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***2418 6. USCIS Provides Guidance on Waiver Applications (and Associated Benefits) by Those with HIV Infection**

U.S. Citizenship and Immigration Services (USCIS) has released a memorandum to USCIS executive leadership from Associate Director of Refugee, Asylum and International Operations Lori Scialabba, Acting Associate Director of Domestic Operations Donald Neufeld, and Office of Policy and Strategy Acting Chief Pearl Chang providing guidance on waiver of inadmissibility (and associated benefit requests) where the applicant has been diagnosed with human immunodeficiency virus (HIV) infection. The memorandum directs USCIS officers to hold in abeyance any waiver application (or associated benefit request) which would be denied under current law if the only ground of inadmissibility is that the applicant has been diagnosed with HIV infection unless the applicant is eligible for a waiver of inadmissibility and USCIS determines that, as a matter of discretion, the waiver should be granted.

This directive, which was effective immediately, was prompted by the Department of Health and Human Services' (HHS) Centers for Disease Control and Prevention's (CDC's) issuance of a proposed rule which would revise 42 CFR Part 34 to remove HIV infection from the definition of "communicable disease of public health significance." [FN23] Under INA § 212(a)(1)(A)(i) [8 USCA § 1182(a)(1)(A)(i)], aliens infected with a communicable disease of public health significance are inadmissible into the U.S. The United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008 [FN24] removed language from that statutory provision which had previously mandated that HIV be on the list of such diseases, thus permitting the HHS to issue the proposed rule change.

The guidance in this memorandum, entitled "Public Law 110-293, 42 CFR 34.2(b), and Inadmissibility Due to Human Immunodeficiency Virus (HIV) Infection" and dated September 15, 2009, rescinds an earlier August 26, 2008, memorandum with the same title which was not released to the public. The August 26, 2008 memorandum advised USCIS officers that, until the HHS amends 42 CFR § 34.2(b) to remove HIV infection, officers are required to continue to consider HIV as a communicable disease for which a waiver is required. The September 15, 2009, memorandum advises USCIS officers that, should the proposed change to 42 CFR § 34.2(b) be adopted, HIV will no longer render an alien inadmissible but that, until such time, the current version of 42 CFR § 34.2(b) continues in effect and officers must continue to find applicants who test positive for HIV infection inadmissible. Such applicants may, however, apply for a waiver of inadmissibility. USCIS officers are advised that, if they find that such an applicant qualifies for the waiver, they may, in their discretion, grant the waiver and, if eligible, any benefits application.

USCIS officers are instructed that, where an HIV-positive applicant does not file for a waiver but may be eligible for one, the officer should issue a request for evidence (RFE) advising the applicant that the HHS has proposed removing HIV infection from the list of communicable diseases that render the applicant inadmissible and that, if this amendment is adopted, the applicant will no longer be inadmissible due to HIV infection. In ad-