Lo Siento Pero Usted No Está Bienvenido: 
U.S. Travel Policies and Immigration Laws 
for HIV-Infected Persons

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Each year, thousands of individuals from around the world seek entry into the United States for either short stays or permanent residency. Although once considered the melting pot of the world for welcoming an influx of diversity, the United States generally prohibits HIV-infected individuals from entering the country. U.S. immigration law imposes travel and immigration regulations prohibiting individuals infected with HIV from entering the country without special waivers and permanent records of the travelers’ HIV status inside their passports. With approximately 1.6 million people living with HIV in Latin America (United Nations Programme on HIV/AIDS, 2007), these restrictions have an impact on HIV-infected Hispanics attempting to travel or immigrate to the United States. In essence, these persons with HIV may believe that the message being sent to them is “Lo siento pero usted no está bienvenido” (“I am sorry but you are not welcome”).

The U.S. policy restricting entry of HIV-infected travelers is currently shared by 12 other countries: Iraq, Saudi Arabia, Libya, Sudan, Qatar, Brunei, Oman, Moldova, Russia, Armenia, South Korea, and China (AIDS Coalition to Unleash Power, 2007; International AIDS Society, 2007). However in November 2007, China announced that it would be reversing its HIV travel restrictions. Rather than reversing the U.S. travel ban, the Department of Homeland Security (DHS) proposed changes to the regulations. These changes will still restrict travel of HIV-infected persons (U.S. Department of Homeland Security [USDHS], 2007). The Association of Nurses in AIDS Care (ANAC), along with many other organizations, announced opposition to the proposed regulations and argued that existing requirements violate human rights (ANAC, 2007). Additionally, the proposed regulations fail to streamline the travel restrictions as promised by President Bush during his 2006 World AIDS Day speech. This column presents a brief overview of U.S. travel policies and immigration laws related to HIV by (a) describing current immigration law as it relates to HIV status, (b) reporting on the proposed DHS changes to current HIV travel and immigration policies, and (c) using common scenarios to discuss application of current laws for HIV-infected Hispanics who wish to travel or immigrate to the United States.

Defining Terms and Current Grounds for Inadmissible Aliens and Removal

Persons who arrive in America generally fall into four main categories: (a) legal immigrants, (b) nonimmigrants, (c) refugees and asylees, and (d)....
undocumented immigrants. In relation to immigration law, an alien is defined as any person who is not a national or citizen of the United States, whether undocumented or documented (Immigration and Nationality Act [INA], 2000a). Immigrants are aliens who wish to enter the United States on a permanent basis, whereas nonimmigrants are aliens who seek to enter the United States on a temporary basis and for a specific purpose. A lawful permanent resident, more commonly known as a green card holder, is a person who has been granted the privilege of permanently residing in the United States as an immigrant.

Refugee and asylee status are closely related and differ only in the location where asylum is requested. An alien who is not physically present in the United States but fears persecution in his or her home country based on race, religion, nationality, social group, or political opinion may qualify as a refugee if he or she resides in one of the regions annually designated by the federal government. An alien who requests asylum from inside the United States is an asylee. One year after being granted asylum, the asylee or refugee may apply for a green card, but an HIV test is performed as part of the required medical examination.

An alien who seeks admission to the United States as either an immigrant or a nonimmigrant must show that he or she is admissible. In general, the INA prohibits admission into the United States by aliens under several health-related grounds, including persons afflicted with a communicable disease of public health significance. In 1987, the Department of Health and Human Services added HIV to the list of diseases that prevented admission. Despite discussion of removing all sexually transmitted diseases from the list in 1990, Congress amended the INA to specifically exclude entry of those infected with "the etiologic agent for acquired immune deficiency syndrome" (INA, 2000b).

At present, an HIV-infected person who is classified as an alien can obtain only temporary admission to the United States. This is done through a special waiver from the Secretary of Homeland Security, who grants a nonimmigrant a visa for temporary admission. An HIV-infected traveler who wishes to enter the United States for a short stay or to attend a conference may request a waiver on a case-by-case basis.

In deciding whether to grant a waiver, the DHS weighs the risk of harm to society if the traveler is admitted, the seriousness of the traveler's prior immigration or criminal law violations, if any, and the nature of the traveler’s reasons for seeking admission, as noted in a 1978 ruling by the Board of Immigration Appeals (Matter of Hranka, 1978). The DHS also considers whether the alien might transmit HIV or incur any costs to the U.S. government. In instances in which admission would bring a public benefit, waivers are granted for 30 days or less to attend a scientific, professional, or academic conference; receive medical treatment; visit close family members; or conduct business. DHS has also granted blanket authorization for HIV-infected aliens to attend specific events, like the Salt Lake City Olympic Games and the 2001 United Nations General Assembly Special Session on HIV/AIDS.

Tourists or individuals who wish to stay longer must apply on an individual basis and satisfy the criteria discussed in the Hranka (1978) ruling. Within these parameters, the applicant must show that she or he (a) has no HIV symptoms, (b) poses only a minimal danger to the public health, (c) has the financial means to cover any health care costs incurred during the visit, including U.S.-accepted medical insurance, and (d) will bring or have access to any drugs medically appropriate for the duration of the trip.

**Proposed Changes**

The threat of bioterrorism and emerging communicable diseases such as severe acute respiratory syndrome ("SARS") and avian flu have generated state, national, and international concerns about travel, quarantine, and border control measures (Schloenhardt, 2006). In March 2003, the Homeland Security Act of 2002 created the USDHS, which resulted in a restructuring of the Immigration and Naturalization Service (INS). Three bureaus were created under DHS to replace INS. The U.S. Citizenship and Immigration Services assumed responsibility for administration of immigration benefits and services. U.S. Immigration and Customs Enforcement was established to enforce immigration and custom laws, whereas U.S. Customs and Border Protection was designated to enforce immigration and custom laws at and between the ports of entry into the United States. The U.S. Citizenship and Immigration Services continues to maintain
immigration customer services and uses the same locations and offices as the former INS.

Since 1991, the U.S. government has upheld its immigration laws and policies related to HIV-infected individuals, as illustrated by the detention at Guantanamo Bay, Cuba, of HIV-infected Haitians who attempted to flee to the United States after a military coup that overthrew President Aristide (Lambrinos, 2006). However in 2006, President Bush directed DHS to propose rules that would create a categorical waiver for HIV-infected immigrants seeking short-term visas. In November 2007, DHS proposed rules to establish “a more streamlined process for issuance of a nonimmigrant visa and temporary admission to the United States for aliens who are inadmissible to the United States due to HIV infection” (USDHS, 2007).

The primary change in the proposed regulations eliminated the additional step of DHS review of applications after consular office or Secretary of State approval. If an applicant meets all the criteria discussed later, which are very similar to what was previously required of waiver applicants, a categorical authorization could be obtained. The DHS proposed that this procedure was more streamlined because decisions could be made at the consular level; however, HIV advocacy groups disagreed. These groups pointed to the use of the term categorical as erroneous, because it applied to the DHS’s authorization of the consular offices in the traveler’s country to make the decision versus granting a blanket authorization to HIV-infected travelers who met the criteria (Gay Men’s Health Crisis, 2007).

Under the new regulations proposed by the DHS, short-term visitors to the United States may receive a maximum term waiver of 30 days if they show the following:

1. They have no HIV symptoms.
2. They understand their medical conditions.
3. They pose only a minimal danger to the public health and understand how HIV is transmitted.
4. They brought an adequate supply of antiretrovirals to last for the duration of their stay.
5. They have the financial means to cover any health care costs incurred during their visit, including U.S.-accepted medical insurance.
6. Their admission will incur no cost to the United States.
7. They are seeking to enter only for business or pleasure under the nonimmigrant classifications.

Even if the proposed regulations are adopted, a traveler may still elect to apply through the DHS to protect rights waived by the streamlined process. For example, use of the categorical waiver requires applicants to sign a written waiver of any rights to change their status while in the United States, which includes application for permanent legal residence. This is a new provision that concerns many HIV advocacy groups because it could be interpreted that use of the waiver program forever bans the ability to apply for a green card. Another portion of the proposed regulations that concerns advocacy groups is that failure to comply could result in permanent ineligibility. Travelers face a possible lifetime ban from entering the United States again if they break one of the conditions, such as falling ill during a visit and being unable to pay for the medical expenses incurred.

Supporters of the travel restrictions see them as a safeguard against the spread of epidemic diseases in America. However, many health and human rights organizations, including ANAC, are opposed to the new regulations and any travel ban on HIV-infected persons on the grounds that travel bans are a violation of human rights to privacy, freedom of movement, and freedom from discrimination. These organizations note that the travel ban has no scientific, medical, or public health benefit (ANAC, 2007). Critics point out that other sexually transmitted diseases such as syphilis and human papilloma virus do not receive the same treatment under the immigration regulations as HIV. Concerns exist that the rules do not require consular officers to be trained in making medical determinations of medical etiology, medication, transmission, and public health concerns (Gay Men’s Health Crisis, 2007). Furthermore, there is no mechanism to appeal a consular officer’s decision.

The comment period on the new regulations closed at the end of 2007. Legislators opposed to the proposed regulations brought forth bills that, if passed, would change and update immigration laws to allow for entry of HIV-infected travelers. Advances in HIV treatment could facilitate changes in U.S. policy regarding HIV-infected individuals. For example in February 2008, the U.S. State Department changed its policy and
removed HIV from a list of medical conditions that disqualified candidates for foreign service posts from becoming U.S. diplomats (Lee, 2008). The medical clearance guidelines on HIV were revised based on advances in HIV care and treatment.

As this column goes to press, there is hope that the U.S. travel ban on HIV-infected persons will be reversed. On March 13, 2008, the Senate Foreign Relations Committee voted 18 to 3 to approve legislation calling for repeal of the ban (Chibbaro, 2008). The repeal was included as part of a bill that would reauthorize the President’s Emergency Plan for AIDS Relief (PEPFAR). Although the House version of this bill does not include the repeal, House representatives have indicated that they will urge the House to approve the Senate version. A vote on the PEPFAR bill and HIV travel ban repeal may take place sometime in 2008.

**Common Scenarios**

Similar to nursing education, the study of law commonly uses scenarios to illustrate application of current laws. The following three scenarios illustrate current immigration law as it may apply to HIV-infected Hispanics (Tam, 2004).

**Scenario One**

Carlos is from Argentina. He has HIV infection and is interested in traveling to Miami to attend the U.S. Conference on AIDS. He has been told that HIV-infected persons are not allowed into the United States and wants to know what he can do to attend the conference.

Current immigration laws allow entry of persons with HIV who wish to attend short-term educational programs or conferences into the United States. Carlos can apply for a waiver to attend the conference. However, with this waiver, his passport will be permanently stamped to indicate that he has HIV.

**Scenario Two**

Maria is from Peru and has been granted asylum in the United States. She applied for a green card several weeks ago. Last week, however, she was diagnosed with HIV. She is now worried about her HIV status and how it may affect her application.

Asylees applying for permanent legal status are required to have a medical examination, which does include testing for HIV. However, since Maria has already been granted asylum, she may apply for an HIV waiver. If Maria’s application seems to be delayed, she should seek legal counsel for assistance with her application.

**Scenario Three**

José is from Guatemala and has been living in the United States for the past 3 years. He illegally entered the United States through Mexico. His mother is a lawful permanent resident. José has HIV infection and wants to know if he can obtain legal status in the United States.

José may have problems applying for legal status for two reasons. The first reason applies to his illegal entrance into the United States. The second problem is his HIV status, which compounds the illegal entry problem. José will probably require legal counsel to assist in his application if he decides to apply for legal status. If José applies for legal status and is denied, he could be removed and sent back to Guatemala.

For all of these scenarios, consulting with an immigration attorney is the best practice. Most people know not to ask an ophthalmologist about a foot problem but may not understand that lawyers, like nurses and other health care providers, have specialty practices. Immigration law, like HIV health issues, involves complex questions and assessment by specialized practitioners. Therefore, anyone with a question about travel and immigration to the United States, including persons who have HIV infection, would be best served by referral to a lawyer who specializes in immigration law, particularly immigration law for HIV-infected persons.

**Conclusion**

Immigration issues are complex and further compounded when the person is infected with HIV. Although changes in the U.S. ban on HIV-infected persons were promised in 2006, the new proposed regulations do not remove restrictions. The U.S. travel ban for HIV-infected persons remains a controversial
issue. Although supporters of the travel restrictions see them as safeguards to the spread of epidemic diseases in America, HIV advocates note that the travel ban serves no scientific, medical, or public health benefit. The travel ban is a violation of human rights to privacy, freedom of movement, and freedom from discrimination and is a policy that the United States shares with only a handful of nondemocratic countries. At this time it is not known whether the restrictions will change; thus, it is important for practitioners to keep current and to be knowledgeable so that they may advise their clients about current U.S. travel and immigration regulations and the impact of these regulations on HIV-infected persons.

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