HIV AND LAWFUL PERMANENT RESIDENCY:

An Analysis of the HIV Bar, Waivers, and Prospects for Change[1]

I. INTRODUCTION TO THE "HIV BAR"

The United States prohibits aliens infected with the Human Immunodeficiency Virus (HIV) from entering the United States.[2] If an alien wishes to enter the U.S., an HIV test is required as part of the overall medical screening process.[3] The United States Citizenship and Immigration Services (USCIS) of the U.S. Department of Homeland Security[4] will deny a visa to any applicant who tests positive for HIV. The exclusion

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[2] Section 212(a)(1)(A) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(a)(1), states that "any alien -- (i) who is determined (in accordance with the regulations prescribed by the Secretary of the Department of Health and Human Services) to have a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome . . . ." is ineligible to receive a visa or to be admitted to the U.S. The designation of HIV/AIDS as a "communicable disease of public health significance" was signed into law as part of the National Institute of Health Revitalization Act of 1993, Pub. L. No. 103-43, 107 Stat. 122, 210. *See generally* 70 INTERP. REL. 677 (May 24, 1993). *See also* 42 C.F.R. 34.2(b), FN 3, *infra.*

[3] *See* INA § 232(b), 8 U.S.C. § 1252(b), which requires the medical examination of arriving aliens. *See also* Public Health, 42 C.F.R. 34.2(b) (1999). By regulation, communicable diseases of public health significance include Chancroid, Gonorrhea, Granuloma inguinale, Human immunodeficiency virus (HIV) infection, Leprosy (infectious), Lymphogranuloma venereum, Syphilis (infectious stage), and Tuberculosis (active).

[4] In accordance with Homeland Security Act of 2002 (effective March 1, 2003), the role of the Immigration and Naturalization Service was shifted to the Department of Homeland Security. The shift separated the department into two sections: Border & Transportation (responsible for immigration and customs enforcement and border protection) and Citizenship and Immigration Service (responsible for review of applications, naturalization, asylum and refugee service centers, as well as other immigration related benefits). This prompted the division of the INS into two areas, the United States Citizenship and Immigration Services (USCIS) and the Border Patrol and Customs Services. The CIS conducts the duties the INS was once responsible for and for the purposes of this article, the division dealing with immigration matters will be referred to as the Immigration Service.

is not limited to applicants outside the United States. Non-citizens already in the U.S. are also affected, since they, too, if infected with HIV, may be denied any type of legal status, regardless of how far along in the immigration process they may be.

This article will focus on non-citizens infected with HIV who reside in the U.S. and wish to become lawful permanent residents (LPRs), that is, those seeking "green cards."[5] Such individuals may have to choose between, on the one hand, remaining in the United States illegally, or, on the other, returning to their country of origin, where, as is often the case, they may have little or no access to life-saving or life-extending medications.

The discriminatory nature of the HIV bar speaks for itself, ignoring, as it does, humanitarian concerns and fostering discrimination against HIV-infected aliens. Yet the negative impact of the policy—which was driven from its inception by hysteria and prejudice—goes far beyond humanitarian concerns. To the surprise of no one, the HIV bar has not only proved useless at keeping HIV outside our borders, it has also resulted in a public health backlash within our borders, thereby undermining the very thing it was intended to protect: the public health.

II. HISTORY: THE HIV BAR DEBATE OF THE 90'S

Congress has near plenary power in regulating immigration, subject to minimal judicial review. In order to protect the American populace, Congress has been given the authority to exclude from the United States

[5] There are two main ways to receive a green card in the U. S. without undergoing a medical examination. One is the application known as "Cancellation of Removal." The other is the application known as "Registry." Both are extremely difficult to obtain.

Cancellation of Removal can only be granted by an Immigration Judge to a person facing removal. *See* INA §240A(b), 8 U.S.C. § 1229b, which allows certain long-term residents of the U.S. to apply for green cards if they can establish, among other facts, that their removal would result in "exceptional and extremely unusual hardship" to a U.S. citizen or LPR parent, child or spouse. Alternatively, this same section also allows a battered spouse or child of a U.S. citizen or LPR to apply for a green card through a similar application. § 240A of the INA was added by § 304 (a) of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996, effective Apr. 1, 1997, pursuant to § 309 of such Act).

Registry applicants must prove they entered the U.S. before Jan. 1, 1972, maintained continuous residence since that time, and are currently persons of good moral character who are not ineligible for U.S. citizenship. *See* INA § 249, 8 U.S.C. § 1259. The date "January 1, 1972" was substituted for "June 30, 1948" by § 203(a) of Pub. L. 99-603, 100. Stat. 3405 (Nov. 6, 1986).

Lastly, while it is true that a medical examination is not required of an applicant for adjustment of status who entered the U.S. as a non-immigrant fiancé or fiancée of a U.S. citizen, the newly married non-citizen applicant had to have previously undergone a medical examination and been found admissible in order to receive the non-immigrant visa to the U.S. *See* 8 C.F.R. 245.5 (1999).

aliens perceived to pose a threat to our society. Under the 1952 Immigration and Nationality Act (INA), there were 31 grounds for exclusion, including a bar against the admission of aliens infected with "any dangerous contagious disease." In June 1987, HIV was added to this list by the U.S. Public Health Service (PHS) of the Centers for Disease Control and Prevention (CDC), within the Department of Health and Human Services (HHS). However, in 1991, the HHS reversed its stance stating that since the United States is "virtually the only major country to try to bar HIV-infected travelers," and since "sexually transmitted diseases ... are not spread by casual contact" or "through the air," the best medical thinking is to educate the population rather than exclude aliens.[6]

In addition to HHS, which was the chief agency charged with updating the "inadmissible list,"[7] there was widespread opposition to the HIV bar among a cross-section of organizations and prominent individuals, including, the American Public Health Association;[8] the American Medical Association; the CDC; the World Health Organization; the then Secretary of Health and Human Services, Donna Shalala (as well as former HHS Secretary Louis W. Sullivan);[9] The Association of State and Territorial Officials (ASTO)[10]; some 200 health-related organizations, including HIV, immigrant, and refugee service providers, religious organizations, gay,

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[6] Communicable Diseases and Foreign Visitors, at http: //www.keepinformed.com/HHS/PR/1991/01/910125.txt (last visited May 28, 2000)

[7] The Department of Health and Human Services (HHS), acting through its U.S. Public Health Service (PHS) branch of the Center for Disease Control (CDC), was instructed under the Immigration Act of 1990 to update the list of excludable diseases. HHS insisted that HIV be removed from the list arguing that the risk "comes not from nationality…but from specific behaviors."

[8] Letter from APHA to Sen. Kennedy (Feb. 11, 1993), *See* 139 CONG. REC. S1697-02, S1714-1715 (daily ed. Feb. 17, 1993).

[9] 139 CONG. REC. S1761-04, S1763.

[10] Letter from ASTO to President Clinton supporting removal of the HIV bar*, See* 139 CONG. REC. S1697-02, S1714.

lesbian, and AIDS activist organizations;[11] the VIII International Conference on AIDS;[12] and a long list of physicians and health care workers.[13]

Despite this widespread opposition, Congress enacted legislation mandating the HIV bar. Congressional records indicate that support for the HIV bar was fueled in part by prejudice, ignorance and homophobia.[14] Officially, Congress justified the Bar on two grounds: (1) protection of the public health, and (2) preservation of scarce public resources. Congress reasoned that allowing infected aliens to enter the U.S. would not only increase the spread of HIV/AIDS, but also result in increased demands on scarce public resources by HIV-infected individuals. Logical as it may sound, the policy ignores the reality of U.S. immigration trends, and has resulted in a policy that may be perpetuating the very problem it seeks to solve.

III. THE IMPACT OF THE HIV BAR ON NON-CITIZENS

A. Held Hostage to their Medical Care

Many non-citizens first learn that they are infected with HIV or have developed AIDS while they are in the U.S.[15] Some learn that they have HIV/AIDS only when they receive the results of their Immigration Service

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[11] Letter from advocacy organizations to President Bill Clinton (Feb. 8, 1993), *See 139* CONG. REC. S1697-02, S1716-1717 (daily ed. Feb. 17, 1993).

[12] ACT-UP, ACLU, NOW, the Bar Association of San Francisco, the Center for Constitutional Rights, the International Rescue Committee, the National Urban League and some other organizations joined GMHC in signing a document condemning discriminatory HIV immigration policies.

[13] Letter from eighty-five physicians and health care workers in opposition of the policy to Charles R. McCance, Director, *Division of Quarantine of the Center for Prevention Services of the Center for Disease Control, See* 139 CONG. REC. S1697-02, S1717 (July 23, 1991).

[14] Senator Helms' statements regarding Bill Clinton's initial promise to lift the HIV bar suggest motives other than simply to protect the public health: "I had reached the conclusion that every possible concession had already been made to the AIDS lobby and to the homosexual rights movement which feeds it. But the Clinton administration's kowtowing to this arrogant and repugnant political group is beyond belief . . . . Who can blame those Americans who feel that this President, after breaking promise after promise, has made clear that about the only citizens who need show up to collect their campaign IOU's are the radicals in the organized homosexual movement." *See* 139 CONG. REC. S1697-02, S1721 (daily ed. Feb. 17, 1993).

[15] Applications for Adjustment of Status (to become an LPR) for non-citizens not living in the U.S., and for many other non-citizens who are ineligible to have their applications adjudicated in the U.S., are processed abroad at American Embassies in many countries. This is known as "Consular Processing." This article will focus on the options available to

medical examination. After being diagnosed, HIV-positive immigrants seek counseling, medical care and treatment. Many soon discover that they cannot get the life-saving or life-extending medications they need except in the United States.[16] At one time, the lack of access to HIV medications outside of the U.S. was not as great a cause for concern, especially as the earliest treatments for HIV were relatively ineffective.[17] But the current standard of treatment in the U.S., called "combination therapy," and known colloquially as the "drug cocktail," has greatly improved the length and quality of the lives of many people living with HIV/AIDS.[18] Consequently, immigrants living with HIV/AIDS in the United States may face the starkest of choices: find a way to obtain legal status or go “home” to die—“home” being a relative term, since many such immigrants have lived in the United States for years.

B. U.S. and Other Nations’ HIV Policies

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non-citizens living in the U.S. who want to become LPRs. While the same criteria is used during Consular Processing as is used by the Immigration Service domestically, the main distinction is that Consular Processing is slower and more difficult because of the greater distances involved and the need for communication between the Consular Officer abroad (an employee of the State Department) and the Immigration Service (which, with the Centers for Disease Control, processes and adjudicates the HIV Waiver).

[16] *See* Michael Specter, *Doctors Powerless As AIDS Rakes Africa*, N.Y. TIMES, August 6, 1998, at A1. ("The optimism of the West is a cruel fantasy in Africa. Here there is no treatment, no cure, little hope and -- in almost every country on this continent -- far more pressing problems to face each day. . . . With an average of less than $10 to spend on each person's health every year, most African countries have no money for tests, for fancy drugs or for complicated support networks."). *See also* Affidavit of Jose Pietro Aparicio, M.D.; March 11, 1998; New York, NY; [Hereinafter "Aparicio Affidavit"] on file with the Gay Men's Health Crisis, Inc., Legal Services Department. ("HIV-positive patients undergoing current typically indicated triple drug therapy are more likely to experience interruptions in treatment upon deportation to Latin America."). *See also* The Statement of the Carr Center of Human Rights Policy, John F.Kennedy School of Government, Harv. U., *AIDS and Human Rights: A Call for Action,* at www.ksg.harvad.edu/cchrp/AIDSStatement01.pdf.

[17] *See* World Health Organization & Joint United Nations Programme on HIV/AIDS, *Guidance Modules on Antiretroviral Treatments*, WHO/ASD/98.1, UN AIDS/98.7, at 7 ("In 1987, zidovudine (ZDV, formerly known as AZT) was approved by the US Food and Drug Administration. In the years that followed, four other drugs of the same family were introduced. The principal problems with these drugs, including ZDV, are their limited potency, their toxicity and their time-limited benefit, largely due to the development of resistance.").

[18] *See* Frank J. Palella, Jr., M.D., et al., *Declining Morbidity and Mortality Among Patients With Advanced Human Immunodeficiency Virus Infection*, NEW ENG. J. MED. 1998; 338: 853 at 860. ("[T]he routine use of increasingly intensive antiretroviral therapies has resulted directly in dramatic declines in the morbidity and mortality among HIV-infected patients with advanced immune depletion."). *See also* Aparicio Affidavit, FN 15, *supra* ("Triple drug therapy has, for the first time, led medical professionals to consider the possibility that the expected lifespan of HIV infected individuals may return to expected life spans for the general population with continued maintenance and development of these therapy regimens.").

Some countries have adopted entry and visa restrictions for people with HIV/AIDS. However, the World Health Organization "has taken the position that there is no public health justification for entry restrictions that discriminate solely on the basis of a person's [HIV] status."[19] And while the U.S. refuses entry to HIV-positive foreign nationals, many other countries—for example, Australia, Denmark, Finland, France, Ireland, Italy, Japan, Netherlands, Portugal, and Switzerland—have no such restrictions for people with HIV. Some other countries, for example Norway and Sweden, do not bar aliens solely based on their HIV status. Rather, in case of doubt, they may offer or oblige the foreign national to undergo a HIV test but only to ensure appropriate treatment. In Finland, HIV-positive foreigners may be deported only if they knowingly spread the HIV virus.[20] Studies of the WHO (1987) estimate that costs of setting up screening and testing procedures for all ports of entry (air, sea and land)—including the costs of testing, the cost of personnel and resources required to establish, maintain and monitor the screening activity, and the cost of the necessary infrastructure—amounts to about $20 per traveler screened.[21] In the United States, we are spending about $10 million a year to exclude approximately 500 aliens. This is money that could presumably be used to encourage early testing among immigrants (many of whom did not enter through the traditional ports of entry), catching the disease at an earlier, more treatable stage, and educating those infected in effective prevention techniques.[22]

IV. WAIVING THE HIV BAR: OPTIONS FOR HIV-POSITIVE NON-CITIZENS[23]

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[19] WHO, *International Travel and Health, 2003* available on Internet at www.who.int./ith/chapter05_05.html.

[20] *Quick Reference. Travel and residence regulations for people with HIV and AIDS*. Fourth Edition. Deutsche AIDS-Hilfe e.V. Berlin (December 2002).

[21] Sarah N. Qureshi, *Global Ostracism of HIV-positive Aliens: International*, MD. J.INT'L L. & TRADE (Spring 1995).

[22] One study finds that the money used for mandated testing could be reallocated to cover the anticipated costs of treating HIV- positive aliens, even without the public charge provision. The study also found that if the INS were to abolish the testing requirement and require incoming immigrants to place a fraction of what they now pay into a special account, the resulting fund would more than cover the cost of treating HIV-positive immigrants who require government assistance, all without incurring the other expenses of the exclusion. United States' Denial of the Immigration of People with AIDS, 6 TEMP. INT'L & COMP. L.J. 145, 152 (1992).

[23] In this section I will not discuss applications for Cancellation of Removal under § 240A of the INA and Registry under § 249 of the INA, neither of which requires a medical examination of the applicant. *See supra* note 2. Cancellation of Removal is discussed and compared to an earlier remedy called Suspension of Deportation, *infra*. Registry is not a viable option unless the non-citizen has been continuously in the U.S. prior to January 1, 1972. By definition, this

The most common application a non-citizen can make to obtain a green card is called an "adjustment of status."[24] United States law allows certain individuals or organizations to file petitions asking that a non-citizen be allowed to become a lawful permanent resident (LPR). If the petition is approved, the non-citizen then files an application for adjustment of status.[25] Part of the examination process for adjustment of status involves a medical examination, including an HIV test. There are applications for family-based immigration, employment-based immigration, the diversity visa program (also known as the "lottery"), refugee and asylee adjustment of status, and country-specific applications for adjustment of status. The HIV bar applies to all such applications. And for each of these applications, a waiver of the HIV bar must be granted for the application to succeed. As discussed below, the requirements of each HIV waiver can differ significantly from application to application.

A. REQUIREMENTS FOR THE STANDARD HIV WAIVER

The same statute that establishes the HIV bar also provides for a waiver for non-citizens applying for green cards through applications for adjustment of status via family-based immigration, employment-based immigration or the diversity visa lottery. For all of these applications, the immigrant seeking to waive the HIV bar must be the spouse, unmarried son or daughter, or minor unmarried adopted child of a U.S. citizen or lawful permanent resident. The parent of a U.S. citizen or lawful permanent resident also qualifies for an HIV

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will exclude all but the handful of potential Registry applicants who have not filed for this relief since it was created in November of 1986.

[24]Sections 201-209 of the INA, 8 U.S.C. 1301-9, provide for the issuance of LPR status to individuals who seek adjustment of status as family sponsored immigrants, employment based immigrants, diversity immigrants, refugees and asylees. *See infra Waiving the HIV Bar: The Draconian HIV Waiver*, Part IV., Subsection A. Long-term non-citizens living in the U.S. have also been able to apply for LPR status through the 1986 amnesty program under INA § 245A(a), 8 U.S.C. 1255a(a). § 245A was added by § 201 of the Immigration Reform & Control Act of 1986 ("IRCA"), Pub. L. 99-603, 100 Stat. 3394, Nov. 6, 1986. Under former INA § 212(a), IRCA amnesty applicants would be denied LPR status if they tested positive for infection with HIV unless they qualified for a waiver of the HIV Bar. The procedures for waiving the HIV Bar under IRCA required the applicant to demonstrate that waiving the HIV Bar would either: serve a humanitarian purpose, assure family unity, or otherwise be in the public interest. Matter of P, 19 I & N Dec. 823 (Comm. 1988). The HIV Waiver under IRCA did not require the HIV- positive intending immigrant to have a family member who was a U.S. citizen or LPR, and was therefore more liberal than the current draconian HIV Waiver (discussed *Infra*). It is safe to say that if the criteria for the HIV Waiver under IRCA were applied to adjustments of status under §§ 201-209, many additional persons with HIV would obtain their green cards.

[25]Applications for adjustment of status can be processed abroad at United States Consulates. *See supra* note 14.

waiver.[26] In addition to requiring a family relationship,[27] the statute permits the Attorney General to establish any other terms or conditions that may be required to obtain a waiver under this provision.[28]

Under the guidelines[29] established by the USCIS, persons seeking a waiver of the HIV bar must also establish that the danger to the public health of the U.S. created by his or her admission is minimal.[30]

1. <u>Family-Based Immigration</u>

U.S. immigration law establishes a system for U.S. citizens and LPRs to sponsor certain family members to become LPRs of the U.S.[31] For example, the law allows a U.S. citizen to petition for his wife or minor child, and that petition is considered to have an immediate priority date, meaning that the non-citizen relative can immediately file the application for adjustment of status to become an LPR.[32] The law also allows a

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[26] *See generally* § 212(g) of the INA, 8 U.S.C. 1182(g). The term "granted an immigrant visa" refers to situations where an HIV- person applies for adjustment of status along with his or her HIV-positive spouse or other family member, who is referred to as a "derivative beneficiary." As long as the principal applicant can be granted an immigrant visa, and that applicant meets the defined family relationship, then it is possible for the derivative beneficiary to receive a HIV Waiver.

[27] The U.S. does not recognize same sex relationships as a basis for granting immigration benefits. *See* Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419 (Sept. 21, 1996), which limits marriage, for federal purposes, to the legal union of a man and a woman. But eight countries do recognize same sex relationships as a basis for granting immigration status. *See* Noemi E. Masliah, et al., *Representing Lesbian, Gay, Bisexual and Transgender Clients*, AILA 1999-00 ANN. HANDBOOK, ADV., [Hereinafter "Representing LGBT Clients"] at 28 ("Currently the United States does not recognize same sex relationships for purposes of conferring immigration benefits. While members of the same sex may not be able to legally marry in other countries, there do exist procedures in some countries whereby same sex couples can register their partnerships for a legal recognition with similar rights to a civil marriage for immigration purposes."); *See, e.g.,*. Representing LGBT Clients, pp. 29-31, *supra*, which discusses same sex couples' rights concerning immigration status in Denmark, Norway, Sweden, Australia, the United Kingdom, New Zealand, Canada and The Netherlands.

[28] *Id.*

[29] *See* Memorandum from Alexander T. Aleinikoff, INS Executive Associate Comm'r, to all INS offices, Immigrant Waivers for Aliens Found Excludable Under § 212(a)(1)(A)(i) of the Immigration and Nationality Act Due to HIV Infection, File No. HQ 212.3-P (Sept. 6, 1995), reproduced in 72 INTERP. REL. 1347 (Oct. 2, 1995).

[30] I am referring here to the public health charge that relates to the possible cost of treating the HIV illness. There is a separate provision, under § 212(a)(4) of the INA, 8 U.S.C. 1312(a)(4), that denies admission (and thereby denies a green card) to persons who "in the opinion of the Attorney General. . . . is likely at any time to become a public charge." I will focus on the more narrow issue of whether the HIV infection makes the non-citizen a risk of becoming a public health charge. Typically, if a non-citizen can demonstrate that she has health insurance which will pay for her treatment and medication for HIV, that person will not be inadmissible on public health charge grounds.

[31] *See* § 201-205 of the INA, 8 U.S.C. 1151-5.

[32] *See* § 203(a)(1) and (2) of the INA, 8 U.S.C. 1152(a)(1) and (2).

U.S. citizen to petition for a sibling,[33] but this kind of petition is processed so slowly that it may take ten years before the non-citizen sibling can file for adjustment of status.[34] In each case, when the adjustment of status application is filed, the applicant will have to take an HIV test as part of the required medical examination, and if the test is positive for HIV, he or she will be found inadmissible unless eligible for a waiver of the HIV bar. Putting aside the three additional requirements set forth by the USCIS,[35] it is clear that requiring an HIV-positive person to have a particular family relationship with a U.S. citizen or LPR will greatly affect whether the HIV bar can be waived. Clearly, a spouse or child of a U.S. citizen will have the required family relationship to obtain an HIV waiver. There is no guarantee, however, that the sibling of a U.S. citizen will have a parent, child or spouse who is a U.S. citizen or LPR. The fact that the preference system recognizes the importance of sibling relationships, but the HIV waiver does not, points to the harshness of the waiver. By not allowing the petitioner's sibling relationship to waive the HIV bar, U.S. law will forever deny green cards to many HIV-positive non-citizens who are receiving treatment for their illness, are employable and would otherwise be eligible for the HIV waiver except for their lack of a relative to waive the HIV bar.

2. Employment-Based Immigration

Employment-based immigration is a process whereby a U.S. employer, for example, a computer software company, petitions the U.S. government (the Department of Labor or the Immigration Service) to allow a non-citizen employee to become an LPR.[36] The employer must demonstrate that the non-citizen employee has a special skill, education or training, that no qualified U.S. citizen is available to fill the position, and that the salary is consistent with the prevailing wage for that type of job. If the petition is approved—and

[33] *See* § 203(a)(4) of the INA, 8 U.S.C. 1152(a)(4).

[34] *See* United States Department of State, Bureau of Consular Affairs, VISA BULL. 5-VIII, at 2.

[35] That there be minimal danger to public health, minimal possibility of spreading the infection, and that there will be no cost incurred by any government agency without that agency's prior consent. *See supra* note 13.

[36] *See* § 203(b) of the INA, 8 U.S.C. 1153(b).

this may take several years—the immigrant may be eligible to file for an adjustment of status, which, again, requires a medical examination, including an HIV test.

Testing positive for HIV will make the employee inadmissible unless all of the stringent requirements for the HIV waiver, explained above, are met. While it is quite likely that applicants such as highly skilled and well-paid computer programmers, college professors, millionaire investors or a person classified by the government as having "extraordinary ability" in a particular field of work, will be educated about HIV and its transmission, and can afford health insurance, it is much less likely that they will have the required family relationship to waive the HIV bar. Once again, although current immigration law recognizes the importance of U.S. employers' need for highly educated and skilled employees, and the law allows employers to petition for their employees in strictly governed circumstances, the employer cannot ask that the HIV bar be waived. Simply put, the employer-employee relationship is not considered important enough to waive the HIV bar, and the employee will likely never become an LPR.

3. <u>The Diversity Visa Lottery</u>

The U.S. has also created a program to annually allocate 50,000 immigrant visas to eligible persons from countries that have relatively low numbers of immigrant visas issued.[37] This is called the "lottery," and it allows randomly selected persons from designated countries to file for adjustment of status almost immediately.[38] The lucky winners of the lottery, however, receive no special treatment when it comes to the issue of the HIV bar. HIV-positive lottery winners must be eligible for an HIV waiver or else they will not be able to benefit from the lottery.[39] This requirement that HIV-positive lottery winners have the required family relationship to waive the HIV bar clearly frustrates the intent of this generous remedial program.

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[37] *See*. § 203(c) of the INA, 8 U.S.C. 1153.

[38] *See* United States Department of State, Bureau of Consular Affairs, VISA BULL. 90-VII, at 1.

[39] *Id*. at 7.

B. The Humanitarian Waiver for Refugees & Asylees

The procedures and requirements for receiving a waiver of the HIV bar are much more lenient for refugees[40] and asylees.[41] By statute, refugees and asylees are eligible to apply to adjust their status to that of LPR after they have been physically present in the U.S. for one year.[42] Again, as part of the adjustment of status application, the refugee or asylee must be tested for HIV. If a refugee or asylee tests HIV-positive, s/he will be denied adjustment of status (i.e., denied a green card) unless eligible for an HIV waiver. However, for refugees and asylees, the Attorney General can waive the HIV bar for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.[43] This means that refugees and asylees seeking to become LPRs can obtain a waiver of the HIV bar without satisfying the family relationship and the public health charge considerations that other would-be LPRs must satisfy. Refugees and asylees would still have to demonstrate that their admission would not pose a danger to the public health of the U.S. and would have a minimal possibility of spreading the infection.

C. Country-Specific Legislation and The HIV Bar & Waiver

1. The Nicaraguan Adjustment and Central American Relief Act[44]

[40] The term "refugee" is defined in § 101(a)(42) of the INA, 8 U.S.C. 1101, as including a person outside of the United States who has been determined to have a "well-founded fear of persecution" on account of his or her race, religion, nationality, membership in a particular social group, or political opinion and/or certain recognized circumstances under § 207(e) of the INA, 8 U.S.C. 1207(e) or by designation of the President.

[41] An asylee is a person who is in the United States who has been determined to have a "well-founded fear of persecution" on account of his or her race, religion, nationality, membership in a particular social group, or political opinion and/or certain recognized circumstances under § 208 of the INA, 8 U.S.C. 1158.

[42] *See* § 209 of the INA, 8 U.S.C. 1159.

[43] *See* § 209(c) of the INA, 8 U.S.C. 1159(c).

[44] Pub. L. 105-100; 111 Stat. 2160 (Nov. 19, 1997) [hereinafter "NACARA"].

With the amendment of the immigration laws in 1996,[45] it became clear that the options for non-citizens to legalize their status had been drastically reduced.[46] In light of this, President Clinton signed NACARA into law on November 19, 1997. This law made individuals from certain Central American countries and the former Soviet Union eligible for Suspension of Deportation or Cancellation of Removal, the 1996 laws notwithstanding.[47] NACARA also permits Cubans and Nicaraguans to file for adjustment of status under certain conditions.[48] However, except for persons applying for Suspension of Deportation under NACARA, all other potential beneficiaries must be tested for HIV and, if positive, must seek an HIV waiver. This is unfortunate because the purpose of NACARA was to make amends to the many immigrants from Central America whose asylum applications were mishandled for political reasons, who come from Cuba, or who fled certain Central American countries during recent political unrest and conflicts.

2. <u>The Haitian Refugee Immigrant Fairness Act[49]</u>

HRIFA was signed into law on October 21, 1998, and allows certain Haitians to file for adjustment of status in an expedited manner. It aims to provide immigration benefits to persons who were either paroled into

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[45] The Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996) and the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214 (Apr. 24, 1996) drastically reduced the options for non-citizens to legalize their status or to prevent their deportation. Specifically, the two laws all but eliminated waivers of deportation for LPRs with criminal convictions, made it more difficult to file for asylum and replaced the remedy known as Suspension of Deportation with a much more difficult to obtain remedy known as Cancellation of Removal.

[46] *See* Mirta Ojito, *Change in Laws Sets Off Big Wave of Deportations*, N.Y. TIMES, Dec. 15, 1998, at A1. ("In the two years since Congress passed tough laws to stem the flow of illegal immigration to the United States, Federal authorities have deported almost 300,000 immigrants to countries all over the world, more than twice the number who were sent back in the two years before. . . . The law also expanded the definition of a deportable crime and directed the immigration agency to deport immigrants convicted of crimes, even if they were legal permanent residents of the United States. . . . In addition, the law took away the power of judges to consider mitigating factors."). *See also* Kevin McCoy, *INS deporting Queens mom with drug rap & AIDS virus*, N.Y. DAILY NEWS, Dec. 14, 1998, at 24 ("For any immigrant, deportation is a wrenching ordeal. For Noemi Nagy it could be a matter of life or death . . . . Her unusual, but by no means unique, plight shows how tightened laws aimed at evicting criminal immigrants here illegally from U.S. soil sometimes also bar ailing legal immigrants from medical treatment rarely available elsewhere.").

[47] *See*. § 203.

[48] *See*. § 202.

[49] Pub. L. 105-277; 105 Enacted H.R. 4328 (Oct. 21, 1998) [hereinafter "HRIFA"].

the U.S. prior to December 31, 1995, after fleeing the Haitian dictatorship, who filed for asylum in the U.S. prior to December 31, 1995, or orphans from Haiti who meet certain requirements. Despite the fact that the very title of the law describes it as providing fairness to refugees, the law does not treat applicants under this law as refugees. Specifically, the INS treats HIV-positive Haitians who apply for adjustment of status under HRIFA as subject to the HIV bar and the limits of the HIV waiver.[50] The fact remains that this law cannot help HIV-positive Haitians become LPRs unless the Haitians have the necessary family relationship to waive the HIV bar. This continues the uneasy relationship between the U.S. government and HIV-positive persons from Haiti.[51]

V. EXPOSING THE FALLACIES AND BACKLASH OF THE HIV-BAR

A. Fallacy #1: The HIV Bar Prevents HIV-POSITIVE Aliens from Entering the U.S.

The HIV-bar keeps about 500 HIV-positive immigrants from entering the U.S. each year.[52] But this does not mean that the Bar prevents HIV-positive immigrants from entering the United States. In fact, there are about 300,000 immigrants who enter the United States each year without going through the Immigration Service's HIV testing sites. The Bar also doesn't prevent a whopping 22 million non-immigrants from entering

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[50] On March 24, 2000 the INS issued final regulations implementing HRIFA. The regulations continue to apply the HIV Bar under § 212(a)(1) to HRIFA applicants, and they direct HRIFA applicants to seek the draconian HIV waiver under § 212(g) of the INA. *See comments at* 65 FED. REG. 15835, Vol. 65, No. 58 (March 24, 2000) at 15837 ("The specific grounds under which an alien may be found inadmissible to the United States are set forth in § 212(a) of the Act. 8 U.S.C. 1182 (a). While HRIFA provides that five of these specific grounds of inadmissibility shall not apply to HRIFA applicants, it does not exempt them from the grounds pertaining to ... inadmissibility under medical grounds, which is discussed in § 212(a)(1)(A), 8 U.S.C 1182 (a)(1)(A).... The statutory authority to grant waivers of medical grounds of inadmissibility is contained in § 212(g) of the Act, 8 U.S.C. 1182(g).")

[51] Historically, Haitians infected with HIV have been routinely denied permission to enter the U.S. In the early 1990s, over 200 HIV-positive Haitians were detained at the U.S. naval base in Guantanamo Bay, Cuba, some for as long as two years, because of their inadmissibility under the HIV Bar at that time. It took an order by a federal judge in New York to compel the U.S. government to parole HIV-positive Haitians into the U.S. *See Haitian Ctrs. Council v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993). It is exactly these individuals -- HIV-positive Haitians paroled into the U.S. in the early 1990s -- who are supposed to benefit from HRIFA, but who will not be able to obtain their green cards through this law unless they meet the requirements of the draconian HIV waiver. Without enough income or assets to meet the public health charge requirement, and without the required family relationship, HRIFA applicants cannot waive the HIV Bar and will not be granted green cards under this law.

[52] The Congressional Research Service ("CRS") also came up with a lower number. They approximate that between 200 to 300 HIV-infected persons seek immigration to the United States each year.

the United States on tourist or other short-term visas. As is well-known, thousands of such visitors overstay their visas, and are also not subject to HIV testing.[53]

B. Fallacy #2: The HIV Bar Preserves Public Resources.

The economic reasoning behind the HIV policy is that immigrants increasingly rely on public resources, and AIDS treatment is expensive. Therefore, barring the entry of immigrants with AIDS will preserve resources. The first part of this reasoning is correct. It is correct that many immigrants rely on public resources. In 1993, Congress relied on the studies of Dr. Huddle, an economist from Rice University, who found that from 1970 to 1997, 19.3 million legal and illegal immigrants had settled in the U.S., costing the government $42.5 billion in public assistance, as contrasted to their paying only $20.2 billion in taxes during the same time period. Dr. Huddle also estimated that the number of immigrants and illegal immigrants would increase to 30.4 million by the year 2002 costing the public $668.5 billion in 1993 dollars with an average of $67 billion each year. [54] Congress is also correct in that AIDS treatment is expensive. Current CDC statistics indicate that the cost of medical treatment for persons with AIDS from the time of diagnosis until death is approximately $103,000 per patient. However, concluding that removal of the HIV-bar will open the door to public charges and drain U.S. resources is flawed in two respects: first it ignores the reality of U.S. healthcare trends; and, second, it ignores the reality of immigration regulations in general.

Regarding the healthcare misconception, the preceding section indicated that less 500 or so HIV-positive aliens would enter the U.S. if the HIV bar were lifted. Using the CDC's estimated cost of treatment per AIDS case, the total annual cost to the United States health care system would be approximated at $51.5 million, assuming that 100% of these HIV-positive aliens become a public charge. $51.5 million is substantial; however,

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[53] Statement of Sen. Kohl, 139 CONG.REC. S1766 (daily ed. Feb. 18, 1993).

[54] See 139 CONG. REC. E1896 (daily ed. July 27, 1993); 139 CONG. REC. H4436 (daily ed. July 1, 1993) (statement of Rep. Burton introducing Donald Huddle, *The Net National Costs of Immigration* (1993)). *See also* Jeremy R. Tarwater, *The Tuberculosis & HIV Debate in Immigration Law: Critical Flaws in United States Academic Anti-Exclusion Arguments.* GEO. IMMIGR. L J. (Winter, 2001).

it pales in comparison to the amount already spent on immigrants allowed into the United States with non-communicable diseases. For example, a Canadian report presented at the 7th Annual International AIDS Conference found that:

> 1.6 percent of all immigrants will suffer from heart disease alone. Using the total 1992 immigration figure of 810,635, it can be approximated that 12,970 of those immigrating to the United States in 1992 will have coronary heart disease within ten years. With the average cost of coronary heart disease treatment being $17,618 per person, a total health care cost of $228.5 million results. Furthermore, this figure approximates the cost of coronary heart disease only. When the potential costs for other health problems such as cancer, diabetes, or stroke are taken into consideration, the increasing health costs argument becomes even less persuasive. [55]

The reasoning of Congress is similarly flawed in that it ignores basic immigration rules. In that regard, AIDS is not the only condition that makes an alien "inadmissible." Criminals, psychopaths, and potential "public charges" are excluded as well. A "public charge" refers to an individual who comes to rely on public resources. For example, if an alien has heart disease and lacks the financial resources needed for treatment, the Immigration Service may bar this alien from entering the U.S. unless he can show that he will not become a financial burden on the locality or state. When it comes to HIV/AIDS, however, the public charge requirement is irrelevant, since an HIV-positive status automatically bars entry. Even if an HIV-positive alien has millions of dollars and the best private insurance policy, unless he is married to a U.S. citizen (and thereby has the possibility of obtaining an HIV-waiver), the alien has no chance of obtaining legal status. (Conversely, meeting the spousal requirement for a waiver is useless unless the alien can pass the public charge test.)

Yet at the same time, Congress justifies the HIV bar on grounds that removing it will open the door to thousands of HIV-positive aliens who will become "public charges." However, this belies the reality of immigration policy explained above. Eliminating the HIV bar would not mean that any individual with HIV could enter the U.S. The public charge test still applies. Rather, eliminating the exclusion would only mean that someone could not be denied entry solely on account of HIV status.

C. Public Health Backlash: The HIV Bar may be Perpetuating the Spread of AIDS.

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[55] *See* 139 CONG. REC. S1761-04, S1763*; See also* Jason W. Konvicka, *Give us Your Tired, Your Poor, Your Huddled Masses... Except When They Have HIV: an Analysis of Current United States Immigration Policy Regarding HIV-Positive Aliens in light of Guantanamo Bay.* U.RICH. L. REV. (Spring 1993).

Aliens who want to stay and become legal permanent residents will be subjected to an HIV test. Infected immigrants will be deported unless they "go underground," or hide from the Immigration Service. Many others, out of fear of being deported may never get tested, and ultimately pose a greater threat to the U.S. healthcare system. These aliens will actively avoid detection, causing them to lose contact with health and social service agencies dedicated to helping those infected with the disease and controlling its spread. As infected aliens shun counseling and treatment, it will result in a predictable increase in high-risk behavior, increasing the spread of the disease in the short term and swelling the cost of treating those infected in the long term. [56]

A deleterious public health backlash has occurred as a result of the exclusionary policy because it sends a message to HIV-positive immigrants already living in the U.S. (many of whom became infected after entering the United States) that their attempts to acquire an immigrant visa will result in deportation based on their HIV status. Thus, the Revitalization Act, rather than promoting education and changes in behavior, creates an incentive for aliens to avoid testing and avoid opportunities to obtain legal status, lest they face deportation.

D. Economic Backlash: The HIV Bar may be Increasing Dependence on Public Resources.

As the previous "Health Backlash" section explains, the HIV bar policy may in actuality be perpetuating the spread of AIDS among immigrant populations within the U.S., rather than reducing the rate of infection. What this means is that many who have been tested HIV positive, opt to simply stay in the U.S. illegally since an HIV status bars obtaining LPR status. These individuals have no chance to acquire good-paying jobs with health benefits. As a result, these aliens are forced to work off the books, thereby depriving the government of taxes. And without a job that provides insurance, these individuals will almost inevitably rely on public resources through ADAP, Medicaid, etc.. Studies have shown that immigrants seek preventive treatment infrequently, which means that infected aliens may not end up in the hospital until they have full-blown AIDS,

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[56] *See* Peter A. Barta, *Lambskin Borders: an Argument for the Abolition of the United States Exclusion of HIV-Positive Immigrants*, GEO. IMMIGR. L J. (Winter, 1998). *See also* 139 CONG. REC. S1761-04, S1763 (daily ed. Feb. 18, 1993); Statement of Sen. Kennedy, 139 CONG. REC. S1697-02, S1720 (daily ed. Feb. 17, 1993).

costing the government much more in the long run. As a result, the U.S. government ends up with precisely the type of situation its immigration laws seek to prevent.

VII. CONCLUSION: SOLUTIONS AND PROSPECTS FOR CHANGE

A. Change the Health Ground of Inadmissibility

Congress could change § 212(a)(1)(A)(i) of the INA to eliminate HIV/AIDS as a communicable disease of public health significance, which would effectively result in the overturning the HIV bar. This would be appropriate given current knowledge of the virus's transmission and advances in its treatment.[57] HIV is treatable, and for most infected individuals in the U.S. who are undergoing treatment, it has become a manageable, chronic illness. Life expectancy as well as the quality of life of HIV-positive persons is continually being improved by medical research and treatment.[58] It makes sense, therefore, to remove the disease from the statutory grounds of inadmissibility and to allow the Secretary of HHS to make an apolitical determination as to whether HIV is still a communicable disease of public health significance.

B. Change the Waiver Requirements

Congress could also revise § 212(g) of the INA to remove or broaden the family relationship required to obtain a waiver of the HIV bar. This would be appropriate where a non-citizen's other relatives (siblings, aunts, uncles, cousins, or other extended family members), domestic partner, or employer would be willing to ask that

[57] HIV is not casually transmitted. HIV is transmitted through unprotected sexual contact or sharing needles with an HIV-infected person. It is less commonly transmitted through transfusions of infected blood or blood products. It can be perinatally transmitted (from a mother to her child), but treatment is available to prevent the infection of newborns born to HIV-positive mothers. *See* Centers for Disease Control & Prevention, National Center for HIV, STD, and TB Prevention, *HIV Transmission*, located on the world-wide-web at <http://www.cdc.gov/nchstp/hiv_aids/hivinfo/vfax/260020.htm>.

[58] *See supra* note 5.

this ground of inadmissibility be waived. It would also be appropriate to recognize the non-citizen's own ties to the U.S. as a basis for waiving the HIV bar, where the non-citizen has longstanding personal and/or professional ties to this country.

C. Bring Back Suspension of Deportation

Under the U.S. immigration law which was in effect until April 1, 1997, persons could apply to become LPRs in the U.S. by applying for "Suspension of Deportation" if they could demonstrate several facts: seven years continuous physical presence in this country, good moral character, and that their deportation to their country of origin would cause extreme hardship to themselves or to their immediate relative.[59] Historically, HIV-positive persons had been granted Suspension of Deportation where they met the requirements of this law and were able to demonstrate that deportation to their home country would cause extreme hardship to themselves because they would not be able to continue the medical care and treatment that they were receiving in this country.[60] The HIV bar does not apply to persons granted Suspension of Deportation.

The current law replaced Suspension of Deportation with "Cancellation of Removal," which has significantly more difficult requirements.[61] Cancellation of Removal requires ten years physical presence in this country, good moral character, and proof that removal would result in "exceptional and extremely unusual hardship" to the non-citizen's U.S. citizen or LPR parent, child or spouse.[62] For HIV-positive non-citizens without a U.S. citizen or LPR parent, child or spouse, Cancellation of Removal is unavailable, even if

[59] *See*. § 244 of the INA as it existed prior April 1, 1997, 8 U.S.C.. 1254.

[60] *See* Memo by David A. Martin, INS General Counsel, February 16, 1996, *Seropositivity for HIV and relief from deportation*, reproduced in 73 INTERP. REL. 902 (July 8, 1996), appendix I. (Mr. Martin discusses the Presidential Advisory Council on HIV/AIDS's January 1996 recommendation that, when permitted by statute, INS and EOIR should grant stays of deportation, suspension of deportation, extended voluntary departure, deferred action, and asylum based on the social group category of HIV-positive individuals. He writes that "Seropositivity for HIV shall be considered in requests for discretionary forms of relief from deportation . . ."). The statutory replacement of Suspension of Deportation with Cancellation of Removal is discussed further, *infra*, as it relates to the status of HIV-positive individuals.

[61] *See*. § 240A of the INA. *See also supra* note 2. Cancellation of Removal can be denied for certain enumerated criminal convictions, fraudulent immigration statements or applications, failure to comply with the statute's strictly defined eligibility requirements, or certain other grounds.

[62] *See*. § 240a(b)(1)(D) of the INA.

deportation would mean losing access to the medical care and treatment that keeps them alive. This consequence leaves the HIV-positive non-citizen in a desperate situation.

One solution to this problem would be for Congress to reinstate the critical element of Suspension of Deportation, i.e. that it would be available upon the demonstration of *hardship to one's self*. This critical element of the statute as it existed previously, recognized that persons with HIV/AIDS frequently face death in their countries of origin because of the lack of medical care and medication for their illness, in addition to profound hardship as a result of the hatred and stigma suffered in many countries by persons with HIV/AIDS. The current form of relief, Cancellation of Removal, diminishes the deadly reality of being deported to a country without life sustaining medications by requiring that an applicant have a parent, child or spouse who would suffer the required hardship upon the non-citizen's deportation.