



Final Rule on Issuance of a Visa and Authorization for Temporary Admission into the United States for Non-Immigrants (Temporary Travelers into the United States) with HIV.

On December 1, 2006 (World AIDS Day) the White House announced that the President would “direct the Secretary of State to request and the Secretary of Homeland Security to initiate a rulemaking that would propose a categorical waiver for HIV-positive people seeking to enter the United States on short-term visas.”

On September 29, 2008 the Department of Homeland Security (DHS) published a final rule for a streamlined process for HIV-positive people to enter the United States.

The basics:

The final rule does not create a new regulatory scheme that would permit HIV-positive persons to enter the United States temporarily nor does it change the law for HIV+ immigrants already in the U.S., most of whom are barred from attaining legal status except in extremely limited circumstances.

HIV-positive immigrants would still be inadmissible under the new rule and subject to the 212(g) waiver requirements, including the need for a qualifying family member, private health insurance, etc.¹

Under the new rule **HIV-positive travelers** seeking a waiver would be limited to admission on a B-1 (entering for a short business related reason) or B-2 visa (visitors for pleasure) for visits of 30 days or less. However, under the new rule, they would be able to apply for a waiver to allow them admission into the United States without prior approval

¹ On July 30, 2008, the President signed into law the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis and Malaria Reauthorization Act of 2008, Public Law No. 110-293. Section 305 of P.L. 110-293 amends section 212(a)(1)(A)(i) of the Immigration and Nationality Act (INA) so that HHS is no longer *required* to designate HIV infection as a communicable disease of public health significance.” **However the Department of Health and Human Services (HHS) has not amended 42 CFR 34.2(b) to remove HIV infection from the list of diseases that qualify as a “communicable disease of public health significance.” Until HHS does amend 42 CFR 34.2(b) HIV-positive individuals will continue to be inadmissible under 212(a)(1)(A)(i) of the INA.**

by the Secretary of Homeland Security. In other words, the determination on their application could be made at the consular officer level in their home countries rather than by the Department of Homeland Security. The “visa stamp” would be valid for 12 months or less; and the traveler would be allowed into the U.S. for 2 “visits” not to exceed 30 days. **Waiver applicants would still be allowed to apply under the current system, i.e., through DHS.**

Criteria for entry:

In general: Any person who is inadmissible under Section 212(a)(1)(A)(i) of the INA due to 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 may be admitted to the United States for a period not to exceed 30 days, provided that:

- The applicant has tested positive for HIV.
- Controlled state of HIV: The applicant needs to demonstrate that they are asymptomatic.
- Evidence: An applicant must prove he or she has been counseled on, and understands the nature, severity and the communicability of his or her medical condition. The applicant must also provide the consular officer with evidence that (a) the danger to the public health is minimal; (b) the possibility of transmission of HIV is minimal; (c) no cost will accrue to any government agency without prior consent.
- Drug supply: Under this final rule, applicants would have to establish that they have in their possession or will have access to an adequate supply of antiretrovirals (ARVs) to last for the duration of their trip to the United States.
- Assets: Applicants would also have to prove they have sufficient assets (such as insurance) to cover any medical care they may need while in the United States.
- Inadmissibility pursuant to the Visa Waiver Program: The Visa Waiver Program allows travelers from certain countries to enter the U.S. without a visa provided they are not “inadmissible.” HIV-positive travelers from these countries are considered “inadmissible” and have always been required to get a visa. This new rule upholds and makes explicit their inadmissibility under the Visa Waiver Program.
- Extension of stay and/or change in status: Under the new rule, waiver applicants would be required to forgo the opportunity to apply for an extension of their stay, a change in nonimmigrant status, or an adjustment of status to that of permanent resident. This means:

1. Travelers would only be permitted to extend their stays in the U.S. beyond 30 days if they demonstrate exigent circumstances should the need arise.
2. Should an applicant have the opportunity to apply for a work visa, they would have to return home to do so.
3. Applicants would not be allowed to apply for a green card within the United States if they entered pursuant to this waiver.

Failure to comply:

If a traveler does not comply with the conditions set out in the new rule, he or she would be permanently ineligible for admission.

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