



U.S. Citizenship
and Immigration
Services

HQ 70/21.1.1
AD 04-05

Interoffice Memorandum

To: Regional Directors
Service Center Directors
District Directors
National Benefit Center Director

From: William R. Yates /S/ by Janis Sposato
Associate Director
Operations

Date: November 2, 2004

Re: Exception to Nonimmigrant HIV Waiver Policy for K and V Nonimmigrants
Adjudicator's Field Manual (AFM) Update: Chapter 41.3: Medical Waivers (AD 04-05)

The purpose of this memorandum is to clarify U.S. Citizenship and Immigration Services' (CIS) policy regarding eligibility for discretionary waivers of inadmissibility due to HIV infection for K and V nonimmigrants.

Section 212(a)(1)(A)(i) of the Immigration and Nationality Act (Act) states that any alien who is diagnosed to have a communicable disease of public health significance is inadmissible. The etiological agent for acquired immune deficiency syndrome (AIDS), or HIV infection, is specifically included in this provision. Section 212(g)(1)(A) of the Act further provides, in pertinent part, that the Secretary of the Department of Homeland Security (DHS) may waive such inadmissibility in the case of an alien who is the spouse or child of a United States citizen or lawful permanent resident.

As a matter of long-standing policy, DHS has, as a matter of discretion, considered applications for waiver of inadmissibility due to HIV infection for immigrant visa applicants and adjustment of status applicants. Through a series of policy memoranda, DHS has also articulated the limited circumstances under which it would consider an application by a nonimmigrant for such a waiver. As stated in the most recent memorandum dated October 17, 2002, DHS will consider applications for a waiver of inadmissibility due to HIV infection for nonimmigrants under two circumstances. First, CIS will consider individual waivers for nonimmigrants who seek to enter the United States for stays of 30 days or less for specific purposes that are considered humanitarian or public interest reasons. Second, CIS will consider blanket waivers for nonimmigrants who are attendees of certain designated international events held in the United States.

On December 21, 2000, the Legal Immigration Family Equity (LIFE) Act of 2000, Public Law 106-553, was enacted. The LIFE Act created, in part, special nonimmigrant K classifications for the spouse of a U.S. citizen (K-3) who is the beneficiary of a petition for alien relative classification and any dependent children (K-4). The LIFE Act also created the V nonimmigrant classification for certain spouses (V-1) of lawful permanent residents who are the beneficiary of a petition for alien relative classification and any dependent children (V-2 and V-3). These aliens are admitted to the United States as nonimmigrants for the purpose of awaiting petition approval, visa availability, and adjustment of status. The Act has long provided for nonimmigrant K classification for the fiancé(e) of a U.S. citizen (K-1) and any dependent children (K-2).

Eligibility for K or V nonimmigrant classification is based on the intention to immigrate as the spouse or child of a United States citizen or lawful permanent resident. As intending immigrants, they are required to complete a medical examination to establish admissibility under section 212(a)(1) of the Act. Because a waiver of inadmissibility is available at the time of adjustment of status, it is determined that K and V nonimmigrants will be exceptions to the above noted HIV waiver policy. Specifically, K and V nonimmigrants will be eligible to apply for a waiver of inadmissibility due to HIV infection in conjunction with their nonimmigrant visa application, or change of status application in the case of certain V nonimmigrants, regardless of their intent to remain in the United States for more than 30 days.

Accordingly, an alien applying for a K-1 visa as the fiancé(e) of a United States citizen, or the child of such an alien applying for a K-2 visa, may apply for a waiver of inadmissibility due to HIV infection under section 212(d)(3)(A) of the Act under standing procedures of that provision. An alien granted a waiver of inadmissibility as a nonimmigrant under section 212(d)(3)(A) will be required to reapply under section 212(g)(1)(A) at the time of adjustment of status.

An alien applying for a K-3 visa as the spouse of a United States citizen, or the child of such an alien applying for a K-4 visa, may apply for a waiver of inadmissibility under section 212(g)(1)(A) of the Act by filing Form I-601 with the DHS. An alien applying for a V-1 visa, or for change of status to V-1 classification, or the child of such an alien applying for a V-2 or V-3 visa or for change of status to V-2 or V-3 classification, may apply for a waiver of inadmissibility under section 212(g)(1)(A) of the Act by filing Form I-601 with the DHS.

DHS will consider such waiver applications under the same eligibility criteria applicable to immigrant visa and adjustment of status applications as set forth in Chapter 41.3(a) of the AFM. Those criteria include establishing that the alien has received counseling/education necessary to prevent the spread of the infection, the alien has made arrangements for medical care in the United States and the cost will not be borne by any government agency without the consent of that agency. Waiver applications under section 212(g)(1)(A) also must be presented to the Center for Disease Control and Prevention (CDC) for advisory review. DHS, in consultation with the CDC, may set

any additional terms and conditions on the approval of such a waiver as may be deemed appropriate. Failure to abide by the terms and conditions of a waiver granted under section 212(g)(1) of the Act will render the alien removable pursuant to the terms of section 237(a)(1)(c)(ii) of the Act.

Questions regarding this memorandum may be directed to Mark Rouse at HQ Office of Program and Regulation Development via DHS email, through appropriate channels.

Accordingly, the AFM is revised as follows:

1. Chapter 41.3(b) of the AFM is revised to include the following as the final bulleted paragraph:
 - **Nonimmigrant K and V applicants are exceptions to this policy as intending immigrants and are eligible to apply for a waiver of inadmissibility due to HIV infection.**

Fiancé(e)s and dependent children under K-1 and K-2 classification may apply for waiver under section 212(d)(3)(A) of the Act at the time they apply for K-1 or K-2 visas or for admission as K-1 or K-2 nonimmigrants. They will be required to apply for a permanent waiver under section 212(g)(1)(A) at the time of application for adjustment of status.

[Note: K-1 and K-2 nonimmigrants must go through this two-step process because the qualifying relationship for the 212(g)(1) waiver is not established until the K-1 nonimmigrant marries the petitioner. However, if the K-1 can qualify under through a different relationship (e.g. if the K-1 is also the mother of a USC child in addition to being the fiancé of a USC) then there is no need for two separate waiver applications and the 212(g)(1) waiver, if approved, can apply to both the nonimmigrant visa and the related adjustment of status.]

Spouses and dependent children under K-3, K-4, V-1, V-2 and V-3 classification may apply for waiver of inadmissibility due to HIV infection under section 212(g)(1) of the Act. V nonimmigrants may apply at the time of change of status, as appropriate.

K and V nonimmigrants applying for such a waiver must satisfy the same special criteria set forth in this chapter as immigrant visa and adjustment of status applicants applying for a waiver of inadmissibility due to HIV infection.

In addition, adjudicators should be aware of special issues that arise in such cases. First, there is the potential of fraud in such cases. Second, it is possible that the petitioner, and the beneficiary, may not have been aware of the alien's health status.

The adjudicator should solicit from the petitioner information as to whether he or she was aware of the alien's health status and whether, under the circumstances, he or she still wishes to proceed with the marriage and/or petition. [Note: frequently aliens are unaware of their HIV status until the blood test required by the immigration medical examination.] See also Chapter 37 of this Field Manual for procedures for K and V classification.

2. The AFM Transmittal Memorandum button is revised by adding as an entry, in numerical order, to read:

<u>Update Number and Date</u>	<u>Chapter</u>	<u>Topics</u>
AD 04-05 [Insert date of memorandum]	41.3(b)	Adds guidance on waiver for HIV infected K and V nonimmigrants.

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