CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

CDMA COMMENT TO PROPOSED RULE THAT REMOVES HIV FROM COMMUNICABLE DISEASE OF PUBLIC HEALTH SIGNIFICANCE

Posted on July 25, 2009 by Cyrus Mehta

In July of 2008, as part of the TTom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis and Malaria Reauthorization ActУ, Public Law 110-93, Congress removed the specific statutory ban on entry into the United States by foreign nationals with HIV, restoring jurisdiction to the Department of Health and Human Services (THHSУ) to determine whether HIV constitutes a Tcommunicable disease of public health significanceУ and thus a ground of inadmissibility. On July 2, 2009, HHS issued proposed regulations which would remove HIV from the list of such diseases, and thereby remove HIV as a ground of inadmissibility. Below is a comment that our firm recently submitted to HHS in support of the proposed regulation.<?xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />

July 24, 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
1600 Clifton Road, NE, MS E-03
Atlanta, GA 30333

Re: Docket # CDC-2008-0001

Dear Sirs/Madams:

Cyrus D. Mehta & Associates, PLLC ("CDMA") writes to commend the Department of Health and Human Services ("HHS") for issuing these proposed

regulations to remove HIV from the list of "communicable diseases of public health significance" and to remove the HIV testing requirement from the routine medical examination of foreign nationals. This change is long overdue and we hope that you will implement it as quickly as possible.

CDMA, is a New York City law firm that represents clients in complex and routine US immigration law matters. CDMA has also worked with non-profit organizations on a variety of immigration issues, including those arising from HIV/AIDS.

As a firm that works with immigrants, we have seen the real human toll that the HIV ban on travel and immigration has taken over the past two decades. The HIV ban has kept families apart, has deprived the U.S. work force of highly skilled workers, and has made it impossible for many foreign nationals to enter the U.S. as long-term non-immigrants or even short-term travelers.

Section 212(a)(l)(A)(i) of the Immigration and Nationality Act ("INA") states that anyone with a "communicable disease of public health significance" is inadmissible to the United States. For 15 years, the INA specified that HIV was a ground of inadmissibility; last year Congress voted to amend the INA and restored authority to HHS to determine what diseases should be on this list. HIV is not casually transmitted. As the medical professionals at CDC/HHS state, "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 organizations have long believed that the best way to reduce the transmission of HIV is by targeting specific risk behaviors, not by singling out groups of people, such as non-citizens, for discriminatory treatment.

Although it is possible for foreign nationals who apply for lawful permanent residence to seek a waiver of the HIV ground of inadmissibility, these waivers are difficult to obtain. To even qualify to apply for a waiver, a foreign national must have a U.S. citizen or lawful permanent resident spouse, child or parent (if the applicant is unmarried.) This means that some family members, such as parents of married sons and daughters, and U.S. citizen siblings, who are considered close enough to sponsor a foreign national for residence are not considered close enough to support an HIV waiver application.

Even if a lawful permanent resident applicant has the qualifying relative to support a waiver application, it is still often impossible to meet the

requirements of the HIV waiver. For those family members abroad who are subject to consular processing, administration of the waiver process varies greatly from country to country with citizens of developing countries often asked to clear impossible hurdles, such as paying astronomical bonds. Furthermore, many foreign nationals, even those who are spouses, stepchildren, or children by adoption of U.S. citizens, find it impossible to prove to a consular officer that they have private health insurance which will be accepted in the United States because they are caught in the Catch-22 where they are unable to obtain such insurance until they are able to physically get to the United States but they cannot get here without a waiver. It is difficult to see what public health purpose keeping the spouses, stepchildren, or children by adoption of U.S. citizens out of the United States could serve.

If a foreign national does not have a qualifying relative, he or she cannot even apply for an HIV waiver. This has meant that highly skilled workers whom the Department of Labor has determined will benefit the U.S. labor market, are completely ineligible to seek a waiver and permanent residence in the U.S. Also, individuals who can qualify as persons of extraordinary ability, or as outstanding professors and researchers, are unable to obtain permanent residence without a qualifying relative. These individuals are likely to be highly educated and have private health insurance through their employers, yet the HIV ban needlessly excludes them from permanent residence here. Moreover, those in same sex marriages are less likely to have a qualifying relative as the Defense of Marriage Act prevents such marriages from being recognized for purposes of a waiver.

Even when waivers have a high chance of approval, as for refugees and asylees, the lengthy and complicated process of accumulating the required documentation and applying for a waiver needlessly delays attainment of permanent residence status for individuals who cannot return to their original countries. Supporting HIV waiver applications also taxes the limited resources of the non-governmental organizations that guide refugees through the resettlement process.

As immigration providers, we have also seen myriad problems in the administration of HIV testing as part of the routine medical examination. All too often, we hear from foreign nationals who are given positive test results without adequate counseling, or who learn of their HIV status from immigration officials rather than doctors. We support HHS's move to divorce HIV testing from the immigration process.

Likewise, the HIV ground of inadmissibility applies even to nonimmigrant visa applicants. This ban has prevented countless individuals from coming to the U.S. and working in skilled jobs, enrolling as foreign students, or even coming to the U.S. as tourists. This ban has no doubt taken a toll on the U.S. economy. More significantly, however, the HIV ban has damaged the U.S. reputation as a world leader in the fight against HIV. No major HIV/AIDS conference has been held on U.S. soil in the last two decades.

Even as the U.S. seeks to fund HIV treatment abroad, educate individuals about modes of transmission, and decrease the stigma and discrimination that have long been associated with this virus, the U.S. has been burdened by a domestic policy which has undermined our position as a leader in the fight against the AIDS pandemic. It is time for the U.S. to end this harmful ban.

We applaud HHS for these proposed regulations and ask that you finalize them as quickly as possible.

Sincerely

Cyrus D. Mehta
Principal Attorney
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