



July 23, 2009

Division of Global Migration and Quarantine
Centers for Disease Control and Prevention
U.S. Department of Health and Human Services
Attn: Part 34 NPRM Comments
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OFFICERS AND DIRECTORS
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RICHARD ZACKS
TREASURER

Re: Docket # CDC-2008-0001, Medical Examination of Aliens – Removal of Human Immunodeficiency Virus (HIV) Infection From Definition of Communicable Disease of Public Health Significance

Dear Sir/Madam,

The American Civil Liberties Union (“ACLU”) submits this comment to commend the Department of Health and Human Services for its proposed rule removing HIV infection from the list of grounds to exclude individuals from the United States and to urge timely adoption of the proposed rule. The ACLU is a nationwide, non-partisan organization of more than 500,000 members dedicated to enforcing the fundamental rights of the Constitution and United States laws. For almost 90 years, the ACLU has sought to preserve and strengthen individual freedoms in all aspects of American life. The Immigrants’ Rights Project (“IRP”) of the ACLU engages in a nationwide program of litigation, advocacy and public education to enforce and protect the constitutional and civil rights of immigrants. The AIDS Project of the ACLU brings impact lawsuits in courts throughout the country designed to protect people with HIV and AIDS from discrimination in employment, schools, housing and health care. The Lesbian Gay Bisexual Transgender (“LGBT”) Project of the ACLU fights discrimination and moves public opinion on LGBT rights through the courts, legislatures and public education.

The ACLU supports removing HIV from the list of communicable diseases of public health significance and ending the policy’s discriminatory, stigmatizing effect.

For fifteen years, the Immigration and Nationality Act (“INA”) singled out HIV as a basis for barring visitors and immigrants. The INA states that anyone with a “communicable disease of public health significance” is inadmissible to the United States.¹ Until 2008, the INA included HIV as a “communicable disease of public health significance”, barring anyone with HIV from

¹ Immigration and Nationality Act § 212(a)(1)(A)(i).

seeking admission to the United States.² In 2008, Congress passed Public Law 110-293, which removed the statutory ban on HIV and restored jurisdiction to the Department of Health and Human Services (“HHS”) to make a medical determination of whether or not HIV constitutes a “communicable disease of public health significance,” as defined in 42 CFR 34.2(b).

The ACLU has long opposed the ban on immigrants with HIV as discriminatory and stigmatizing, and strongly supports the decision by Congress and HHS/CDC to update immigration policy to reflect accurate scientific information. As the medical professionals at CDC/HHS state in the proposed rule, “HIV infection is not spread by casual contact, through the air, or from food, water, or other objects. An HIV-infected person in a common public setting will not place another individual at risk. HIV is a fragile virus and cannot live for very long outside the body. The virus is not transmitted by mosquitoes, or through day-to-day activities such as shaking hands, hugging, or a casual kiss. HIV infection cannot be acquired from a toilet seat, drinking fountain, doorknob, eating utensils, drinking glasses, food, or pets.” Public health and medical specialists have long believed that the best way to reduce HIV transmission of HIV is to target specific risk behaviors, not by singling out groups of people, such as non-citizens, for discriminatory treatment.

The HIV ban has discriminated against countless foreign nationals wanting to visit the United States or immigrate here permanently. In particular, the ban has disproportionately impacted LGBT foreign nationals seeking admission into the United States. Although individuals with HIV have been able to apply for a waiver, only those with “qualifying relatives” – most commonly opposite sex spouses – are even eligible to apply, thus excluding most LGBT individuals from even applying for a waiver.

In addition, given the Obama administration’s recent signing of the U.N. Convention on the Rights of Persons with Disabilities (CRPD), continuing the HIV ban would violate the United States’ obligations under this treaty by singling out people with a certain disability (HIV) for exclusion from the country.³ As a signatory, even before Senate ratification, the United States has a general duty to comply with the CRPD’s requirements.⁴

Now that Congress has lifted the statutory HIV ban, removing HIV from the list of diseases of public health significance is the final, long overdue, step in ending the ban’s discriminatory impact.

The ACLU opposes continued mandatory HIV testing in the immigration process.

² Immigration and Nationality Act § 212(a)(1)(A)(i), as amended by Public Law 110-293, July 30, 2008.

³ See National Council on Disability, *Finding the Gaps: A Comparative Analysis of Disability Laws in the United States to the United Nations Convention on the Rights of Persons with Disabilities (CRPD)* at 17. http://www.ncd.gov/newsroom/publications/2008/pdf/ncd_crpd_analysis.pdf

⁴ See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (“Vienna Convention”), Article 18 (“A State is obliged to refrain from acts which would defeat the object and purpose of a treaty” from the time it signs a treaty.) See also Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 Va. J. Int’l L. 431 (2004) (“Although the Senate has not ratified the Vienna Convention, the United States is a signatory, and both the executive and legislative branches employ the Convention as an authoritative guide to international treaty law.”)

In addition to removing HIV from the HHS/CDC list of diseases of public health significance, the proposed rule would also remove HIV from the scope of examinations in 42 CFR 34.3, meaning that individuals seeking admission as immigrants into the United States would no longer undergo mandatory HIV testing. The ACLU supports HHS/CDC's move to eliminate mandatory HIV testing from the immigration process.

Although HHS/CDC has elected to end mandatory HIV testing for immigrants, the proposed rule solicits comments on an alternative that would retain mandatory HIV testing in the immigration process while still removing HIV from the list of communicable diseases. The ACLU opposes any continuation of the existing policy of mandatory HIV testing in the immigration process. Under the current regime of mandatory testing, too many immigrants receive positive test results in settings that are not medically appropriate, without adequate counseling about the medical, emotional or legal consequences of a positive HIV diagnosis. Many learn about their HIV status from immigration officials or counselor officials rather than doctors or other medical professionals, which could threaten their privacy and access to adequate information about the disease and its consequences.

Mandatory testing undermines individuals' rights to autonomy in their own medical decision making. Current CDC policy recommends that, prior to HIV testing, individuals receive information, orally or in writing, that includes "an explanation of HIV infection and the meanings of positive and negative test results" and that they "should be offered an opportunity to ask questions and to decline testing."⁵ Mandatory testing is also inconsistent with the UNAIDS/World Health Organization guidelines on HIV testing, which recommend that HIV testing always be informed and voluntary.⁶

Continued mandatory testing in the immigration process would threaten applicants' privacy rights could increase discrimination against individuals with HIV. As HHS/CDC notes in the proposed regulation, examinations undertaken in an individual's home country might not be kept confidential, and results could be used to discriminate against the individual undergoing testing, particularly in countries where stigmatization against HIV remains especially high. Continued mandatory testing would also mean that the Department of Homeland Security ("DHS") would continue to collect information about applicants' HIV status. If positive HIV status is no longer a bar to admission to the United States, then there is no clear purpose for DHS to collect information about an applicant's HIV status. Continued DHS collection of information about an applicant's HIV status could jeopardize that applicant's privacy rights and could potentially be used against an applicant in his/her application for adjustment of status or naturalization if DHS considers an applicant's HIV status as a basis for finding him/her a public charge.

In the interest of protecting immigration applicants' autonomy in decision making, right to privacy, and protection against further discrimination and stigmatization, the ACLU strongly

⁵ Centers for Disease Control and Prevention (CDC) (2006) Revised recommendations for HIV testing of adults, adolescents, and pregnant women in health-care settings, *MMWR*, 55(No. RR-14), 1-17 at 2, 7-8, 13. available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5514a1.htm>.

⁶ World Health Organization, "UNAIDS/WHO Policy Statement on HIV Testing," at 2 (July 2004), available at <http://www.who.int/hiv/pub/vct/en/hivtestingpolicy04.pdf>.

supports the HHS/CDC proposal to end mandatory HIV testing in the immigration medical examination.

The ACLU applauds HHS/CDC for these proposed regulations and asks that you finalize them as quickly as possible. If you have any questions, regarding these comments please contact Joanne Lin, ACLU Legislative Counsel, at 202/675-2317 or jlin@dcacclu.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael W. Macleod-Ball".

Michael W. Macleod-Ball,
Acting Director, Washington Legislative Office

A handwritten signature in black ink, appearing to read "Joanne Lin".

Joanne Lin,
Legislative Counsel, Washington Legislative Office