
IMMIGRATION AND HIV

By Linda Tam¹

INTRODUCTION

The Immigration and Naturalization Service's Transition to the Department of Homeland Security.

The Homeland Security Act of 2002 abolished the Immigration and Naturalization Service (INS) and created the Department of Homeland Security (DHS), effective March 1, 2003.² Within the DHS, three bureaus were created to take over the same functions: U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP). USCIS administers immigration benefits and services.³ These services include processing family-sponsored and employment-based petitions, naturalization applications, and asylum and refugee cases.⁴ ICE enforces immigration laws, customs laws and protects over 8,000 federally owned and leased buildings within the United States and its territories.⁵ CBP enforces immigration and customs laws at and between the ports of entry into the United States.⁶

Despite the name change, USCIS maintains all familiar immigration customer services.⁷ Forms using the INS logo are still accepted.⁸ Applications sent to the INS will be received and processed the same way as before March 1, 2003.⁹ Previous applications before March 1, 2003 as well as INS issued documents are still valid.¹⁰ USCIS uses the same locations and offices that were part of the INS.¹¹ Immigration information and applications can be found at the government's official website <http://www.uscis.gov> or at the National Customer Service Center at 1-800-375-5283.

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The 2004 version of this chapter was updated by Linda Tam, Esq. of the East Bay Community Law Center.

² Homeland Security Act of 2002 § 471, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

³ *Id.*

⁴ *Id.*

⁵ Mailman and Yale-Loehr, "Immigration Functions in the Department of Homeland Security," 8 *Bender's Immigration Bulletin* 663 (April 2003).

⁶ *Id.*

⁷ BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY, LEAFLET NO. M-568, WELCOME TO THE BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES (2003).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

I. **Basic Immigration Law Concepts and Definitions**

A. **Alien** – An alien is any person who is not a national or citizen of the United States.¹² This includes undocumented and documented individuals, immigrants and non-immigrants.

B. **Immigrants** – Immigrants are aliens who seek to enter the United States on a permanent basis. Every alien seeking entry into the United States is presumed to be an immigrant, unless an alien can prove he is a non-immigrant.¹³

C. **Non-Immigrants** – Non-immigrants are aliens who seek to enter the United States on a temporary basis and for a specific purpose.¹⁴ There are many classes of non-immigrants.¹⁵

D. **United States Citizen** – There are four principal ways to obtain United States citizenship: birth in the United States,¹⁶ “naturalization” or application by lawful permanent residents to become United States citizens, acquisition and derivation through United States citizen parents,¹⁷ and service in the U.S. military¹⁸. United States citizens have the right to travel and to public benefits. It is very difficult to lose United States citizenship once it is obtained. Some countries do not allow dual citizenship, so if you become a U.S. Citizen, you may lose your original citizenship.

E. **Lawful Permanent Resident** – A Lawful Permanent Resident or “green card holder” is someone who has been “lawfully accorded the privilege of residing permanently in the U.S. as an immigrant in accordance with the immigration laws.”¹⁹

F. **Grounds of Inadmissibility** - An alien who arrives at a port of entry, who seeks admission to the United States as a non-immigrant or immigrant, is required to demonstrate that he or she is “admissible.”²⁰ A person who applies for adjustment of status to become a Lawful Permanent Resident must also demonstrate that he is “admissible.” The grounds of inadmissibility are a list of the types of aliens that Congress seeks to keep out of the United States. The list encompasses economic, political, health, criminal and other miscellaneous grounds.²¹ The grounds of inadmissibility do not apply to U.S. citizens.²²

¹² Immigration and Nationality Act of 1952 (“INA”) § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2002).

¹³ INA §§ 101(a)(15), 214(b).

¹⁴ INA §§ 101(a)(15), 214.

¹⁵ INA § 101(a)(15).

¹⁶ INA § 301 *et seq.*

¹⁷ *Id.*

¹⁸ INA §§ 328-30.

¹⁹ INA § 101(a)(20).

²⁰ INA § 212(a).

²¹ *Id.*

²² *Gegiow v. Uhl*, 239 U.S. 3 (1915).

Inadmissibility bars legal entry to the United States. An inadmissible alien may encounter problems in three different contexts: (1) he might not be allowed to enter at the U.S. border; (2) he might be unable to obtain lawful permanent residence; or (3) if he enters the U.S. without being admitted, he could be removed for being inadmissible under INA § 212(a)(6)(A).

Examples of Grounds of Inadmissibility:

- Convicted of a “crime of moral turpitude” or violation of certain laws relating to controlled substances;²³
- Assisted in the smuggling of other aliens into the U.S.;²⁴
- Has a “communicable disease of public health significance;”²⁵
- Is likely at any time to become a public charge;^{26 27}
- Does not have a valid entry document to enter the U.S.;²⁸
- Has accrued more than 180 days of illegal presence in the U.S., has departed the U.S. voluntarily and seeks re-admission.²⁹

G. Grounds of Removability

Any alien who has already been admitted to the U.S. either on a temporary or permanent basis and is physically present in the U.S. can be found removable.³⁰ Any alien in the U.S. who at the time of entry, admission or adjustment of status was inadmissible is also removable.³¹ The grounds of removability are encompassed in INA § 237. The grounds of removability are very similar to the grounds of inadmissibility.

Examples of Grounds of Removability:

- Has been convicted of a crime of moral turpitude, an aggravated felony, a crime related to controlled substances, or a crime relating to domestic violence;³²
- Assisted in the smuggling of other aliens into the U.S.;³³
- Becomes a public charge within 5 years of becoming a Lawful Permanent Resident;³⁴
- Engaged in terrorist activity;³⁵
- Obtained legal status through marriage fraud;³⁶
- Was inadmissible at the time he or she was admitted to the U.S.;³⁷
- Is present in the U.S. in violation of any immigration law.³⁸

²³ INA § 212(a)(2)(A).

²⁴ INA § 212(a)(6)(E).

²⁵ INA § 212(a)(1)(A)(i).

²⁶ INA § 212(a)(4).

²⁷ A public charge is an alien who has become or is likely to become primarily dependent on the government for subsistence.

²⁸ INA § 212(a)(7).

²⁹ INA § 212(a)(9)(B).

³⁰ INA § 237(a).

³¹ INA § 237(a)(1).

³² INA § 237(a)(2).

³³ INA § 237(a)(1)(E).

³⁴ INA § 237(a)(5).

³⁵ INA § 237(a)(4)(B).

³⁶ INA § 237(a)(1)(G).

³⁷ INA § 237(a)(1)(A).

Red Flags

In examining a client's case, it is crucial to be aware of certain factors that may complicate the case.

- A client's criminal history can make a client inadmissible or removable.³⁹ It is important to obtain and examine criminal convictions carefully. This may mean getting a client's rap sheet and certified court conviction records, and doing an FBI or California Department of Justice criminal background check.
- Another factor that may complicate a client's case is how much illegal presence in the U.S. he has accrued.⁴⁰ Depending on how long an alien has been present in the U.S. illegally, if he leaves the U.S. and attempts to return legally, he may be barred from obtaining immigration relief for which he is otherwise eligible for a number of years.⁴¹
- Similarly, if the alien has a prior deportation order against him, he may be barred from obtaining relief for which he is otherwise eligible and may be removed under the prior order.⁴² Sometimes an alien is not aware that there is a removal order against him.

Common Types of Immigration Relief

The following is a non-exhaustive list of the common types of immigration relief available. All of these types of relief, except Temporary Protected Status, may lead to Lawful Permanent Residency:

³⁸ INA 237(a)(1)(B).

³⁹ INA §§ 212(a)(2), 237(a)(2).

⁴⁰ INA §§ 212(a)(9)(B), 212(a)(9)(C).

⁴¹ *Id.*

⁴² INA §§ 212(a)(9)(A), 212(a)(9)(C), 241(a)(5).

A. Asylum – An alien who is physically present in the United States or seeking entry at a U.S. port because he has a well-founded fear of persecution in his country of nationality or last residence can apply for asylum.⁴³ The grounds for claiming asylum are race, religion, nationality, membership in a particular social group, and political opinion.⁴⁴

B. Refugee – An alien who is not physically present in the United States but fears persecution in his home country based on the same enumerated grounds as asylum may qualify as a refugee if he resides in one of the regions outside of the U.S. designated annually by the U.S. government.⁴⁵

C. Family Petition - Certain family members can petition for a qualifying relative.⁴⁶ U.S. citizens can file a petition for their spouses, parents, children (unmarried and under 21), adult unmarried and married sons and daughters, and brothers and sisters. Lawful Permanent Residents can file a petition for their spouses, children (unmarried and under 21), and unmarried adult sons and daughters. Spouses, parents and children of U.S. citizens are considered immediate relatives. Immediate relatives can file their petition and the application for lawful permanent residency together. There is neither a waiting time nor numerical limit for the admission of immediate relatives each year.⁴⁷ All other family categories have annual limits on the number of people who may be lawful permanent residents. As a result, there are also long waiting times for an available visa.

D. Cancellation of Removal - This relief is available to Lawful Permanent Residents already in immigration proceedings who have been convicted of certain crimes or who are undocumented aliens.⁴⁸ The applicant must show continuous presence in the U.S. for 10 years, good moral character during that time, and proof that removal would cause exceptional and extremely unusual hardship to the alien's Lawful Permanent Resident or United States Citizen spouse, child, or parent.⁴⁹ The Lawful Permanent Resident applicant must show continuous presence in the U.S. for at least 7 years and Lawful Permanent Resident status for at least 5 years. Additionally, the Lawful Permanent Resident applicant must not have been convicted of an aggravated felony and must show that the positive factors for keeping him in the U.S. outweigh the reasons for ordering removal.⁵⁰

Aliens placed in proceedings prior to April 1, 1997 may still fall under the rules for Suspension of Deportation, the predecessor to Cancellation. Suspension of Deportation has similar, but less strict requirements.

⁴³ INA §§ 101(a)(42)(A), 208(a).

⁴⁴ *Id.*

⁴⁵ INA § 101(a)(42)(A).

⁴⁶ INA § 203.

⁴⁷ INA § 201(b)(2).

⁴⁸ INA § 240A.

⁴⁹ INA § 240A(b)(1).

⁵⁰ INA § 240A(a)(1).

E. Employment-Based Immigration - In most cases, the alien needs a job offer from a U.S. employer and the correct experience, training, and education for the job to apply for permanent residence.⁵¹ The employer must demonstrate, in most cases, that there are no U.S. workers willing, qualified, and available to accept a particular job, that the employer will pay the immigrant the prevailing wage for that job, and that the employment of the immigrant will not have an adverse impact on the wages or working conditions of U.S. workers.⁵²

F. Diversity Lottery - The lottery provides up to 55,000 immigrant visas each fiscal year for persons from countries that currently do not constitute the principal sources of immigration to the United States. The application for the lottery requires a simple letter, and either a high school education or at least two years of work experience.⁵³

G. Nicaraguan Adjustment and Central American Relief Act (NACARA) - Section 202 of NACARA allowed certain Nicaraguans and Cubans physically present in the U.S. to apply for lawful permanent residence. Qualifying individuals needed to apply for adjustment of status by March 31, 2000. Although the application period has expired, an alien may be eligible to file a motion to reopen his removal proceedings as a result of the enactment of the Legal Immigration Family Equity Act (LIFE) Amendments to section 202 of NACARA.

Section 203 applies to certain Guatemalans, Salvadorans, and nationals of former Soviet bloc countries who entered the United States by specific dates and applied for asylum or registered for settlement benefits under *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991). Section 203 allows qualified individuals to apply for cancellation of removal or suspension of deportation.

Registry - To qualify for lawful permanent residency under the Registry program, aliens must have been continuously present in the U.S. since January 1, 1972, is a person of good moral character, and is not removable or ineligible for citizenship.⁵⁴

I. Violence Against Women Act Relief - Battered spouses and children of Lawful Permanent Residents or U.S. Citizens may self-petition to obtain lawful permanent residence if they have been battered or subject to extreme cruelty in the U.S. during the marriage and the marriage was entered in good faith.⁵⁵ This procedure can be done without the abuser's assistance or knowledge so as to protect the applying individuals. There are also special provisions for battered spouses who are applying for an HIV waiver and Cancellation of Removal.⁵⁶

⁵¹ INA § 203(b).

⁵² INA § 212(a)(5).

⁵³ INA § 203(c).

⁵⁴ INA § 249.

⁵⁵ INA § 204(a).

⁵⁶ INA §§ 212(g)(1)(C), 240A(b)(2).

J. Temporary Protected Status - Temporary Protected Status is granted to people from selected countries that the U.S. government has recognized as currently unsafe due to war, environmental catastrophe, or extraordinary disaster.⁵⁷ The individual must be in the U.S. to apply. Examples of current designated countries include Angola, Burundi, El Salvador, Honduras, and Nicaragua.

II. Common Legal Sources

Code of Federal Regulations -- Title 8 -- Aliens and Nationality. Chapter 1 – Immigration and Naturalization Service, Department of Justice.
<<http://www.gpoaccess.gov/cfr/index.html> >

U.S. Department of State. State Department's Foreign Affairs Manual.
<<http://www.foia.state.gov/famdir/Fam/fam.asp>>

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009.

Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§ 1101 *et seq.*).

⁵⁷ INA § 244.

QUESTIONS AND ANSWERS ABOUT IMMIGRATION & HIV

If you are an HIV-positive immigrant, you may have many questions about how having HIV affects your immigration status. We created this pamphlet to answer some commonly asked questions about HIV and immigration.

I have heard that the Immigration and Naturalization Service (INS) no longer exists. Is this true?

Yes. The U.S. government has created three new agencies to take over all the same functions. U.S. Citizenship and Immigration Services (CIS) grants people immigration benefits such as work permits, visas, green cards, and citizenship. The Bureau of Immigration and Customs Enforcement (ICE) and the Bureau of Customs and Border Protection (CBP) enforce immigration laws. In this pamphlet I will sometimes use the word “Immigration” to mean any of these three agencies.

Can I get legal status in the United States if I am HIV positive?

Maybe. There is an immigration law that says HIV-infected people cannot get legal status in the U.S. because the government considers HIV to be a serious disease that is dangerous to the public health. However, you can still get legal status if you have a way of immigrating to the U.S. and you qualify for an exception to the law.

Who does this HIV law affect?

This law affects almost everyone who is trying to get legal status. It applies to people outside of the U.S. who want to come to the U.S. legally and people who are already in the U.S. who want to get legal status. The law does not affect U.S. citizens.

Are there exceptions to this law?

Yes, there are exceptions to this law under some circumstances and for certain groups of people. You may be eligible to apply for an HIV waiver, which will give you special permission to get legal status even though you have HIV.

How do I get a waiver?

There are different kinds of waivers depending on whether you want to live in the U.S. permanently or come to the U.S. temporarily. Each kind of waiver has different application requirements.

I want to live in the U.S. permanently. Can I get a waiver?

If you are applying for your green card through a family member or a job, you need a specific kind of family relationship to qualify for a waiver. You must be the spouse, parent, unmarried son or daughter, or minor unmarried adopted child of a U.S. citizen or Lawful Permanent Resident. A Lawful Permanent Resident is someone who has his green card. In addition, you will have to show that your presence in the U.S. will not be a health danger to others, that there is little risk you will spread the disease, and that the government will not have to pay for any medical expenses unless it has already agreed to.

If I want to visit the U.S. for a short time, is there a waiver available?

Yes, there are two different waivers:

1. **30-Day Waiver:** This waiver is for people who want to conduct business, get medical treatment, visit family, or attend conferences in the U.S. for fewer than 30 days. Applicants must show that they do not have current symptoms of HIV, do not pose a danger to the public health, and have enough money to pay for medical care in the U.S. if needed.
2. **Designated Event Waiver:** This waiver is for people to attend certain events in the U.S. that have been designated by the U.S. government to be in the public interest, such as educational conferences and sports events.

Do I need a waiver if I am applying for asylum?

You do not need a waiver to apply for asylum, but you need a waiver to apply for your green card after you get asylum. If you are an asylee, you do not need a family relationship to apply for a waiver. Instead, you have to show that it will benefit the public for you to stay in the U.S., there are humanitarian reasons why you should stay, and/or it will allow you to remain with family members in the U.S. You still have to show that your presence in the U.S. will not be a health danger to others, that there is little risk you will spread the disease, and that the government will not have to pay for any medical expenses unless they have already agreed to.

Does my HIV status affect my current immigration status?

Testing positive for HIV will not affect your current immigration status. However, if you try to change your status, it may become a problem. For example, if you apply for a green card, you will need to take an HIV test as part of the required medical examination. If you test positive, you will not be able to get your green card unless you qualify for a waiver.

Can I be deported because I am HIV positive?

Generally, you will not be deported just because you are HIV positive. However, if you are here in the U.S. illegally, then you may be deported for being here illegally. Or if there is some other reason why you could be deported, then you may still be deported on those grounds.

Will Immigration find out that I have HIV?

Generally, there are three circumstances in which Immigration may find out you are HIV positive:

When you are applying for a visa to come to the U.S. temporarily:

- If you live outside of the U.S. and you want to come to the U.S. temporarily, you need to get a visa at the U.S. consulate abroad.
- You are not required to take a medical examination to apply for a visa to come to the U.S. temporarily. But the officer at the consulate has the right to ask you to take an HIV test if he has reason to suspect that you are HIV positive.
- On the visa application, there is a question that asks, “Have you ever been afflicted with a communicable disease of public health significance?” Under the law, HIV is

considered a “communicable disease of public health significance.” If you answer “yes” and you do not qualify for an HIV waiver, then your application will be rejected. If you answer “no” and for some reason Immigration finds out that you deliberately lied on your application, they may find you committed fraud. The consequences for committing fraud are very severe.

When you are applying for your green card or visa to live in the U.S. permanently:

- If you are applying to live in the U.S. permanently, you will have to take a medical examination and submit it to Immigration as part of your application. The medical exam includes an HIV test. If you test positive, you will need a waiver.

When you enter the United States:

If you are not a U.S. citizen, when you arrive at a border checkpoint or airport, you may be questioned about your HIV status. This may happen if you look sick or you are carrying HIV medications and pamphlets. If you do not qualify for a waiver, Immigration may deny your entry.

- Warning: If you lie to get an immigration benefit and Immigration discovers it, then it may decide you have committed fraud. Fraud occurs when the lie concerns an important aspect of your application, such as lying about whether your marriage is real. Fraud has very serious immigration consequences.

If you are in the U.S. illegally:

What are the consequences of being in the U.S. illegally?

If Immigration discovers you are in the U.S. illegally, they may deport you and bar you from returning legally in the future. Even if Immigration never finds you or deports you, your illegal presence in the U.S. may be a problem when you want to apply for legal status. You should always consult an attorney before filing any application.

I am currently in the U.S. illegally. How can I get a green card?

There are many different ways you may qualify for a green card. Unfortunately, sometimes even though you have been in the U.S. for many years, you may not qualify for a green card. But it is important for you to consult an attorney to see what laws apply to your particular situation. In this section, we will discuss three of the many ways people may get a green card.

1. **Family** – A close family member can petition for you so you can apply for a green card.
- U.S. citizens can petition for their spouses, parents, brothers and sisters, and married and unmarried sons and daughters.
 - Lawful permanent residents can petition for their spouses, children, and unmarried sons and daughters.

How long does it take to immigrate through a family member?

It depends. There are two steps in the process. First, your family member files a petition for you. Second, you file your application for a green card. Spouses, parents and unmarried children under 21 of U.S. citizens can file both of these together and can immigrate almost immediately. However, all other family categories must wait long periods of time after the petition is filed. How long you wait depends on what the family relationship is, what country you are from and when your family member filed the petition for you. For some family categories from certain countries, the wait is as long as ten years.

2. **Employment** – A U.S. employer can petition for you to get a green card.
- Generally, you must have a job offer and have special skills or educational background for that job. For most jobs, you will need to show that there are no qualified Americans available and willing to take the job.

Does having HIV affect getting a green card through my family or my job?

When you apply for your green card, you must take a medical examination, which includes an HIV test. If you test positive, you cannot get a green card unless you get an HIV waiver. Not everyone is eligible for a waiver. See **page 18** for more information on waivers.

3. Asylum

You may be eligible to apply for asylum if you are afraid to return to your home country because of your religion, race, nationality, political opinion or membership in a social group. A social group can be based on sexual orientation or HIV status. You will have to show that your fear is based on harm you suffered in the past or harm you will suffer in the future.

How does having HIV affect getting asylum?

Your HIV status will not hurt your asylum application. In fact, you may apply for asylum based on your HIV status if you suffered harm in the past because you are HIV-positive or if there is a pattern of severe harm and discrimination against people with HIV in your home country. If you win your asylum case, you will need an HIV waiver when you apply for your green card. You can apply for your green card one year after you win asylum. See **page 12**.

I am in the U.S. illegally. Can I apply for asylum?

Yes. You may apply for asylum whether you are here legally or illegally. However, there are circumstances in which you cannot or may not want to apply for asylum, such as if you have committed certain serious crimes or if you have a deportation order against you already.

When do I apply for asylum?

You have to apply within one year of arriving in the U.S. If you have been here for more than a year and want to apply, you will have to show there are changed conditions in the country you left or exceptional circumstances in your life here that caused your failure to file within one year. You should consult with an

attorney if you are applying after one year because your case will be more complicated.

I've heard people who got their green card because they were here for a long time. Is this true?

No, not now. Currently, there is no amnesty. The last amnesty expired in 1987. What you may have heard about is Cancellation of Removal. You can apply for Cancellation ONLY in Immigration Court to stop your deportation. You must show you have been here for more than 10 years and you have good moral character. Most importantly, you need to show that if you are deported, it will cause your spouse, parent or child who is a U.S. citizen or lawful permanent resident exceptional and unusual hardship. This is very difficult to show.

Will using public benefits now hurt my chances of getting legal status in the future?

You may have trouble getting a green card if you use certain kinds of public benefits. Immigration may not give you a green card if it thinks you will become a “public charge.” This means they think you will become dependent on the government in the future. To decide this, Immigration will consider your overall situation, such as your age, health, job, work history, and education.

As one of the factors, they will also consider whether you use or have used cash benefits or long-term care at government expense. A cash benefit supplements your income with money, like General Assistance or SSI. Health care benefits, food programs, or other programs that do not give cash are not considered cash benefits. So you can receive free medical care at clinics, food stamps, public housing, job training, or other non-cash assistance without hurting your chance of getting a green card. It does not hurt you if your children receive cash assistance as long as that money is not your only income.

Common Scenario #1:

Maria is from Guatemala. In 1999, Maria came across the border illegally through Mexico. She has been HIV positive since 1998. Her mother is a lawful permanent resident. She wants to know if she can get legal status.

Maria's situation is a little complicated. Even though she has a way to immigrate, she may have problems because she came to the U.S. illegally and has lived in the U.S. illegally for a long time. Here are some things Maria can consider:

1. Maria's mother can file a petition for Maria based on their family relationship. If Maria's mother files the petition today, Maria can expect to wait approximately eight years until she is eligible to file an application for her green card. If Maria's mother already filed the petition or she becomes a U.S. Citizen, Maria will have to wait less time or she may be able to file her green card application now.
2. Maria will have to file an HIV waiver with her green card application because she is HIV positive.

3. Since Maria came here illegally and has been here illegally for more than one year, she will have problems applying for her green card. We will try to explain this a little here, but these problems and laws are difficult to explain, so it is best to consult an attorney.

There are specific laws about who can apply for their green card in the U.S. and who must apply from outside of the U.S. Because of the family category through which Maria is immigrating, and because Maria came to the U.S. illegally and has lived here illegally for many years, she will have to leave the U.S. to apply for her green card. However, if Mary leaves the U.S., there is a law that will prevent her from returning legally for 10 years because she has been in the U.S. illegally for a long time. So Maria will need to apply for an exception to this law in order to come back into the U.S. and get her green card. To get an exception Maria must show she has a spouse or parent who is a U.S. citizen or lawful permanent resident who will suffer extreme hardship if she is not allowed to return to the U.S.

There was a special law called 245(i) that allowed someone like Maria to pay a fine and file her green card application in the U.S. The 245(i) law has expired, but if Maria's mother or a different family member filed a valid petition for Maria before April 30, 2001, the law would still help her. She would be able to pay the fine and file her application in the U.S. If no one filed a petition for Maria before 245(i) expired, Maria must leave the U.S. to do her application.

Common Scenario #2:

In 2001, when Juan tried to cross the border into the U.S., he was arrested two times by Immigration before he entered the U.S. successfully. Juan is HIV positive and also homosexual. He has no family in the U.S. Can Juan get legal status in the U.S.?

Juan should consult with an immigration attorney before he applies for any kind of immigration benefit. Sometimes when someone is arrested crossing the border, he is given a deportation order. The immigration attorney can help Juan find out whether there is a deportation order against him. If he has a deportation order, he can be detained and deported by Immigration at any time based on the old order. Also, he will be ineligible for many different kinds of immigration relief, including asylum.

If Juan does not have a deportation order against him, and he is afraid to return to his country because of his sexual orientation or HIV status, he may consider applying for asylum. However, Juan will have to explain why he did not file within a year of coming to the U.S. If Juan wants to file an asylum application, he should consult an attorney because there are many risks involved in filing an asylum application. He may also be able to find free legal assistance to help prepare his application. Even if Juan has a deportation order, he should learn about what options he has.

If you are a Lawful Permanent Resident (“LPR”):

What is a lawful permanent resident?

Lawful permanent residents are people who have their “green card.” If you have a green card, you can live and work in the U.S. permanently. You can also travel freely outside the country, but your permanent home must be in the U.S.

Will I lose my green card because I have HIV?

No. You will not lose your green card just because you are HIV positive. However, you can still lose your green card:

- if you commit certain kinds of crimes;
- if you stay out of the country too long; or
- if they find out you lied to get the green card in the first place.

How does having HIV affect my green card?

If you travel to a foreign country for more than 180 days, you risk not being able to return to the United States. This is because when you come back, immigration officials will inspect and question you very closely before they let you come in, just like someone coming to the U.S. for the first time. The immigration officials may ask about your HIV status, especially if they find medications in your baggage or if you show symptoms. If immigration officials discover you have HIV, they can stop you from returning to the U.S. if you do not qualify for a waiver.

Warning:

Lawful Permanent Residents need to be careful about how long they stay out of the U.S. If you stay out of the U.S. for more than a year, Immigration will assume that you have abandoned your residency and you could lose your green card. To be safe, you should not travel out of the U.S. for long periods of time. This is also a good reason to become a U.S. citizen as soon as you can. Citizens can stay out of the country as long as they want and do not need to worry about being allowed to come back to the U.S.

Why should I become a citizen?

A foreign-born person who becomes a U.S. citizen has the same rights as a U.S.-born citizen. Your immigration status will be secure and cannot be taken away from you except in very rare, extreme situations. Having HIV will not affect your citizenship status at all. As discussed above, you will be able to travel and stay out of the country for as long as you want without losing your citizenship. You will be able to vote. You will be eligible to apply and receive all public benefits. You will be able to file petitions for your close family members to come to the U.S. legally. Also, you will not have to worry about renewing your green card when it expires.

Can I apply to become a U.S. citizen even though I have HIV?

Yes, you can become a U.S. citizen even though you are HIV positive. If you want to become a citizen you will have to meet the general requirements for citizenship:

- (1) You must have had your green card for five years (or three years if you received your green card through marriage to a U.S. Citizen);

- (2) You need to have been physically in the U.S. for at least half of that required time.
- (3) You need to have stayed in the U.S. as an LPR without leaving the U.S. for trips of 6 months or longer.
- (4) You need to be of good moral character.
- (5) You need to show that you can speak, read, and write basic English
- (6) You will need to pass an exam on U.S. history and government.

Your HIV status will not hurt your application, but as we discuss in the next question, your HIV status could bring up other issues that could be a problem.

Do I need to do something special for my citizenship application because I have HIV?

No, you do not need to do anything special for your naturalization application.

If I apply to become a citizen, will Immigration find out I have HIV?

The citizenship application does not require a medical examination, and it does not ask any questions about your health. However, during your citizenship interview, the interviewer may ask any questions about anything you wrote on your application. In that way, the interviewer could find out that you have HIV. Your HIV itself will not hurt your application, but the interviewer could find out other information that could hurt your application. For example, he could ask you why you were receiving disability benefits. Once he finds out you have HIV, he could ask how you contracted it. If he finds out you contracted HIV through drug use, it could be a big problem. Being a drug abuser is a reason to be deported, so your application could be denied and you could lose your green card because of the drug use.

Should everyone file for citizenship?

No. Some people should not file for citizenship because they could lose their green card and be deported. When you apply for citizenship, immigration officials will review your entire immigration file. They will also fingerprint you and run a criminal history check. If they find out that you were actually not eligible to get your green card when you obtained it, they will take away your green card when you apply for citizenship. For example, this will happen if they find out you lied to get your green card, or if you were convicted of a serious crime since you got your green card. This is why it is important to consult an immigration attorney.

Can using public benefits hurt my green card?

Generally, using benefits will not hurt your green card. However, if you leave the country for more than 180 days, when you try to return to the U.S., you may have to show immigration officials that you will not be a “public charge.” (See page 12.) If they decide you are going to be dependent on cash benefits from the government in the future, they could deny your entry.

In very, very rare situations, you could be deported if you use cash benefits or long-term care within 5 years of getting your green card. This will happen only if the government first sues you to repay the money, you refuse to pay, and you used the

benefits for reasons that existed before you came to the U.S. You can be ordered deported only by an immigration judge after a full hearing.

Will using public benefits affect my chance of becoming a U.S. citizen?

No. You cannot be denied U.S. citizenship because you used public benefits as long as you got the benefits legally.

Common Scenario #1:

Jose has had his green card for 5 years, and he wants to apply for citizenship. He was diagnosed with HIV last year. Will HIV affect his citizenship application?

Simply having HIV will not hurt his application. If Jose has satisfied all of the other requirements and has no other problems, he will be able to become a citizen.

Common Scenario #2:

Manuel got his green card in 1999, and he was diagnosed with HIV in 2002. He visited his parents in El Salvador shortly after his diagnosis. He planned on being there for one month, but he ended up staying for thirteen months to take care of his sick mother. Will he be able to come back to the U.S.?

Since Manuel was gone for more than 180 days, the immigration official will examine him very closely at the border when he tries to come back. The official may ask Manuel about his HIV status or if he has committed any crimes. If the official finds out that Manuel has HIV, then he will need to file a waiver in order to return to the U.S. Manuel will also have another problem. Because Manuel was gone for more than one year, Immigration will assume that he has abandoned his U.S. residency. Manuel will have to show that his visit was just temporary and that he intended to return to the U.S. while he was abroad.

If You Are an Asylee:

What is an asylee?

An asylee is someone who was granted asylum because he was afraid to return to his country of origin because of persecution. An asylee has permission to live and work in the U.S.

As an asylee, can I apply for a green card?

One year after you win your asylum case, you can apply for your green card. As part of the application, you will need to take a medical exam, which includes an HIV test. If you test positive for HIV, you will have to apply for an HIV waiver before you can get your green card. (See page 18.)

As an asylee, how long will it take to get my green card?

Unfortunately, it takes a very long time because only 10,000 asylees are allowed to get their green card every year. If you filed your green card application today, it would take approximately ten years. Applications that were filed earlier, in 1998, for example, are taking less time, approximately five years.

As an asylee, can I travel outside the country?

You will need to get a travel document from Immigration before you leave the U.S. It takes time for Immigration to approve your application for a travel document, so you need to plan ahead. It is important that you do not travel back to the country from which you were granted asylum or you could lose your status as an asylee. However, after you get your green card you can travel anywhere, including your home country.

Will using public benefits affect my current or future immigration status?

No, asylees can use any public benefits without hurting their chance of getting a green card.

Common Scenario:

John was granted asylum in 1999 and filed an application for his green card in 2000. He was diagnosed with HIV in 1999 after he won asylum. John is wondering what happened to his application because he has not heard anything since he got a receipt notice. He also wants to know what he should do now that he knows he has HIV.

John will not lose his asylee status because he has HIV but he has to file an HIV waiver before he can become a lawful permanent resident. He should do this after consulting with an immigration attorney. Currently, the waiting period for an asylee who filed a green card application in 2000 is approximately six or seven years.

HIV WAIVERS

Section 212(a)(1)(A) of the Immigration and Nationality Act renders aliens who have a “communicable disease of public health significance” statutorily inadmissible to the United States. As HIV is considered such a disease, aliens who are HIV-positive must obtain a waiver if they wish to be lawfully admitted to the U.S.⁵⁸

There are waivers available for applicants seeking admission both as non-immigrants and immigrants. However, as discussed below, various eligibility requirements apply and certain discretionary factors are considered for each type of waiver.

I. Waivers for Non-Immigrants⁵⁹

Two different waivers are available to HIV positive non-immigrants seeking admission to the United States: (1) a Routine HIV Waiver and (2) a “Designated Event” Waiver. Applicants seeking a non-immigrant visa are not required to take a medical examination. However, consular officers, prior to the issuance of a visa, and CBP officers at ports-of-entry do have the authority to require a non-immigrant to submit to a medical examination should they have any reason to believe it necessary.⁶⁰

Moreover on Form DS-156, Application for Non-Immigrant Visa, Question 38 asks, “Have you ever been afflicted with a communicable disease of public health significance or a dangerous physical or mental disorder, or ever been a drug abuser or addict?” Since HIV is considered a “communicable disease of public health significance,” if an applicant knowingly answers this question falsely, he could be found to have committed immigration fraud. The consequences of immigration fraud are extremely severe. However, if the applicant answers “yes” and does not qualify for a waiver, he will be refused admission. If the applicant unknowingly answers falsely, an argument could be made that he did not commit fraud.

A. Routine HIV Waiver

Routine HIV Waivers are granted for admission to the United States for 30 days or less to attend conferences, receive medical treatment, visit close family members, or conduct business. In addition to the usual requirements for a non-immigrant visa, the applicant must demonstrate that: (1) he is not currently showing symptoms of the disease; (2) there are sufficient assets, such as insurance, that would cover any medical care that might be required in the event of illness in the U.S.; (3) the proposed visit to the United States is for 30 days or less; and (4) the visit will not pose a danger to public health in the U.S.⁶¹

⁵⁸ INA § 212(a)(1)(A)(i); 42 CFR §34.2(b) (2002).

⁵⁹ INA § 212(d)(3).

⁶⁰ INA §§ 235, 232, 221(d), 9 FAM §41.108.

⁶¹ See INS Fact Sheet “HIV Infection: Inadmissibility and Waiver Policies” issued July 10, 1998, last modified Feb. 20, 2003 [hereinafter *INS Fact Sheet*].

B. “10-Day Waiver”/“Designated Event” Waiver

This waiver is granted for admission to the United States to attend certain “designated events” that are considered to be in the public interest, such as academic and educational conferences and international sports events. To initiate the process, the event organizers must write a request to Health and Human Services (HHS). HHS then reviews the request, and writes a letter to the Department of State (DOS) regarding a specific event. DOS recommends the event to the Attorney General, who “designates” the event and authorizes a blanket waiver. This blanket waiver allows HIV-positive applicants seeking admission to be admitted for the duration of the designated event without being questioned about their HIV status.⁶² However, this kind of waiver applies only for the specific event. If the applicant seeks future admissions to the U.S., he will have to apply for another waiver.

II. Waiver for Immigrants

When applying for lawful permanent resident status in the U.S. or an immigrant visa abroad, all intending immigrants are subject to an HIV test as part of the required medical examination (I-693).⁶³ All those who test positive will need a waiver except those applying through Registry, Suspension of Deportation/Cancellation of Removal, and Nicaraguan Adjustment and Central American Relief Act (NACARA) §203.

There are two different waivers available for aliens seeking admission as a lawful permanent resident: (1) a waiver under INA §212(g) that requires a qualifying relative, and (2) a waiver based on a showing of family unity, humanitarian grounds and public interest.

Asylees/refugees, Special Agricultural Workers, and Legalization applicants can apply for a waiver based on family unity/humanitarian grounds/public interest considerations.⁶⁴ All other applicants, such as those aliens applying for LPR status through family, employment, NACARA §202, Cuban-Haitian Adjustment Act, and INA §204(f), will need a waiver under §212(g) if they wish to become lawful permanent residents.⁶⁵

A. Section 212(g) Waiver

Eligibility Requirements.

To be eligible for a 212(g) waiver, the applicant must have a qualifying relative.⁶⁶ That is, the applicant must be the spouse or unmarried son or daughter, or the minor unmarried lawfully adopted child of a U.S. citizen or lawful permanent resident; or be the parent of

⁶² *Id.* See Memorandum (Medical Examinations, Vaccination Requirements, Waivers of Medical Grounds of Inadmissibility, and Designation and Revocation of such Designation) by Johnny Williams, Executive Associate Commissioner Office of Field Operations amending INS Adjudicator’s Field Manual, Ch. 41.3(b), (Oct. 17, 2002) [hereinafter *Williams Memo*].

⁶³ 9 FAM §40.11, INA§232(b); 8 C.F.R. §245.5.

⁶⁴ INA §§210(c)(2)(B) (Special Agricultural Workers), 245A(d)(2)(B)(i) (Legalization), 209(c) (Asylees/Refugees).

⁶⁵ See Williams Memo; Los Angeles County Bar Association Training Materials, “Immigration & HIV Waiver,” Barristers AIDS Legal Services Project in Collaboration with the HIV & AIDS Legal Services Alliance, Inc. (January 22, 2003)[hereinafter *LACBA Training Materials*]; INS Fact Sheet; INA 212(g);

⁶⁶ INA §212(g); Williams Memo.

a U.S. citizen or lawful permanent resident.⁶⁷ Alternatively, the applicant for a 212(g) waiver must be a self-petitioning battered spouse or child.⁶⁸

To satisfy the three discretionary criteria, the applicant must show that: (1) the danger to the public health created by the alien's admission is minimal; (2) the possibility of the spread of infection created by the alien's admission is minimal; and (3) no expense will be incurred by any government agency, without that agency's prior consent.⁶⁹

What to File.

To file, applicants must file the following documents:

- 1) Form I-601, Application for Waiver of Grounds of Inadmissibility;
- 2) HIV Waiver Supplement (entitled "To Be Completed for Applicants with HIV Infection"):
 - Statement A is completed by the applicant;
 - Statement B is completed by the health care provider in the U.S. who is treating or who has agreed to see the applicant for evaluation and treatment;
 - Statement C is completed by the applicant's sponsor;
 - Statement D is completed by the local or state health officer after Statement B is signed;
- 3) I-601 filing fee of \$195.00.⁷⁰

Evidence considered sufficient to meet the three discretionary factors includes:⁷¹

- 1) Evidence of the qualifying family relationship;
- 2) Declaration of applicant about his awareness of nature and severity of the disease, knowledge of disease and modes of transmission, medical treatment, and any counseling received. This declaration should also touch on family unity factors, employment, hardship factors, activities and contributions to the community. Although some of these factors are not formally considered, it is helpful to include this kind of information for both public charge and waiver purposes;
- 3) Declaration of qualifying relative describing family, family relationship and hardship;
- 4) Evidence that the danger to public health and risk of spread is minimal, such as:
 - a. Letter from treating physician stating that client is being treated and is under a doctor's care, is aware of the nature and severity of the

⁶⁷ INA §212(g).

⁶⁸ INA §212(g).

⁶⁹ Williams Memo at Ch.41.3(a)(2)(E); INS Fact Sheet; INA 212(g).

⁷⁰ Williams Memo at Ch. 41.3(a)(2)(D); U.S.CIS Forms and Fees, <<http://uscis.gov/graphics/formsfee/forms/index.htm>>

⁷¹ Williams Memo at Ch. 41.3(a)(2)(E); Memorandum (Immigrant Waivers for Aliens Found Excludable Under Section 212(a)(1)(A)(i) of the Immigration and Nationality Act Due to HIV Infection), T. Alexander Aleinikoff, Executive Associate Commissioner Office of Programs, HQ 212.3-P (Sept. 6, 1995), reprinted in 72 Interpreter Releases 1347-54 (Oct. 2, 1995) [hereinafter *Aleinikoff Memo*]; LACBA Training Materials.

- condition, and has been counseled about preventative measures and how the disease is transmitted;
 - b. Letter from educator or counselor to show that client has been educated about the above;
- 5) Proof that no cost will be incurred by any level of government without their consent, such as:
- a. Evidence of private insurance;
 - b. Evidence of personal financial resources to cover medical costs;
 - c. Evidence that hospital/non-governmental clinic/research facility will provide care at no cost to the government;
 - d. Evidence of participation in government-funded study and extent of medical coverage provided;
 - e. Evidence that government agency providing medical treatment has consented to provide treatment through the agency or his designee

The waiver can be submitted with the adjustment of status application, at the interview, or after the interview in response to a Request for Evidence/Notice of Deficiency given by USCIS.⁷² After filing, the USCIS will forward the waiver request to the Centers for Disease Control (CDC) so that it can issue an endorsement of review to verify that the applicant has identified a suitable health care provider in the U.S.⁷³ The health care provider must submit the results of a comprehensive evaluation within 30 days after adjustment is granted. After issuing an endorsement of review, the CDC will forward the waiver application to the USCIS for adjudication.⁷⁴ The USCIS official will make separate findings on the HIV waiver determination and the public charge determination.⁷⁵

Note that publicly-funded medical treatment for HIV does not automatically mean that the alien has not met the third waiver requirement.⁷⁶

Denials & Appeals

Adjustment of status applicants in the U.S. whose waivers are denied can appeal the denial to the Administrative Appeals Office (AAO) in Washington DC. While the appeal is pending, the applicant will be allowed to retain his work authorization. If the appeal is denied, the adjustment of status application will also be denied. Applicants whose waivers and appeals are denied are asked to depart the U.S. voluntarily and could be placed in removal proceedings. Immigrant visa applicants applying at a U.S. consulate abroad have no recourse if they do not qualify for a waiver, or if their waiver or any subsequent appeal to the AAO is denied.

⁷² U.S. CIS Forms & Fees, <<http://uscis.gov/graphics/formsfee/forms/i-485.htm>> (File I-601 with application); LACBA Training Materials.

⁷³ Williams Memo at Ch. 41.3(a)(2)(G).

⁷⁴ *Id.*

⁷⁵ Williams Memo at Ch. 41.3(a)(2)(H); Aleinikoff Memo.

⁷⁶ Williams Memo at Ch. 41.3(a)(2)(E).

B. Family Unity/Humanitarian Grounds/Public Interest Waiver

HIV-positive aliens applying for lawful permanent resident status through the Legalization, Special Agricultural Worker, and Refugee/Asylum Programs (one year after being granted refugee/asylee status) must apply for an HIV waiver. Aliens applying for admission from abroad as refugees also must apply for an HIV waiver prior to being admitted.

Each of the above programs authorizes a waiver for humanitarian purposes, to assure family unity, and/or when it is otherwise in the public interest.⁷⁷ These applicants do not need a qualifying relative. However, they still must show that: (1) the danger to the public health created by the alien's admission is minimal; (2) the possibility of the spread of infection created by the alien's admission is minimal; and (3) no expense will be incurred by any government agency, without that agency's prior consent.⁷⁸

For refugees applying for admission from abroad, eligibility for federally funded programs such as Medi-Cal, Refugee Medical Assistance and other services provided under the Ryan White CARE Act, is sufficient to meet the third prong.⁷⁹ However, refugees and asylees applying for adjustment of status still must meet the third prong by submitting evidence of eligibility for HIV treatment or health care coverage in the U.S. as suggested below.⁸⁰

Refugee/asylee applicants must submit the following documents:⁸¹

- 1) Form I-602, Application by Refugee for Waiver of Grounds of Excludability;
- 2) HIV Waiver Supplement, signed as described above for the I-601;
- 3) No fee is required.

Additionally, refugees/asylees should include evidence of the following:⁸²

- 1) Declaration of applicant that includes his awareness of nature and severity of the disease, knowledge of disease and modes of transmission, medical treatment, and any counseling received. This declaration should also describe positive family unity factors, why applicant fled and cannot return to his home country, past and current employment, hardship factors, activities, awards and contributions to the community;
- 2) Evidence of family ties in the U.S., such as marriage and birth certificates;
- 3) Any evidence of awards, stable employment, or character references;
- 4) Country conditions evidence supporting any humanitarian reasons for granting admission;

⁷⁷ INA 210(c)(2)(B) (Special Agricultural Workers); 245A(d)(2)(B)(i) (Legalization); 209(c) (Asylees/Refugees).

⁷⁸ Williams Memo at Ch. 41.3(a)(2)(F).

⁷⁹ Memorandum (Guidance Regarding Waivers for HIV+ Refugees) and Talking Points (Change in HIV Waiver Filing Requirements for Refugees), John W. Cummings, Deputy Director, Office of International Affairs (Jun. 16, 1999), *reprinted in* 76 Interpreter Releases 1551 (Oct. 25, 1999); Letter from David Satcher, Assistant Secretary for Health and Surgeon General, to Doris Meissner, Commissioner of INS (May 21, 1999), *reprinted in* 76 Interpreter Releases 1551 (Oct. 25, 1999).

⁸⁰ Williams Memo, Ch. 41.3(a)(2)(F).

⁸¹ Williams Memo, Ch. 41.3(a)(2)(D).

⁸² Williams Memo, Ch. 41.3(a)(2)(E), Ch. 41.3(a)(2)(F); Aletnikoff Memo.

- 5) Evidence that the danger to public health and risk of spread is minimal, such as:
 - a. Letter from treating physician stating that client is being treated and is under a doctor's care, is aware of the nature and severity of the condition, and has been counseled about preventative measures and how the disease is transmitted;
 - b. Letter from educator or counselor to show that client has been educated about the above;
- 6) Proof that no cost will be incurred by any level of government without its consent, such as:
 - a. Evidence of private insurance;
 - b. Evidence of personal financial resources to cover medical costs;
 - c. Evidence that hospital/non-governmental clinic/research facility will provide care at no cost to the government;
 - d. Evidence of participation in government-funded study and extent of medical coverage provided;
 - e. Evidence that government agency providing medical treatment has consented to provide treatment through the agency or his designee.

The waiver can be submitted with the adjustment of status application, at the interview, or after the interview in response to a Request for Evidence/Notice of Deficiency given by USCIS.

If the waiver is denied, the adjustment of status application will also be denied. The denial of a waiver cannot be appealed, but it may be renewed in proceedings.⁸³

Legalization and SAW applicants must submit the following documents:

- 1) Form 1-690, Application for Waiver of Excludability;
- 2) HIV Waiver Supplement, signed as described above;
- 3) Filing fee of \$35.00.

These applicants also must submit the additional supporting evidence that refugee/asylee applicants submit.

⁸³ Williams Memo, Ch. 41.6(a)(3).