August 14, 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

VIA EMAIL
To: part34hivcomments@cdc.gov

Re: Interim Final Rule on Medical Examination of Aliens- Removal of Human Immunodeficiency Virus (HIV) Infection From Definition of Communicable Disease of Public Health Significance.

Docket Number: CDC-2008-0001

To Whom It May Concern**:**

HIV Law Project thanks the U.S. Department of Health and Human Services for the opportunity to submit comments in response to the proposed rule on Medical Examination of Aliens- Removal of Human Immunodeficiency Virus (HIV) Infection From Definition of Communicable Disease of Public Health Significance.

HIV Law Project was founded in 1989 to provide legal and advocacy services in New York City for underserved HIV-positive persons, including women and their families, undocumented and recent immigrants, and communities of color. HIV Law Project was the first, and remains the only organization in New York City focused exclusively on legal advocacy for these communities, and has therefore developed special expertise in the legal issues facing HIV-positive immigrants.

We applaud the Department of Health and Human Services (HHS) for proposing this regulation, for it is time to realize the national consensus in favor of removing HIV as a bar to entry to the United States. Congress gave voice to this sentiment in 2008 by repealing that provision of the Immigration and Nationality Act which made foreign-born individuals with HIV ineligible for admission into the U.S. We urge HHS to act swiftly to adopt the proposed rule to conform with Congress's clearly stated intent to end this discriminatory, punitive, and irrational bar.

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Further, we applaud HHS for recognizing that the on-going inclusion of HIV in the list of "Communicable Diseases of Public Health Significance" (the list) lacks any rational basis, perpetuates the stigmatization of individuals living with HIV, and is unsupported by medical evidence.

The Proposed Rule Must Be Enacted Swiftly to Avoid Further Discrimination Against People Living with HIV

Since its enactment in 1993, the HIV entry ban has violated the human rights enumerated in the International Covenant on Civil and Political Rights, the UN Declaration of Human Rights, and the UN Guidelines on Human Rights and HIV/AIDS. When vulnerable groups, such as women, gay men, ethnic and national minorities, and the poor are subjected to an HIV entry ban, the potential for human rights abuse is exacerbated. By enforcing the ban, we undermine our country's fundamental principles of dignity, equality, and respect, particularly for those who belong to underrepresented groups.

For this reason, we applaud the HHS for proposing to lift the ban, but only swift enactment will achieve conformity with international human rights. Maintaining a standard of inadmissibility for those with HIV reflects a policy based upon fear rather than informed public health research. It is a discriminatory measure that violates international human rights and burdens vulnerable groups. The power to end this infringement now rests with HHS.

As the *UNAIDS International Guidelines on HIV/AIDS and Human Rights* points out, the HIV ban is

> ineffective with regard to HIV since HIV is not casually transmitted… These coercive measures drive people away from prevention and care programmes, thereby limiting the effectiveness of public health outreach. A public health exception is, therefore, seldom a legitimate basis for restrictions on human rights in the context of HIV.[1]

We are pleased that HHS acknowledges that the HIV ban reaffirms the stigma associated with HIV and discourages people from getting tested. The UN's International Guidelines make clear that not only is there no rational basis for an entry bar, but that as a coercive measure it may be pushing people away from the care and treatment that they need. For this reason also, swift adoption of the proposed rule is crucial. Lifting the ban

[1] UNAIDS, *International Guidelines on HIV/AIDS and Human Rights*, ¶ 105, HR/PUB/06/09 (2006) (emphasis added).

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is an important step in reducing the stigma and discrimination associated with HIV.

Further, lifting the ban is a significant step toward vindicating the rights of survivors of domestic violence who are living with HIV. There is a clear link between domestic violence and HIV infection; women and girls who experience violence are particularly vulnerable to infection with HIV. According to World Health Organization, one in three of the world's women will experience violence in her lifetime, including being raped, beaten, sold into marriage or domestic servitude, or subjected to harmful practices such as female genital mutilation. Battered women are more than three times as likely to contract HIV as women who are not in violent relationships.[2] In light of these statistics, lifting the ban protects HIV-positive battered women from further trauma, and allows the possibility of a safe refuge. The sooner the proposed rule is enacted, the sooner this barrier to their self-determination is lifted.

Finally, it is important that HHS and USCIS consider a mechanism that would allow persons prejudiced by the HIV entry ban to reinstate their applications for adjustment of status or immigrant visas without suffering undue delay or payment of additional fees. For many years, the HIV ban has prevented foreign nationals with valuable skills or family ties from becoming permanent residents of the United States and has reinforced the stigma against HIV. We encourage the agencies responsible for enforcing the ban to work together to alleviate the harm it has caused to persons living with HIV.

The Proposed Rule Adopts the Correct Approach Regarding HIV Testing

HHS states in Section IV of the Proposed Rule that three regulatory approaches were considered, one of which would have removed HIV infection from the list of communicable diseases while continuing with mandatory HIV testing. HHS was correct to reject this approach in favor of the proposed rule, which removes HIV from the list and also as an element of the medical exam.

For all the reasons stated by HHS in the regulatory analysis, removing HIV from the list while maintaining mandatory testing would be misguided policy. Doing so would differentiate HIV from other serious health conditions that are not a basis of inadmissibility. Further, the U.S.

[2] Jitender Sareen, et. al.; "Is Intimate Partner Violence Associated with HIV Infection Among Women in the United States?", General Hospital Psychiatry, Volume 31, Issue 3, 274-278, (May 2009).

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government would have little control of the uses made of results from HIV tests conducted by panel physicians in an immigrant's home country. More broadly, preserving the confidentiality of test results would become a nearly impossible challenge. Women and girls subjected to intimate partner and gender-based violence are especially vulnerable to the risk of unwanted disclosure, especially since those who test positive are often not properly counseled and may have their confidentiality violated.

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. These sorts of situations are traumatic for the individuals concerned, and dangerous to public health goals.

Also, though inadmissibility based on test results would no longer be required, test results would nonetheless be included in an applicant's file. USCIS officers evaluating files might easily use this information when making a determination about future public charge concerns about HIV-positive applicants. Officers would have broad discretion in the use of HIV test results, potentially undermining the removal of HIV from the list.

US Customs and Immigration Services (USCIS) should not be in the business of collecting private health information that is not essential to the immigration process. **We support universal voluntary HIV testing, and believe that reducing the number of undiagnosed HIV cases is an essential public health goal. Yet, mandatory testing by USCIS has no place in working toward this goal.** Once HIV has been removed from the list of communicable diseases, the nexus between USCIS and HIV testing and prevention disappears. No justification supports the artificial maintenance of this link once HIV is removed from the list.

In sum, there is no better time than now to end the HIV entry ban. Last year's statutory repeal of the ban signals a sea change in policy regarding people with HIV. It shows that we are prepared to move beyond anachronistic, irrational fears about the transmission of HIV. It further demonstrates that we are ready to join the international community in rejecting discriminatory and coercive practices against people with HIV and in recognizing the important link between human rights and public health. We applaud the important step forward that HHS has taken by proposing this rule, and we urge HHS to adopt the rule and remove HIV from the list of communicable diseases. Doing so would vindicate this country's tradition of treating all people with dignity, respect, and equality under the law.

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Thank you very much for the opportunity to submit these comments.

Sincerely yours,

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