

The HIV Entry Ban

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Background and History

United States immigration law authorized the Department of Health and Human Services (HHS) to maintain a list of “communicable diseases of public health significance”. An immigrant with any disease on this list is rendered inadmissible to the U.S. In May 1987, HHS added HIV infection to this list. Since that time, HIV positive immigrants and travelers have been barred from entering the United States except in certain cases when discretionary waivers have been issued. In addition, HIV positive immigrants already in the country have faced tremendous obstacles adjusting their residency status. HHS twice proposed eliminating the ban, first in 1991 and again in 1993, by removing HIV from the disease list. These attempts were defeated by an organized response from Members of Congress and their supporters who wanted to keep the ban in place.¹

In 1993, Senators Don Nickles (R-OK) and Jesse Helms (R-NC) spearheaded the effort to codify the HIV entry ban into law as a part of the National Institutes of Health Revitalization Act.² The ban, which had previously been enforced on a strictly administrative level, was written into law upon the passing of this act on June 10, 1993.³ For the next 15 years, people living with HIV/AIDS (PLWHA) were prohibited from entering the U.S. based on both statutory law and administrative regulation.

In recent years a renewed focus has been placed on eliminating the HIV Entry Ban. Advocates have issued a number of organizational statements, sign on letters, and action alerts in an effort to garner support for the issue. In July of 2008, the statutory requirement for the ban was lifted with the passage of the Tom Lantos and Henry J. Hyde Global Leadership Against HIV/AIDS, Tuberculosis and Malaria Reauthorization Act of 2008. The removal of this Congressional ban was supported by a variety of advocacy organizations. A letter, signed by 160 HIV advocacy groups, including AIDS Action, was sent to members of the Senate to garner their support of the ban’s removal. The Act “amend[ed] the Immigration and Nationality Act to eliminate infection with the etiologic agent for acquired immune deficiency syndrome (AIDS) as a public health grounds for alien nonadmission.”⁴ The passage of this act, while a positive advancement, does not do away with the ban in its entirety. With the elimination of the statutory requirement, HHS once again has the authority to remove HIV from the list of inadmissible diseases.

In September of 2008, the Department of Homeland Security (DHS) passed a rule streamlining the issuance of certain short-term non-immigrant visas to people infected with HIV who are

otherwise eligible to enter the U.S.⁵ While appearing as an effort to lessen the effects of the ban, this rule does not abolish the ban. The final decision to remove HIV from HHS’s list can only be made by the Secretary of HHS.

Rationale for Travel Restriction

The United States government offered two rationales to explain the HIV entry ban. One reason given is that the ban protects the public health of U.S. citizens. The lack of understanding surrounding HIV in the 1980s perpetuated an environment of fear regarding HIV transmission, and the government believed an Entry Ban would assist in keeping HIV outside of our borders. The other rationale is that the ban protects the U.S. from economic costs perceived to be generated by HIV-infected non-citizens who would rely on U.S. health and social service systems.⁶

Evidence Against

Great strides have been made in the area of HIV research and prevention since the ban was established in 1987. Scientific evidence now soundly supports the fact that HIV is not passed through casual contact, but rather through specific behaviors such as unprotected sexual intercourse with an infected individual and the use of contaminated needles to inject drugs. Our knowledge of this fact justifies that “there is,” as the *International Guidelines on HIV/AIDS and Human Rights* point out, “no public health rationale for restricting liberty of movement or choice of residence on the grounds of HIV status.”⁷ Travel restrictions that are utilized to protect public health in the instance of an outbreak of a highly contagious disease are not effective or relevant in the case of HIV/AIDS.

The economic justification for the HIV Entry Ban is harder to soundly disprove, but various factors discredit this assertion. Other provisions exist within U.S. immigration law which ensure that immigrants demonstrate that they are unlikely to become a “public charge” before they are allowed to enter the U.S.⁸ If an alien has a medical condition, such as heart disease, and lacks the financial resources necessary for treatment, the Immigration Service can prohibit this alien from entering the U.S. unless he can show that he will not become a financial burden on the state. This

“public charge” issue is irrelevant when dealing with HIV/AIDS since an HIV-positive status automatically bars entry.

Further, improved HIV therapies have extended the productivity and longevity of PLWHA. This alongside the fact that the international movement of people brings great economic benefits (as they contribute to national revenue, taxes, and productivity, and contribute to the labor supply) makes it increasingly hard to prove that PLWHA will produce more costs than benefits.⁹ The economic impact that a non-national will have on a nation is a matter that must be considered on an individual assessment level, and can often be addressed without relating to HIV.

Results of Ban

The HIV Entry Ban has resulted in various negative consequences since its conception. The ban continues to perpetuate stigma and discrimination surrounding PLWHA, and bans these members of society from ever realizing full civic participation. Travelers and immigrants often enter countries illegally as a means of avoiding the travel restrictions, often disrupting their HIV treatment. Their illegal status will then prevent them from seeking out and receiving HIV prevention and care services.

The ban goes so far as to undermine the global fight against HIV/AIDS by blocking access to treatment, and returning people to countries where HIV care is limited or unavailable. People who immigrate to and visit the U.S. are actively deterred from seeking out HIV testing and treatment so as to not put their immigrant status at risk. This only results in further perpetuating the epidemic.

Supporting such a discriminatory, unscientific and ineffective policy succeeds in discrediting the United States’ position as a global leader in the fight against HIV/AIDS. The United States’ efforts to fight AIDS globally, seen most notably in the President’s Emergency Plan for AIDS Relief (PEPFAR), are detracted from when one considers such domestic actions as the HIV Entry Ban. Many other countries have adopted more moderate immigration policies when it comes to HIV-positive aliens. The United States is one of only 12 countries with such a stringent policy. The U.S. is joined by Sudan, Saudi Arabia, Libya, Russia, South Korea, Armenia, Brunei, Iraq, Moldova, Oman, and Qatar.¹⁰

The entry ban can have a profound impact on the personal lives of HIV-positive individuals seeking to visit family, attend meetings, study, or do business in the United States. Testing, in many of these situations, is completed without appropriate pre and post-test counseling and without proper consideration of confidentiality. Aliens may learn of their positive-HIV status and at the same time learn that they are not allowed to travel, visit family, or study. In many situations it is also a possibility that the alien’s HIV-status has become known to government officials as well as potential future employers, further exposing the individual to discrimination.¹¹

Perhaps the most publicized consequence is the fact that the International AIDS Society is unable to host its biannual meeting of the International AIDS Conference, the worlds largest scientific and policy meeting of global HIV/AIDS scientists, policymakers and advocates, in the United States. The United States loses the opportunity to raise public awareness of HIV/AIDS in the U.S. by not hosting the conference.¹²

Current Administrative Action

In September 2008, the Department of Homeland Security released a statement saying that “HHS is currently beginning the rulemaking process to remove HIV from the list.”¹³ If the process follows normal HHS guidelines it will involve a panel discussion of public health experts, who will review policy and examine the issue. Any changes in policy will be published in the federal register, and a thirty day public comment period will follow. Any final decision to remove HIV from the list of communicable diseases of public health significance must come from HHS.

Conclusion

The HIV Entry Ban was born out of fear and discrimination at a time when HIV was poorly understood. Our knowledge and understanding of HIV transmission and prevention has grown immensely over the past 20 years and the Entry Ban is now known to be ineffective. What was created in an effort to protect American citizens from a perceived threat has turned into an out of date inequitable practice. It is time to overturn the ban and end the discrimination. AIDS Action supports the abolishment of the HIV Entry Ban, as well as the actions necessary to do so.

⁹ Nieburg, P., Morrison, J.S., Hofer, K., & Gayle, Helene. (2007). *Moving Beyond the U.S. Government Policy of Inadmissibility of HIV-Infected Noncitizens*. Center for Strategic and International Studies Task Force on HIV/AIDS. Retrieved October, 2008 from <http://www.csis.org/media/csis/pubs/movingbeyondinadmissibility.pdf>.

¹⁰ Ibid.

¹¹ Kovacka, Jason. (1993). Give Us Your Tired, Your Poor, Your Huddled Masses... Except When they Have HIV. *University of Richmond Law Review*, 531 (27).

¹² Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, H.R. 5501, 110th Cong., 2nd Sess. (2008).

¹³ U.S. Department of Homeland Security. (2008). *Fact Sheet: Streamlined Process Announced for Otherwise Eligible HIV-Positive Individuals to Enter the United States*. Retrieved September, 2008 from http://www.dhs.gov/news/releases/pr_1222704743103.shm.

¹⁴ Joint United Nations Programme on HIV/AIDS & International Organization for Migration. (2004). *Statement on HIV/AIDS-Related Travel Restrictions*. Retrieved October 2008 from http://www.un.int/jahna/webdav/site/myjahna/site/shared/ma/nasite/activities/health/UNAIDS_IOM_statement_travel_restrictions.pdf.

¹⁵ Ibid.

⁹ Nieburg, P., Morrison, J.S., Hofer, K., & Gayle, Helene. (2007). *Moving Beyond the U.S. Government Policy of Inadmissibility of HIV-Infected Noncitizens*. Center for Strategic and International Studies Task Force on HIV/AIDS. Retrieved October 2008 from <http://www.csis.org/media/csis/pubs/movingbeyondinadmissibility.pdf>.

¹⁰ Joint United Nations Programme on HIV/AIDS & International Organization for Migration. (2004). *Statement on HIV/AIDS-Related Travel Restrictions*. Retrieved October 2008 from http://www.un.int/jahna/webdav/site/myjahna/site/shared/ma/nasite/activities/health/UNAIDS_IOM_statement_travel_restrictions.pdf.

¹¹ Sullivan, Andrew. (2008). *Phobia of the Gates*. Retrieved November 2008 from <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/13/AR2008051302719.html>.

¹² Joint United Nations Programme on HIV/AIDS & International Organization for Migration. (2004). *Statement on HIV/AIDS-Related Travel Restrictions*. Retrieved October 2008 from http://www.un.int/jahna/webdav/site/myjahna/site/shared/ma/nasite/activities/health/UNAIDS_IOM_statement_travel_restrictions.pdf.

¹³ Nieburg, P., Morrison, J.S., Hofer, K., & Gayle, Helene. (2007). *Moving Beyond the U.S. Government Policy of Inadmissibility of HIV-Infected Noncitizens*. Center for Strategic and International Studies Task Force on HIV/AIDS. Retrieved October 2008 from <http://www.csis.org/media/csis/pubs/movingbeyondinadmissibility.pdf>.

¹⁴ U.S. Department of Homeland Security. (2008). *Fact Sheet: Streamlined Process Announced for Otherwise Eligible HIV-Positive Individuals to Enter the United States*. Retrieved September, 2008 from http://www.dhs.gov/news/releases/pr_1222704743103.shm.