NEW YORK CITY BAR

December 5, 2007

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

RE: DHS Proposed Regulations
Docket Number: USCBP– 2007–0084

To Whom It May Concern:.

We write to you to express the concerns of the Association of the Bar of the City of New York ("NYCBA") regarding several proposed changes to regulatory law that the Department of Homeland Security ("DHS") has recently announced. For the reasons stated below, the NYCBA opposes the proposed regulations which continue to discriminate unnecessarily against individuals with HIV and do not achieve their stated purpose of streamlining the waiver application process for short-term travelers.

Since its founding in 1870, the NYCBA has grown to 23,000 members who work to promote the public good by advocating for political, legal and social reform. This letter was drafted by the NYCBA's Special Committee on AIDS and the Immigration and Nationality Law Committee. Together, these committees possess a comprehensive knowledge of the issues raised by the DHS's proposed regulations and the experience to anticipate the effects of the new rules. The NYCBA has historically opposed any inadmissibility provision which singles-out foreign nationals living with HIV and treats them differently than individuals living with similar communicable diseases.

On December 1, 2006, World AIDS Day, the White House indicated that President Bush supports a "streamlined process" for a "categorical waiver" for individuals living with HIV, [1] and that he "considers the participation of people living with HIV/AIDS a critical element in the global HIV/AIDS response."[2] Although the President's expressed goals are a laudable step towards combating unnecessary stigmatization of people living with HIV, it is the opinion of the NYCBA that the DHS's proposed regulatory changes, issued on November 5, 2007, do not forward these goals. If anything, the proposed procedure for processing an HIV-waiver application will serve only to further hinder the entry of HIV-positive foreign nationals into the United States and the NYCBA, therefore, opposes the proposed regulations.

[1] FACT SHEET: WORLD AIDS DAY 2006 (December 1, 2006), *available at www.whitehouse.gov/news/releases/2006/12/20061201-2.html.*
[2] *Id.*

Background

Pursuant to the Immigration and Nationality Act ("INA") Section 212(a)(1)(A)(i), any alien who is infected with the HIV virus is inadmissible to the United States. INA Section 212(d)(3)(A)(i) authorizes DHS to issue an NIV to an applicant who is inadmissible, acting on a recommendation from the Department of State or a consular officer, while Section 212(d)(3)(A)(ii) allows the admission of an inadmissible non-immigrant who already has a visa on particular terms and conditions. Procedures for issuance of such waivers are set forth in the regulations at 8 C.F.R. § 208. 12 and in various Immigration and Nationality Service ("INS") and DHS memoranda, as described below.

On October 17, 2002, legacy INS issued its most comprehensive memorandum on medical issues to date, including "the adjudication of medical grounds of inadmissibility" (hereinafter "10/17/02 Memo").[3] This Memo laid out the requirements for HIV positive NIV applicants to obtain a waiver of the HIV ground of inadmissibility. Specifically, the Memo required 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.[4]

Under existing rules, foreign nationals living with HIV must overcome an evidentiary burden unlike that for any other visa applicants, even though the maximum stay available to them is 30 days. Thus, HIV positive NIV applicants are unable to obtain any longer-term non-immigrant visa, such as a student or skilled worker visa.

A second type of HIV waiver is available where the non-immigrant seeks admission for up to ten days to attend a scientific, professional, or academic conference in the United States, provided admission for such purpose is in the public interest. This "designated event" waiver, pursuant to Section 212(d)(3)(A) or (B), is usually issued in a blanket form, for example, for all attendees to a particular conference. The fact that DHS already permits HIV-positive foreign visitors into the United States under this waiver without having to make any individualized showing about the visitors' health, knowledge of risk behaviors, or ability to pay for treatment in the United States, undermines DHS's current position that an individualized assessment of each waiver is somehow necessary to protect the public health.

The proposed rule addressed below would add a third short-term waiver for HIV-positive travelers. While this waiver is purportedly designed to make the application process simpler, as discussed below, it in fact complicates the evidentiary requirements for waiver applicants while forcing them to waive existing rights upon admission to the United States.

President Bush and the Impetus for these Proposed Regulations

On World AIDS Day, 2006, President Bush announced his intention to loosen travel restrictions for people with HIV, and stated that he would issue an executive order which would provide a "categorical waiver" for up to 60 days for HIV positive non-immigrants. Rather than issue an executive order, however, DHS has now issued proposed regulations which retain the word "categorical" but continue to place an onerous burden on travelers with HIV to provide evidence about the state of their illness and their ability to pay for any complications which may

[3] Available at http://www.immigrationequality.org/uploadedfiles/2002%20HIV%20Immigration%20policy%20memo.pdf

[4] 10/17/02 Memo at p. 25.

arise. HIV is the only medical condition for which DHS requires this level of documentation in order to obtain a short-term waiver.

The Proposed Waiver

The new rules laid out by DHS include twelve requirements for HIV-positive short-term visa applicants to be granted a waiver:

> (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 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;
> (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 a waiver under this paragraph (f), waives any opportunity to apply for an extension of nonimmigrant stay, a change of nonimmigrant status, or adjustment of status to that of permanent resident

Essentially, these proposed regulations codify existing criteria that now exist in memorandum or policy format; add new, more onerous requirements; and take away rights and privileges. We comment here specifically on some of the problematic sections of the proposed regulation.

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

The City Bar has historically opposed any inadmissibility provision based on an individual's HIV-positive status. Despite President Bush's call for a "blanket waiver," the proposed regulations would continue the requirement that travelers with HIV disclose their status to seek admission to the United States and submit to an individualized review of their waiver application.

§ 212.4(f)(2)(ii) – "Contagious infection"

Under the proposed regulations an applicant would also have to demonstrate that he or she is "not currently exhibiting symptoms indicative of an active, contagious infection associated with acquired immune deficiency syndrome." This language merely adds to stigma and misunderstanding about the nature of the HIV virus. HIV/AIDS is not a contagious disease as is commonly understood, like a cold or flu. The Centers for Disease Control's own website clearly explains that casual contact does not spread the HIV virus.[5] This medically inappropriate and stigmatizing language serves to undermine the United States' position as a leader in the fight against the global AIDS pandemic.

§ 212.4(f)(2)(iii) – Proof of Counseling on Communicability
§ 212.4(f)(2)(iv) – Proof of Minimal Danger to Public Health

The proposed regulations would require 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 regulations would probably require an applicant for a short-term visa to submit a detailed affidavit similar to that which applicants for permanent residence must submit detailing that he or she has been counseled, understands the nature of the illness and will not engage in high risk behavior, and prove to the consular officer that he or she is aware of transmission modes. This additional requirement is a prime example of how there is nothing streamlined about these proposed regulations.

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

For the first time, these regulations will require HIV-positive travelers to carry all of the medication they may require while in the United States with them, or prove to the consular officer that anti-retroviral medication is not yet medically indicated for the waiver applicant. This section of the proposed regulations overlooks the fact that many people with HIV are healthy without taking any medication. Conceivably, then, people with HIV who are not taking medication would not be eligible for this waiver, or would be put to the trouble of verifying that it is not "medically appropriate" for them to be taking anti-retrovirals.

It is also impractical to require individuals with HIV to travel with all their medications, particularly since the rules also require the individual to prove that he or she has health insurance which is accepted in the United States. An individual traveling with large amounts of medication will likely encounter hostile and invasive questioning at the port of entry which could lead to a serious breach of the traveler's confidentiality. Moreover, since many HIV medications require refrigeration, requiring a traveler to carry them with him or her may be medically inappropriate.

This section of the proposed regulations also requires a short-term traveler to prove that he or she either has health insurance which is accepted in the United States or assets sufficient "to cover any medical care" which may be required while he or she is in the United States. Here the regulations continue to treat HIV unlike any other potentially costly medical illness and present financial obstacles which will likely make it impossible for any potential traveler from the developing world to ever qualify for a short-term waiver.

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

As a practical matter, it would probably be impossible to obtain prior written consent from a U.S. government agency to cover the cost of medical treatment for a short-term traveler, so this

[5] *See* http://www.cdc.gov/hiv/resources/qa/qa31.htm .

section of the proposed regulations essentially reiterates the prior requirement that he or she provide proof of private insurance in order to enter the United States.

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

While President Bush's World AIDS Day proclamation specifically called for a waiver of up to 60 days, inexplicably the proposed regulations limit the waiver period to a 30 day entry. This so-called "categorical" waiver is only available to visitors to the United States who do not wish to enter this country more than twice in any given year. It does not provide any benefit to HIV positive non-immigrants who may wish to come to the United States for a longer period, or more frequently, or to work or to study. Given the extensive requirements -- to show good health, adequate supply of, or access to medication, and either health insurance accepted in the United States or sufficient assets to cover any required medical treatment -- there seems to be no legitimate requirement for this 30 day limitation.

§ 212.4(f)(2)(ix) – No Other Ground of Inadmissibility Applies

The proposed regulations allow the "streamlined" application process only for individuals who have no other ground of inadmissibility besides being HIV. Thus individuals with a second ground of inadmissibility would have to apply under the "old" waiver process and would therefore not be forced to waive the ability to change, extend or adjust status, as discussed below, from within the United States which is required under the new process. Ironically, then, those individuals with HIV who have violated a provision of the immigration law would have greater rights upon entering the United States than those whose sole ground of inadmissibility is their HIV status.

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

The NYCB strongly opposes this section of the proposed regulations. This proposed new rule requires that an applicant for admission waive any opportunity to apply for a change, extension or adjustment of status. We believe this is unnecessary, punitive, and inconsistent with the stated purpose of this regulation. If the DHS wishes to propose a new rule which would limit the rights of non-immigrants to change, extend, or adjust status in the United States -- rights and benefits which are recognized in the INA as well as in the regulations and agency decisions -- it should do so explicitly and clearly, rather than dress up such restrictive and punitive regulations as a "categorical" waiver process for a health-related ground of inadmissibility. There is no possible benefit from these restrictions that can be justified on public health grounds, and significant reasons to oppose them. A person may break a leg, or suffer injury in a car accident, while here, and so cannot leave within the allotted time period. A person may become eligible for a temporary work visa while in the United States, or decide to get married to a U.S. citizen they have come to the U.S. to visit. The political climate in the visitor's country could suddenly deteriorate to the extent that the visitor now needs to apply for asylum in our country. Given the extensive requirements to be issued such a visa in the first instance, there is no sensible reason for then imposing such draconian restrictions. A person who can meet all of the onerous financial and health requirements to be issued a visa under this proposed rule should be considered an attractive candidate for an application for extension, change or adjustment of status.

Finally, barring a foreign national with such a waiver from adjustment of status, would prevent an asylee (even if his asylum grant was based on fear of persecution because he or she is HIV-positive) from becoming a permanent resident or a U.S. citizen. Since an asylee cannot return to his or her country for consular processing, he or she would never be able to obtain permanent residence or citizenship in the United States. The NYCB believes that this harsh result violates international law which requires full integration of refugees and asylees into the countries where they are given status.

Conclusion

Although President Bush called for a "streamlined," "categorical" waiver, and although the introductory materials in the proposed regulations use these terms frequently, in fact, the only aspect of the proposed regulations which "streamlines" current policy, is the shift in adjudication which would allow already overworked consular officers to make decisions on waiver applications rather than DHS.[6] While DHS states that this change will result in faster decisions, there is no indication of how the consular officers will be trained on implementation of this new policy. However, the proposed regulations place an enormous burden of proof on the applicant and require the reviewing officer to understand the progression of HIV illness and its appropriate treatment in order to evaluate the applicant's current medical condition and whether or not he or she is adherent prescribed treatment. The proposed regulations contain no requirement for additional training of consular officers on HIV issues, despite these new and complex evidentiary requirements.

Accordingly, we reiterate that we strongly oppose *any* regulation which interferes with an HIV-positive individual's ability to enter the United States based on the individual's HIV status. The United States government must not perpetuate HIV-related stigma and shame, as these phenomena continue to be primary contributors to the spread of the illness.[7] Therefore, we urge the DHS not to promulgate these proposed regulations, which unfairly and unnecessarily discriminate against HIV-positive foreign nationals.

Committee on AIDS
Committee on Immigration and Nationality Law

The Association of the Bar of the City of New York

[6] In fact, the introductory materials to the proposed regulations indicate that consular officers are already involved in the decision making process for HIV waivers. Page 6 states "Consular officers must find (based on evidence provided by the applicant that satisfies reviewing officials)" that there will be no public health or public coffer implications to the United States if the HIV positive visa applicant is granted a waiver.

[7] *See* STIGMA AND SHAME PREJUDICE, FEAR AND STIGMA CONTINUE TO EXCLUDE PEOPLE LIVING WITH AIDS FROM THE MAINSTREAM. MAC AIDS Fund (2007), available at *www.macaidsfund.org/news/pr_rl_global_study.html*.