HIV travel restrictions*, Positive Living, December 21, 2006, <http://napwa.org.au/node/597>.

³ *White House Fact Sheet: World AIDS Day 2006*, December 1, 2006, <http://www.whitehouse.gov/news/releases/2006/12/20061201-2.html>

⁴*Id.*

⁵*New Global Study from MAC AIDS Fund Uncovers Surprising Reality That Disease Is Still Underestimated as a Global Killer*, www.macaidsfund.org/news/pr_rl_global_study.html. This survey was conducted during a two week period in September 2007 among adults in the United States, the United Kingdom, France, Russia, China, India, Brazil, Mexico and South Africa.

The United Nations and World Health Organization oppose any restrictions on travel or immigration for people living with HIV/AIDS.⁶ However, the United States is currently one of only approximately 15 countries which ban HIV-positive travelers from entering on short-term visas.⁷ While China recently announced its intention to remove its own ban on HIV-positive travelers,⁸ the United States has instead taken further steps to codify this ban with the proposed waiver rule. The proposed rule adds to the stigma attached to HIV and undermines the President's goal of "ending discrimination against people living with HIV/AIDS."

The "Streamlined," "Categorical" Waiver

Although President Bush in his speech called for a "streamlined," "categorical" waiver, and although the introductory material to the proposed rule frequently employs these adjectives, the only feature of the proposed rule which "streamlines" current policy is the shift in adjudication of the intending visitors' waiver applications from DHS to the on-site consular officers.⁹

While the introduction to the proposed rule uses the term "categorical" repeatedly, the only thing "categorical" about the rule is the codification of numerous *categories* of evidence that a waiver applicant must supply to obtain the waiver. The proposed regulations require that an applicant make an individualized showing that he is qualified for the waiver. The "categorical" language in the introduction is both misleading and disingenuous. Far from "categorical," the proposed rule imposes new burdens on the waiver applicant: it requires more evidence to support a waiver application than under the "case by case" approach. Rather than streamlining the application process for waivers, the proposed rule imposes additional burdens on applicants and adjudicators.

The Proposed Rule Fails to Provide Training to Consular Officers on Medical Aspects of HIV/AIDS Which Are Necessary in Implementing the Rule

⁶"International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version," http://www.ohchr.org/english/issues/hiv/docs/consolidated_guidelines.pdf.

⁷Other countries which continue to impose a travel ban include China, Iraq, Russia, and Saudi Arabia. "Bush Orders Easing of Travel Restrictions on HIV-Positive Foreigners," <http://www.siecus.org/policy/PUpdates/pdate0296.html>

⁸Canada West News Service, *China moves to drop ban on foreigners with HIV*, November 13, 2007, <http://www.canada.com/topics/news/world/story.html?id=cd7d4c32-6cf5-4519-a9ca-81a4567d0fd9&k=85960>.

⁹In fact, the introductory material to the proposed rule indicates that consular officers are already involved in the decision making process for HIV waivers. 72 Fed. Reg. 62593, 62596 (Nov. 6, 2007). "Consular officers must find (based on evidence provided by the applicant that satisfies reviewing officials)" that there will be no public health implications or costs to United States agencies or local governments without their consent if the HIV-positive visa applicant is granted a waiver. *Id.*

While DHS states that this change will result in faster decision-making – a welcome change – there is no indication of how the consular officers will be guided or trained on the implementation of the new rule. Furthermore, the enormous burden of proof that the proposed rule will require of the short-term visitor/waiver applicant will demand that the reviewing officer have a sophisticated understanding of HIV-related illnesses and treatments. For example, proper assessment of an applicant’s current medical condition and whether or not the applicant is complying with the appropriate treatment requires more than a cursory understanding of the disease. The proposed rule is silent regarding any additional training for officers on HIV issues.¹⁰ The proposed rule’s elimination of DHS’s oversight, will only increase the potential for inconsistent results.

Additionally, the proposed rule does not require training of Customs and Border Protection officers in the importance of maintaining the confidentiality of travelers’ HIV status. It therefore seems inevitable that HIV-positive foreign nationals traveling with HIV medication will be subject to invasive questioning and secondary inspection upon seeking entry into the United States as a result of obtaining a waiver under the proposed rule.

Current Non-immigrant HIV Waivers

On October 17, 2002, legacy Immigration and Naturalization Service (“INS”) issued a comprehensive memorandum on medical issues which included guidance on “the adjudication of medical grounds of inadmissibility” (hereinafter “10/17/02 Memo”).¹¹ The 10/17/02 Memo laid out the requirements for HIV-positive non-immigrant visa applicants to obtain a waiver of the HIV ground of inadmissibility. Specifically, the 10/17/02 Memo requires waiver applicants to demonstrate that:

he or she is not currently afflicted with symptoms of the disease; the proposed visit to the United States is for 30 days or less; there are sufficient assets such as insurance, that would cover any medical care that might be required in the event of illness while in the United States; and that the visit will not pose a danger to public health in the United States.¹²

The criteria laid out in the 10/17/02 Memo essentially restated the criteria that had been

¹⁰ It should be noted that anecdotal evidence received by AILA members, already suggests that different consulates handle HIV waivers very differently, with some recommending waivers relatively easily and some almost never recommending them.

¹¹ INS Memorandum, Johnny Williams, *Medical Examinations, Vaccination Requirements, Waivers of Medical grounds of Inadmissibility, and Designation of Civil Surgeons and Revocation of Such Designation (AD 01-03)*, (October 17, 2002) published on AILA InfoNet at Doc. NO. 04111862 (posted Nov. 18, 2004). Also available at <http://www.immigrationequality.org/uploadedfiles/2002%20HIV%20Immigration%20policy%20memo.pdf>

¹²*Id.* at 25.

spelled out in earlier memo dated August 19 1993.¹³ The application of these criteria has placed an often insurmountable burden on non-immigrant visa applicants who are HIV-positive and has subjected their visa applications to a degree of scrutiny unlike that of any other non-immigrant visa applicant. Moreover, unlike those waivers for other grounds of inadmissibility, the longest waiver available for HIV-positive non-immigrants is for a period of 30 days. This makes the waiver unavailable to those HIV-positive applicants seeking student, skilled worker, or other nonimmigrant seeking longer-term admissions.¹⁴

The introductory materials to the proposed rule state that in practice very few short term waivers have been denied.¹⁵ This begs the question of why then is this onerous waiver application needed at all. The only example provided of a waiver application being denied is that of an applicant who refuses to state that he or she will not engage in high risk behavior. If DHS's records reflect that the existing process for adjudicating these waiver applications almost always results in their being granted, it is difficult to understand how the imposition of the new evidentiary requirements will achieve the stated goal of streamlining the same process. Clearly, it will do the opposite.

The Proposed Rule

Infection with HIV is already the only “communicable disease of public health significance” which is explicitly mentioned in the INA as a ground of inadmissibility.¹⁶ The proposed rule will now codify the most onerous waiver process for any medical condition. The proposed rule adds new evidentiary requirements to be met by the applicant while, at the same time, subtracting presently existing rights and privileges. An analysis of each section of the proposed rule follows.

§ 212.4(f)(2)(i) – Disclosure of HIV Status

The only way to end the discrimination of the HIV ban on travel is to remove the ban entirely. The proposed rule applies to non-immigrants who test positive for HIV and requires them to disclose their status.¹⁷ Treating foreign nationals with HIV differently from carriers of all other illnesses continues to stigmatize them. At the very least, the

¹³*Id.* at Appendix 41-3. This was the year that the HIV ban was enshrined in the INA, long before the medical advances of Highly Active Anti-retroviral Therapy which has made HIV a treatable illness and long before education campaigns have made it widely known that HIV cannot be transmitted through casual contact.

¹⁴Although the introductory materials to the rule states that under the current system, there can be longer waivers than thirty days, there is nothing in DHS or INS policy memoranda which allows for longer non-immigrant HIV waivers.

¹⁵ 72 Fed. Reg. 62593, 62596 (Nov. 6, 2007).

¹⁶INA § 212(a)(1)(A)(i).

¹⁷Under current policy, an HIV non-immigrant's passport is stamped with the notation “212 (SMALL D)(3)(A)(I) WAIVER OF 212 (A)(1) GRANTED” which AILA believes is a violation of confidentiality for HIV-positive travelers because anyone familiar with this ground of inadmissibility can easily ascertain that the individual is HIV-positive.

proposed rule will reinforce discrimination, not end it.

§ 212.4(f)(2)(ii) – “Contagious infection”

The proposed rule further requires a waiver applicant to demonstrate that he or she is “not currently exhibiting symptoms indicative of an active, contagious infection associated with acquired immune deficiency syndrome.” This portion of the proposed rule demonstrates a fundamental lack of understanding of the nature of HIV and AIDS. HIV is not “contagious” through casual contact; it can only be transmitted through bodily fluids. Likewise, the most common opportunistic infections which are associated with an AIDS diagnosis, such as PCP pneumonia and Kaposi’s Sarcoma, are not transmitted to individuals whose immune systems are intact.¹⁸ Including this language in the proposed rule further displays the lack of understanding of the nature of transmission of the virus and continues to attach the label “contagious” to the virus when, to a medical certainty, it does not apply to the condition.¹⁹

§ 212.4(f)(2)(iii) – Proof of Counseling on Communicability

The proposed rule will force an applicant for a short-term waiver to demonstrate that he or she has been counseled about and understands, “the nature, severity and communicability of his medical condition.” Thus, the rule seems to require that an applicant for a short-term visa submit a detailed affidavit similar to the one which HIV-positive applicants for an immigrant visa or for permanent residence must submit detailing that he or she has been counseled, that he or she understands the nature of the illness, and that he or she will not engage in high risk behavior.²⁰

§ 212.4(f)(2)(iv) – Proof of Minimal Danger to Public Health

This section of the proposed rule requires an applicant to demonstrate that admission into the United States will pose a minimal risk to the public health in the United States. This section of the proposed rule will require that the applicant prove to the consular officer that he or she is aware of transmission modes and will not engage in high risk behavior.

¹⁸ The only opportunistic infection which is contagious is active tuberculosis, which is itself a separate ground of inadmissibility. *See HIV/AIDS and Opportunistic Infections*, American Lung Association,

<http://www.lungusa.org/site/pp.asp?c=dvLUK9O0E&b=35437#contagious>

¹⁹ *See Centers for Disease Control Fact Sheet on HIV and its Transmission*, <http://www.cdc.gov/hiv/resources/factsheets/transmission.htm>

²⁰ Oddly, the explanatory section of the proposed regulations further requires that the applicant acknowledge the fact that he or she must not donate blood or blood components, even though all blood in the United States is currently screened for HIV and all blood donors are screened for risk categories including travel in high HIV prevalence countries. Since blood donations are carefully screened anyway, there is no justification for the requirement of this language in an affidavit further stigmatizing the waiver applicant.

Ironically, through these two sections of the proposed regulations, DHS demonstrates its understanding that it is high risk *behavior* that puts the American public at risk for HIV infection, not categories of people. Nonetheless foreign nationals continue to be singled out under United States policy as somehow placing Americans at risk for HIV infection.

§ 212.4(f)(2)(v) – Access to Medication and Insurance

This section of the proposed rule imposes a new burden on a visitor’s visa applicant.²¹ Under this section, the applicant will be required, if medically appropriate, to have in his or her possession a sufficient supply of anti-retroviral medications to last for his or her anticipated stay in the United States. This is an unreasonable burden to place on a traveler.

First, many individuals who are HIV-positive must take multiple doses of different medications each day. If a traveler in this situation intends to remain in the United States for the permitted thirty days, the amount of medications he or she would require for this time period could literally fill an entire suitcase. Second, many HIV medications must remain constantly refrigerated. Requiring a traveler to travel with this kind of medication will lead to their spoiling. Third, while the proposed rule states that a traveler must have antiretroviral drugs in his or her possession or have access to them only “if medically appropriate,” this section places the burden on the traveler to prove to a consular officer whether or not it is medically appropriate for him or her to have to take anti-retroviral medications. It is absurd to ask an applicant to meet the proposed rule’s burden before an officer who, by not being trained medical personnel, has no ability to assess whether or not the applicant meets the criterion.

Moreover, it is clear that DHS anticipates that individuals traveling to the United States with HIV medications will experience problems at ports of entry because the introductory materials to the proposed rule cite a Food and Drug Administration policy which permits the United States government to not interdict unapproved medications if they are for personal use.²² In spite of the existence of such an FDA policy, there is no mention in the proposed rule of how front line officers at U.S. ports of entry will be trained to understand what medications are appropriate for HIV treatments, as opposed to illicit drugs.

Finally, the proposed rule also requires an applicant to demonstrate that he or she has “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.” Again, HIV-positive visa applicants will be held unnecessarily to a standard unlike that of any other visa applicant. There is little likelihood that an HIV-positive individual who is asymptomatic will require hospitalization while in the United States. Despite this, the proposed rule requires that applicants demonstrate that they have health

²¹While the earlier 10/17/02 Memo required sufficient assets to cover treatment, there was no requirement that the individual travel to the United States with medication.

²² 72 Fed. Reg. 62593, 62597 (Nov. 6, 2007).

insurance that is accepted in the United States. Individuals with other serious medical conditions, including cancer, kidney disease, heart disease or hepatitis have no comparable burden. Furthermore, the requirement for visitors to have access to medication and to have the assets necessary, such as insurance to cover any possible medical emergency which may arise while in the United States, will make it impossible for travelers from those countries hardest hit by HIV to obtain short-term visas, thereby undermining the President's stated objective of "the participation of people living with HIV/AIDS."²³

§ 212.4(f)(2)(vi) – No Cost to Any Government Agency

Here, the proposed rule borrows language from existing DHS policy as applied to applicants for legal permanent residence,²⁴ stating that the applicant's admission "will not create any cost to . . . [the government] or any agency thereof without the prior written consent of the agency." As a practical matter, this reinforces the earlier section of the proposed rule, which requires the applicant to demonstrate that he or she has private health insurance. Then, the proposed rule goes on to impose an additional burden beyond that which already exists for legal permanent resident applicants²⁵ by requiring that visitor's visa applicants obtain written consent from any government agency which may agree to fund the applicant's treatment while in the United States. It is almost impossible to conceive how a foreign national who is outside the United States will be able to obtain the written consent of a government agency to fund his or her treatment while in the United States.

§ 212.4(f)(2)(vii) – Activities Consistent with B-1 or B-2 Classifications

This section of the rule is one of the only areas which may expand the availability of the waiver rather than limiting it. While the 10/17/02 Memo required the waiver applicant to demonstrate "humanitarian" reasons for why the waiver should be granted and listed only "attend[ing] conferences, visit[ing] close family members, or conduct[ing] business"²⁶ as activities which fit within this definition, the proposed rule allows for anyone whose

²³See *White House Fact Sheet: World AIDS Day 2006*, December 1, 2006, <http://www.whitehouse.gov/news/releases/2006/12/20061201-2.html>

²⁴While AILA also opposes the HIV ground of inadmissibility for applicants for legal permanent residence, there is at least some rational basis for requiring applicants for permanent residence to demonstrate that their admission will not create a cost to the U.S. government because they are required by law to demonstrate that they are not likely to become public charges. Because there is no comparable requirement for short-term travelers, it is irrational and overly burdensome to require short-term visitors to meet this standard.

²⁵The language in the 10/17/02 Memo governing applications for waivers for legal permanent residents merely states, "there will be no cost incurred by any level of government agency of the United States without prior consent of that agency." 10/17/02 Memo at 20.

²⁶*Id.* at 25.

activities “are consistent with the B-1 (business visitor) or B-2 (visitor for pleasure)” to apply for the waiver. Thus it would appear that this waiver would now be available for entrants who wish to engage in all activities permitted to a visitor.

§ 212.4(f)(2)(viii) – Visit Limited to 30 Days

Although President Bush’s World AIDS Day speech specifically called for a waiver for up to 60 days, the proposed rule limits the waiver period to a 30 day entry. There is no justification offered for such a limited entry. Additionally, the proposed rule limits individuals to two admissions if admitted under the rule’s streamlined procedures.²⁷ Nowhere in the proposed rule is there an articulation of a rational basis for the two-admission limit. Visitors in similar situations – granted B-1 and B-2 visas – are not subject to two admissions in one year.²⁸ Finally, for individuals from developing countries who will wish to travel to the United States to be trained on HIV prevention and treatment, such a short stay, in most instances, will be far from sufficient and/or cost-effective.

§ 212.4(f)(2)(x) – No Admission Under the Visa Waiver Program

Individuals seeking admission to the United States under the Visa Waiver Program currently must apply for a waiver if they are subject to any ground of inadmissibility. This section does not change existing law.

§ 212.4(f)(2)(xi) – Any Failure to Comply with Admissions Conditions Will Render the Applicant Ineligible for a Further Waiver Under This Section

There is no explanation of how an individual will fail to comply with conditions of the waiver nor is there any rationale provided as to why such failure will bar an applicant from being able to apply for a waiver under 8 C.F.R. § 212.4(f).

§ 212.4(f)(2)(xii) – Waiver of Ability to Change Status, Extend Status or Adjust Status

AILA strongly opposes this section of the proposed rule. As a practical matter, the inability to change or extend one’s non-immigrant status will have little impact since the visitor will only be able to remain in the United States for 30 days. However, the inability to apply for adjustment of status will have extremely harsh results for some individuals. Under this section of the proposed rule, an individual will be ineligible to adjust his status even if the individual marries a United States Citizen while here or if the individual comes to the United States to visit a United States Citizen son or daughter and then

²⁷ New 8 C.F.R. § 212.4 (f)(3), 72 Fed. Reg. 62593, 62599 (November 6, 2007)

²⁸ In fact, B-1 and B-2 visitors are also not limited to 30 day entries. Rather, B-1 and B-2 entrants are generally admitted for a minimum of six months and are also allowed to apply for extensions of temporary stay in increments of not more than six month increments. 8 C.F.R. § 214.2(b)(4).

decide to seek adjustment of status.

Forcing an individual to return to his or her own country to process an application for an immigrant visa is unnecessarily harsh and serves no public policy goal in light of the fact that the applicant had previously successfully demonstrated that he or she had met the numerous requirements for the waiver under the proposed rule. Anecdotal evidence from AILA members reveals that HIV waivers for legal permanent resident applicants are much more difficult to obtain through consular processing than through adjustment of status. Although an adjustment applicant faces the same legal standard – including demonstrating that he or she will not become a public charge and that there will be no cost to any government agency for his or her HIV treatment without the agency’s prior consent – as a practical matter, it is often impossible for an applicant who is abroad to obtain health insurance or the government agency’s consent to meet this standard.

A better approach would provide adjustment of status to individuals seeking a waiver under the proposed rule similar to the provisions provided to individuals in the United States under the Visa Waiver Pilot Program. For example, while Visa Waiver Pilot Program travelers are generally barred from applying for adjustment of status, Visa Waiver Pilot program entrants can adjust status if they are a qualifying immediate relative under INA § 201(b)(2)(A)(i).²⁹ Similar to visa waiver entrants, B-1 and B-2 visitors admitted under the proposed rule should also have an opportunity to adjust status based on a relationship with a qualifying immediate relative. The rule’s bar on adjustment of status lacks a rational basis and should be revised to allow adjustment under the exception found in 8 C.F.R. § 245.1(b)(8).

Moreover, if the foreign national is completely barred from adjustment of status, it will mean that an individual who obtains asylum in the United States (even if based in whole or in part on fear of persecution because of his or her HIV status) will be forever barred from becoming a permanent resident and eventually a citizen of the United States. Since an individual who is granted political asylum cannot return to his or her country for any reason including consular processing, he or she will be forever barred from obtaining permanent residence and citizenship in the United States. The rule should clarify that if an individual previously admitted under the proposed rule is later granted asylum they will not be subject to the bar on adjustment. Such a bar on adjustment would be *ultra vires* to the asylum provisions under Section 209 of the INA, which allows asylees and refugees the ability to adjust status after one year. This section of the proposed rule fails to provide a rational explanation for creating such a harsh result which may, in fact contravene both the INA and United States obligations under international law to fully integrate refugees and asylees into society.

AILA Strongly Opposes The Proposed Rule

When President Bush announced his intentions last year to ease travel restrictions for HIV-positive foreign nationals, he created an opportunity for the United States to join the

²⁹ See 8 C.F.R. § 245.1(b)(8).

industrialized nations in removing outdated, unnecessary and stigmatizing travel restrictions on individuals with HIV. Instead, with the issuance of the proposed rule, DHS has codified an existing policy that fails to achieve the President's stated objectives, adds new burdens on applicants and consular officers, and imposes new conditions and limitations on HIV-positive visitors. The proposed rule will enshrine in the form of regulations the existing, discriminatory policy and will continue to treat foreign nationals with HIV very differently from those who carry any other virus, and will further stigmatize them for no legitimate reason. AILA opposes the HIV ban on travel and urges DHS to allow a truly, categorical waiver for visitors to the United States who are HIV-positive and which will not demand the onerous, individualized showing that is required by the proposed rule to obtain a waiver.

AILA appreciates the opportunity to comment on the proposed rule, and is hopeful that our feedback will inform USCIS' decisions on this matter.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION