

Impacts of the 2008 Global AIDS Bill on Travel and Asylum Seekers in the United States

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Introduction

Since 1987, the United States has barred foreigners who are HIV-positive from entering the country or obtaining legal permanent residence.¹ The HIV travel and immigration ban was originally implemented in 1987 by regulations issued through the Public Health Service of the Department of Health and Human Services and required HIV screening for all persons over 14 years of age applying for immigrant and nonimmigrant visas.² This rule was codified in the Immigration and Nationality Act of 1993,³ which labeled HIV/AIDS as a communicable disease of public health significance.⁴ The end result was discrimination in travel against HIV-positive individuals. Although foreign nationals seeking to travel to the U.S. could obtain waivers, the process was and still is mired with uncertainties.⁵ Additionally, a study conducted in 2006 showed that of 1113 HIV positive survey respondents, 349 (31%) had traveled to the United States. Of those 349 that had traveled to the US, only 14.3% traveled with the mandatory waiver to obtain a travel visa. Many simply did not disclose their status.⁶ It is likely that those who did not disclose their status skirted the system by having others take the tests on their behalf.

This ban had no public health functions in terms of reducing the numbers of HIV/AIDS rates in the U.S. On the contrary, Congress later found that in some cases the HIV travel and immigration ban discouraged foreign students, refugees, and nonpermanent residents who are already in the United States and who may be at risk of infection from seeking testing, treatment or care for HIV/AIDS.⁷ This ban may also have disproportionately affected travelers from areas with high HIV/AIDS prevalence rates including certain parts of Africa, the Caribbean and Latin America. For example in *Haitian Centers Council v. Sale*⁸, Haitian service organizations and others brought a class action lawsuit seeking declaratory and injunctive relief arising from Immigration and Naturalization Service's (INS) actions against Haitians who had tested positive for Human

¹ Victoria Neilson, *HIV-Based Persecution in Asylum and Immigration Decisions*, 19 AIDS AND PUBLIC POLICY JOURNAL (2004).

² See generally HIV Nondiscrimination in Travel and Immigration Act of 2007, H. R. 3337, 110th Cong., as introduced in the house. This bill never became law as it was proposed in a previous session of Congress. However, the findings are still relevant.

³ INA § 212(a)(1)(A)(i). The Act provides in pertinent part “any alien--- who is determined ... to have a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome,” is ineligible to receive a visa or to be admitted to the U.S.

⁴ Victoria Neilson, *supra* note 1.

⁵ Special waivers for non-immigrants [INA 212(d)(3)] include: 30 day entries if the person is asymptomatic, the visit is for 30 days or less, the person has sufficient assets and will not pose a danger to public health in the U.S.; and event waivers if deemed to be in the public interest and authorized by the Attorney General.

⁶ See The AIDS pandemic: US Travel Ban on HIV Infected Individuals. Available at <http://the-aids-pandemic.blogspot.com/2009/02/us-travel-ban-on-hiv-infected.html> (last visited March 20, 2009).

⁷ HIV Non Discrimination in Travel and Immigration Act of 2007, *supra* note 2.

⁸ 823 F.Supp 1028 (E.D. N.Y. 1993).

Immunodeficiency Virus (HIV), detained on Guantanamo Bay Naval Base in Cuba. The District Court held that the Immigration and Naturalization Service violated Refugee Act and Due Process rights of prescreened HIV-positive Haitian detainees by subjecting them to further screening interviews without benefit of counsel or other procedural safeguards, and that the Attorney General abused her discretion by denying detainees parole. Although this case was decided on Fifth Amendment Due Process grounds and violations of the Administrative Procedure Act, the fact that the plaintiffs were HIV-positive Haitian political refugees who were trying to enter the U.S. underpinned the government's case in denying them asylum.

The 2008 Amendment

In July 2008, Congress passed and then-President Bush signed the Global AIDS bill. Known as the Lantos-Hyde U.S. Leadership Against HIV/AIDS, Tuberculosis and Malaria Reauthorization Act of 2008,⁹ the Act repealed the section in the immigration law that prohibited HIV-positive visitors from entering the country or becoming permanent residents.¹⁰ This repeal was hailed by AIDS activist groups and public health practitioners as something long overdue.¹¹ But what impacts is this likely to have on entry and stay in the U.S. by those who are HIV positive?

Impact on Those Entering or Wishing to Stay in the U.S.

The removal of the HIV positive ban in travel to the U.S. may be good news for AIDS patients wishing to travel and or stay in the U.S. However, it is unlikely that this will have a significant impact, at least in the near future. This is primarily due to two reasons. First, although Congress repealed this ban, the bill allows the 1987 administrative policy to remain in place unless the Department of Health and Human Services (HHS) or one of its component agencies, such as the U.S. Centers for Disease Control & Prevention, reverses the policy.¹² To date, HHS has not done so. Second, it will take some time before we have appellate decisions indicating how courts are likely to rule on HIV-based discrimination for travel and asylum application in the U.S. However, an educated guess can be made based on two earlier cases. In *Haitian Centers Council*, *supra*, the United States tried to find countries that would help in the relocation of Haitian refugees. Two countries, Belize and Honduras, offered to provide limited assistance, but prior to

⁹ 22 U.S.C.A. § 7601. Public Law No: 110-293.

¹⁰ Section 212(a)(1)(A)(i) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(1)(A)(i)) is amended by striking ' which shall include infection with the etiologic agent for acquired immune deficiency syndrome,' and inserting a semicolon.

¹¹ Kaiser Daily HIV/AIDS Report, March 25, 2008. Available at http://www.kaisernetwork.org/daily_reports/rep_index.cfm?hint=1&DR_ID=51111. (last visited March 20, 2009) quoting Mark Kline, head of retrovirology at Baylor College of Medicine and director of the school's AIDS International Training and Research Program, noting that " There is no scientific basis whatsoever for the travel ban, and there never has been,... In addition, the ban has led to a U.S. boycott by some HIV/AIDS advocacy and research groups, and International AIDS Society conferences have not been held in the U.S. since Congress passed the travel restrictions.;" and an editorial in Toronto Globe and Mail, March, 28, 2008 noting that "[t]he recent effort to loosen "discriminatory and anachronistic" U.S. HIV/AIDS-related travel restrictions for visitors and immigrants is a "long-overdue development," ... "the restrictions from the "outset" had "more to do with politics than any serious medical concern."

¹² Lou Chibbaro Jr, *Bush Signs Sweeping AIDS Bill*. WASHINGTON BLADE, August 1, 2008. Available at <http://www.washingtonblade.com/2008/8-1/news/national/13020.cfm> (last visited March 7, 2009).

accepting the Haitians, asked that they be tested for the HIV virus.¹³ The results of those tests disclosed the presence of the virus in a number of the Haitian detainees at Guantanamo leading the government to conduct HIV testing for all previously screened Haitians.¹⁴ The INS General Counsel in a memo in 1992 wrote that:

Any person "screened in" as a possible refugee who has been determined to have a communicable disease that is not curable should be given an interview to determine whether he or she is a refugee within the definition of INA § 101(a)(42). In the case of a Haitian national in Guantanamo, this definition requires a finding that the person is unable or unwilling to return to Haiti because of a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."¹⁵

This is a very high hurdle to meet. Additionally, courts have not been willing to grant reprieve or asylum to foreign nationals who are HIV-positive. In *Sichone v. Gonzalez*¹⁶, plaintiff petitioned for review of an order affirming immigration judge's decision denying her application for asylum, withholding of removal, and relief under the Convention Against Torture.¹⁷ The plaintiff had argued that she had a well-founded fear of persecution based on her seropositive status. The court held that any suffering she underwent on account of being HIV-positive in Zambia did not amount to persecution by the government or an entity the government could not or would not control, as required to establish her eligibility for asylum. The fact that the government hospitals did not have HIV medications did not constitute extreme treatment within the meaning of the Immigration and Nationality Act (INA).¹⁸

A New Approach

Discrimination based on one's HIV status is outdated and has no sound public health rationale. On the contrary, it may encourage aliens living in the U.S. who are affected to fail to seek treatment or even lie on their forms. The better approach is the one advocated by the 2008 Amendment. Congress should, however, go further and mandate HHS expeditiously change the rules. For public health practitioners, an added advantage will be the hosting of an international HIV/ AIDS conference here in the U.S., an event that was not possible with the ban in place. It will help remove the long held view that the U.S. does not welcome people with HIV/AIDS.

Health Law Perspectives (April 2009), available at:
<http://www.law.uh.edu/healthlaw/perspectives/homepage.asp>

¹³ *Haitian Centers* at 1035.

¹⁴ *Id.*

¹⁵ *Id.* at 1036.

¹⁶ 183 Fed.Appx. 50, 2006 WL 1426294 (C.A.2).

¹⁷ *Id.* at 51.

¹⁸ *Id.*