



U.S. Citizenship  
and Immigration  
Services

HQ 70/21.1.1  
HQ 70/12.2.1  
*AFM Update AD10-03*

## Memorandum

TO: EXECUTIVE LEADERSHIP

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DATE: November 24, 2009

SUBJECT: Public Law 110-293, 42 CFR 34.2(b), and Inadmissibility Due to Human  
Immunodeficiency Virus (HIV) Infection

Revision to *Adjudicator's Field Manual* (AFM) Chapters 24.2, 40.1, 41.3, and  
Appendix 41-1, 41-2, and 41-3 (AD 10-03)

### 1. Purpose

Effective January 4, 2010, Human Immunodeficiency Virus (HIV) infection will no longer make an alien inadmissible under section 212(a)(1)(A)(i) of the Immigration and Nationality Act (Act). This memorandum accordingly provides guidance for applications involving HIV.

### 2. Background

In 2008, Congress amended section 212(a)(1)(A)(i) of the Act and no longer required the Secretary of Health and Human Services (HHS) to designate HIV infection as a “communicable disease of public health significance.” See Act of July 30, 2008, Pub. L. No. 110-293, § 305, 122 Stat. 2918, 2963 (2008). On July 2, 2009, HHS published a proposed amendment to 42 CFR 34.2(b) in the *Federal Register* at 74 *Fed. Reg.* 31798. The amendment proposed to remove HIV infection from

the list of communicable diseases of public health significance. On November 2, 2009, HHS published the final rule, amending its regulations at 42 CFR 34.2(b) and removed HIV infection from the definition of “communicable disease of public health significance.” 74 FR 56547 (November 2, 2009). This regulatory amendment is effective January 4, 2010.

Admissibility is determined based on the law in effect at the time of the final decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). For this reason, effective January 4, 2010, any alien diagnosed with HIV infection will no longer be inadmissible under section 212(a)(1)(A)(i) of the Act.

On September 15, 2009, USCIS instructed its officers to hold in abeyance any pending benefit application that was deniable under current HHS regulations but would become approvable once HIV infection was removed from 42 CFR 34.2(b). See memorandum entitled, "Public Law 110-293, 42 CFR 34.2(b), and Inadmissibility Due to Human Immunodeficiency Virus (HIV) Infection."

### **3. Guidance**

#### **A. Adjudication before January 4, 2010**

Between now and January 4, 2010, USCIS officers should continue to adjudicate cases involving HIV infection under the following guidelines:

- If an applicant has already filed a waiver of inadmissibility because of HIV infection and the waiver is approvable under current law, the officer should adjudicate the waiver and the related benefit application.
- If an applicant has already filed a waiver of inadmissibility because of HIV infection and the waiver is not approvable under current law, the officer will hold the case in abeyance until January 4, 2010.
- If an applicant is inadmissible because of HIV infection but has not yet filed a waiver, the officer should advise the applicant that the case will be held in abeyance until January 4, 2010, unless the alien requests adjudication by filing a waiver.

An applicant must generally file a motion to reopen or reconsider, with the fee prescribed by 8 CFR 103.7(b), within 30 days of a USCIS decision. USCIS has decided to waive this filing deadline if USCIS denied a case, based solely on HIV infection, on or after July 2, 2009, the date of the HHS proposed rule. In a case decided on or after July 2, 2009, the USCIS officer should grant an untimely motion, filed with the proper filing fee. Once the final rule takes effect on January 4, 2010, the USCIS officer should make a new decision in light of the final HHS rule.

#### **B. Adjudication on or after January 4, 2010**

Beginning January 4, 2010, an officer should administratively close any waiver application based solely on HIV infection and then adjudicate the related benefit application. Because the alien was

inadmissible at the time he or she filed the waiver application, administrative closure of the waiver application will not justify refunding the filing fee.

Furthermore, an officer will not consider any diagnosis of HIV infection when determining inadmissibility under 212(a)(1)(A)(i) of the Act. If the civil surgeon or panel physician omitted the results of the HIV testing on any medical examination documentation prior to January 4, 2010, but the case is adjudicated on or after January 4, 2010, the officer should disregard the lack of HIV testing.

#### **4. Adjudicator's Field Manual (AFM) Update**

The *Adjudicator's Field Manual* (AFM) is updated accordingly, and the following subchapters of the AFM are revised:

A. Subchapter 24.2(e)(3)(B) (HIV/AIDS Test) of the AFM is deleted in its entirety.

B. Subchapter 40.1(b)(2) of the AFM is revised to read as follows:

#### **40.1. HEALTH -RELATED GROUNDS OF INADMISSIBILITY AND MEDICAL EXAMINATIONS**

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(b)(2) Communicable Diseases of Public Health Significance. As of January 4, 2010, HHS has designated the following conditions as communicable diseases of public health significance in accordance with 42 CFR 34.2(b):

a) Chancroid.

b) Communicable diseases as listed in a Presidential Executive Order, as provided under Section 361(b) of the Public Health Service Act. The current revised list of quarantinable communicable diseases is available at <http://www.cdc.gov> and <http://www.archives.gov/federal-register>.

c) Communicable diseases that may pose a public health emergency of international concern if it meets one or more of the factors listed in 42 CFR 34.3(d) [http://www.access.gpo.gov/nara/cfr/waisidx\\_03/42cfr34\\_03.html](http://www.access.gpo.gov/nara/cfr/waisidx_03/42cfr34_03.html) and for which the CDC Director has determined (A) a threat exists for importation into the United States, and (B) such disease may potentially affect the health of the American public. HHS/CDC's determinations will be announced by notice in the Federal Register.

d) Gonorrhea.

e) Granuloma inguinale.

f) Leprosy, infectious.

g) Lymphogranuloma venereum.

h) Syphilis, infectious stage.

i) Tuberculosis, active. Only a Class A tuberculosis (TB) diagnosis renders an applicant inadmissible to the U.S. Under current CDC guidelines, Class A TB means tuberculosis that is clinically active and communicable.

**Special Note on HIV.** As of January 4, 2010, HIV is no longer defined as a communicable disease of public health significance. Until July 30, 2008, section 212(a)(1)(A)(i) of the Act had specifically required the Secretary of Health and Human Services to classify HIV infection as a communicable disease of public health significance. Public Law 110-293 (July 30, 2008) removed this requirement. On November 2, 2009, HHS published a final rule that removes HIV infection from the definition of a communicable disease of public health significance effective as of January 4, 2010. See 74 FR 56547 (November 2, 2009). Therefore, as of January 4, 2010, an alien infected with HIV is no longer inadmissible to the United States under section 212(a)(1)(A)(i) of the Act. Furthermore, as of January 4, 2010, the adjudicator should disregard a diagnosis of HIV infection when determining inadmissibility under section 212(a)(1)(A)(i) of the Act.

C. Subchapter 40.1(e)(2) is revised as follows, removing all mention of HIV infection:

#### **40.1 HEALTH-RELATED GROUNDS OF INADMISSIBILITY AND MEDICAL EXAMINATIONS**

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**(e) Revision of Form I-693.** \* \* \*

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**(2) Serologic (Blood) Tests.** All applicants who are 15 years of age and older at the time of the medical examination must undergo serologic testing for syphilis. Applicants under the age of 15 at the time of the examination must also undergo serologic testing if there is reason for the civil surgeon or USCIS to suspect infection.

If the applicant was younger than 15 at the time of the medical examination but has turned 15 while the application is pending, he or she is not routinely required to return to the civil surgeon for serologic testing. If the adjudicator has reason to suspect, however, that the applicant may have acquired syphilis since the medical examination took place, it is within the adjudicator's discretion to require the applicant to return to the civil surgeon for further tests.

D. Subchapter 41.3(a)(2) of the AFM is revised in its entirety to read as follows:

### **41.3 WAIVER OF MEDICAL GROUNDS OF INADMISSIBILITY**

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#### **(a) Waivers under Section 212(g)(1) of the Act. \* \* \***

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**(2) HIV.** As of January 4, 2010, HIV infection is no longer defined as a communicable disease of public health significance according to HHS' regulations. See 42 CFR 34.2(b) *as amended by* 74 FR 56547 (November 2, 2009). Therefore, HIV infection does *not* make the alien inadmissible under section 212(a)(1)(A)(i) of the Act for any immigration benefit adjudicated on or after January 4, 2010, even if the alien filed the immigration benefit application before January 4, 2010.

Accordingly, the adjudicator should administratively close any HIV waiver application filed before January 4, 2010, but adjudicated on or after January 4, 2010.

3. Subchapter 41.3(b) of the AFM is deleted in its entirety.

4. Appendix 41-1 (Guidance Regarding Waivers for HIV+ Refugees) of the AFM is deleted in its entirety.

5. Appendix 41-2 (CDC Form for Applicants with HIV Infection) of the AFM is deleted in its entirety.

6. Appendix 41-3 (Headquarters Program Responsibility For Nonimmigrant Waivers of Inadmissibility) of the AFM is deleted in its entirety.

### **5. Use**

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of an immigration benefit. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

### **6. Contact Information**

Questions regarding this memorandum and USCIS policy regarding the medical examination of aliens may be directed through supervisory channels to OFO AOS and Legalization Mailbox, John T. Baldwin, Service Center Operations, Family & Status Branch, Whitney Reitz, Programs Branch Chief, RAIO/International Operations, Pamela G. Williams, Policy and Regulation Management, or Roselyn Brown-Frei, Office of Policy & Strategy.