



I G L H R C

The International Gay and Lesbian Human Rights Commission

# THE US HIV IMMIGRATION BAN

A SEXUAL RIGHTS ISSUE

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## What is the US HIV Immigration Ban?

- The ban was imposed in 1987; it bars any foreign national who is found to have a “dangerous contagious disease” from entering the United States. In 1990, the law was amended to bar individuals with a “communicable disease of public health significance” from entering the country.<sup>1</sup>
  - In 1990, the U.S. Department of Health and Human Services (HHS) attempted to remove HIV from the exclusion list because it is not transmitted casually. A public backlash prevented the removal of HIV from the list, and in May 1993, Congress approved legislation codifying the exclusion with the support of the Clinton Administration.
  - The 1993 legislation did produce two positive outcomes:
    1. The US Attorney General is granted discretion to offer exclusion waivers; a 10-30 day grant may be granted for a family visit, medical treatment, work-related meeting, or participation in a scientific or health-related conference.<sup>2</sup>
    2. Discrimination and persecution based on HIV status can be considered grounds for asylum. Congress recognized that a situation may occur where a person who escaped persecution in his or her home country would face a likely situation of renewed persecution if they returned to their country of origin.<sup>3</sup>
  - As of 2004, contrary to medical opinion, the US government considers HIV as contagious and as much of a public health hazard as severe acute respiratory syndrome (SARS), tuberculosis, and leprosy.<sup>4</sup>
  - Every applicant for permanent residence in the US over the age of 15 must undergo mandatory HIV testing. This is often done without informed consent or pre- and post-test counseling.
  - Those seeking nonimmigrant visas, such as a visitor’s visa, are not subject to mandatory testing. However, the Immigration and Naturalization Agency (INA) is permitted to test if it suspects that a visitor is HIV positive, such as discovering HIV medications on the person. There is little data available about who gets tested in this way and for what reasons.
- The ban can only be lifted by an act of Congress.

## Why is the ban misguided?

- The ban is based on misguided policy presumptions. Despite the preponderance of evidence to the contrary, the US government continues to claim that the ban is necessary to protect public health, implicitly suggesting that HIV/AIDS is a “foreign” disease.<sup>6</sup> The United Nations Guidelines on HIV/AIDS and Human Rights have clearly cited exclusion based on HIV status as an infringement of human rights:

*There is no public health rationale for restricting liberty of movement or choice of residence on the grounds of HIV status. Therefore, any restrictions on those rights based on suspected or real HIV-status alone, including HIV screening of international travelers, are discriminatory and cannot be justified by public health concerns.<sup>7</sup>*

- The ban irrationally discriminates against foreign nationals and arbitrarily targets them for mandatory testing.
- The ban is founded on the unsupportable argument that HIV positive persons who travel or immigrate to the US cannot be responsible for their sexual practices and do not know how or are unwilling to engage in safer sex (barring circumstances of coercion).
- The ban deters persons who are living with HIV/AIDS and are living in the US without documentation to disclose their HIV status. It may prevent them seeking and receiving health care because they fear being deportation. However, postponing care will only increase the burden on the State and their families if and when the virus progresses.
- HIV positive lesbians, gay men, bisexuals and transgender persons continue to face discrimination in immigration claims. They have been denied green cards simply based on their HIV status, even though they might have legally worked and dutifully paid taxes for many years. They have been harassed during immigration interviews and their HIV status has been inappropriately disclosed by immigration officials. Positive sexual minorities visiting the US have been forced to lie about their HIV status. They may even fear the consequences of bringing their life-saving medications with them, thus weakening their body’s ability to fight the infection and increasing HIV-resistance once they do restart taking their medications.<sup>8</sup>
- While the possibility of receiving a waiver to the ban exists in principle, in practice the bureaucracy LGBT persons who are HIV positive must negotiate in order to seek a waiver stands as a significant deterrent. The heartbreaking result is that persons living with HIV/AIDS may be unable to visit their loved ones, and families may be torn apart when, for example, during the mandatory medical exam for immigration, one family member tests positive and is refused entry to the US, while the rest of her or his family are able to proceed.
- Ultimately, the US HIV immigration ban unfairly sets people with HIV apart from those with other diseases and disabilities. It plays into hostility and hatred toward persons living with HIV/AIDS, and bolsters the homophobia which is its all-too-frequent companion.

## How does the US HIV Immigration Ban violate human rights?

- When the US government restricts movement or deports persons simply because of their HIV status, it violates *the right to freedom of movement*.<sup>8</sup>
- When the US government requires mandatory testing, mandatory collecting and storing of information on people's HIV status, requires positive persons (or their doctors) to notify public authorities of their status, requires that the results of HIV tests be disclosed to public authorities, and other measures that infringes a person's confidentiality concerning her or his HIV status, where there is no public health emergency, it violates *the right to privacy*.<sup>9</sup>
- When the result of legislation is to intensify stigma so that it hinders HIV positive persons from accessing education, information, and health care, they are prevented from exercising their *rights to education, information, and the highest attainable standard of health*.<sup>10</sup>
- When US policy excludes a particular group without reasonable justification, it violates *the right to freedom from discrimination*.<sup>11</sup>
- When the US government forcibly removes a family member from the rest of the family, it *subjects persons to arbitrary interference with his [sic] privacy, family, home or correspondence, nor to attacks upon his honor or reputation*.<sup>12</sup>

1. Immigration and Nationality Act, 8 U.S.C. 1001, Section 212(a).

2. For a waiver, the applicant must demonstrate that he or she is not currently afflicted with symptoms of the disease; there are sufficient assets, such as insurance, that would cover any medical care that might be required in the event of illness while in the US; and that the visit will not pose a danger to public health in the US. For detailed instructions, please see [uscis.gov/e/graphics/publicaffairs/factsheets/hivfs.htm](http://uscis.gov/e/graphics/publicaffairs/factsheets/hivfs.htm).

3. See immigration factsheet at [thebody.com](http://thebody.com)

4. See Terrence Higgins Trust [www.tht.org.uk](http://www.tht.org.uk)

5. See in particular research studies conducted by the Canadian HIV/AIDS Legal Network at [www.aidslaw.ca](http://www.aidslaw.ca)

6. UNAIDS, *HIV/AIDS and Human Rights, International Guidelines* (January 6, 1998) 46, note 105.

7. 6See documentation by Terrence Higgins Trust: [www.advocacyonline.net/tht/sep04/content\\_camp\\_end\\_12.jsp](http://www.advocacyonline.net/tht/sep04/content_camp_end_12.jsp). Also see case studies in Jonathan Rauch, "Bad Blood: To Fight AIDS, Lift the ban on Immigrants with HIV," *Reason* (January 12, 2004). This document can be found at [www.reason.com/rauch/011204.shtml](http://www.reason.com/rauch/011204.shtml)

8. International Covenant on Civil and Political Rights (ICCPR) art. 12, and the Universal Declaration of Human Rights (UDHR), art. 13.

9. ICCPR art. 17

10. UDHR art. 26(2), and the International Covenant in Economic, Social, and Cultural Rights (ICESCR) arts. 12 and 13

11. ICCPR 2(1), and ICESCR\2(2).

12. 11 UDHR arts. 12 and 16, ICESCR art. 10, and ICCPR art. 23.