



December 6, 2007

**Submitted via U.S. Mail and the  
Federal eRulemaking Portal:**

Department of Homeland Security  
Border Security Regulations Branch  
Customs and Border Protection  
1300 Pennsylvania Ave, NW. (Mint Annex)  
Washington, DC 20229

[www.regulations.gov](http://www.regulations.gov)

**RE: DHS Docket No. USCBP- 2007-0084**

Dear Sir/Madam:

Lambda Legal Defense and Education Fund (“Lambda Legal”) submits these comments to the proposed regulations on Issuance of a Visa and Authorization for Temporary Admission into the United States for Certain Nonimmigrant Aliens Infected With HIV. Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and people living with HIV through impact litigation, education and public policy work. Lambda Legal is opposed to the regulations as currently drafted and calls for greatly simplified regulations – regulations that accurately reflect current information regarding HIV and are responsive to the President’s directive to propose a categorical waiver that will enable persons living with HIV to more readily enter the United States for short term visits.

Since HIV infection was first placed on the list of “dangerous contagious” diseases and made a basis for inadmissibility to the United States in 1987 (and subsequently specifically designated as a “communicable disease of public health significance” in the Immigration and Nationality Act in 1993), there have been extraordinary advances in the understanding and treatment of HIV/AIDS, including much greater understanding of how HIV is transmitted. At this stage of the epidemic, there is simply no medical justification to continue to treat people living with HIV as creating – by their very presence – a danger to the public health. For that reason, among others, Lambda Legal is opposed to the current statutory bar on admission of individuals living with HIV. While we do not expect that lifting the admissibility bar altogether is within DHS’s rulemaking authority, we urge that DHS use its rulemaking authority to respond to the President’s directive to draft regulations facilitating short-term entry of individuals living with HIV by proposing regulations creating a truly categorical and streamlined waiver.

**Lambda Legal Objects to the Proposed Regulations Because They Do Not Provide  
for a Categorical Waiver**

The proposed regulations do not create anything resembling a categorical waiver for people living with HIV who plan to visit the United States. Instead they continue to require an individualized, detailed, case-by-case assessment of the applicant's medical condition, treatment regimen, counseling, risk behaviors and financial assets. The Department should respond to the President's directive by creating a categorical waiver, one that will actually enable more people living with HIV to enter the United States on short-term visas.

### **Lambda Legal Objects to the Proposed Regulations Because HIV-Positive Travelers Will Have to Relinquish Valuable Rights and Benefits if They Use the Proposed Waiver Process**

From a legal perspective, the most worrisome aspect of the proposed regulations is the requirement that waiver applicants give up any right to change, extend or adjust their status while in the United States should future circumstances warrant such a change, extension or adjustment. Whatever benefit a person might receive from using the proposed new process does not justify DHS curtailing the legal rights of HIV-positive travelers in this fashion.

The proposed regulations make no accommodation for changed circumstances. Though perhaps rare, unforeseen circumstances are likely to arise for a small number of visitors that would require them to remain in the United States past the 30-day expiration of their visas (*e.g.*, hospitalization after an automobile accident, the death of a relative in the United States). The proposed regulations provide no exception or process for an individual facing such exigent circumstances.

The inability to adjust status would also mean that an HIV-positive individual who enters the United States under the proposed waiver process could not adjust status even if she has a United States citizen spouse, son or daughter who qualified her for an immediate relative petition, instead requiring a return to the home country for lengthy consular processing. The families, and thus the lives, of United States citizens should not be disrupted in this way simply because a spouse or parent received a waiver that was adjudicated by a consular officer rather than by DHS. Requiring a return to the home country for another adjudication of an HIV waiver in such circumstances is unreasonable and punitive.

Even more troubling, one could interpret the proposed regulations to mean that an individual who enters the United States under the proposed waiver and subsequently *receives asylum* in the United States would be forever barred from applying for legal permanent residence and, eventually, U.S. citizenship. Virtually by definition, successful asylum applicants would not be able to return home and change the type of waiver under which they entered the United States, thereby indefinitely placing these individuals in immigration limbo and preventing them from becoming citizens of the United States. The proposed regulations concerning waiver of future immigration rights would result in disparate treatment for HIV-positive asylees who enter under the "new" waiver as compared to other HIV-positive asylees and refugees, and lack even a rational basis to support such differential treatment. This proposed curtailment of the legal rights of HIV-positive individuals is unjustifiable.

As patently unfair and potentially harmful as the waiver of rights is, the problem is magnified by the lack of assurance that any required waiver of rights would be a truly informed waiver. While strongly opposing a requirement that an HIV-positive traveler relinquish these rights at all, Lambda Legal even more strongly opposes the suggestion that a foreign traveler would give up these rights without being provided, by the consular officer, with a full written and oral explanation of the consequences and available options.


### **Lambda Legal Objects to the Proposed Regulations Because Without a Reduction in the Individual Evidentiary Burden, the Proposed Waiver Will Remain Unworkable**

Lambda Legal foresees significant problems created by the mechanism through which the waiver process will purportedly be streamlined. While Lambda Legal recognizes the potential benefit of providing an alternative process that allows for waiver approval by consular officers, we are very concerned about the current proposal, which requires consular officers to evaluate medical documentation and information without guidance or training.<sup>1</sup> Consular officers are not properly qualified or equipped to make competent determinations regarding many of the proposed factors or conditions, nor are provisions included for training consular officers to make such determinations.

### **The Proposed Regulations Must Be Significantly Revised**

In conclusion, Lambda Legal calls upon DHS to draft and publish for comment a new set of regulations, offering a truly categorical waiver that would actually and effectively streamline the process and would not require an HIV-positive traveler to give up safeguards and rights available to other would-be visitors to the United States.

Sincerely,



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<sup>1</sup> Indeed, the proposed regulations themselves evince a fundamental lack of understanding regarding HIV and AIDS, stating that the waiver applicant must demonstrate that he or she is “not currently exhibiting symptoms indicative of an active, contagious infection associated with acquired immune deficiency syndrome.” See Fr. Doc. E7-21841, proposed Section 212.4(f)(2)(ii). The “contagious infection(s)” associated with AIDS, such as pneumocystis pneumonia (PCP), cytomegalovirus (CMV), and toxoplasmosis, are not easily transmitted to individuals who do not have compromised immune systems. See “Opportunistic Infections,” at [aids.org, http://www.aids.org/factSheets/500-Opportunistic-Infections.html#anchor50142](http://www.aids.org/factSheets/500-Opportunistic-Infections.html#anchor50142). The presence of such an infection, while threatening to the health of a person with AIDS, has no bearing on the public health of the general population in the United States.