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07/06/99 10:19:00 AM

Record Type: Record

To: Mary.E.Giovagnoli@intmail.usdoj.gov, J.Kelly.Ryan@intmail.usdoj.gov, Irene Bueno/OPD/EOP

cc: See the distribution list at the bottom of this message

Subject: Re[2]: HIV + refugees/Mtg with Michael Myers

I've got a meeting from 2-4; could we do this call at 4 pm on Wednesday instead? I'm cc'ing INS OGC for their availability.

Scott, it sounds like you have a better feel for Michael's concerns. I think all that INS is prepared to say on Thurs. is that we've issued revised field guidance for refugees, keeping the existing 3-prong test, and that we will be looking at revising the test generally in an upcoming reg. I don't think that we want to signal the content of that upcoming reg., other than to say that (i) we will look to combine the first 2 prongs, since they are redundant, and (ii) we're looking at the 3rd prong in light of our administrative experience and increased knowledge about HIV/AIDS over the last 10+ years. We could also say, if asked, that we don't think that the 3rd prong is legally impermissible as a de facto "public charge" test. Is Michael looking for something more?

Reply Separator

Subject: Re: HIV + refugees/Mtg with Michael Myers

Author: Scott_Busby@nsc.eop.gov_at_inetgw2 at wtgate

Date: 7/2/99 7:39 PM

Weds at 3 p.m. is good with me. We can use the same conf. code #, 757-2104 x5643. We should also make sure to have someone from INS General Counsel on the call as the issue that I think Michale would like to discuss is a legal one to a significant extent.

Irene Bueno

07/02/99 05:33:06 PM

Record Type: Record



OFFICE OF NATIONAL AIDS POLICY
EXECUTIVE OFFICE OF THE PRESIDENT
THE WHITE HOUSE

FACSIMILE TRANSMITTAL SHEET

TO:

Irene Breno

FROM:

Todd Summers

COMPANY:

DATE:

FAX NUMBER:

6-5581

TOTAL NO. OF PAGES INCLUDING COVER:

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RE:



URGENT



FOR REVIEW



PLEASE COMMENT



PLEASE REPLY



PLEASE RECYCLE

NOTES/COMMENTS:

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary
Office of Public Health and ScienceAssistant Secretary for Health
Surgeon General
Washington, D.C. 20201

MAY 21 1999

The Honorable Doris Meissner
Commissioner
Immigration and Naturalization Service
425 I Street, N.W.
Washington, D.C. 20536

Dear Ms. Meissner:

On behalf of the Secretary of Health and Human Services Donna Shalala, let me thank you for your attention to the health needs of refugees seeking entry to the United States. I understand that you are interested in obtaining information related to the programs that refugees who test positive for the human immunodeficiency virus (HIV), are eligible to receive including the Medicaid program, the Refugee Medical Assistance (RMA) program, and the Ryan White CARE Act (RWCA).

RMA provides for the health care of low-income refugees during their first eight months in the United States for those individuals not covered by Medicaid (primarily, single adults and couples without children). This coverage includes primary health care and some ancillary support services and is substantially equivalent to those services provided by Medicaid.

All States extend Medicaid eligibility to pregnant women with incomes below 185 percent of the Federal poverty level; children less than age 6 in families with income below 133 percent of the Federal poverty level; children between ages 6 and 15 in families with income below 100 percent of the Federal poverty level; and, by 2002, children between ages 16 and 18 in families with income below 100 percent of the Federal poverty level. Many States currently provide coverage to all children under age 19 and to a higher percent of the Federal poverty level than required under Federal law.

In addition to the groups eligible for Medicaid described in the preceding paragraph, an individual may be eligible for Medicaid if aged or determined to be disabled. To be determined disabled, the individual must at a minimum meet the disability definition used by Social Security Administration for the Supplemental Security Income program. This definition requires that the applicant be unable to work because of a physical or mental condition which has lasted or is expected to last for 12 months or result in death. An individual who is HIV-positive but without specific manifestations of AIDS or evidence that because of his/her condition is unable to work will not be found disabled.

Page 2 - The Honorable Doris Meissner

Once an individual is found to meet the Medicaid financial and categorical criteria (i.e. a member of a group such as pregnant women, dependent children, disabled persons and the aged), the applicant, if an alien, must meet the restrictions on eligibility of aliens. All aliens entering the United States on or after August 22, 1996, are barred from receipt of Medicaid, except for treatment of an emergency medical condition, for five years after entry. Refugees and certain other groups are exempt from this bar for seven years after entry to the United States. Therefore, a Medicaid eligible refugee may receive full Medicaid benefits.

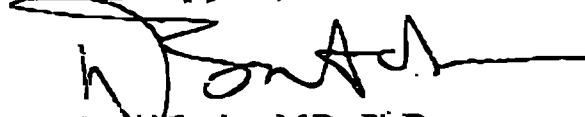
In addition to RMA and Medicaid, refugees may also be eligible for a variety of services supported through the Ryan White CARE Act (RWCA), which is administered by the Health Resources and Services Administration of the Department of Health and Human Services. These services include primary care, prescription drug benefits, case management, and translation services. Though the range and availability of CARE Act funded services varies from area to area, we are confident that a basic level of HIV-related care is available in most communities. Ryan White CARE Act funds are not restricted from serving refugees or immigrants.

Our Office of Refugee Resettlement is working with your staff and those from other agencies of HHS to develop a pilot program for serving HIV-positive refugees. This prospective initiative may include training of private resettlement agency staff in HIV-related issues, support for accessing community-based HIV resources, and other components to improve awareness of and access to the broad array of publicly and privately supported programs for individuals living with HIV and AIDS. We look forward to developing this pilot and jointly assessing the benefits of an enhanced service program that will utilize service providers and materials that are linguistically and culturally appropriate for the refugee populations.

In our view, the country's commitment to providing services to HIV-positive individuals provides adequate support for refugees who are HIV-positive upon their admission to the United States and during their transition to full participation in our society.

Thank you again for your continuing efforts to provide for those individuals most in need. We stand ready and willing to continue our work together on their behalf.

Sincerely yours,



David Satcher, M.D., Ph.D.
Assistant Secretary for Health and
Surgeon General

Fact Sheet

Administration for Children and Families

Office of Refugee Resettlement

Refugee Assistance Program

Since 1975, over 2 million refugees have been resettled in the United States. In order to be designated as refugees, people must have a well-founded fear of persecution in their country of origin because of race, religion, nationality, membership in a particular social group, or political opinion. In order to be admitted to the United States, refugees usually must have a special tie to the U.S., such as: former employment by the U.S. Government or a U.S. company; previous education; close relatives living in the U.S.; and/or persecution specifically related to an individual's association with the U.S. Government. Refugees may also be admitted on humanitarian grounds. In FY 1997, nearly 82,000 refugees, entrants, asylees from Northern Iraq, and Amerasians were admitted to the U.S. for resettlement.

The major goal of this program is to provide assistance in order to help refugees achieve economic self-sufficiency and social adjustment within the shortest time possible following their arrival in the U.S. For FY 1999, \$435 million is available through five different programs: cash and medical assistance, social services, preventive health services, the voluntary agency matching grant program, and the targeted assistance grant program. The Administration has requested \$443 million for these programs for FY 2000.

Cash and Medical Assistance

Cash and medical assistance are available to needy refugees -- who are not eligible for other cash or medical assistance programs, such as Temporary Assistance to Needy Families (TANF), Supplemental Security Income (SSI), or Medicaid -- who arrive in the U.S. with no financial resources. This refugee assistance, if needed, is paid entirely from federal funds and is available for eight months following arrival in the U.S.

ACF also reimburses states for the costs incurred in the case of refugee children in the U.S. who are identified in countries of first asylum as unaccompanied minors. Depending on their individual needs, refugee children are placed in foster care, group care, independent living, or residential treatment.

Social Services

To help refugees become self-supporting as quickly as possible, ACF also provides funding to state governments and private, non-profit agencies which are responsible for providing services, such as English language and employment training. Refugees receiving cash and medical assistance are required to be enrolled in employment services and to accept offers of employment.

Preventive Services

For FY 1998 and FY 1999, funds were provided to state public health departments for preventive health assessment and treatment services to refugees for protection of the public health against contagious

diseases.

Voluntary Agency Matching Grant Program

This program requires match from private funds or in-kind goods and services. During the refugees' first four months in the U.S., several voluntary resettlement agencies take responsibility for resettling refugees and assisting them to become self-sufficient through private initiatives without recourse to public assistance.

Targeted Assistance Grant Program

This program targets additional resources to communities facing extraordinary resettlement problems because of a high concentration of refugees and a high use of public assistance by the resident refugee population. Special efforts are directed to those refugees who depend upon public assistance.

Refugee Population Highlights

From FY 1983 through FY 1997, over 1.4 million refugees have been resettled in the U.S. The five States with the largest refugee arrivals for this period were: California (371,770); New York (205,556); Texas (73,411); Florida (125,955); and Washington (58,583).

From FY 1983 through FY 1997, more Southeast Asians initially resettled in California than any other State (36 percent). For the same period, more non-Southeast Asians resettled in New York than any other State (22 percent). The majority of refugees initially resettled in California were from Vietnam (41 percent), followed by refugees from the former Soviet Union (21 percent). Seventy-two percent of the refugees initially resettled in New York were from the former Soviet Union, followed by refugees from Vietnam (eight percent). Seventy-eight percent of refugees initially resettled in Florida were from Cuba and Haiti. In Texas, refugees from Vietnam (56 percent) and refugees from the former Soviet Union (five percent) made up the largest proportion. In the State of Washington, refugees from Vietnam (35 percent) and refugees from the former Soviet Union (34 percent) made up the largest proportion.

Distribution by State for FY 1997 Refugee Arrivals

In FY 1997, 81,760 refugees were resettled in the U.S. The five States with the largest refugee arrivals for this period were: New York (11,083); California (11,069); Florida (8,975); Washington (4,709); and Illinois (4,410). The majority of arrivals resettled in New York were from the former Soviet Union (72 percent). The majority of refugees resettled in California were also from the former Soviet Union (49 percent), followed by refugees from Vietnam (18 percent). Seventy-two percent of the refugees initially resettled in Florida were from Cuba, with another 15 percent from the former Yugoslavia. Sixty-five percent of the refugees initially resettled in Washington were from the former Soviet Union, with another 15 percent from the former Yugoslavia. In Illinois, refugees from the former Yugoslavia (59 percent) made up the largest proportion, followed by refugees from the former Soviet Union (27 percent).

Temporary Assistance in Time of Crisis

The Social Security Act authorizes the Department of Health and Human Services (HHS) to provide temporary assistance to United States citizens and their dependents who are identified by the Department of State as needing to return from a foreign country to the U.S., but do not have resources to do so. This financial assistance is repayable to the U.S. Government.

HHS administers the Repatriation Program. If an American citizen in a foreign country becomes ill, is without funds, or needs to be returned to the U.S. because of a threatening situation in a foreign country, HHS will provide needed services.

For situations involving the evacuation of a group of Americans from a foreign country, HHS may be requested to establish reception sites as well as provide individual assistance. The Administration for Children and Families (ACF) operates both individual and group repatriation programs through agreements with state agencies.

A National Emergency Repatriation Plan is also established by HHS in coordination with other involved federal agencies, voluntary organizations, and states to implement large scale repatriation operations in the event of a national security emergency. Under the National Emergency Repatriation Plan, states carry out the operational responsibility for the reception, temporary care, and onward transportation of those returned to the U.S. States include emergency repatriation in their overall Emergency Operations Plan used to respond to emergency situations.

February 1999

U.S. REFUGEE RESETTLEMENT BENEFITS

Resettlement benefits for refugees arriving in the U.S. are provided through a combination of public and private funding. Public funding is largely coming from the Federal Government, however some States provide additional funds. The private non-profit voluntary agencies which place refugees in communities raise considerable funding privately, and recruit volunteers, contributing generously to the cost of resettlement.

Upon arrival in the U.S., the voluntary resettlement agencies provide reception and placement services which include: securing housing, basic furnishings, clothing, food, general orientation to public services and access to the program of refugees services in the State of resettlement.

Benefits for newly arriving refugees include transitional cash assistance, health benefits, and a wide variety of social services, which include: employment services such as skills training, job development, orientation to the workplace and job counseling. The focus is first and foremost on finding employment as soon as possible that will lead to economic self-sufficiency for the family. Often this requires more than one member of the family becoming employed, and special attention is paid to ensure that women have equal access to training and services leading to job placement. To further assist in family adjustment to the U.S. and in the transition to employment, additional services are offered such as family strengthening, youth and elderly services, counseling and mental health services.

Transitional cash assistance benefits are provided to refugees on the basis of family composition. Single adults and childless couples are eligible for the refugee cash assistance program for a time period up to the end of their eighth month in the U.S. They are expected to be employed by that time. However, families with children under 18 years of age are eligible for the mainstream welfare program that assists unemployed families with children. The amount of the monthly cash assistant grant is established by the individual States, is based on family size, and includes support services such as child care and transportation. The recent revisions to U.S. welfare laws limit cash assistance benefits to families from federal funds to a total of five years. States may use State funds to augment these guidelines.

Health benefits follow similar rules. Singles and childless couples are eligible for the refugee medical assistance program for their first eight months in the U.S. Even if they become employed early after arrival, they may receive health benefits for their first eight months. Families are eligible for the Medicaid program which is the mainstream health benefits program

for unemployed and low-income families in the U.S. Refugees who are eligible for Medicaid may be covered for longer than five years if a State chooses to do so. The cash and medical benefits available in each State may vary in terms of time limits and benefits, providing they meet certain Federal guidelines.

Social services through a refugee services system are available for the first five years after arrival in the U.S. However, the program of services is structured to promote employment and self-sufficiency much earlier than five years. Services are also provided following job placement to ensure continued employment, and to enhance opportunities for advancement. There are continuing services beyond five years on a limited basis for those refugees who are identified as difficult to employ. They are assisted in overcoming barriers and learning new skills that will improve their chances for employment.

Refugee programs use case managers to track the progress of each case and to refer refugees to the services they need, when they need them. Service providers do not normally accept a refugee client unless they are referred by their case manager. The use of case managers has been a strong factor in increased self-sufficiency.

Refugees who are elderly or disabled receive benefits from the Social Security Administration, the same as Americans. However, the recent changes by Congress limit the eligibility of non-citizens to their first seven years in the U.S. Time limits for non-citizens do not apply once they become U.S. citizens. The refugee program offers citizenship classes to assist refugees who wish to study for the citizenship test.

Over the years, the U.S. has accepted a number of unaccompanied refugee minors. These children are placed in special foster care programs in certain States, and are provided the regular foster care services of that State as well as supplemental services that are culturally and linguistically appropriate. As the children near adulthood, they are assisted in the transition to independent living and with career choices. The primary focus of the unaccompanied minors program has always been to work toward reuniting these children with relatives whenever possible.

December 18, 1998

MEMORANDUM

Waiver of Exclusion for HIV-positive Refugees

The InterAction Committee on Migration and Refugee Affairs ("CMRA") is a coalition of national non-governmental organizations that work in partnership with the United States Government to rescue and resettle refugees. CMRA presents this memorandum of law with the conviction that the Immigration and Naturalization Service ("INS") should omit from any proposed rule on admission of HIV-positive refugees considerations of ability to pay medical costs, because such a criterion would be: a "public charge" exclusion that is contrary to the plain language, legislative intent, and legislative purpose of the Refugee Act of 1980; arbitrary and capricious; and contrary to U.S. obligations under international refugee protection agreements. The HIV waiver policy would undermine refugee protection by resulting in refoulement of persons already adjudicated by the U.S. to have a "well-founded fear of persecution."

Since the mid-1980s, the United States has maintained, in one form or another, an exclusion for reasons of public health on admission of aliens infected with HIV ("HIV-positive aliens"), the precursor to Acquired Immune Deficiency Syndrome ("AIDS").¹ While this bar applies to all categories of aliens under the Immigration and Nationality Act ("INA"), the Attorney General is authorized to waive the INA's public health exclusions for refugees, including the HIV bar, because of "humanitarian purposes, to assure family unity, or when it is

¹ Section 212(a)(1)(A)(i) of the INA, 8 U.S.C. § 1182(a)(1)(A)(i), classifies any alien who is infected "with the etiologic agent for acquired immune deficiency syndrome" to be inadmissible.

otherwise in the public interest."² As the Attorney General's delegate for the exercise of this waiver authority, since 1988 the INS has required an HIV-positive refugee applying for a waiver of the HIV exclusion to establish that:

"(1) the danger to the public health of the United States created by his or her admission is minimal; (2) the possibility of the spread of the infection created by his or her admission to the United States is minimal; and (3) there will be no cost incurred by any level of government agency of the United States without the prior consent of that agency."³

As recently as 1995, the INS reaffirmed these conditions for exercise of the waiver of the HIV ban for refugees ("the INS HIV Waiver Policy").⁴ CMRA has learned that INS is considering incorporating these three criteria into a proposed regulation, the details of which are still under consideration.

Congress did not authorize the Attorney General to consider ability to pay medical costs in the exercise of her discretion to waive the HIV exclusion for refugees, and indeed specifically excluded refugees from application of the "public charge" ground of exclusion.⁵ Consideration of ability to pay medical costs has long been a "public charge" issue, from which Congress intended refugees to be exempt. Estimates from the United Nations High Commissioner for Refugees ("UNHCR") suggest that the third or "no governmental cost" prong of the INS HIV Waiver Policy operates to bar entry of persons adjudicated by the United States

² INA § 207(c)(3); 8 U.S.C. § 1157(c)(3).

³ See Cable from James A. Puleo, INS Assistant Commissioner for Examinations, to INS Field Offices (Mar. 2, 1988), *reprinted in* 65 Interpreter Releases 239 (Fed. Publications 1988) ("Puleo Cable").

⁴ Memorandum from T. Alexander Aleinikoff, Executive Associate Commissioner of the INS, Regarding Immigrant Waivers for Aliens Found Excludable Under Section 212(a)(1)(A)(i) of the Immigration and Nationality Act Due to HIV Infection (Sept. 6, 1995), *reprinted in* 72 Interpreter Releases 1347 (Fed. Publications 1995) ("Aleinikoff Memo").

⁵ INA § 207(c)(3); 8 U.S.C. § 1157(c)(3).

to have a "well-founded fear of persecution," notwithstanding the statutory ban on application of the "public charge" exclusion to refugees.⁶ CMRA thus respectfully requests that INS reconsider the legality and propriety of including such "public charge" considerations in determinations of whether the Attorney General should exercise her discretion to waive the HIV ground of exclusion for refugees. INS should omit the "no governmental cost" prong of its HIV Waiver Policy from any formal agency rule it promulgates because this criterion is: (1) a "public charge" exclusion that is contrary to the plain language, legislative intent, and legislative purpose of the Refugee Act of 1980; (2) arbitrary and capricious; and, (3) contrary to U.S. obligations under international agreements dealing with refugee protection.⁷

BACKGROUND

The history of the exclusion of HIV-positive aliens dates to the mid-1980s and provides some useful insight into what authority the INS was granted to add to the language of INA § 212(a)(1)(A)(i). Section 212(a)(1)(A)(i) provides for the exclusion of any alien who has

⁶ Under § 101(a) of the INA, 8 U.S.C. § 1101(a), Congress defined a refugee in terms almost identical to those used in international treaties on refugee protection. That definition of a refugee includes:

"(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and unable or unwilling to avail himself or herself of the protection of that country because of persecution or a *well-founded fear of persecution* on account of race, religion, nationality, membership in a particular social group, or political opinion * * *." (Emphasis added).

⁷ CMRA assumes that criteria 1 and 2 of the INS HIV Waiver Policy may be addressed through education of HIV-positive refugees on the modes of transmission of HIV, and thus does not take issue with either at this time.

been determined to carry a "communicable disease of public health significance."⁸ While the exact language of this exclusion has changed over the years, the immigration laws have provided for the exclusion of carriers of contagious diseases that threaten the public health of the United States for over a century. For most of that time, and for most diseases, the U.S. Public Health Service ("PHS") has been charged with determining which diseases fall into the category of "communicable disease[s] of public health significance."⁹

The first proposal to add AIDS to the list of contagious diseases for which an alien may be excluded under the INA was made by the Department of Health and Human Services ("HHS") in April 1986.¹⁰ While that proposal was pending, in June of 1987, Senator Jesse Helms succeeded in obtaining unanimous Senate approval for an initiative to statutorily mandate addition of HIV to the list of "dangerous contagious diseases."¹¹ Senator Helms

⁸ 8 U.S.C. § 1182(a)(1)(A)(i). Prior to revision of this ground of exclusion in 1990, aliens infected with a "dangerous contagious disease" were excludable. *See supra* for a discussion of the 1990 amendments to Section 212(a).

⁹ *See generally* "Grounds for Exclusion of Aliens Under the Immigration and Nationality Act: Historical Background and Analysis," H.R. Doc. 89-263, 100th Cong., 2d Sess. 73-78 (Sept. 1988).

¹⁰ "Medical Examination of Aliens (AIDS)," 51 Fed. Reg. 15354 (1986).

¹¹ In a comprehensive review of grounds for exclusion of aliens under U.S. immigration law, the House of Representatives Committee on the Judiciary described the history of the statutory listing of HIV as an excludable disease:

"On May 31, 1987, according to Senator Jesse Helms, President Reagan 'directed the Secretary of Health and Human Services to finalize an April 23, 1986 proposed rule adding AIDS to the list of dangerous contagious diseases.' Senator Helms noted this as an argument for his amendment to H.R. 1827, the fiscal year 1987 Supplemental Appropriations bill, requiring the President to add HIV infection to the list of dangerous contagious diseases on or before August 31, 1987. While the need for the amendment was questioned during the floor debate, it passed the Senate on June 2 by a unanimous vote of 96 yeas and was accepted in a modified form in the legislation enacted on July 11, 1987 as Public Law 100-71." *Grounds for Exclusion, supra*, at 85-86.

accomplished this by offering a modified Senate floor amendment to the 1987 Supplemental Appropriations Act to direct the Secretary of HHS to list HIV as an excludable disease.¹² Under this pressure, HHS finalized its proposed regulations in June 1987.¹³ According to the Secretary of HHS: "[w]ith our current state of knowledge about HIV infection, * * * the exclusion of applicants with HIV infection is justified."¹⁴ The status of HIV as an excludable "dangerous contagious disease" remained unchanged from 1987 until the passage of the Immigration Act of 1990.

In the Immigration Act of 1990, Congress extensively revised the health-related grounds for exclusion of aliens. The revised public health ground excluded any alien "who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance * * *."¹⁵ Congress's intent in revising the public health ground of exclusion was to "insure that this exclusion will apply *only* to those diseases for which admission of aliens with such diseases would pose a public health risk to the United States."¹⁶ The HHS Secretary was instructed to determine the list

¹² See 133 Cong. Rec. S7415 (daily ed. June 2, 1987). Section 518 of the Supplemental Appropriations Act, Pub. L. 100-71, 101 Stat. 391, 475 (July 11, 1987) provides that "[o]n or before August 31, 1987, the President, pursuant to his existing power under section 212(a)(6) of the Immigration and Nationality Act, shall add human immunodeficiency virus infection to the list of dangerous contagious diseases contained in title 42 of the Code of Federal Regulations."

¹³ "Medical Examination of Aliens (AIDS), 52 Fed. Reg. 21532 (1987) (to be codified at 42 C.F.R. § 34).

¹⁴ "Medical Examination of Aliens," 52 Fed. Reg. 32540, 32543 (Aug. 28, 1987) (final rule).

¹⁵ Pub. L. 101-649, § 601, 104 Stat. 4978, 5067 (Nov. 29, 1990) *amending* INA § 212(a)(1)(A)(i); 8 U.S.C. § 1182(a)(1)(A)(i).

¹⁶ H.R. Conf. Rep. No. 955, 101st Cong., 2d Sess. 119 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6784, 6793 (emphasis added).

of "communicable diseases of public health significance" on the basis of "current epidemiological principles and medical standards."¹⁷

The HHS Secretary in the Bush Administration, Dr. Louis Sullivan, published his recommendations in the Federal Register in early 1991, proposing to remove all diseases from the exclusion list except infectious tuberculosis.¹⁸ In May 1991, one week prior to taking effect, the Bush Administration pulled back the proposal citing hostile public reaction, and adopted an interim rule retaining HIV infection as a ground for exclusion.¹⁹ The status of HIV as an excludable disease under INA § 212(a)(1)(A)(i) remained unchanged until President Clinton took office.

Campaigning on a promise to lift the HIV exclusion, President Clinton indicated that he would remove HIV administratively from the list of excludable diseases. Shortly after President Clinton assumed office in early 1993, the PHS prepared a final rule to remove HIV from the list of excludable diseases.²⁰ Opponents of removing HIV from the list of exclusions quickly moved to amend the National Institutes of Health Revitalization Act of 1993 to codify the existing interim ban on admission of HIV-positive aliens into the United States.²¹ After a frequently bitter debate, the National Institutes of Health Revitalization Act of 1993 was passed

¹⁷ *Id.*

¹⁸ 56 Fed. Reg. 15258 (Jan. 23, 1991).

¹⁹ 56 Fed. Reg. 25000 (May 31, 1991).

²⁰ "Debate Again Erupts Over Excluding Aliens Infected With AIDS Virus," 70 Interpreter Releases 210 (Fed. Publications Feb. 22, 1993).

²¹ *See* 139 Cong. Rec. S 1762 (daily ed. Feb. 18, 1993).

by the Congress and signed into law by the President.²² While the NIH Revitalization Act statutorily required that HIV be listed on the excludable disease list, there is no indication in the record that Congress intended to do anything other than prevent the Clinton Administration from administratively removing HIV from the exclusion list.²³

Thus, despite the changing statutory basis for listing HIV as an excludable disease, administrative guidelines issued by INS headquarters in 1988, and reaffirmed in 1995, on criteria for the grant of waivers of the HIV exclusion, remain in effect to this day. Those guidelines provide that the Attorney General's waiver authority under INA § 207(c)(3) will be exercised for HIV-positive refugees only where the refugee can establish that:

"(1) the danger to the public health of the United States created by his or her admission is minimal; (2) the possibility of the spread of the infection created by his or her admission to the United States is minimal; and (3) there will be no cost incurred by any level of government agency of the United States without the prior consent of that agency."²⁴

²² National Institutes of Health Revitalization Act of 1993, Pub. L. No. 103-43, 107 Stat. 122 (Jun 10, 1993).

²³ *See, e.g.*, 139 Cong. Rec. H2739 (daily ed. May 25, 1993) (Statement of Rep. Mazzoli):

"Regulations, policies, and practices have developed with regard to waivers of exclusion, testing requirements, and health-related questioning. The conferees, by requiring that HIV be included among the list of excludable diseases until such time as Congress shall remove it, have taken the position that waiver, questioning, and testing decisions should continue to be left to the discretion of the Attorney General. Thus the conference report does not codify any current policies or practices concerning those authorities." *See also id.* at H2736 ("[w]aiver authority under the current law remains unchanged.") (Statement of Rep. Bliley).

²⁴ *See supra* Puleo Cable, 65 Interpreter Releases at 239; Aleinikoff Memo, *supra*, 72 Interpreter Releases at 1347.

These guidelines were developed in the context of the "legalization" program pursuant to the Immigration Reform and Control Act of 1986 ("IRCA").²⁵ They were intended primarily for undocumented immigrants applying for amnesty under IRCA, not for refugees fleeing persecution. Indeed, these guidelines are contrary not only to the spirit but also the letter of U.S. refugee law, and thus should be amended before including them in any formal agency rule the INS may contemplate promulgating.

DISCUSSION

I. THE INS HIV WAIVER POLICY IMPERMISSIBLY ADDS A PUBLIC CHARGE CRITERION TO THE WAIVER DETERMINATION FOR REFUGEES.

A. The Plain Language of the Refugee Act of 1980 Exempted Refugees from the "Public Charge" Ground of Exclusion.

When Congress enacted the Refugee Act of 1980, it established a "permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and * * * provide[d] comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted."²⁶ Congress reiterated in the Refugee Act:

"the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary transportation and processing admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States."²⁷

²⁵ Pub. L. 99-603, 100 Stat. 3359 (Nov. 6, 1986).

²⁶ Pub. L. No. 96-212, § 101(b), 94 Stat. 102 (1980) (codified in scattered parts of 8 U.S.C.).

²⁷ *Id.* § 101(a).

To implement this policy, Congress, *inter alia*, delegated discretion to the Attorney General to waive for refugees some exclusions in the INA that operate to keep certain classes of aliens out of the United States.²⁸

In INA § 207(c)(3), Congress also *statutorily precluded* application to refugees of the INA's provisions excluding aliens on the basis that they are: (1) "likely at any time to become a public charge," (8 U.S.C. § 1182(a)(4)); (2) lack a labor certification (8 U.S.C. § 1182(a)(5)); or (3) lacked at the time of application a valid, unexpired visa and/or passport (8 U.S.C. § 1182(a)(7)(A)). Not only is it unnecessary for the Attorney General to waive the public charge, labor certification, and lack of visa or passport exclusions for refugees, Congress has *mandated* that such grounds "not be applicable to any alien seeking admission to the United States under this subsection * * *."²⁹ Those grounds of exclusion cannot be applied to refugees even if the Attorney General so desired. Ironically, the INS has recognized as much in the policy memorandum concerning its HIV Waiver Policy: "the public charge provisions do not apply to refugees" and "[r]efugees and individuals granted asylum who are applying for adjustment of status under section 209 of the Act are not subject to the public ground charge of excludability."³⁰ Thus, to the extent that the "no governmental cost" criterion of the INS HIV Waiver Policy is a "public charge," it conflicts with § 207(c)(3) of the INA and is thus unlawful.

B. Congress Clearly Considered Medical Costs To Be A Public Charge.

The plain language of the Refugee Act indisputably expresses Congress's intention that the "public charge" exclusion not be applied to refugees. While Congress did not

²⁸ See *id.* at § 201(b) (adding INA § 207(c)(3); 8 U.S.C. § 1157(c)(3)).

²⁹ INA § 207(c)(3); 8 U.S.C. § 1157(c)(3).

³⁰ Aleinikoff Memo, *supra*, 72 Interpreter Releases at 1353

expressly define what a "public charge" is for purposes of the INA or Refugee Act, its intent and purpose in enacting the Refugee Act (and making corresponding amendments to the INA) clearly demonstrates that Congress considered refugee medical costs to be subsumed in the "public charge" exclusion. Moreover, because Congress intentionally left the definition of a "public charge" to administrative regulation and practice, and ultimately the courts, to develop, the administrative and judicial definition of the term in the INA is presumed to have been endorsed by Congress at the time of enactment of the Refugee Act absent some affirmative indication to the contrary.³¹ Under those judicial and administrative interpretations, medical costs have long been considered a "public charge" issue.

Employing traditional tools of statutory construction, it is clear that Congress intended to preclude consideration of ability to pay potential medical costs as a ground for exclusion of refugees. Under those circumstances, where Congress has expressed a clear intent on an issue, the INS's HIV Waiver Policy, even if promulgated as a formal agency rule, is not entitled to the deference traditionally afforded reasonable interpretations of a statute entrusted to an agency to administer. Although the Supreme Court has held in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*³² and its progeny, that an agency's interpretation of the statute entrusted by Congress to it to administer is entitled to significant deference, that deference is not unbounded. Before an agency interpretation of a statute is afforded *Chevron* deference, it must be determined whether Congress has spoken to the particular issue in the statute the agency is purporting to interpret. As the Court noted in *Chevron*:

³¹ See, e.g., *Conroy v. Aniskoff*, 507 U.S. 511, 516-518 (1993) (applying well-established presumption that Congress is familiar with, and accepts, judicial construction of an act when it subsequently legislates in that area without affirmatively reversing judicial interpretations).

³² 467 U.S. 837 (1984).

"The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent [citing cases]. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."³³

It cannot be disputed that Congress exempted refugees from exclusion as "public charges." It is also clear that Congress understood and intended that medical costs be included within the sweep of the "public charge" exclusion.

1. The Statutory Factors To Be Used To Identify Likely Public Charges Include Medical Costs And Ability To Pay.

INS has phrased criterion 3 of its HIV Waiver Policy without reference to the term "public charge," but that cannot obscure the "public charge" nature of the test. Criterion 3 states that an HIV-positive refugee applicant must establish that "there will be no cost incurred by any level of government agency of the United States without the prior consent of that agency" in order for the Attorney General to exercise her discretion to waive the exclusion of HIV-positive aliens. According to INS guidance to Field Officers, HIV-positive refugees may satisfy criteria 3 by any of the following: proof that a hospital, research organization or other type of facility will provide care at no cost to the U.S. Government; proof of private insurance; formal consent by a U.S. government agency to provide medical treatment to the applicant; or proof of personal assets of the applicant sufficient to cover medical costs.³⁴

While Congress intentionally left the term "public charge" undefined in the INA,³⁵ section 212(a)(4) of the INA, (8 U.S.C. § 1182(a)(4)) lists the factors that a consular

³³ *Id.* at 843 n.9.

³⁴ Aleinikoff Memo, *supra*, 72 Interpreter Releases at 1351.

³⁵ *See* Grounds for Exclusion, *supra*, at 121 ("As [a] 1950 Senate Judiciary report recommended, the term 'public charge' has not been defined by statute. However, there has been

officer should take into account in determining whether an alien is "likely at any time to become a public charge." Those factors include age; health; family status; assets, resources and financial status; and education and skills.³⁶ The similarity between the factors to be taken into account under the "no governmental cost" criterion and the "public charge" determination indicates that they are in fact the same test.

2. *Judicial and Board of Immigration Appeals Opinions Confirm that Ability to Pay Medical Costs Is a "Public Charge" Issue.*

Because Congress intentionally left the term "public charge" undefined in the INA, it has fallen to the Board of Immigration Appeals ("BIA") and the courts to give content to the exclusion. A review of BIA and judicial decisions that have considered the definition of "public charge," demonstrates that the ability of an alien to pay his or her medical costs long has been a public charge issue. In keeping with administrative practice, the courts and BIA have kept issues of excludability on public health grounds separate from considerations of whether an alien could meet his or her health-related expenses. The latter traditionally has been part of the "public charge" analysis of admissibility.

The definition of a "public charge" has remained largely unchanged in both the INA and the administrative and judicial opinions that have considered the term. One of the leading cases to consider the term is *Wallis v. United States ex rel. Mannara*, in which the Second Circuit upheld a determination that an alien suffering from a cardiac problem and senility was likely to become a public charge.³⁷ The court reasoned that:

a sizeable body of case law interpreting what it does and does not mean in varying circumstances.").

³⁶ INA § 212(a)(4)(B); 8 U.S.C. § 1182(a)(4)(B).

³⁷ 273 F. 509 (2d Cir. 1921).

"[a] person likely to become a public charge is one whom it may be necessary to support at public expense by reason of poverty, insanity and poverty, *disease and poverty*, idiocy and poverty."³⁸

Similarly, the District Court in *Ex parte Orzechowska* found that a girl who was institutionalized in a state hospital was not a public charge, but *only* because her family had paid part of the cost of hospitalization and assured the court that it would reimburse the state for the balance.³⁹ Thus, the fact that she was being treated for a medical condition at public expense would have made her excludable as a public charge if the state were not adequately reimbursed for its expenses in treating her by her family. Other early cases also understood the costs of hospitalization or institutionalization to be a "public charge" issue.⁴⁰

While there have been few recent judicial cases considering the issue of excludability as a "public charge" on the basis of potential medical costs, more recent opinions of the Board of Immigration Appeals are consistent with these judicial precedents in defining medical costs as a public charge, not a public health, issue. For example, in *Matter of B*, the BIA held that an alien admitted to an Illinois mental institution at public expense was not deportable as a public charge because the state provided free mental care to all of its residents.⁴¹ Implicit in its holding was the BIA's view that hospitalization at public expense was a public charge issue in

³⁸ *Id.* at 511 (emphasis added) (quoting *Ex parte Mitchell*, 256 F. 229 (N.D.N.Y. 1919)).

³⁹ 23 F.Supp. 428, 429 (D. Oregon 1938).

⁴⁰ See, e.g., *Canciamilla v. Haff*, 64 F.2d 875 (9th Cir. 1933) (excluding epileptic alien as public charge because committed to state hospital at public expense); *Fernandez v. Nagle*, 58 F.2d 950 (9th Cir. 1932) (alien who was committed to home for the aged and infirm because too weak and sick to work was a public charge); *United States ex rel. Markin v. Curran*, 9 F.2d 900 (2d Cir. 1925) (excluding alien suffering from syphilis as likely to become a public charge); *United States ex rel. La Fata v. Williams*, 204 F. 848 (S.D.N.Y. 1913) (excluding alien as likely to become a public charge due to valvular heart condition).

⁴¹ 3 I & N. Dec. 323 (Sept. 10, 1948) (Approved by Atty. Gen).

general. And in *Matter of Harutunian*, a decision that extended the analysis of *Matter of B*, the BIA stated that in the public charge analysis, an alien's physical and mental condition as it affects his or her ability to earn a living is of major significance.⁴² Finally, in a more recent BIA opinion, the Board stated that:

"The traditional test applied by the Service to determining whether an alien is likely to become a public charge is a 'prediction based on the totality of the alien's circumstances' as presented in the individual case." [Citation omitted].

* * * *

"[F]actors that have been considered are the alien's age, capacity to earn a living, *health*, family situation, work history, *affidavits of support*, and other relevant factors."⁴³

Thus, a longstanding and unbroken chain of judicial and administrative interpretations of the scope of the "public charge" exclusion confirms that ability to pay potential medical costs is a "public charge" issue. And, as noted above, barring an affirmative expression of a contrary intent, Congress is presumed to have been aware of and endorsed these longstanding constructions of the scope of the "public charge" exclusion in subsequent legislation amending the INA, such as the Refugee Act.

3. *The History of the 1990 Immigration Act and Implementing Regulations Also Confirm that Medical Costs Are A Public Charge Issue.*

Further evidence of the public charge nature of ability to pay medical costs is found in the legislative history of the Immigration Act of 1990 and the PHS regulations promulgated to implement the statute.⁴⁴ The 1990 Immigration Act extensively revised 8 U.S.C. § 1182(a), the health-related exclusion of aliens, to remove specific disorders in favor of a focus on the dangers that may be posed by physical and mental disorders. In the change most pertinent

⁴² 14 I. & N. Dec. 583, 588 (Feb. 28, 1974).

⁴³ *Matter of A*, 19 I. & N. Dec. 867, 869 (Dec. 29, 1988) (emphases added).

⁴⁴ Pub. L. 101-649, 104 Stat. 4978 (Nov. 29, 1990).

to the issue of the ban on HIV-positive aliens, the public health exclusion was rewritten to focus on "communicable disease[s] of public health significance." Although the nomenclature of this ground for exclusion was changed, the House Judiciary Committee Report accompanying the Act noted with respect to the Attorney General's authority to waive the contagious disease exclusion in 8 U.S.C. § 1182(a):

"The bill does not repeal the Attorney General's discretionary authority to admit or exclude aliens or exercise waiver authority for certain health conditions. In this regard, the Committee recognizes that the Attorney General may be required to impose certain requirements in order to address possible health threats *or public charge situations*, including follow-up treatments and institutional care. It is expected that HHS and the Attorney General will work closely together in setting guidelines for the imposition of such conditions. Although the Attorney General may impose bonds and other conditions as prerequisites to admissions, such requirements are not to be interpreted so strictly as to undermine the purpose of the bill in this area, namely to make it possible for aliens who do not pose a danger to enter this country."⁴⁵

As the Committee Report makes clear, in the exercise of her waiver authority for certain health conditions, the Attorney General is authorized to impose requirements to address public health threats *or* public charge situations. While criteria 1 and 2 of the INS HIV Waiver Policy are arguably requirements imposed to address the public health threat posed by HIV-positive refugees, criterion 3, the "no governmental cost" requirement, cannot be characterized as anything but a measure to address a "public charge" situation.

The PHS regulations to implement the 1990 Immigration Act's mandate for revision of the exclusions of aliens on health grounds confirm this interpretation. Those regulations recognize two separate categories of public health-related exclusions.⁴⁶ In the first category, a Class A Medical Certificate is issued by a doctor in cases where the alien poses a

⁴⁵ H. R. Rep. No. 723(I), 101st Cong., 2d Sess. 53, *reprinted in* 1990 U.S.C.C.A.N. 6710, 6733 (emphasis added).

⁴⁶ 56 Fed. Reg. 25000 (May 31, 1991).

threat to herself or the community.⁴⁷ An alien issued a Class A Medical Certificate is presumptively excludable as a threat to the public health and can only be admitted if the immigration officer invokes a discretionary waiver. In contrast, in the second category, a Class B Medical Certificate is used to exclude aliens on the basis not of the threat they pose to themselves or the public health, but because of the possibility that the alien might become a public charge due to a medical condition.⁴⁸ Indeed, under the heading "Public Charge Exclusion on Health Grounds" in the Federal Register notice implementing Section 601 of the 1990 Immigration Act, which required amendment of the Class B Medical Certificate to its current form, the PHS stated that a physician is to issue a Class B Medical Certificate if the alien has "physical and mental abnormalities which bear on the likelihood of an alien becoming a public charge."⁴⁹ In a Class B Medical Certificate case, the examining physician is:

"required to identify, in addition to any specifically excludable conditions they find in an alien, any physical or mental abnormality, disease, or disability serious in degree or permanent in nature amounting to a departure from normal well-being. Their reports must describe the nature and extent of the abnormality, the degree to which the alien is incapable of normal physical activity, and the extent to which the condition is remediable. They *must also indicate the likelihood, that because of the condition, the applicant will require extensive medical care or institutionalization and state total projected costs of medical care or institutionalization.*"⁵⁰

Thus, even the PHS regulations relating to exclusion as a public charge recognize that consideration of the medical costs associated with care of an alien suffering from a disease or disability is a public charge issue, not a public health factor.

⁴⁷ See 42 CFR § 34.4(b) (1997).

⁴⁸ *Id.* § 34.4(c).

⁴⁹ 56 Fed. Reg. at 25001.

⁵⁰ *Id.* (Emphasis added).

* * * *

Congress left the definition of a "public charge" in the INA to administrative, and ultimately judicial, interpretation. In interpreting that term, the courts and BIA have long held that ability to pay medical costs, as opposed to the underlying medical condition that generates those costs, is a public charge issue. Legislating against that longstanding administrative and judicial construction of a "public charge," Congress's exemption of refugees from the "public charge" ground of exclusion in the Refugee Act of 1980 can only be interpreted as exempting refugees from exclusion on the basis of ability to pay medical costs, the very purpose and effect of the INS HIV Waiver Policy's "no governmental cost" criterion.

It is also clear that, notwithstanding the fact that Congress has not defined a "public charge" either generally in the INA or for purposes of the exemption for refugees in the Refugee Act, Congress clearly understood that term to include a refugee's ability to pay the medical costs of a chronic medical condition or disease. The legislative language, history and purpose of the Refugee Act and subsequent legislation all are premised on admission of refugees without regard to the costs of treating their medical conditions. Indeed, even the PHS's regulations for medical examination of aliens recognize that ability to pay medical costs is a "public charge" issue.

II. THE INS HIV WAIVER POLICY IS ARBITRARY AND CAPRICIOUS AND THUS SHOULD NOT BE PROMULGATED AS A REGULATION.

A. Regulations Based on Factors That Congress Expressly Precluded An Agency From Considering Are Arbitrary and Capricious.

Agency rules or regulations that are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" are an invalid exercise of the agency's rulemaking

authority.⁵¹ In giving meaning to "arbitrary" and "capricious" for purposes of determining the validity of agency regulations, the Supreme Court has stated that: "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider * * *."⁵² Indeed, an agency rule that relies on factors Congress did not intend the agency to consider is unlawful not only because arbitrary and capricious, but also because it is contrary to law.⁵³ As the U.S. Court of Appeals for the District of Columbia Circuit has noted, whether classified as contrary to law or arbitrary and capricious:

"an agency cannot justify a decision by reference to its discretionary authority, if the decision lies beyond the scope of the agency's discretion. * * * * A statute may define as off-limits to an agency a particular basis for a decision, just as it may foreclose a particular result altogether. * * * * Thus, *if an agency rests a decision on statutorily impermissible considerations, a reviewing court must set aside the decision as beyond the scope of the agency's discretion.*"⁵⁴

By incorporating criterion 3 of the INS HIV Waiver Policy into a regulation, the INS would be basing its regulation on a factor Congress expressly has made an impermissible consideration in the exercise of the Attorney General's discretion to grant waivers of the HIV exclusion for refugees.

The Service has conceded in its various guidelines on HIV that the public charge ground of exclusion is inapplicable to refugees.⁵⁵ It could not do otherwise given the clear

⁵¹ Administrative Procedures Act § 10, 5 U.S.C. § 706(2)(A).

⁵² *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that National Highway Traffic Safety Administration's rescission of a passive restraint requirement for automobiles was arbitrary and capricious). *See also Arent v. Shalala*, 70 F.3d 610, 616 (D.C. Cir. 1995).

⁵³ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

⁵⁴ *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 620 (D.C. Cir. 1987) (emphasis added), *vacated as moot*, 817 F.2d 890 (D.C. Cir. 1987).

⁵⁵ *See Aleinikoff Memo, supra*, 72 Interpreter Releases at 1353.

statement of Congress in section 201(b) of the Refugee Act of 1980 that "public charge" considerations were not to be applied against refugees. By specifically exempting refugees from the public charge ground of excludability, Congress manifested its unambiguous intention that issues of cost to government agencies not serve as a bar to entry for refugees. It would be strange indeed if Congress had enacted the Refugee Act to bring the United States into compliance with its obligations under international agreements to provide protection to refugees, who by definition have fled their homes and property, yet included provisions that would require those same refugees to be self-sufficient upon arrival in the United States. Indeed, Congress expressly recognized that many refugees would require public assistance to meet their medical needs by creating and funding programs to provide refugees with medical care. For the INS and Attorney General to incorporate into regulations the current criterion in the INS HIV Waiver Policy requiring refugees to establish that they will not impose HIV-related medical costs on any governmental agency without the prior consent of an agency, would be to circumvent by regulation the express statutory bar Congress erected. INS should remove the "no governmental cost" criterion from its guidelines and any proposed regulations on waiver determinations for HIV-positive refugees, else it "rel[y] on factors which Congress has not intended it to consider" in promulgating regulations.

CMRA understands that "federalism" concerns have been offered as a rationale for the "no governmental cost" prong of the INS HIV Waiver policy. Clearly, Congress intended the federal government to work in close coordination with state and local governments, as well as private refugee assistance organizations, in assisting refugees to adjust to life in the United States. That said, Congress just as clearly has expressed its intention that refugees, even those who may require public medical assistance, be admitted to the United States without regard to

their ability to pay for their medical costs.⁵⁶ By specifically exempting refugees from the public charge ground of exclusion, Congress manifested its intent that refugees be admitted without regard to the potential medical costs HIV-positive or otherwise ill refugees may impose on public health agencies at the local, state or federal level. It is for Congress to balance "federalism" concerns with other interests, including the national refugee assistance policy of the U.S.⁵⁷ Having spoken clearly on its desire for refugees to be admitted without regard to their ability to pay medical costs, INS and other Executive branch agencies are not free to circumvent the will of Congress through the introduction of "federalism" or other concerns.

B. The INS HIV Waiver Public Charge Criterion Is Also Arbitrary and Capricious Because It Is Not Applied to Other Medical Conditions That Cost Governmental Agencies As Much or More Than HIV.

Despite repeating the congressional mandate that the public charge exclusion does not apply to refugees, the INS justifies its "no governmental cost" criterion for waiver of the HIV exclusion on the basis of the purported costs of treating HIV-positive refugees over the course of the disease.⁵⁸ In addition to the facial contradiction in the INS HIV Waiver Policy, the

⁵⁶ INA § 207(c)(3); 8 U.S.C. § 1157(c)(3).

⁵⁷ See *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 509 (1981) (holding that provision of the Occupational Safety and Health Act directing Secretary of Labor to regulate toxic materials "to the extent feasible" precludes the Secretary from using cost-benefit analysis in deciding how to exercise his statutory standard-setting authority because "[a]ny standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in [the OSH Act].")

⁵⁸ See Aleinikoff Memo, *supra*, 72 Interpreter Releases at 1349. The Aleinikoff Memo notes that:

"[The Public Health Service] has determined that HIV infection gives rise to the possibility that the applicant will develop AIDS and that he or she will eventually require hospitalization or other type of medical care at some point in the future. Consequently, those who qualify for a discretionary waiver of excludability for

governmental cost criterion also is arbitrary and capricious because it selectively requires refugees infected with HIV to establish their ability to pay medical costs, while imposing no such condition on other refugees with chronic diseases that potentially cost as much or more than HIV/AIDS to treat over the course of the disease. Such a selective exercise of the Attorney General's discretion to grant waivers for refugees under INA § 207(c)(3) is irrational, and if incorporated into a formal agency rule, would be invalid as an arbitrary and capricious exercise of agency rulemaking authority.

As noted *supra*, Section 10 of the Administrative Procedures Act prohibits agency actions that are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."⁵⁹ While the scope of review by a court of agency action under the arbitrary and capricious standard is narrow, an agency must "examine the relevant data and articulate a satisfactory explanation for its action."⁶⁰ Under this standard, an agency action or regulation that treats similarly situated parties differently must be adequately explained or it will be set aside as arbitrary and capricious.⁶¹ The purpose of the rule against disparate treatment of similarly

HIV infection must also establish that the burden of supporting them during the course of their illness will not rest on the public. According to PHS, the average cost of medical treatment for an HIV-infected person through the course of the illness is approximately U.S. \$85,000. Examiners should note that HIV infection does not automatically result in a finding that an applicant is likely to become a public charge; however, in reviewing each case, a reasonable calculation of the applicant's future ability to pay the expected costs of the illness should be made. In addition to the medical expenses, a reasonable calculation of the applicant's ability to meet basic living expenses should also be made."

⁵⁹ 5 U.S.C. § 706(A)(2).

⁶⁰ *State Farm, supra*, 463 U.S. at 43.

⁶¹ See *Petroleum Communications, Inc. v. Federal Communications Comm'n*, 22 F.3d 1164, 1172 (D.C. Cir. 1994); *Chadmoore Communications, Inc. v. Federal Communications Comm'n*, 113 F.3d 235, 242 (D.C. Cir. 1997).

situated parties is "to prevent an agency from, inter alia, 'vacillat[ing] without reason in its application of a statute or the implementing regulations.'"⁶² Absent an adequate explanation by the agency for its disparate treatment of similarly situated parties, agency action will be set aside as arbitrary and capricious.⁶³

Despite the fact that the INS HIV Waiver Policy has been in effect for over a decade, the Service has not provided any basis for concluding that HIV-positive refugees are distinct from refugees suffering from other chronic medical conditions in their inability to pay for the costs of their medical treatment. Asymptomatic HIV-positive refugees are likely to be able to work, and thus to contribute to their medical costs and upkeep, for many years.⁶⁴ Moreover, empirical evidence in fact demonstrates that other diseases cost more to treat and have a greater incidence in the refugee population.⁶⁵ Without some reasoned explanation for imposing an ability to pay health care cost condition on HIV-positive refugees, when refugees suffering from other chronic medical conditions face no such obstacle, the INS HIV Waiver Policy is arbitrary and capricious and should not be promulgated as an agency rule.

⁶² *Chadmoore Communications*, 113 F.3d at 242 (citation omitted).

⁶³ *Id.*

⁶⁴ See Sarah N. Qureshi, *Global Ostracism of HIV-Positive Aliens: International Restrictions Barring HIV-Positive Aliens*, 19 Md. J. Int'l L. & Trade 81, 84 (1995) (noting that the long incubation period of HIV results in most HIV-positive persons remaining asymptomatic for five to eight years).

⁶⁵ See, e.g., Christine N. Cimini, Note, *The United States Policy on HIV Infected Aliens: Is Exclusion an Effective Solution?*, 7 Conn. J. Int'l L. 367, 384 (1992); Website of the American Liver Foundation, <http://gi.ucsf.edu/ALF/pubs/progtxcost.html>, visited Oct. 27, 1998; see also "The Cost of Treating HIV/AIDS," Website of Milliman & Robertson: Actuaries & Consultants, http://www.blueworld.com/milliman/publications/reports/HRR26/CoT_AIDS.htm, visited Nov. 10, 1998.

III. THE INS HIV WAIVER POLICY IS UNLAWFUL BECAUSE IT IS IN DEROGATION OF UNITED STATES' INTERNATIONAL OBLIGATIONS.

As a signatory to the Protocol Relating to the Status of Refugees, the United States agreed to be bound by the substantive provisions of the Convention Relating to the Status of Refugees without respect to the country of origin of the refugee.⁶⁶ The Protocol defines a refugee by reference to the Convention as:

"any person who * * * owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return it." ⁶⁷

This definition tracks almost verbatim the definition of a refugee added to INA § 101(a)(42), by the Refugee Act of 1980. Indeed, as the Supreme Court has observed, enactment of the Refugee Act was intended primarily to bring U.S. refugee law into compliance with U.S. international obligations under the Protocol and Convention.⁶⁸

⁶⁶ 19 U.S.T. 6224, T.I.A.S. 6577, *done* Jan. 31, 1967, *entered into force* Nov. 1, 1968. The Convention Relating to the Status of Refugees, T.I.A.S. 6577, 189 U.N.T.S. 150 (July 28, 1951), to which the U.S. never formally acceded, was limited by its definition of a "refugee" as a person who had a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" because "of *events occurring before 1 January 1951*" either "*in Europe*" or "*in Europe and elsewhere.*" Convention Art. I(A) & (B) (emphases added). The Protocol essentially amended the Convention to remove any geographic or temporal limitation in the Convention, but expressly incorporated articles 2 to 34 of the Convention into the Protocol. Thus, although the United States was never a State Party to the Convention, its ratification of the Protocol bound it to observe articles 2 through 34 of the Convention with respect to any refugee who qualifies under the Convention's definition, as modified by the Protocol.

⁶⁷ Convention, art. I, as modified by Protocol, art. I(2).

⁶⁸ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1986) ("If one thing is clear from the legislative history of the * * * entire 1980 [Refugee] Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations

The central element of the Protocol is the principle of "non-refoulement," meaning that no Party "shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened * * *."⁶⁹ In the case of persons affected by criterion 3 of the INS HIV Waiver Policy, these people have already been adjudicated to have a "well-founded fear of persecution" and thus to be refugees deserving of protection under the Protocol and Convention. The only ground on which the United States denies them protection is that they may impose costs upon a local, state or federal agency by virtue of a disease. By imposing this condition upon persons who fully qualify as refugees under the Protocol's definition, the United States puts those refugees in danger of forced repatriation ("refoulement") because many countries of first asylum will not permit HIV-positive refugees to reside within their borders. Thus, when a refugee flees his or her country of nationality into a country of first asylum that prohibits HIV-positive aliens from residing therein, the INS HIV Waiver Policy operates to preclude resettlement in what may be the refugee's only viable option - the United States.

The United Nations High Commissioner for Refugees, who has been delegated primary responsibility for implementation of the Protocol and Convention, has criticized national HIV-exclusion policies on these very grounds.⁷⁰ In a 1988 Policy Statement, the High

Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States acceded in 1968." (footnote omitted).

⁶⁹ Convention, art. 33, 19 U.S.T. at 6276.

⁷⁰ The U.N. General Assembly passed the Statute of the Office of the United Nations High Commissioner for Refugees on December 14, 1950, charging the UNHCR with, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;" and "[p]romoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States." ¶¶ 8(a) & (d). Indeed, for purposes of U.S. law, the Supreme Court has accorded the

Commissioner spelled out the legal and policy grounds against screening and exclusion of refugees for HIV and/or AIDS.⁷¹ The High Commissioner noted that:

"[e]ven if express provisions [on the chronically sick or disabled] are absent from the Convention and the Statute, these instruments provide the framework within which the problems of sick and disabled refugees must be resolved; namely, international protection predicated upon the basic principle of non-refoulement and durable solutions premised upon international co-operation and solidarity.

"Fundamental principles of human rights provide further, and occasionally more specific, guidance as to the policies and practices appropriate to the resolution of the problems of refugees who are chronically sick, or who suffer from infectious diseases."⁷²

Drawing on this framework and principles, the High Commissioner concluded that:

"In so far as they have an impact on refugees and asylum-seekers, national and other measures taken to combat AIDS and to prevent the spread of HIV infection must be related to the overall objectives of the international system, namely, protection and solutions. Every aspect of the refugee's life, from the moment of flight to return home or assimilation in a new national community, may be affected. Screening for example may result in refoulement, refusal to grant protection or denial of refugees' right to return voluntarily to their country of origin."

UNHCR's interpretation of the Convention and Protocol significant deference when construing U.S. obligations under the Protocol and implementing legislation. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) ("the [UNHCR's] Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes."). Thus, when the UNHCR criticizes the INS HIV Waiver Policy as applied to refugees, it is more than just an expression of the viewpoint of a disinterested international agency; it is an interpretation of the obligations the U.S. has assumed under the Refugee Protocol and Convention that is entitled to significant deference.

⁷¹ *UNHCR Policy and Guidelines regarding Refugee Protection and Assistance and Acquired Immune Deficiency Syndrome (AIDS)*, UNHCR/IOM/70/88; UNHCR/FOM/63/88, (May 6, 1988).

⁷² *Id.*

The High Commissioner explained how discrimination against HIV-positive refugees either on the basis of fear of their disease or of the costs of treating the disease undermines the framework established under the Convention and Protocol for protection of refugees:

"It may be assumed that the ordinary non-national, denied admission because of testing HIV seropositive, can return to the support system of his or her own community. That possibility is denied to the refugee, for whom a waiver is the only alternative to indefinite orbit or return to persecution. In the resettlement context, waivers will be required as a matter of policy, often for specific groups of refugees. Without systematic waivers, established first asylum and transit practices will be subverted by the apprehensions of receiving countries. Lives will also be lost, for example, through failure to rescue at sea when disembarkation schemes premised on resettlement guarantees collapse, because of third country unwillingness to accept those with HIV infection.

* * * * The economic costs of admission and care must be seen as essential to overall international efforts as has long been the case for physically and mentally disabled refugees.⁷³

In commenting more recently on the effect of national policies that serve to exclude HIV-positive refugees, the Executive Committee of the High Commissioner's Programme has reaffirmed the contradiction between international refugee protection obligations and national bans on admission of HIV-positive refugees: "UNHCR is concerned about refugees who are rejected by resettlement countries on the basis of their HIV status, especially when rejections lead to risk of *refoulement*, detention or persecution in the country of first asylum or refuge."⁷⁴

⁷³ *Id.*

⁷⁴ "Resettlement: An Instrument of Protection and a Durable Solution," 3rd Meeting, Standing Committee, Executive Committee of the High Commissioner's Programme, ¶ 12, 28 May 1996, EC/46/SC/CRP.32, available at www.unhcr.ch/refworld/unhcr/excom/standcom/1996/32.htm. The UNHCR made the same point in its comments submitted to HHS on its ultimately unsuccessful January 23, 1991 proposal to remove HIV from the list of excludable diseases:

"This principle [of nonrefoulement] is jeopardized by medical screening programs that contribute to the creation of an international impasse: the refugee cannot remain indefinitely incarcerated in a refugee camp in the country of first asylum, (s)he is denied resettlement solely on the grounds of a chronic health condition, and (s)he cannot return home where his or her life or freedom would be

According to UNHCR officials, a number of countries have policies requiring reporting of HIV-positive refugees, which result in detention and deportation of such refugees.⁷⁵

Indeed, in specifically considering the U.S. exclusion of HIV-positive aliens as applied to refugees, the U.N High Commissioner for Refugees has gone so far as to urge the U.S. to abrogate its exclusion of HIV-positive refugees. In 1990, then-U.N. High Commissioner for Refugees Thorvald Stoltenberg asked the U.S. to end its policy of screening refugees seeking resettlement in the U.S. for the HIV virus because:

"[w]ith respect to legal protection concerns, the special situation of refugees must be given due consideration. Refugees constitute a particularly vulnerable category of persons given the fact that their very status as refugees means that they are denied the protection of their countries of origin. In concrete terms, they cannot return to these countries of origin. If adopted by all receiving countries, mandatory screening of refugees prior to resettlement would deny a durable solution, resettlement, and would threaten a temporary solution, first asylum. By doing this, screening puts in danger the most basic and inalienable right of refugees: the right to non-refoulement or safety from persecution."⁷⁶

threatened." Comments of the Office of the U.N. High Commissioner for Refugees, Feb. 21, 1991, on "Medical Examination of Aliens," 56 Fed. Reg. 2482 (Jan. 23, 1991).

⁷⁵ While UNHCR would not specify which countries have policies that result in deportation of HIV-positive refugees, a number of countries have policies or regulations prohibiting admission of HIV-positive aliens in general. See, e.g., Peri H. Alkas & Wayne X. Shandera, "HIV and AIDS in Africa: African Policies in Response to AIDS In Relation to Various National Legal Traditions," 17 *J. Leg. Med.* 527, 541-542 (1996) (listing Libya and Mauritius as countries that exclude HIV-infected persons "outright" for purposes of tourism, employment and permanent residence); Sarah N. Qureshi, Note and Comment, "Global Ostracism of HIV-Positive Aliens: International Restrictions Barring HIV-Positive Aliens," 19 *Md. J. Int'l L. & Trade* 81, 93 (1995) (noting that "China, * * * Japan and Vietnam routinely denied entry to carriers of the AIDS virus.").

⁷⁶ Letter from Thorvald Stoltenberg, United Nations High Commissioner for Refugees, to James A. Baker, III, Secretary of State, Aug. 24, 1990, at 2. Identical letters were sent to, *inter alia*, HHS Secretary Louis Sullivan and Attorney General Richard Thornburgh.

As the High Commissioner subsequently made clear in his letter, his office would continue attempts "to convince other Nations [including the United States] *to follow internationally acceptable guidelines* in their legislation and practices with regard to HIV-infected refugees." ⁷⁷

The clear implication of the High Commissioner's diplomatic language is that the U.S. HIV-positive refugee policy is *not* internationally acceptable. The INS should drop the "no governmental cost" criterion from any rule it proposes on exercise of the Attorney General's waiver authority for HIV-positive refugees. To do otherwise would be to risk undermining the international obligations the U.S. assumed in acceding to the Refugee Protocol.

CONCLUSION

Congress enacted the Refugee Act of 1980 to provide a systematic and regular procedure to give effect to the historic commitment of the United States to refugees. As victims of persecution on the basis of race, religion, nationality, political opinion, or membership in a particular social group, refugees of necessity often flee their country leaving behind all of their possessions and property. Congress recognized this fact when it enacted the Refugee Act, providing for a variety of social services for refugees resettled in the United States, including funding for medical care. Most significantly, Congress specifically prohibited the consideration of "public charge" issues with respect to the admission of refugees, again in recognition of the fact that refugees leave their homelands not of choice but of necessity.

The INS HIV Waiver Policy operates to exclude most HIV-positive refugees who cannot meet that policy's "no governmental cost" criterion. In enacting the exemption from the public charge ground of exclusion in the Refugee Act of 1980, Congress was aware of the significant number of refugees who would require resettlement in the U.S., but would not have

⁷⁷ *Id.* (Emphasis added).

the financial resources to pay for care of chronic medical conditions or disease. Congress made clear, however, that the only refugees to be denied admission on public health grounds were those that posed a risk to the public health of the U.S. because of the communicable nature of their disease. Longstanding judicial construction of the "public charge" exclusion, and the legislative language, history and purpose of the Refugee Act and subsequent legislation, all confirm that Congress intended refugees to be admitted to the U.S. *without* regard for their ability to pay for their medical costs.

In addition to the fact that Congress intended for refugees to be admitted without regard to their ability pay medical costs, it would be arbitrary and capricious for the INS to exclude HIV-positive refugees on the basis of their ability to pay the costs of treating their disease. Consideration of a factor in the Attorney General's waiver determination that Congress expressly precluded from entering into the refugee admission decision would be arbitrary and capricious, as well as contrary to law. Thus, any agency rule incorporating such public charge considerations would be unlawful. Moreover, application of a condition for exercise of the Attorney General's waiver authority only to HIV-positive refugees also would be arbitrary and capricious because selectively applied. Notwithstanding the deference traditionally paid to agency rulemaking authority, an agency rule that treats similarly situated parties differently without some reasoned explanation is clearly arbitrary and capricious.

Finally, the INS HIV Waiver Policy contradicts the international obligations the U.S. has assumed as a party to the Protocol Relating to the Status of Refugees. As the U.N. High Commissioner has made clear in several different forums, exclusion of HIV-positive refugees threatens the ability of the international refugee system to effectively resettle refugees, ultimately risking the refoulement of those refugees to their countries of persecution. Indeed, as the U.N.

agency charged with primary responsibility for interpretation and enforcement of refugee protection agreements, the High Commissioner has gone so far as to criticize the U.S. HIV Waiver policy directly as internationally unacceptable.

Because the "no governmental cost" criterion of the INS HIV Waiver Policy is contrary to congressional intent, arbitrary and capricious, and in derogation of U.S. international obligations, CMRA respectfully requests that INS omit this criterion from any rule it promulgates.



IMMIGRATION AND NATIONALITY ACT

TITLE II - IMMIGRATION

CHAPTER 2 - QUALIFICATIONS FOR ADMISSION OF ALIENS; TRAVEL CONTROL OF CITIZENS AND ALIENS

INA: ACT 212 - GENERAL CLASSES OF ALIENS INELIGIBLE TO RECEIVE VISAS AND INELIGIBLE FOR ADMISSION; WAIVERS OF INADMISSIBILITY



(a) Classes of Aliens Ineligible for Visas or Admission.-Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) Health-related grounds.-

(A) In general.-Any alien-

(i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome,

(ii) 1/ except as provided in subparagraph (C) 1a/ who seeks admission as an immigrant, or who seeks adjustment of status to the status of an alien lawfully admitted for permanent residence, and who has failed to present documentation of having received vaccination against vaccine-preventable diseases, which shall include at least the following diseases: mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B and hepatitis B, and any other vaccinations against vaccine-preventable diseases recommended by the Advisory Committee for Immunization Practices,

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)-

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior, or

(iv) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict, is inadmissible.

(B) Waiver authorized.-For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g).

(C) 1/ EXCEPTION FROM IMMUNIZATION REQUIREMENT FOR ADOPTED CHILDREN 10 YEARS OF AGE OR YOUNGER.--Clause (ii) of subparagraph (A) shall not apply to a child who--

(i) is 10 years of age or younger,

(ii) is described in section 101(b)(1)(F) , and

(iii) is seeking an immigrant visa as an immediate relative under section 201(b) ,



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(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any-

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive or firearm (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iii) Engage in terrorist activity defined.-As used in this Act, the term "engage in terrorist activity" means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time, including any of the following acts:

(I) The preparation or planning of a terrorist activity.

(II) The gathering of information on potential targets for terrorist activity.

(III) The providing of any type of material support, including a safe house, transportation, communications, funds, false documentation or 5/ identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity.

(IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organization.

(V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.

(iv) Representative defined.-As used in this paragraph, the term 'representative' includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(C) Foreign policy.-

(i) In general.-An alien whose entry or proposed activities in the United States the Secretary of State has

reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is inadmissible.

(ii) Exception for officials.-An alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) solely because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States.

(iii) Exception for other aliens.-An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

(iv) Notification of determinations.-If a determination is made under clause (iii) with respect to an alien, the Secretary of State must notify on a timely basis the chairmen of the Committees on the Judiciary and Foreign Affairs of the House of Representatives and of the Committees on the Judiciary and Foreign Relations of the Senate of the identity of the alien and the reasons for the determination.

(D) Immigrant membership in totalitarian party.-

(i) In general.-Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.

(ii) Exception for involuntary membership.- Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

(iii) Exception for past membership.-Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that-

(I) the membership or affiliation terminated at least-

(a) 2 years before the date of such application, or

(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

(iv) Exception for close family members.-The Attorney General may, in the Attorney General's discretion, waive the application of clause (i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States.

(E) Participants in nazi persecutions or genocide.-

(i) Participation in nazi persecutions.-Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with-

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany,
or

(IV) any government which was an ally of the Nazi government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

(ii) Participation in genocide.-Any alien who has engaged in conduct that is defined as genocide for purposes of the International Convention on the Prevention and Punishment of Genocide is inadmissible.

(4) Public charge.-

(A) In general.-Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible. 6/

(B) Factors to be taken into account.-(i) In determining whether an alien is excludable under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's-

(I) age;

(II) health;



INS Home Where is? Text and Graphics

July 10, 1998

HIV Infection: Inadmissibility and Waiver Policies

Section 212(a)(1)(A)(i) of the Immigration and Nationality Act renders inadmissible any applicant for a visa or admission who is found, according to the regulations published by the Secretary of Health and Human Services (HHS), to have a communicable disease of public health significance, which includes HIV infection. However, in view of humanitarian and family unity concerns, the law also provides waivers of inadmissibility, which are discretionary and granted on a case-by-case basis.

Two specific waiver policies have been implemented for applicants seeking admission as **nonimmigrants** (for a temporary period of time), who are inadmissible due to HIV infection:

Routine HIV Waiver Policy. Nonimmigrants may be granted a waiver for admission to the United States for 30 days or less to attend conferences, receive medical treatment, visit close family members, or conduct business. 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 United States; the proposed visit to the United States is for 30 days or less; and that the visit will not pose a danger to public health in the United States.

The "Designated Event" Policy. This policy facilitates the admission of HIV-positive persons to attend certain "designated events," which are considered to be in the public interest, such as academic and educational conferences and international sports events. To initiate the process, HHS 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 the United States specifically to participate in the "designated event"-to be admitted for the duration of the event without being questioned about their HIV status.

Applicants seeking admission to the United States as **immigrants** (for a permanent stay) must establish the required family relationship. They must be the spouse or unmarried son or daughter, or the minor unmarried lawfully adopted child of a U.S. citizen or permanent resident; or have a son or daughter who is a U.S. citizen or permanent resident. The applicant also must satisfy three discretionary criteria that were developed by INS to ensure the public health, safety and welfare:

- ① The danger to the public health created by the alien's admission is minimal;
- ② The possibility of the spread of the 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.

--INS--

INS Home Where is? Text and Graphics

10/29/98

U.S. Asylum and Refugee Policy

The United States offers asylum and refugee protection based on an inherent belief in human rights and in ending or preventing the persecution of individuals. Asylum is a precious and important protection granted by federal law to qualified applicants who are unable or unwilling to return to their country of nationality because of persecution or a well-founded fear of persecution. Claims of persecution must be based on at least one of five internationally recognized grounds: race, religion, nationality, membership in a particular social group, or political opinion. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 provided that some actions taken under coercive population control programs constitute persecution on account of political opinion. A maximum of 1,000 aliens per fiscal year may be granted asylum or admitted as a refugee under this provision.

In addition to asylum and refugee protection, withholding of removal is available to refugees in the United States who can show a likelihood their lives or freedom would be threatened if they were returned to the country in question. Withholding of removal is in some ways similar to asylum, but is governed by a higher standard, requiring applicants to establish that it is more likely than not that they would be persecuted. Unlike asylum, however, once this standard is met, there is no discretion to deny withholding and the applicant may not be returned to the country.

Asylum /Refugee Application Process

Asylum and refugee applicants are both adjudicated under the same legal standard, but differ in terms of where they are located. The potential asylee is in the United States or applying for admission at a port of entry, and the potential refugee is outside the United States. Aliens in the United States or at a port of entry can apply for asylum by filing an Application for Asylum, Form I-589, with either the Immigration and Naturalization Service (INS) or the Executive Office for Immigration Review (EOIR), the Department of Justice agency that comprises the immigration courts and Board of Immigration Appeals (BIA). Applicants can obtain a Form I-589 and filing instructions from an asylum office, an INS district office or by calling the INS toll-free request line at 1-800-870-3676. **A Form I-589 must be filed within one year after the alien's arrival in the United States, unless there exist changed circumstances affecting the applicant's eligibility for asylum, or extraordinary circumstances relating to the delay in filing.** People overseas who are eligible for consideration by the U.S. refugee program apply by filing a Registration for Classification as a Refugee, Form I-590.

"Affirmative" Asylum Applications With INS

An alien who is in the United States and who is not in immigration proceedings may apply for asylum by filing a Form I-589 with the appropriate INS regional Service Center by mail. The Service Center sends the applicant a receipt notice and refers the applicant to one of eight asylum offices around the country. The offices are staffed by approximately 300 specially trained members of the Asylum Officer Corps (AOC), which has been adjudicating asylum applications filed with INS since 1991. Asylum claims brought before the AOC are "affirmative" applications filed voluntarily by the alien. If an asylum officer denies the asylum application of an alien in lawful status, the applicant can reapply for asylum if he/she is later placed in removal proceedings before an immigration judge. Aliens who are in unlawful status and cannot be granted asylum

by the AOC are referred to an immigration judge, before whom they can again raise their asylum claim. **Affirmative asylum applicants are not placed in detention while their application is considered.**

Although the Form I-589 is an application for both asylum and withholding of removal, generally it is immigration judges, and not asylum officers, who adjudicate applications for withholding of removal during removal proceedings in which it has been determined that an alien is removable.

"Defensive" Asylum Applications With EOIR

The Executive Office for Immigration Review has exclusive jurisdiction over the cases of aliens who are placed in removal proceedings and then seek asylum. Asylum claims filed before EOIR are "defensive" applications raised in removal proceedings before immigration judges as a defense against removal. **Aliens who seek asylum as a defense against removal may be detained for being in the United States illegally until an immigration judge rules on their asylum claim. Their detention, however, is not due to their asylum claim.**

Asylum Process for Certain Arriving Aliens

The 1996 law mandates that aliens who arrive at a U.S. port of entry without travel documents or who engage in fraud or material misrepresentation be detained and placed in expedited removal. Aliens who express or indicate a fear of persecution during the expedited removal process receive a "credible fear" interview with an INS asylum officer. Aliens found to have a credible fear are referred for ordinary removal proceedings in which they may apply for asylum before an immigration judge. **Aliens determined to have a credible fear are detained because they remain in removal proceedings until an immigration judge rules on their asylum claim. Their detention also is not due to their asylum claim.**

Parole

INS district directors have discretionary authority to parole, or release, an alien in proceedings from detention. In determining whether release is appropriate on a case-by-case basis, district directors must decide whether the alien's release would serve an urgent humanitarian need or significant public benefit and whether the alien has established his/her identity, poses a threat to the community, demonstrates family ties in the community, presents evidence of a credible asylum claim, or poses a risk of flight. Different, more restrictive criteria govern the custody of certain criminal aliens.

Overseas Refugee Processing

Each year the President, in consultation with Congress, determines the number of refugees who may be admitted to the United States during the coming fiscal year. This annual ceiling is divided among five regional sub-ceilings -- Africa, East Asia, Europe, Latin America/Caribbean and the Near East/South Asia. For fiscal 1999, the President and Congress have determined that up to 78,000 refugees may be admitted to the United States, with those admissions allocated among the five regions as follows:

- Africa.....12,000
- East Asia..... 9,000
- Europe (includes 3,000 unfunded).....48,000
- Latin America/Caribbean.....3,000
- Near East/South Asia.....4,000
- Unallocated.....2,000

The Europe, Bosnia and former Soviet Union ceiling includes 3,000 unfunded numbers allocated to the former Soviet Union for use as needed, provided that resources within existing appropriations are available to fund the cost of their admission. The 2,000 unallocated numbers will be allocated as needed to meet regional shortfalls. Unused admissions numbers from one region may be transferred to another region where the need for admissions numbers exceeds the sub-ceiling.

Access to the U.S. refugee program is not open-ended. To file a Form I-590, a refugee applicant must first be found to be eligible for a refugee interview. The question of whether applicants are eligible for a refugee interview is governed by their nationality and whether they come under one of the processing priorities used to manage the U.S. refugee program. Like the setting of the admissions' ceiling, the designation of eligible nationalities and processing priorities is decided annually as part of the consultations process.

Traditionally, refugee applicants are interviewed in third countries after having fled their country of persecution. Individuals who have fled their country and believe themselves to be at risk if returned should contact the nearest office of the United Nations High Commissioner for Refugees (UNHCR). That office will make a decision as to whether the individuals require protection and where that protection may be provided. The U.S. legal definition of refugee also allows for in-country refugee processing in countries so designated by the President. For fiscal 1999, the U.S. refugee program will operate in-country programs in Havana, Ho Chi Minh City and Moscow. Those eligible for Moscow processing are nationals or habitual residents of the former Soviet Union as it existed on September 2, 1991.

--INS--

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Refugee Resettlement -- HIV+ Case Incidence

- Data to date shows a total of 208 cases/754 people in unresolved cases involving an HIV+ member.
(Unresolved means HIV+ case member is still stuck.)
- Overall, 83% of the cases reported remain unresolved.
(Resolved cases include 17 that traveled to the U.S. with the HIV+ member and 5 resettled to 3rd countries.)
- The HIV+ caseload in Africa grew from 15 cases in FY 97 to 104 cases in FY 98. Already in FY 99 we have 50 cases on record.

Department of State
Bureau of Population, Refugees and Migration

HIV+ Cases in the U.S. Resettlement Program

Updated 2/25/99

Where:	HIV+ Case Member		Unresolved*		% Unres.
	Cases	Persons	Cases	Persons	Cases
Bangkok**	42	91	16	22	38%
Belgrade	1	2	0	0	0%
Cairo	4	4	2	2	50%
Frankfurt	3	3	1	1	33%
Havana	0	0	0	0	0%
Hong Kong	1	1	0	0	0%
Madrid					
Manila					
Moscow	29	102	29	102	100%
Nairobi	169	664	160	627	95%
Riyadh	1	9	0	0	0%
Vienna	0	0	0	0	
TOTAL	250	876	208	754	83%

* Unresolved means the HIV+ member is still stuck.

(Resolved means traveled to the U.S. or elsewhere or died.)

** Bangkok data does not yet include ODP numbers.

Notes

Administrative Discretion Gone Awry: The Reintroduction of the Public Charge Exclusion for HIV-Positive Refugees and Asylees

Rebecca Kidder

The ignorance, misinformation, and fear that accompanied public awareness of Acquired Immune Deficiency Syndrome (AIDS) in the mid-1980s has had lingering effects upon American immigration policy. The Secretary of Health and Human Services (HHS) first proposed adding AIDS to the list of "dangerous contagious diseases"¹ that are grounds for excluding an alien under the Immigration and Nationality Act (INA) in April 1986.² In 1987, Congress and the President prompted the Secretary to finalize regulations that would make Human Immunodeficiency Virus (HIV) infection a public health exclusion.³ Members of Congress were concerned that other countries would encourage and "support emigration of their [HIV] infected citizens" to the United States.⁴ The Secretary agreed that "[w]ith our current state of

1. The exclusion laws were amended in 1990 to change "dangerous contagious diseases" to "communicable disease[s] of public health significance." 8 U.S.C. § 1182(a)(1)(A)(i) (1994). A list of those diseases is provided at 42 C.F.R. § 34.2(b) (1987).

2. See Medical Examination of Aliens (AIDS), 51 Fed. Reg. 15,354 (1986) (to be codified at 42 C.F.R. § 34.2(b)(8)) (proposed Apr. 23, 1986).

3. See 133 CONG. REC. S7410 (daily ed. June 2, 1987); Medical Examination of Aliens, 52 Fed. Reg. 32,540 (1987) (to be codified at 42 C.F.R. § 34). Congress amended the Supplemental Appropriations Act by a vote of 96 to 0 to direct the Secretary of Health and Human Services to list HIV as an excludable disease. See 133 CONG. REC. S7415 (daily ed. June 2, 1987) (Rollcall Vote No. 142). These regulations were finalized in June 1987. See Medical Examination of Aliens (AIDS), 52 Fed. Reg. 21,532 (1987) (to be codified at 42 C.F.R. § 34).

4. Medical Examination of Aliens (AIDS), 52 Fed. Reg. at 32,543. Ignorance about the genesis and transmission of HIV led the Centers for Disease Control to list Haitians as a high risk group along with homosexuals, intravenous drug users, and hemophiliacs. See Elizabeth Mary McCormick, Note, *HIV-Infected Haitian Refugees: An Argument Against Exclusion*, 7 GEO. IMMIGR. L.J. 149, 153-54 (1993). Haitian national origin was removed as a risk factor in 1985, as knowledge increased about transmission of HIV. See *id.* at 156-57. There was uncertainty about the costs and health implications of HIV in 1987. One commentator has noted that,

knowledge about HIV infection, . . . the exclusion of applicants with HIV infection is justified."⁵

In 1993, in the face of increasing knowledge about the transmission of HIV, President Bill Clinton announced his intention to order HHS to remove HIV infection from the list of excludable diseases.⁶ Congress responded by codifying the HIV exclusion to override the President's decision.⁷ As a result, the exclusion of HIV-positive aliens applying for immigrant visas, refugee visas, and adjustment to permanent resident status is still in effect. The HIV exclusion, however, is not an absolute bar to admission for all aliens. Refugees may obtain waivers under the Refugee Act of 1980,⁸ which granted the Attorney General discretion to waive some exclusions, including the HIV exclusion, "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."⁹ Since 1988, the INS has refused to grant

[n]early all exclusions have been enacted at times of a high degree of nativism, racism, or anti-communism. Furthermore, the enactments often coincide with economic depressions and serve the domestic political needs of elected officials. The exclusions say more about the fears of the native-born than they do about the immigrant groups targeted.

Robert J. Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration*, 29 HARV. C.R.-C.L. L. REV. 439, 445 (1994). Given that HIV was first associated with Haitian national origin in 1982, that there were fears about the U.S. economy in 1988, and that 1988 was an election year, it is not difficult to see why the general exclusion of HIV-positive immigrants was passed.

5. Medical Examination of Aliens (AIDS), 52 Fed. Reg. at 32, 543. The concern that other nations would export undesirable aliens to the United States was one of the primary reasons immigration exclusions were originally passed. See HOUSE COMM. ON THE JUDICIARY, GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT, H.R. DOC. NO. 89-263, at 6 (1988) [hereinafter EXCLUSION HISTORY].

6. See Philip J. Hiltz, *Clinton to Lift Ban on H.I.V.-Infected Visitors*, N.Y. TIMES, Feb. 9, 1993, at A17.

7. The exclusion was signed into law as part of the National Institute of Health Revitalization Act of 1993, Pub. L. No. 103-43, 107 Stat. 122, 210 (1993). From 1987 to the present, the Immigration and Naturalization Service (INS) has enforced the HIV exclusion primarily by requiring a serologic HIV test for aliens applying for immigrant visas, refugee visas, and adjustment to permanent resident status. See Medical Examination of Aliens (AIDS), 52 Fed. Reg. 21,607-08 (1987). Although the primary way the INS discovers that an alien is HIV-positive is through a required medical examination, it may exclude any alien whose HIV status becomes known to an immigration officer. See Memorandum from Office of the Commissioner, INS, to All Regional Commissioners, All District Directors, and All Officers in Charge (Sept. 18, 1990), reprinted in 67 Interpreter Releases 1089, 1100-01 (Fed. Publications) (1990); see also SANA LOUE, IMMIGRATION LAW & HEALTH: PATIENTS AND PROVIDERS 9-17 (1995).

8. Pub. L. No. 96-212, 94 Stat. 102, 104 (codified as amended in scattered sections of 8 U.S.C.). The Refugee Act explicitly covers refugees, who are, by definition, aliens applying for a refugee visa from abroad with a United States Consulate or regional director. See 8 C.F.R. § 207 (1995). The Refugee Act also grants the Attorney General discretion to admit asylees, who are aliens located in the United States when they apply for protection. See 8 U.S.C. § 1158 (1994); 8 C.F.R. § 208 (1995). Both refugees and asylees must meet the definition of a refugee. A refugee is a person who "is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (1994). The main difference between refugees and asylees is that refugees are overseas and asylees are in the United States when they apply for protection. In addition, the Refugee Act delegates authority over asylees to the Attorney General, so the standards governing admission of asylees, while parallel to the refugee provisions, are within the discretion of the Attorney General. Refugees and asylees who apply for adjustment to permanent resident status are also eligible for a waiver of the HIV exclusion. See *id.* § 1159(c). This Note only discusses the application of the INS HIV Rule to refugee applicants and applicants for permanent resident status. The term refugees encompasses both groups unless otherwise indicated.

9. 8 U.S.C. § 1157(c)(3) (1994).

HIV waivers to refugees unless they can prove that the federal government will not have to pay for their medical treatment. In 1988, Associate Commissioner James A. Puleo released a memorandum in which he set forth three criteria that limit the availability of HIV waivers.¹⁰ The third criterion of the memo requires immigration officers to evaluate whether the government will bear the medical costs of admitting a refugee, which this Note will refer to as the INS HIV Rule.

The INS initially applied the INS HIV Rule to illegal aliens applying for permanent resident status under the Immigration Reform and Control Act Amendment to the INA (IRCA)¹¹ in 1986 through a formal regulation.¹² This regulation only concerns aliens applying for permanent residence under the amnesty provisions of IRCA,¹³ but through the Puleo Memo the INS informally extended the HIV Rule to refugee applicants as well as refugees and asylees applying for permanent resident status.¹⁴ Puleo's successor, Alexander Aleinikoff, issued a memo reaffirming the Puleo Memo in 1995.¹⁵

The INS HIV Rule contradicts the Refugee Act waiver provision, which states that the Attorney General cannot apply public charge exclusions to refugees.¹⁶ While the Immigration and Nationality Act does not define the term "public charge," over one hundred years of case law and legislative history indicate that a public charge is a person who is likely to become dependent on government support for survival.¹⁷ In the 1995 Aleinikoff Memo, the INS recognized that refugees cannot be excluded as public charges

10. See Cable from James A. Puleo, INS Assistant Commissioner for Examinations, to INS Field Offices (Mar. 2, 1988), reprinted in 65 Interpreter Releases 239 (Fed. Publications) (1988) [hereinafter Puleo Memo].

11. See 8 U.S.C. § 1255a(d)(2) (1994).

12. 8 C.F.R. § 245a(3)(d)(4) (1995).

13. See *id.* See generally Bettina M. Fernandez, Comment, *HIV Exclusion of Immigrants Under the Immigration Reform and Control Act of 1986*, 5 LA RAZA L.J. 65 (1992) (arguing that HIV exclusion waiver criteria undermine purpose of IRCA amnesty legislation); Court E. Golumbic, Comment, *Closing the Open Door: The Impact of the Human Immunodeficiency Virus Exclusion on the Legalization Program of the Immigration Reform and Control Act of 1986*, 15 YALE J. INT'L L. 162, 177-79 (1990) (discussing application of HIV exclusion to IRCA amnesty applicants).

14. See Puleo Memo, *supra* note 10, at 239; UNITED NATIONS HIGH COMM'N ON REFUGEES, A GUIDE TO THE U.S. INS HIV WAIVER APPLICATION PROCESS FOR THE RESETTLEMENT OF REFUGEES 1 (1995) [hereinafter UNHCR Memo]. The INS has enforced the HIV Rule against refugees without the benefit of a formal regulation promulgated in accordance with the notice and comment requirements under the Administrative Procedure Act. See Angela M. Bean & Robert S. Hilliard, *Representing Clients with HIV*, in 2 AMERICAN IMMIGRATION LAW ASSOCIATION IMMIGRATION & NATIONALITY LAW HANDBOOK 492, 495 (4th ed. 1993).

15. See Memorandum from Alexander T. Aleinikoff, Executive Associate Commissioner of the INS, Regarding Immigrant Waivers For Aliens Found Excludable Under Section 212(a)(1)(A)(i) of the Immigration and Nationality Act Due to HIV Infection (Sept. 6, 1995), reprinted in 72 Interpreter Releases 1347 (Fed. Publications) (1995) [hereinafter Aleinikoff Memo].

16. See 8 U.S.C. § 1182(a)(4) (1994) (stating that "[a]ny alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is excludable"). However, 8 U.S.C. § 1157(c)(3) (1994) specifically exempts refugees from this provision. See also *infra* note 20.

17. See *infra* Sections I.B-C.

even if they become dependent on the government for support.¹⁸ However, the Aleinikoff Memo also reiterates the INS HIV Rule, requiring an alien to show that "there will be no cost incurred by any level of government agency of the United States without the prior consent of that agency."¹⁹ While the INS claims that the HIV Rule is not the public charge exclusion listed under INA section 212(a)(4),²⁰ it is used to effect the same result. Under no other exclusion provision does the INS require a waiver applicant to prove that she will not become a public charge as a condition for waiver eligibility. In every other instance, the public charge exclusion is considered a separate ground for exclusion.

This Note argues that the INS HIV Rule violates the Refugee Act of 1980 and is therefore an illegitimate use of administrative discretion. Part I examines whether the INS HIV Rule is a public charge exclusion or a public health exclusion and concludes that it is a public charge exclusion.²¹ Part II argues that applying a public charge exclusion to refugees is contrary to the plain language and legislative history of the Refugee Act of 1980. It further demonstrates that the 1993 codification of the HIV exclusion did not grant the INS discretion to consider costs for HIV-positive refugees. Finally, Part III discusses the limited avenues of judicial review available to refugees and concludes with a discussion of policy reasons why the INS should abandon the HIV Rule.

I. PUBLIC CHARGE OR PUBLIC HEALTH?

The INS is clearly aware that the public charge exclusion does not apply to refugees. In a 1995 memorandum to all INS District Directors and Field Staff, Associate Commissioner Aleinikoff stated that "the public charge provisions do not apply to refugees," and that "[r]efugees and individuals granted asylum who are applying for adjustment of status under section 209 of the Act are not subject to the public charge ground of excludability."²² However, Aleinikoff also reaffirmed the INS HIV Rule, which requires refugees to prove they will not burden any government agency.²³ While

18. See Aleinikoff Memo, *supra* note 15, at 1353.

19. *Id.*

20. The refugee exclusion waiver provision states that "[t]he provisions of paragraphs (4), (5), and (7)(A) of section 1182(a) of this title shall not be applicable to any alien seeking admission to the United States under this subsection." 8 U.S.C. § 1157(c)(3). Section 1182(a)(4) provides for the exclusion of persons seeking admission to the United States on the ground that they are "likely at any time to become a public charge." *Id.* § 1182(a)(4). Section 1182(a)(5) is the labor certification requirement. *See id.* § 1182(a)(5). Section 1182(a)(7)(A) requires all immigrant applicants to provide documentation that will establish their identity, including a valid passport. *See id.* § 1182(a)(7)(A).

21. See Deborah J. Bartz, Comment, *The United States HIV Exclusion: Endangering Refugees' Human Rights*, 17 HAMLINE L. REV. 155, 174 (1993).

22. Aleinikoff Memo, *supra* note 15, at 1353.

23. *See id.* at 1351.

Congress initially conflated public health and public charge concerns in immigration exclusion law in the early 1900s, since 1952 Congress has treated medical costs as a public charge issue, not as a matter of public health. Judicial precedent confirms that ability to pay medical costs can only be understood as a public charge concern. The INS has not justified the apparent inconsistency between the mandatory waiver of the public charge exclusion under the Refugee Act and the HIV Rule.²⁴

A. *The INS HIV Rule: Requiring Evidence of Self-Sufficiency*

The INS has indicated in the Puleo and Aleinikoff memoranda that:

[T]he discretionary authority of the Attorney General will not be used unless the applicant can establish that (1) the danger to the public health of the United States created by the alien's admission to the U.S. is minimal, (2) the possibility of the spread of the infection created by the alien's admission to the U.S. is minimal, and (3) there will be no cost incurred by any level of government agency of the U.S. without prior consent of that agency.²⁵

According to the INS, the third criterion, the INS HIV Rule, can be met in at least four ways.²⁶ First, an applicant may provide evidence that she has private health care insurance that will cover her health care costs.²⁷ Second, an applicant may provide evidence of financial resources that would cover the medical costs of HIV treatment.²⁸ Third, an applicant may provide a statement of consent to treatment from government health care officials.²⁹ Last, an applicant may provide a statement from a specific private or government health care or research facility that will assume responsibility for treatment.³⁰ The INS has noted that "the average cost of medical treatment for an HIV-infected person . . . is approximately U.S. \$85,500."³¹ Given the conditions that create refugees,³² and the fact that the estimated lifetime cost to the government for treating HIV in the United States ranges from \$40,000

24. David Martin, General Counsel for the INS, could not explain the inconsistency in a brief interview, nor could Kelly Ryan, Associate General Counsel at the State Department. See Interview with David Martin, General Counsel, INS, in New Haven, Conn. (Apr. 18, 1996) (notes on file with the *Yale Law Journal*); Telephone Interview with Kelly Ryan, Associate General Counsel, Department of State (Apr. 26, 1995) (notes on file with the *Yale Law Journal*).

25. Puleo Memo, *supra* note 10, at 239.

26. See Aleinikoff Memo, *supra* note 15, at 1351, 1353.

27. See *id.* at 1351; UNHCR Memo, *supra* note 14, at 2.

28. See Aleinikoff Memo, *supra* note 15, at 1351; UNHCR Memo, *supra* note 14, at 2.

29. See Aleinikoff Memo, *supra* note 15, at 1351; UNHCR Memo, *supra* note 14, at 2.

30. See Aleinikoff Memo, *supra* note 15, at 1351; UNHCR Memo, *supra* note 14, at 2.

31. Aleinikoff Memo, *supra* note 15, at 1349.

32. See generally U.S. COMM. FOR REFUGEES, WORLD REFUGEE SURVEY (1995) (documenting impoverished conditions under which most refugees survive after fleeing persecutors).

to \$75,000 per person,³³ the typical refugee would probably have difficulty qualifying for a waiver based on her personal resources. Unfortunately, the INS has not compiled a comprehensive list of its waiver decisions. In addition, a lack of explicit policies on what evidence is sufficient to prove that a refugee will not become a public burden exacerbates uncertainty in the waiver process and makes it difficult to evaluate how the HIV Rule is actually being applied to refugees.³⁴

B. *Lessons From the Past: The Separation of Public Charge and Public Health Concerns*

Congress and the INS excluded aliens as public charges and public health threats for over one hundred years. The historical development of exclusion policy by Congress and the INS, however, shows an increasingly clear distinction between health and public charge concerns. This distinction indicates that medical costs must be recognized as a public charge concern.

Congress enacted the first federal immigration exclusion on March 3, 1875.³⁵ The main purpose of the exclusion was to prevent the emigration of people likely to become dependent on the public coffers for support.³⁶ Congress passed the first formal public health exclusion in 1891, excluding "persons suffering from a loathsome or dangerous contagious disease."³⁷ The trend of excluding aliens for public charge and public health reasons continued throughout the early 1900s.³⁸ Congress enacted public health exclusions to protect the public health and the federal treasury; it was concerned about the financial burden posed by aliens' medical conditions.

33. See Jesse Green & Peter S. Arno, *The 'Medicaidization' of AIDS*, 264 JAMA 1261, 1261 (1990); discussion *infra* Subsection III.B.2.

34. Indeed, at least one East Coast district had no policy regarding evidence sufficient to meet the burden of proof other than health insurance. Given that the District Director had not adjudicated any applications for an HIV waiver to date, he indicated that he did not think the issue warranted attention until an application was actually under review. See John Weiss, Remarks at the Connecticut AILA Meeting (Nov. 30, 1995) (notes on file with the Yale Law Journal).

35. See EXCLUSION HISTORY, *supra* note 5, at 6 (discussing 18 Stat. 477 (1875)); see also Richard A. Boswell, *Restrictions on Non-Citizens' Access to Public Benefits: Flawed Premise, Unnecessary Response*, 42 UCLA L. REV. 1475, 1480 (1995); James F. Smith, *A Nation That Welcomes Immigrants?: An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 229-30 (1995).

36. See EXCLUSION HISTORY, *supra* note 5, at 6.

37. Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084; see also EXCLUSION HISTORY, *supra* note 5, at 10.

38. The Act of February 20, 1907, added the exclusion of persons with physical and mental defects. See Pub. L. No. 59-96, § 2, 34 Stat. 898, 898-99 (1907); see also EXCLUSION HISTORY, *supra* note 5, at 14. The Act of February 5, 1917, added the term "vagrants" to the public charge exclusions. See Pub. L. No. 64-301, § 3, 39 Stat. 874, 875; see also EXCLUSION HISTORY, *supra* note 5, at 21. Waivers were available, however, for some immediate relatives. The Act of March 3, 1903, provided a waiver for those persons suffering from "any contagious disorder" if they were immediate family members of immigrants who had applied for citizenship and could prove the "disorder was contracted on board the ship in which they came." Pub. L. No. 57-162, § 37, 32 Stat. 1213, 1221.

The Immigration and Nationality Act of 1952 refined the public health exclusions to separate the concern that a person with health problems would become a public charge from the concern that a person posed a health risk to the community.³⁹ The INA structurally separated these public health and public charge concerns by creating separately numbered exclusions in the legislation.⁴⁰ Under the 1952 regulations and under present regulations, there are two levels of health exclusion: those warranting the issuance of a Class A Medical Certificate and those warranting a Class B Medical Certificate.⁴¹

Doctors issue a Class A Medical Certificate out of a public health concern that an alien poses a threat to herself or the community. If an examining doctor issues a Class A Medical Certificate, the alien is presumptively excludable as a threat to public health and the immigration officer must exclude the alien unless a discretionary waiver is available.⁴² In contrast, the Class B Medical Certification is not concerned with public health, but rather, is used to exclude aliens on the basis that they might become public charges.⁴³ The Class B Medical Certificate is not a per se exclusion and is only used as evidence that the INS should exclude an alien as a public charge.⁴⁴ A physician issues a

39. See Immigration and Nationality Act, Pub. L. No. 82-414, § 212, 66 Stat. 163, 182 (1952). While the 1952 INA marks the first time public health and public charge concerns were clearly separated, in reality it was the culmination of a trend toward separation and refinement of immigration-exclusion law. For instance, the Public Health Service kept active tuberculosis as a mandatory exclusion, but provided that tuberculosis which had been inactive for over one year was only a ground for exclusion if it affected an alien's ability to earn a living. See H.R. REP. NO. 82-1365, at 48 (1952), cited in EXCLUSION HISTORY, *supra* note 5, at 75. Similarly, the exclusion of people with disabilities that might affect their ability to support themselves became waivable if they could prove they would not have to earn a living. See S. REP. NO. 81-1515, at 345 (1950), cited in EXCLUSION HISTORY, *supra* note 5, at 75. In these two examples, Congress and the INS separated public health exclusions from the public charge rationale for exclusion. This refinement was codified in the 1952 INA which included a separate exclusion applicable to any alien certified by the examining surgeon as having a physical defect, disease, or disability, when determined by the consular or immigration officer to be of such a nature that it may affect the ability of the alien to earn a living, unless the alien affirmatively establishes that he will not have to earn a living.

Immigration and Nationality Act § 212(a), Pub. L. No. 82-414, 66 Stat. 163, 182 (1952). This increasing refinement in exclusion law can be attributed, in part, to the increasing bureaucratization of immigration law as the INS gained more control over the immigration process. See generally SELECT COMM'N ON IMMIGRATION AND REFUGEE POL'Y, 96TH CONG., HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE 61-66 (1980).

40. The public health exclusions were listed under INA §§ 212(a)(1)-(6), Pub. L. No. 82-414, 66 Stat. 163, 182 (1952). The public charge exclusions were listed as INA §§ 212(a)(7)-(8) & 212(a)(15), 66 Stat. 163. The public charge exclusions included exclusions for physical or mental disability that affected the ability to earn a living, exclusion of "paupers, professional beggars or vagrants," and exclusion of other persons likely to become a public charge. See *id.*

41. See 42 C.F.R. § 34.4 (1995).

42. See *id.* § 34.4(b).

43. See *id.* § 34.4(c).

44. The Immigration Act Amendments of 1990 reflected a growing belief that a physical or mental disability is not necessarily a threat to the community and does not necessarily make a person incapable of supporting herself. See Peter Margulies, *Asylum, Intersectionality, and AIDS: Women with HIV as a Persecuted Social Group*, 8 GEO. IMMIGR. L.J. 521, 539 (1994). Congress narrowed the mental and physical disability exclusions to apply only to those mental or physical afflictions that present a threat to the lives or property of others. See 8 U.S.C. § 1182(a)(1)(A)(ii)(I)-(II) (1994).

Class B Medical Certificate if she finds "other physical and mental abnormalities that bear on the likelihood of an alien becoming a public charge."⁴⁵

Under current regulations, medical doctors must make findings regarding the public charge provision separate from the public health exclusion decision. Federal regulations require doctors to consider:

the nature and extent of the abnormality, the degree to which the alien is incapable of normal physical activity, and the extent to which the condition is remediable. The medical examiner shall indicate the likelihood, that because of the condition, the applicant will require extensive medical care or institutionalization.⁴⁶

According to this description, medical costs are explicitly considered a public charge issue.

Given that medical costs are treated as a public charge issue in the Federal Regulations, it seems clear that the INS HIV Rule is a public charge exclusion for HIV-positive refugees. By injecting public charge issues back into public health exclusions, the INS has returned to the practice of the late 1800s and early 1900s, when public charge and public health concerns were not separated in exclusion decisions.⁴⁷

C. *Judicial Opinion: Ability to Pay Is Not a Health Concern, But a Public Charge Issue*

One argument for excluding aliens who cannot afford health care is that they pose a threat to public health if they are not treated. No court, however, has held that ability to pay for medical expenses is a public health concern. In fact, ability to pay has always been considered a public charge issue. Early cases held that hospitalization at public expense due to conditions arising before entry was a ground for exclusion as a public charge.⁴⁸ In *Ex parte Wong Nung v. Carr*,⁴⁹ an alien was excluded as a public charge because he

45. 42 C.F.R. § 34.4(c)(1) (1995).

46. *Id.* § 34.4(c)(2).

47. This conflation of public health and public charge concerns is premised on the notion that people with disabilities are incapable of supporting themselves. Under the logic of the INS HIV Rule, every alien with a medical disability would be presumptively excludable as a public charge. Such a view of disability would probably conflict with the Americans with Disabilities Act, 42 U.S.C. § 12101 (1994), but a full discussion of this issue is beyond the scope of this Note.

48. See, e.g., *Canciamilla v. Haff*, 64 F.2d 875 (9th Cir. 1933) (excluding alien as public charge after being committed to state hospital at public expense for epileptic condition); *Fernandez v. Nagle*, 58 F.2d 950, 950 (9th Cir. 1932) (excluding alien as public charge when committed to "Relief Home for the Aged and Infirm" because alien was "too weak and sick" to work).

49. 30 F.2d 766 (9th Cir. 1924).

was admitted to a public hospital for leprosy treatments.⁵⁰ Mental defects also have been grounds for exclusion as a public charge even without any proof of past institutionalization at public expense.⁵¹ One judge explained that "[a] person likely to become a public charge is one whom it may be necessary to support at public expense by reason of poverty, insanity and poverty, disease and poverty, idiocy and poverty."⁵²

In *Matter of B*,⁵³ the Board of Immigration Appeals held that an alien admitted to an Illinois mental institution at public expense was not *deportable* as a public charge because the state provided free mental care to all state residents. The court considered hospitalization at public expense to be a public charge issue, and not a public health issue.⁵⁴ In *Matter of Harutunian*,⁵⁵ the Board used the same rationale when it modified the reasoning in *Matter of B* and held that an alien who received old age assistance from the state of California was *excludable* under the public charge provision.⁵⁶

This case law indicates that an alien's inability to pay medical costs is a public charge matter. Despite the fact that two cases involved leprosy and syphilis,⁵⁷ both contagious diseases listed as communicable diseases of public health significance in the Immigration and Nationality Act,⁵⁸ the courts have never excluded aliens unable to pay for their medical treatment as public health threats. The courts have not distinguished between dangerous and benign mental and physical conditions in reasoning that failure to pay medical expenses is solely a public charge issue.

50. See *id.* at 768-69.

51. See *United States ex rel. Minuto v. Reimer*, 83 F.2d 166, 168 (2d Cir. 1936) ("She was a woman seventy years old with an increasing chance of being dependent, disabled, and sick.") (affirming exclusion order); *United States ex rel. Markin v. Curran*, 9 F.2d 900 (2d Cir. 1925) (excluding alien as likely to become public charge because she had syphilis and was blind in one eye); *United States ex rel. La Fata v. Williams*, 204 F. 848 (S.D.N.Y. 1913) (excluding alien as likely to become public charge due to valvular heart condition).

52. *Wallis v. United States ex rel. Mannara*, 273 F. 509, 511 (2d Cir. 1921) (excluding aliens as likely to become public charges due to cardiac problem and senility).

53. 3 I. & N. Dec. 323 (B.I.A. 1948).

54. See *id.* at 324. While asylees and refugees are presumably subject to the public charge ground for deportation, this decision significantly decreases the possibility that an asylee or refugee would be put in deportation proceedings on the basis of his or her medical costs. Refugees and asylees are eligible for many forms of public benefits granted to all residents. See Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 UCLA L. REV. 1453, 1458-60 (1995). One other barrier to deportation proceedings is the lack of statutory authority under the Refugee Act to revoke asylum or refugee status on the basis of a refugee's excludability. See *infra* Section III.A.

55. 14 I. & N. Dec. 583 (B.I.A. 1974).

56. See *id.* at 590.

57. See *Ex parte Wong Nung v. Carr*, 30 F.2d 766 (9th Cir. 1929); *Markin v. Curran*, 9 F.2d 900 (2d Cir. 1925).

58. Any alien "who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, which shall include infection with the etiologic agent for [AIDS]" is excludable. 8 U.S.C. § 1182(a)(1)(A)(i) (1995). The Secretary of Health and Human Services has listed chancroid, gonorrhea, granuloma inguinale, HIV, infectious leprosy, lymphogranuloma venerum, syphilis in the infectious stage, and active tuberculosis as diseases of public health significance. See 42 C.F.R. § 34.2(b) (1995).

D. *Public Health and Untreated Diseases: Why the HIV Exclusion Does Not Promote Public Health*

The exclusion of aliens because of their inability to pay for treatment of their medical problems has long been considered a public charge issue by the courts, Congress, and the INS. Deviating from the historical treatment of medical care costs by treating the INS HIV Rule as a public health exclusion admittedly could be justified by an unprecedented medical problem that presented an uncontrollable public health risk unless the disease was treated. When HIV was first discovered, scientists were unsure how it was transmitted and whether treatment for the medical condition would decrease the risk of transmission.⁵⁹ Under these conditions, barring the entry of aliens who were unable to guarantee they would be treated seems justifiable as a public health exclusion.⁶⁰ But under the current state of medical knowledge, the INS HIV Rule cannot be justified as a rule designed to protect the public health.

The only public health rationale that could be supported by the INS HIV Rule is that the mere existence of an untreated HIV-positive refugee in the community would pose a threat to the public health. This reasoning, however, has no basis in epidemiological knowledge. At the present time, there is no known cure for HIV, and there is no medical treatment that can decrease the probability of transmitting the virus. Unlike tuberculosis, treatment does not make HIV less contagious. HIV cannot be transmitted by casual contact; it can only be transmitted through specific behaviors.⁶¹ HIV, therefore, does not present the same public health risk that would be created by allowing people with contagious diseases spread by casual contact or airborne vectors to remain untreated.

II. ADMINISTRATIVE DISCRETION: LOOKING FOR JUSTIFICATION IN THE HISTORY OF THE REFUGEE ACT

While administrative agency interpretations of statutes are given great deference after *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁶² and *Citizens to Preserve Overton Park, Inc. v. Volpe*,⁶³ legislative regulations must be overruled when they are arbitrary, capricious, or manifestly

59. See *supra* note 4.

60. See generally McCormick, *supra* note 4, at 153-57 (discussing early medical knowledge of HIV).

61. See Christine N. Cimini, Note, *The United States Policy on HIV Infected Aliens: Is Exclusion an Effective Solution?*, 7 CONN. J. INT'L L. 367, 377-80 (1992) (discussing several studies of HIV transmission). The INS can exclude refugees who pose a threat because of their behavior without recourse to consideration of health care costs. See Aleinikoff Memo, *supra* note 15, at 1351. The first two prongs of the Aleinikoff Memo require refugees to prove that "(1) the danger to the public health of the United States created by [the alien's] admission is minimal, [and] (2) the possibility of the spread of the infection created by [the alien's] admission to the U.S. is minimal." *Id.*

62. 467 U.S. 837 (1984).

63. 401 U.S. 402 (1970).

contrary to statute.⁶⁴ Under *Chevron*, courts review administrative agency actions in two steps. First, the courts determine whether an agency rule or regulation contradicts a congressional mandate as evidenced by express congressional intent.⁶⁵ The Supreme Court has held that the plain language of the statute is the first place to look for congressional intent.⁶⁶ If the wording of the legislation does not resolve the question, the courts proceed to examine the legislative history of the statute governing the administrative rule for evidence that the administrative rule is consistent with the intent and purpose of the statute.⁶⁷ If the legislative history does not address the issue, or the legislative history addresses the issue and clearly expresses an intention consistent with the administrative regulation, then the courts must defer to the administrative agency's interpretation of the statute and uphold the rule or regulation as a valid exercise of administrative authority.⁶⁸ Second, when an administrative agency rule is facially valid under the first step of the *Chevron* test, the court only determines whether the rule is being applied in an arbitrary or capricious manner.⁶⁹ Finally, if the court finds that the application of the regulation is "based on a permissible construction of the statute," the agency decision is not an abuse of discretion.⁷⁰

This Part applies the first step of the *Chevron* test to the INS HIV Rule and concludes that the INS HIV Rule violates the plain language, legislative intent, and general purpose of the 1980 Refugee Act and is therefore contrary to the statute.⁷¹ First, the INS HIV Rule ignores the unique language of the

64. See *Chevron*, 467 U.S. at 844; *Overton Park*, 401 U.S. at 416.

65. See *Chevron*, 467 U.S. at 842-43.

66. See *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993); see also *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83 (1991) (explaining that when statutory language is clear, courts should not look to statements from legislators or congressional committees); *Barr v. United States*, 324 U.S. 83, 90 (1945) ("If Congress has made a choice of language which fairly brings a situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators.").

67. See *Chevron*, 467 U.S. at 863.

68. See *id.* at 843, 866.

69. See *Overton Park*, 401 U.S. at 416; see also *Chevron*, 467 U.S. at 843.

70. See *Chevron*, 467 U.S. at 843.

71. This Note does not focus on whether the INS HIV Rule would also fail the second step of the *Chevron-Overton Park* test as an arbitrary or capricious use of administrative agency authority. In the second step of review, the courts determine whether the application of a regulation "was based on a consideration of relevant factors and whether there has been a clear error of judgment." *Overton Park*, 401 U.S. at 416. Part III discusses the availability of judicial review and some policy reasons explaining why the application of the HIV Rule to refugees is contrary to humanitarian goals, but a more in-depth analysis of the second step of judicial review is beyond the scope of this Note. The INS HIV Rule may indeed be arbitrary if it is not applied to all refugee applicants equally or if it contradicts the general humanitarian purposes of the Refugee Act. While an exploration of this issue may be fruitful, it is difficult to evaluate the impact of the INS HIV Rule because the INS does not systematically compile statistics on waiver grants and denials for refugees. In fact, only three HIV waiver grants have been widely publicized. See Joseph Migliozi, Note, *The INA Asylum Application Procedure for Political Refugees With HIV*, 3 REGENT U. L. REV. 95, 117 (1993). Kelly Ryan, Associate General Counsel for the State Department, said that in her experiences at Guantanamo Bay, Cuba, HIV-positive waiver applicants were able to meet the burden of proof by showing that they had private health insurance. Telephone Interview with Kelly Ryan, Associate General Counsel, Department of State (Apr. 26, 1995) (notes on file with the *Yale Law Journal*).

Refugee Act by applying the INS HIV Rule to HIV-positive refugees. The INS HIV Rule also eviscerates two clearly stated purposes of the Refugee Act: (1) to distinguish refugees from immigrants; and (2) to apply the same criteria to all refugees in the admission process. Finally, the INS HIV Rule contradicts Congress's express intention not to exclude refugees who cannot pay for their medical care, but rather, to provide funding for their medical treatment.

A. The Language of the Refugee Act Exclusion Waiver Provision

The INS HIV Rule contradicts the plain language of the Refugee Act by deliberately applying the public charge exclusion to HIV-positive refugees. The Refugee Act, which was signed into law by President Carter on March 17, 1980,⁷² provided special guidance on the application of general immigration exclusions to refugees. That guidance was articulated in the refugee exclusion waiver, which indicates that the public charge exclusion, labor certification requirements, and immigrant documentation requirements "shall not be applicable to any alien seeking admission to the United States" under the Refugee Act.⁷³ The waiver also establishes that refugee applicants who are excludable under the public health exclusions, as well as many of the other immigration exclusions, may have those exclusions waived by the Attorney General "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."⁷⁴

The public charge exclusion must be waived for HIV-positive refugee applicants because they are a subset of the group of "any aliens seeking admission" under the Refugee Act. By its plain language, therefore, the Refugee Act bars consideration of government costs of admitting and supporting refugees, including the medical costs of refugees who are HIV-positive. The Aleinikoff Memo directly contradicts the plain language of the statute when it states that "the guidelines provided in this Memorandum are intended to ensure that all waiver applications involving HIV infection are adjudicated fairly and consistently, and that all aliens found excludable under section 212(a)(1)(A)(i) [the HIV exclusion] are treated equally."⁷⁵ This memorandum fails to recognize that refugees are distinct from other immigrants because they are aliens admitted under the Refugee Act.

72. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.); see also CONGRESSIONAL RESEARCH SERVICE, 96TH CONG., REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES 51 (1980) [hereinafter RESETTLEMENT REPORT].

73. 8 U.S.C. § 1157(c)(3) (1994); see also *supra* text accompanying note 20.

74. 8 U.S.C. § 1157(c)(3). Some exclusions are mandatory. Aliens who are ineligible to apply for refugee status due to a mandatory exclusion include: controlled substance traffickers; aliens who present a security concern; aliens who have engaged in terrorist activity; aliens whose admission affects foreign policy concerns; and aliens who participated in Nazi persecution or any form of genocide. *Id.* § 1157(c)(3) & § 1182(a)(2)(C), (a)(3)(A)-(C) & (E).

75. Aleinikoff Memo, *supra* note 15, at 1354.

Not all immigrants are eligible for a waiver of the HIV exclusion, and not all groups of immigrants are exempt from the public charge exclusion.⁷⁶ There are five separate waivers of the HIV exclusion available under the Immigration Act of 1990. These waivers cover different groups of immigrants and give the Attorney General different levels of discretion to waive immigration exclusions. Each waiver was passed with different considerations in mind. A comparison of the other four exclusion waiver provisions with the refugee waiver language clarifies how the INS HIV Rule, as a public charge exclusion, is contrary to the plain language of the Refugee Act.

The fact that each waiver provision gives the Attorney General a different level of discretion indicates that Congress contemplated the precise language of the waiver provisions and intentionally waived the public charge exclusion for refugees. Under the first waiver provision, immediate relatives of U.S. citizens, permanent residents, and people with a valid U.S. immigrant visa may be granted an HIV waiver at the complete discretion of the Attorney General. A waiver of health exclusions is available under Section 212(g) of the INA.⁷⁷ Section 212(g) of the INA states that the Attorney General may grant a waiver "in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General, in his discretion after consultation with the Secretary of Health and Human Services, may by regulations prescribe."⁷⁸ Clearly, the Attorney General's discretion is unlimited under this provision.⁷⁹

The second example is the waiver provision in the Immigration Reform and Control Act of 1986 (IRCA),⁸⁰ a statute that granted illegal aliens who had been in the United States before January 1, 1982 the chance to apply for permanent resident status under a general amnesty if applications were filed between November 6, 1986 and November 6, 1987. The Attorney General has limited authority to waive the HIV exclusion for some IRCA applicants.⁸¹ The Attorney General cannot waive the public charge exclusion unless an applicant is "an alien who is or was an aged, blind, or disabled individual."⁸² The Attorney General may waive some immigration exclusions, including the HIV exclusion "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest,"⁸³ but the public charge exclusion cannot

76. The structure of the INA makes the public charge exclusion applicable to all immigrants unless a specific waiver of the exclusion is available. See 8 U.S.C. § 1182.

77. See *id.* § 1182(g). Under this provision, immediate relatives include minor unmarried children, spouses, and parents.

78. *Id.*

79. See Faith G. Pendleton, Note, *The United States Exclusion of HIV-Positive Aliens: Realities and Illusions*, 18 SUFFOLK TRANSNAT'L L. REV. 269, 277 (1995).

80. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201(a)(1)(A), 100 Stat. 3359, 3394.

81. See 8 U.S.C. § 1255a.

82. *Id.* § 1255a(d)(2)(B).

83. *Id.* § 1255a(d)(2)(B)(i). Application of the INS HIV Rule as a limitation on the use of Attorney

be waived unless someone is aged, blind, or disabled.

A waiver of some immigration exclusions was also available for Special Agricultural Workers until October 25, 1994 under the Special Agricultural Workers program (SAW).⁸⁴ Under this program, some migrant workers were eligible to become permanent residents if they were not excludable under the immigration exclusions. The statute gave the Attorney General the discretion to waive all exclusions "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."⁸⁵ The public charge exclusion was applied to Special Agricultural Workers, with a slight modification: "An alien is not ineligible for adjustment of status . . . if the alien demonstrates a history of employment in the United States evidencing self-support without reliance on public cash assistance."⁸⁶ As with the other waiver provisions, this waiver makes the decision to waive the public charge exclusion discretionary, and like the immediate relative waiver, the decision to waive the public charge exclusion is wholly within the discretion of the Attorney General.

Finally, under the Temporary Protected Status (TPS) provision,⁸⁷ the Attorney General has complete discretion to waive the public charge exclusion and many other immigration exclusions including the HIV exclusion. Applicants for TPS must prove that they are nationals of, or last resided in, a state designated by the Attorney General as eligible for Temporary Protected Status due to armed conflict, environmental disaster, or the inability of the state to handle the repatriation of nationals abroad or to assure the safe return of its nationals.⁸⁸ The TPS waiver reiterates the typical waiver language in providing that "the Attorney General may waive any other provision of section 1182(a) of this title in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."⁸⁹ Because the waiver of the public charge consideration is permissive and not mandatory, the INS HIV Rule would not violate the express language or structure of this statute either.

The language of the waiver in the Refugee Act differs from the language of the other four waiver provisions of the INA. It does not give the Attorney General the discretion to apply the public charge exclusion. The other four waiver provisions either give the Attorney General no discretion to waive the

General discretion to grant HIV waivers does not contradict the IRCA waiver provision because the statute already indicates that waiver applicants will have to prove that they will not become a public charge. In the limited case of aged, blind, or disabled applicants, the decision to waive the public charge exclusion is left to the discretion of the Attorney General, so if the Attorney General decides to limit her own discretion, it does not contradict any congressional mandates. *But cf.* Golumbic, *supra* note 13 (arguing that application of HIV waiver program under IRCA violates spirit and intent of legislation).

84. 8 U.S.C. § 1161 (1988) (repealed 1994).

85. *Id.* § 1161(e)(2)(A) (repealed 1994).

86. *Id.* § 1161(e)(2)(C) (repealed 1994).

87. 8 U.S.C. § 1254a(c)(2)(A)(ii) (1994).

88. *See id.* § 1254a(b).

89. *Id.* § 1254a(c)(2)(A)(ii).

public charge exclusion by making the public charge exclusion mandatory, or complete discretion to waive the public charge exclusion as she sees fit. In contrast, the Refugee Act gives the Attorney General no discretion to apply the public charge provision in any circumstance. When the INS considers a refugee's ability to pay for her medical expenses, it contravenes the plain language of the refugee waiver provision by applying a public charge concern.

The contrast with the language used for other groups of immigrants bolsters the conclusion that the language of the Refugee Act, which makes the public charge exclusion inapplicable to any and all refugee applicants, was intentional and clear. "Any alien[s] seeking admission" as refugees, whether they are HIV-positive, permanently disabled, or young and healthy, are exempt from the public charge exclusion.⁹⁰

B. *Refugees, Asylees, and Other Immigrants: Looking at Legislative Intent*

The legislative history of the Refugee Act further demonstrates that the INS HIV Rule is contrary to congressional intent. Whether the INS applies the public charge consideration indirectly during the exclusion waiver process or directly through the application of the official public charge exclusion, considering costs for individual refugees violates two purposes of the Refugee Act: ensuring that refugees are treated differently from other immigrant applicants; and removing ad hoc distinctions among refugees. The INS HIV Rule eviscerates both purposes by grouping excludable refugees with all other excludable immigrants.

1. *Refugees Are Not Immigrants*

While the legislative history of the Refugee Act does not specifically discuss the rationale for the waiver provision, the very creation of a new status not subject to the same requirements for admission as other immigrants clearly indicates that Congress intended to distinguish refugees from other immigrants. Moreover, in the legislative history of the Refugee Act, Congress indicated explicitly that refugees should be treated differently from immigrants. The legislative history expressly states that one objective of the Refugee Act is to "separate[] the admission of refugees from that of immigrants under the preference system."⁹¹ As one congressional report stated: "Refugees, as distinct from immigrants, are aliens who flee their country of nationality generally because of persecution or fear of persecution. Immigrants, in contrast, leave their country of nationality voluntarily to seek family reunification, economic, or other benefits through reestablishing permanent

90. *Id.* § 1157(c)(3).

91. H.R. REP. NO. 96-608, at 1 (1979).

residence in some other country of their choice."⁹² Senator Edward Kennedy, a sponsor of the Refugee Act, echoed this recognition of the different policy reasons for admitting refugees than for admitting immigrants when he said, "It also will give statutory meaning to our national commitment to human rights and humanitarian concerns, which are not now reflected in our immigration laws."⁹³ This statement, along with many others in the legislative history, shows that the standards for admission under the Refugee Act are separate from the applicable standards for admission of immigrants.⁹⁴

2. *Congress Intended to Create a Standardized Admission Process for All Refugees*

The legislative history also indicates that Congress intended to admit refugees on the basis of humanitarian concerns. To effectuate this goal, Congress created a standardized admission procedure for refugee applicants. The INS HIV Rule dismantles this standardization created by Congress because it applies an exclusion to one subgroup of refugees that is not applied to all refugees. The INS HIV Rule mandates proof that HIV-positive refugees will not become public charges by failing to pay for their medical treatment. This exclusion is not applied to refugees who are not HIV-positive.

One purpose of the 1980 Refugee Act was to end ad hoc and arbitrary distinctions made between refugees for the purposes of admission. Before the passage of the 1980 Refugee Act, there were many different programs for the admission of refugees.⁹⁵ Some refugee groups were subject to the public charge exclusion while other groups of refugees were not. The admission criterion varied depending on the law under which the refugee was admitted.

92. RESETTLEMENT REPORT, *supra* note 72, at 21. As one Representative argued: [T]here is a fundamental difference between being an immigrant and being a refugee. An immigrant is a person who would like to come to the United States in search of the American dream That is also true of the refugee, but a refugee comes not only in search of the American dream but to escape a desperate personal nightmare. That person is coming not only looking for personal opportunity but physical safety, refuge and sanctuary.

125 CONG. REC. 35,818 (1979) (statement of Rep. Mikulski).

93. 125 CONG. REC. 23,231-32 (1979).

94. See 126 CONG. REC. 4504 (1980) (statement of Rep. Sensenbrenner) ("[W]hen this bill was before the House of Representatives on December 20, I opposed this bill on the grounds that it separated out our policy on refugees from our policy on legal immigration The conference committee report does not solve the problem . . . and should be rejected for that reason."); 125 CONG. REC. 35,815-16 (1979) (statement of Rep. Hamilton Fish) ("This bill represents a statement of a new U.S. policy toward refugees, principally a focus on the humanitarian plight of the refugee."); see also *infra* Subsection II.B.2.

95. For a discussion of refugee law history, see generally GIL LOESCHER & JOHN A. SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT (1986) (detailing history of U.S. refugee policies); Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981) (analyzing U.S. legal responses to refugee and asylum policy after World War II, culminating in enactment of Refugee Act of 1980); Kathryn M. Bockley, Comment, *A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise*, 21 N.C. J. INT'L L. & COM. REG. 253 (1995) (presenting historical analysis of political factors in refugee admission process).

The original Refugee Act bills, S. 643 and H.R. 2816, both included mandatory waivers of the public charge exclusion for all refugee applicants.⁹⁶ This waiver was modeled after the Indochinese Refugee Act of 1977,⁹⁷ in which the INS granted Indochinese refugees adjustment to permanent residence without regard to the public charge exclusion, the immigrant documentation requirements, or the literacy requirement.⁹⁸ Congress had passed several pieces of legislation benefitting refugees before the passage of the Indochinese Refugee Act.⁹⁹ Under every previous piece of legislation, with one exception, the public health and public charge exclusions had been mandatory.¹⁰⁰ The one exception, the parole provisions of the INA, gave the Attorney General complete discretion to parole aliens without regard to exclusions, "in his discretion[,] . . . temporarily [and] under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest."¹⁰¹ The parole provision gave the Attorney General the authority to license aliens to come into the country temporarily for emergency reasons. Parole is similar to probation in that the Attorney General can revoke parole at any time for any reason including no good reason at all. Under this provision, Hungarian, Soviet, Cuban, and Indochinese refugees were all paroled regardless of whether they were technically excludable due to disease or poverty.¹⁰²

Congress departed from the past practice of using different criteria to admit and adjust different groups of refugees when it enacted the Refugee Act. As initially drafted, the Senate version of the Refugee bill, S. 643, limited eligibility to refugees of "special concern" to the United States.¹⁰³ The Senate intended to allow flexibility for future policymakers when it adopted the "special concern" language. As the Judiciary Committee of the Senate stated:

96. See S. REP. NO. 96-256, at 15 (1979); H.R. REP. NO. 96-608, at 29 (1979).

97. Act of Oct. 28, 1977, Pub. L. No. 95-145, 91 Stat. 1223.

98. See RESETTLEMENT REPORT, *supra* note 72, at 17.

99. See generally Bockley, *supra* note 95 (detailing use of political criteria for admission of refugees under pre-1980 refugee programs).

100. Under the Displaced Persons Act of 1948, an applicant had to provide evidence that she would not displace an American worker and that she would not become a public charge. See Pub. L. No. 80-774, § 2(d), 62 Stat. 1009, 1010, as amended by Act of June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219, and Act of June 28, 1951, Pub. L. No. 82-60, 65 Stat. 96. Similarly, under the Refugee Relief Act of 1953, aliens had to prove they had housing and would not become public charges. Again, they were inadmissible if they had contagious diseases. See Pub. L. No. 83-203, § (a)(14), 67 Stat. 400, 403, as amended by Act of Aug. 31, 1954, Pub. L. No. 83-751, 68 Stat. 1044. The Fair Share Refugee Act also mandated that a refugee-escapee prove she could, "with some assistance, become self supporting," and that she meet the public health exclusion. Act of July 14, 1960, Pub. L. No. 86-648, § (b), 74 Stat. 504, 504-05. Finally, under the INA seventh preference for refugees, an alien had to be admissible as an immigrant, except that the literacy requirements were not applicable. See Immigration and Nationality Act, Pub. L. No. 82-414, § 212(b), 66 Stat. 163, 187 (1952); see also RESETTLEMENT REPORT, *supra* note 72, at 5-6 (listing all refugee programs and admissions under those programs).

101. 8 U.S.C. § 1182(d)(5) (1994). It is clear, however, that Congress did not foresee the use of the parole provision to admit large groups of refugees. See Anker & Posner, *supra* note 95, at 15.

102. See Bockley, *supra* note 95, at 266-78.

103. S. REP. NO. 96-256, at 3 (1979).

The bill does not, and cannot, explicitly define what refugees are deemed to be "of special concern to the United States." . . . The bill, when enacted, is designed for the decades to come, and what refugees will be deemed of special concern to the American people will be a public policy issue that will be, as it is now, debated and reviewed continuously by Congress, the President, and the American people.¹⁰⁴

The House of Representatives preferred to use the term "special humanitarian concern" instead of the term "special concern."¹⁰⁵ The House made it clear that it wanted to eliminate political considerations from the admission criteria.¹⁰⁶ As Representative Hamilton Fish explained:

With respect to the allocation of numbers of refugees to be admitted among different groups of refugees, the term "special humanitarian concerns" defines those who will be admitted. . . . *[T]he word humanitarian was added to emphasize that the plight of the refugees themselves is paramount as opposed to national origins, political considerations or a possible contribution by the United States to the refugee condition. . . .*

The committee report sets forth some of the historical considerations that can provide guidance as to persons who are in fact of humanitarian concern to this country.¹⁰⁷

The House wording was eventually adopted so that all "refugees of special humanitarian concern" are eligible to apply under the Refugee Act.¹⁰⁸

104. *Id.* at 6.

105. *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Int'l Operations of the House Comm. on Foreign Affairs*, 96th Cong. 84 (1979) [hereinafter *House Hearings*] (statement of Dale F. Swartz, D.C. Lawyers Committee for Civil Rights Under the Law).

106. Dale F. Swartz of the D.C. Lawyers Committee for Civil Rights Under the Law explained:

The House version, as I understand it, adopts the concept of special humanitarian concern, the purpose being to, in effect, eliminate from our determinations of what groups of refugees we will admit, purely political considerations; that it should be a humanitarian determination not, as it has been in the past by statute, a somewhat humanitarian, somewhat political determination.

Id.

107. 125 CONG. REC. 35,816 (1979) (statement of Rep. Fish) (emphasis added); *see also id.* at 23,237 (statement of Sen. Thurmond); *id.* at 23,246 (statement of Sen. Kennedy); *id.* at 35,813 (statement of Rep. Holtzman) ("The committee report states explicitly that the criterion for admitting refugees . . . will be 'special humanitarian concern.'"). The Senate explicitly rejected an amendment offered by Senator Huddleston that would have limited refugee admissions to those of "special responsibility to the United States." *Id.* at 23,246 (Amendment No. 529).

108. 8 U.S.C. § 1157 (1994). Congress requires the President to admit only refugees of "special humanitarian concern." Refugee Act § 101(b), Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended at 8 U.S.C. § 1157 (1994)). The President conducts annual refugee prioritization based on humanitarian factors in consultation with Congress. *See* 8 U.S.C. § 1157(a)(3). Under the consultation provision, President Clinton submitted a proposed revision to the worldwide refugee priority system in 1995. *See Report to the Congress on Proposed Refugee Admissions for Fiscal Year (FY) 1996*, Aug. 1, 1995, available in WESTLAW, U.S. Testimony Library, File No. 1995 WL 455226. If Congress or the President intended to exclude HIV-positive refugees who could not pay for their medical costs, these officials could have excluded HIV-positive refugees from the group of refugees of special humanitarian

Congress standardized the admission criteria for refugees to combat ideological and political restrictions and to create a procedure guided by planning rather than ad hoc decisionmaking. As Senator Rudy Boschwitz explained:

We need a permanent and systematic procedure for the admission of refugees so as to insure [sic] all refugees that they will be treated equally and fairly. . . . Our response to each crisis is subject to the mood of the times rather than being guided by a set procedure that must be applied to all the refugees seeking admission to the United States.¹⁰⁹

Echoing these comments, Representatives Shirley Chisholm, Peter Rodino, and Elizabeth Holtzman lauded the fact that the Refugee Act applied the same admission criteria for all refugees.¹¹⁰

Even though Congress was primarily concerned with political discrimination when it enacted the Refugee Act, Congress clearly did intend to apply the same admission criteria to all refugees as a mechanism for reducing both political and ideological discrimination. Exclusions are admission criteria because they determine eligibility for admission. The INS HIV Rule contradicts Congress's intent to eliminate the public charge exclusion from the refugee admission process and to apply the same criteria, including uniform exclusions, to all refugee applicants.

3. *Congress Decided to Fund Medical Treatment Instead of Excluding Refugees*

The legislative history of the Refugee Act also indicates that Congress intended to pay for refugee medical expenses, not to exclude refugees with

concern indicated in the priority list. Not only did the President and Congress decline to take this measure, but they also affirmatively indicated that refugees with severe medical problems warranted a high admission priority. Included among the group of refugees who receive first priority for admission are "UNHCR-referred or Embassy identified persons . . . including women-at-risk, victims of torture or violence, physically or mentally disabled persons in urgent need of medical treatment not available in the country of first asylum," and "UNHCR-referred or Embassy identified persons, for whom other durable solutions are not feasible and whose status in the place of asylum does not present a satisfactory long-term solution." *Id.*

109. 125 CONG. REC. 23,240 (1979); see also RESETTLEMENT REPORT, *supra* note 72, at 1 ("The major impetus for the legislation was the need to end an ad hoc approach that had characterized U.S. Refugee policy since World War II.").

110. See 126 CONG. REC. 4501 (1980) (statement of Rep. Rodino) ("I firmly believe that the product of our labors has enabled us to present to the House landmark legislation in an area which for years has been dealt with on an ad hoc, piecemeal basis, many times reacting to a situation when it was upon us."); 125 CONG. REC. 35,820 (1979) (statement of Rep. Chisholm) ("Refugees fleeing persecution regardless of the country they come from, on humanitarian considerations alone, should be equal in standing for entry into the United States."); *id.* at 35,813 (statement of Rep. Holtzman) ("[This bill] will mandate equity in our treatment of all refugees . . . it will provide set procedures for admission . . .").

medical problems. At least one commentator has argued that Congress never intended to allow refugees into the country who would be dependent on the state for medical treatment.¹¹¹ In reality, the legislative history of the Refugee Act documents congressional awareness of the price for refugee assistance quite vividly. In the face of significant evidence that the medical costs for treating refugees would be long term and significant, Congress chose a policy of assistance rather than exclusion.

When debating the Refugee Act, Congress was aware that many refugees had medical problems that required treatment. As Representative Vento said,

The squalid conditions of the camps have contributed to severe health problems among the refugees. In many cases their physical ailments are chronic conditions requiring long-term treatment or the result of tropical diseases, the diagnosis and treatment of which can be a major problem for a physician in a cold weather State.¹¹²

Not only was Congress aware that some refugees had long-term medical disabilities, but Congress also knew that some refugees would need state-supported medical care and benefits after admission.¹¹³ Instead of excluding aliens with medical problems because they could not support themselves, Congress responded to the potential burden on state governments by funding programs to address refugee needs. Representative Lungren stated in the floor debates that "[t]here is a Federal commitment, a correct Federal commitment, in my judgment, that we should accept these refugees. However, at the same time it ought to be a Federal commitment to take care of the refugees to the extent that Government programs are necessary."¹¹⁴ The cost of medical assistance was one of the most contentious issues in the floor debates. Congress made it abundantly clear that the response to costs of resettlement

111. See Jason Pardo, Comment, *Excluding Immigrants on the Basis of Health: The Haitian Centers Council Decision Criticized*, 11 J. CONTEMP. HEALTH L. & POL'Y 523, 538 (1995).

112. 125 CONG. REC. 37,230 (1979) (statement of Rep. Vento); see also *id.* at 37,234 (statement of Rep. Bruce Vento). Representative Holtzman added:

This bill sets up careful and explicit requirements regarding medical screening. There was a question on the floor about exotic and tropical diseases that refugees might have. We have no system now for following up with refugees who come here with medical problems. This bill will set up such a system.

Id. at 37,236.

113. See 126 CONG. REC. 4504 (1980) (statement of Rep. Danielson) ("Recent HEW figures . . . indicate that, nationwide, 37.02 percent of the refugees (more than 112,540) were receiving medicaid [sic] . . ."); 125 CONG. REC. 23,251 (1979) (statement of Sen. Chiles) ("A disproportionate number of the refugees were elderly and disabled, who were pushed out of Cuba. . . . They need a tremendous amount of medical and social services, and that is what we have agreed to provide in the appropriations compromise . . ."); *id.* at 35,819 (statement of Rep. Lungren) ("[A] good portion of those refugees who have already been here for 4 years are still on some form of assistance—cash assistance or medical assistance of some sort."); *id.* at 23,248 (statement of Sen. Cranston) ("The California Department of Social Services does know that 43,000 Indochina refugees presently receive cash assistance. . . . This implies that the refugees are not becoming economical [sic] self-sufficient as originally expected.")

114. 125 CONG. REC. 35,819 (1979).

was not to exclude but to provide for a coordinated program that took into account the differing needs of individual refugees.¹¹⁵ Representative Boschwitz explained, "This legislation provides that organization and planning we so desperately need. It allows us to take into consideration the particular needs of the refugees as well as our own resources."¹¹⁶

While Congress made the public health exclusions applicable to refugees at the discretion of the Attorney General, Congress also made it abundantly clear that refugees would not be excluded because they could not pay for medical care. Congress understood that the new refugee admission policy would be expensive when it considered the 1980 Refugee Act. Instead of creating divisions between refugees based on their ability to support themselves, Congress limited the overall number of refugee admissions¹¹⁷ and funded medical assistance programs.¹¹⁸ Absent any indication by Congress that it intends to change its approach to refugee medical costs, the INS HIV Rule contradicts congressional intent.

C. *The Attorney General's Discretion to Grant Waivers of Excludability to Refugees and Asylees*

In response to the analysis of the legislative history and plain language of the Refugee Act, the INS could argue that the waiver decision is distinct from the admission decision and that the waiver authority of the Attorney General is greater than the authority to deny admission to nonexcludable refugees.

115. One Representative stated:

We in the Congress will have to deal with the socioeconomic impacts of this bill. We will have to deal with overloaded school systems and medical clinics, scarce housing facilities, and rising welfare expenditures in our local communities. Consequently, I believe the Congress should have a major role in determining how many people will enter this country under the provisions of this bill.

Id. at 37,204-05 (statement of Rep. Moorehead); *see also* 126 CONG. REC. 4504 (1980) (statement of Rep. Danielson) ("Our Nation's commitment to resettle these refugees includes providing financial and medical assistance . . ."); 125 CONG. REC. 23,234 (1979) (statement of Sen. Kennedy) ("[T]here will be residual needs among some refugees beyond 2 years, but the committee believes these needs can be met through the other programs authorized in the bill—such as social service programs—when the 2-year limit on Federal support of cash and medical payments end."); *id.* at 23,248 (statement of Sen. Cranston) ("The task ahead of us is indeed large and it will be an expensive undertaking. There is no way to mask that fact.").

116. 125 CONG. REC. 23,240 (1979); *see also id.* at 35,815 (statement of Rep. Holtzman) ("The reason the committee adopted a more generous—and a more realistic—reimbursement formula is that decisions to admit refugees are within the exclusive province of the Federal Government and every effort must be made to minimize the financial impact on State and local governments.").

117. *See The Refugee Act of 1979: Hearing on S. 643 Before the Senate Comm. on the Judiciary*, 96th Cong. 22 (1979) [hereinafter *Senate Hearings*]. However, Congress did not limit annual asylum admissions. *See* 8 U.S.C. § 1158 (1994); *see also* H.R. REP. NO. 96-781, at 20 (1980) ("It is the intent of the conferees that prior to fiscal year 1983, Congress will review the 50,000 annual numerical limitation and take appropriate action to retain or adjust this figure."); 126 CONG. REC. 4506 (1980) (statement of Rep. Butler) ("[T]he importance of this legislation is for the Congress of the United States to retain control of the number of refugees . . .").

118. *See* 8 U.S.C. § 1522(e).

Given that medical costs are a public charge consideration,¹¹⁹ however, the INS must argue that it has more discretion to deny admission to excludable refugees under the Refugee Act than to nonexcludable ones. The INS may instead try to argue that Congress granted the Attorney General complete discretion to grant waivers of immigration exclusions even though it limited the Attorney General's discretion in the normal admission process. This argument, however, ignores how actual refugee admission decisions are made for refugees who must apply for a waiver.

The decision to grant refugee or asylee status is within the discretion of the Attorney General.¹²⁰ Under refugee and asylum application procedures, the presiding officer or immigration judge first determines whether an applicant is eligible for refugee status.¹²¹ An applicant is eligible if, *inter alia*, she meets the refugee definition,¹²² is not firmly resettled in another country,¹²³ did not engage in persecution,¹²⁴ and has not committed an aggravated felony.¹²⁵ If she is eligible for admission, but is excludable under the applicable immigration exclusions, the presiding officer or immigration judge must then decide whether the applicant merits a favorable exercise of discretion in the form of an exclusion waiver, which then entitles the refugee to admission. An officer or immigration judge must base a decision to admit or deny the refugee or asylum applicant as a matter of discretion on the "totality of the circumstances."¹²⁶ The most important factor is the harsh consequences that may result from denying an applicant resettlement because of the reasons for which she fled her country of origin in the first place.¹²⁷

The waiver decision is one part of the decision to exercise discretion to admit a refugee. An applicant's excludability under one of the waivable exclusions is a negative discretionary factor that must be considered under the totality of the circumstances test articulated in the Board of Immigration Appeals' decision in *Matter of Pula*.¹²⁸ Other factors that the Attorney General must weigh in the admission decision measure the strength of the refugee's claim to be a refugee of "special humanitarian concern."¹²⁹ The waiver decision is not distinct from the decision to exercise discretion favorably to admit an applicant.¹³⁰ While the presiding officer or immigration

119. See *supra* Part I.

120. See *Matter of Pula*, 19 I. & N. Dec. 467, 471 (B.I.A. 1987).

121. See *id.* at 474.

122. See 8 U.S.C. § 1101(a)(42).

123. See 8 C.F.R. § 207.1(b) (1995).

124. See 8 U.S.C. § 1101(a)(42).

125. See *id.* § 1157(c)(3).

126. *Matter of Pula*, 19 I. & N. Dec. 467, 473 (B.I.A. 1987).

127. See *id.* at 474 ("[T]he danger of persecution should generally outweigh all but the most egregious of adverse factors.").

128. See *id.* at 473-74.

129. 8 U.S.C. § 1157(a)(3).

130. Under the asylum procedures, an applicant for asylum does not submit a request for a waiver separate from her request for asylum. See 8 C.F.R. § 208.3(b) (1995). In contrast, if a refugee is excludable,

judge must decide whether to waive an exclusion before deciding to admit an applicant, there is no reason, in the statutes or otherwise, why the Attorney General should be granted more discretion for this one step of decisionmaking.

According to the Refugee Act, the Attorney General cannot exclude a refugee applicant who is not otherwise excludable on the basis that the applicant is likely to become a public charge.¹³¹ The language of the Refugee Act does not provide the Attorney General with unlimited discretion; she cannot apply public charge questions to deny or grant a refugee visa.

While the lesser level of protection afforded HIV-positive refugees may not seem a significant distinction on its face, the implications are enormous. If the INS can deny a refugee waiver based on public charge concerns, it can also deny a waiver based on the labor certification requirements and immigrant documentation requirements. All three of these exclusions¹³² are mandatorily waived for refugee applicants in the Refugee Act.¹³³ Extended to its logical conclusion, the INS's claimed waiver authority could have dramatic repercussions. Take, for instance, the rather common case of a refugee who suffers from a mental disorder due to torture. This disorder, which causes the refugee to be a threat to herself, would justify a public health exclusion.¹³⁴ Under the logic adopted by the INS, it could exclude her for nothing more than an inability to provide documentation of her identity.¹³⁵ Or take the example of a refugee who was a member of the Communist Party in Afghanistan and who is excludable as a former member of a Communist Party.¹³⁶ If a seventy-year-old refugee with a physical disability that affects her ability to earn a living was a member of the Communist Party, the INS could deny a waiver of the exclusion on the basis that the refugee is likely to become a public charge, even if the INS concludes that her membership in the Communist Party is not a reason to exclude her.¹³⁷

Congress surely could not have intended this result when it granted the Attorney General the discretion to waive exclusion provisions under the Refugee Act. One primary purpose of passing the Refugee Act was to limit the discretion of the Attorney General.¹³⁸ By considering public charge issues in

she must submit a waiver request to the officer in charge of deciding whether to grant a refugee visa. *See id.* § 207.3. However, it is the Attorney General who promulgated these procedures, not Congress. Thus, even if one concludes that the refugee waiver process is one distinct step in the decision to grant or deny a visa, it is one subset of the entire discretionary decision, not a separate decision process altogether.

131. *See* 8 U.S.C. § 1157(c)(3).

132. *See id.* § 1182(a)(4) (public charge exclusion); *id.* § 1182 (a)(5) (labor certification exclusion); *id.* § 1182(a)(7)(A) (immigrant documentation exclusion).

133. *See id.* § 1157(c)(3).

134. *See id.* § 1182(a)(1)(A)(ii)(I).

135. *See id.* § 1182(a)(7)(A)(i).

136. *See id.* § 1182(a)(3)(D)(i).

137. *See id.* § 1182(a)(4).

138. *See* Anker & Posner, *supra* note 95, at 48-50, 52-56.

the refugee waiver process, the INS is considering factors that Congress could not have intended to make relevant to refugee resettlement decisions.

D. The 1993 Codification of the HIV Exclusion Did Not Expand the Attorney General's Authority to Deny HIV Waivers to Refugees

To salvage the INS HIV Rule as a legitimate exercise of administrative discretion, Congress's 1993 codification of the HIV public health exclusion would have to demonstrate express congressional intent to make the public charge exclusion applicable to HIV waiver applicants or to afford the Attorney General discretion to apply the public charge exclusion to HIV-positive refugees. The legislative history of the 1993 codification of the HIV exclusion reveals that Congress sidestepped the debate over how the HIV exclusion should apply to refugees. Absent an express intention to change the HIV waiver process under the Refugee Act, neither courts nor the INS should infer from the legislative history of the 1993 codification an implicit intention to alter the Refugee Act as a general immigration exclusion.

Some contend that, with the codification of the HIV exclusion in 1993, Congress explicitly intended to allow cost considerations to play a role in the admission of HIV-positive refugees.¹³⁹ It is uncontested that the major impetus for the codification was President Clinton's proposal to remove HIV-positive status from the list of communicable diseases listed under the public health exclusions¹⁴⁰ at a time when parole was pending for 222 HIV-positive asylum seekers detained at Guantanamo Bay, Cuba.¹⁴¹ It seems counterintuitive, given this fact, to conclude that Congress did not intend to exclude all HIV-positive aliens, including HIV-positive refugees.

Only the actual test applied by courts to determine when a piece of legislation overrides an earlier statute can resolve the legitimacy of the INS HIV Rule. In the absence of explicit overruling by subsequent legislation, repeal by implication is only inferred by courts when two statutes are irreconcilable.¹⁴² Courts have found that intent to overrule a statute should not be construed from statements made by members of Congress after the

139. See Pardo, *supra* note 111, at 535.

140. See Bartz, *supra* note 21, at 160; *supra* text accompanying notes 6-7.

141. See Jason W. Konvicka, Note, *Give Us Your Tired, Your Poor, Your Huddled Masses . . . Except When They Have HIV: An Analysis of Current United States Immigration Policy Regarding HIV-Positive Aliens in Light of Guantanamo Bay*, 27 U. RICH. L. REV. 531, 542 (1993); McCormick, *supra* note 4; Pendleton, *supra* note 79, at 299.

142. See *Norfolk & W. Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1985) (noting that repeal of antitrust laws by implication disfavored); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1977) (noting that repeal by implication not permissible unless two statutes are irreconcilable); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (explaining that repeal by implication should only be upheld where two statutes cannot mutually coexist); *Rosenberg v. United States*, 346 U.S. 273, 294 (1953) (holding partial overlap of statutes on same subject matter does not justify repeal by implication).

enactment of the statute.¹⁴³ Indeed, the D.C. Circuit has ruled that statements made during congressional floor debates unconnected with the passage of a statute should not be construed as express intent to overrule an earlier statute absent explicit statutory language in the subsequent law.¹⁴⁴ Unless Congress expressly indicated in the text of the 1993 HIV exclusion that it intended to codify the administrative INS HIV Rule or intended to apply public charge concerns to HIV-positive refugees, statements by members of Congress in floor debates cannot support an implicit overruling of the Refugee Act's prohibition on applying the public charge exclusion to refugees. Given this legal standard, whether members of Congress expressed their disdain for HIV-positive refugees is irrelevant to the question of whether the Refugee Act waiver is still legitimate law. Under the D.C. Circuit's analysis, only an explicit statement in text of the HIV exclusion passed in 1993 could change the application of the exclusion to refugees through the Refugee Act.

In 1993, President Clinton expressed an intent to remove HIV from the list of "dangerous contagious diseases" listed in the public health exclusions.¹⁴⁵ Following this announcement, a group of senators lead by Senator Nickles introduced Amendment 37 to Senate Bill 1, the National Institute of Health Revitalization Act of 1993.¹⁴⁶ Amendment 37 codified the designation of HIV infection as a communicable disease of public health significance under the public health immigration exclusions. The text of the new HIV exclusion does not even mention the Refugee Act or the Attorney General's waiver authority.¹⁴⁷ The legislative history of the 1993 HIV exclusion highlights the paucity of support for the notion that it amends the Refugee Act.

Refugees were mentioned only seven times in the Senate debate and nine times in the House debates in over forty pages of congressional discussion of

143. See, e.g., *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464, 471 n.6 (1994) (noting views of Congress on meaning of statute passed by earlier Congress not accorded weight in statutory construction); *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982) (noting post hoc statements by congressional committees are not given significant weight in statutory construction); *United States v. Clark*, 445 U.S. 23, 33 n.9 (1980) (holding congressional remarks on statute passed by another Congress have little weight in statutory construction); *Hazardous Waste Treatment Council v. United States E.P.A.*, 886 F.2d 355, 365 (D.C. Cir. 1989) (noting that postenactment statements by members of Congress cannot be considered in determining meaning of statute); *Tinch v. Walters*, 765 F.2d 599, 602 (6th Cir. 1985) (holding views of Congress should be given little weight in statutory construction of statute passed by previous Congress); *Quarles v. St. Clair*, 711 F.2d 691, 705 (5th Cir. 1983) (noting even explicit postenactment, retrospective statements of legislative intent should not be controlling).

144. See *Colorado v. United States Dep't of Interior*, 880 F.2d 481, 490 (D.C. Cir. 1989).

145. See Hiltz, *supra* note 6, at A17.

146. See 139 CONG. REC. S1707-08 (daily ed. Feb. 17, 1993). Amendment 37 (proposed by Sens. Nickles, Dole, Kassebaum, Helms, Gramm, Lott, Coats, Mack, Craig, Bond, and Coverdell) required a report of the estimated medical costs to the United States of admitting persons with HIV. This report was to include a breakdown of the costs to States and municipalities and an assessment of how well the public charge provision was working as an exclusion. It also required a separate report on the cost implications of refugees entering, or likely to enter, the United States with HIV, and a comparison of the costs of aliens with other health afflictions with the costs of HIV-positive aliens admitted to the United States. See *id.* at S1708.

147. See 8 U.S.C. § 1182(c)(3) (1994).

the HIV exclusion.¹⁴⁸ The small number of congressional representatives who even mentioned refugees illuminates the lack of intent to affect how the HIV exclusion, as a general immigration law, was supposed to apply to refugees. Senator Kennedy first raised the issue of how the HIV exclusion could affect refugee applicants directly when he said:

But what the supporters of the Nickles amendment are saying . . . is you have 268 black Haitians in Guantanamo Bay Many of them have been found to be in credible fear of persecution or death if they go back in Haiti. The proponents of this amendment say, "Send them back. Send them back. We do not care."¹⁴⁹

In response, Senator Donald Nickles said, "[R]efugees, when they come in and seek asylum in the United States, are automatically eligible for welfare packages including Medicaid. I did not realize that until recently. I am just saying I am concerned about the cost. That is 215 people."¹⁵⁰ He went on to argue that all refugees are eligible for Medicaid, so the costs would be enormous if all refugees were admitted.¹⁵¹ Senator Jesse Helms opposed admitting Haitian refugee applicants held at Guantanamo Bay because he did not think they were refugees. He argued that "they are not applying for immigration through normal channels. This administration obviously considers Haitians to be political refugees."¹⁵²

Despite these negative comments about HIV-positive refugees, not one senator proposed changing the admission or waiver process for refugees. In fact, some of the Senate discussion of refugees as a distinct group focused on the availability of an exclusion waiver. Senator Alan Simpson argued that the exclusion "does not affect refugees who are admitted under another provision which allows waivers of medical exclusion."¹⁵³ Senators Nancy Kassebaum and Kennedy both commented that the HIV exclusion is waivable under current administrative practice, and that administrative practice would not be affected by the Amendment.¹⁵⁴ Thus, no discussion in the Senate reveals an

148. See 139 CONG. REC. H2729-33, H2736, H2738-39 (daily ed. May 25, 1993); 139 CONG. REC. H1203-10 (daily ed. Mar. 11, 1993); 139 CONG. REC. S1761-67 (daily ed. Feb. 18, 1993); 139 CONG. REC. S1707-29 (daily ed. Feb. 17, 1993).

149. 139 CONG. REC. S1712 (daily ed. Feb. 17, 1993).

150. *Id.* at S1719.

151. See 139 CONG. REC. S1762 (daily ed. Feb. 18, 1993).

152. 139 CONG. REC. S1722 (daily ed. Feb. 17, 1993) (statement of Senator Helms). Senator Helms also argued:

[U]nder the law anyone granted refugee status is automatically given welfare. . . . [I]f we allow the 300 or so AIDS-infected refugees at Guantanamo entry we are looking at a potential cost to the taxpayers of \$20 million in medical bills alone, and that is just the tip of the iceberg.

Id.

153. *Id.* at S1729.

154. See 139 CONG. REC. S6883 (daily ed. May 28, 1993).

explicit intention to change the admission process or administrative practice governing refugee HIV waivers.

In the House of Representatives, Representative Henry Waxman expressed dismay that refugees with HIV would be subject to a different standard than refugees without HIV.¹⁵⁵ Representative Waxman asked, "Should we turn them back to certain execution and persecution, or should we accept them on the basis which the United States has accepted refugees in the past?"¹⁵⁶ Representative Robert Dornan argued that a holding area such as Guantanamo Bay offered a solution to the problem. In defending the differential treatment of refugees with HIV, Representative Dornan said, "I want to be humane, but I am not going to let in communicable diseased people into this country, because it will kill as sure as you and I stand here. And we want our constituents to respect us."¹⁵⁷ Representative John Cunningham skirted the issue by arguing that "law based on individual specifics is bad law. It is going to cost us down the line for these AIDS patients beyond what we are already saturated with."¹⁵⁸ Like the Senate discussion, the House discussion lacked any proposals to change the refugee admission process or the availability of HIV waivers for refugees.

Despite the negative comments of a few representatives, there is no evidence in the legislative history that Congress intended to change the availability of HIV waivers under the Refugee Act or to codify the existing INS practice of applying the INS HIV Rule. Commenting on the conference committee report, Representative Romano Mazzoli stated:

Regulations, policies, and practices have developed with regard to waivers of exclusion, testing requirements, and health-related questioning. The conferees, by requiring that HIV be included among the list of excludable diseases until such time as Congress shall remove it, have taken the position that waiver, questioning, and testing decisions should continue to be left to the discretion of the Attorney General. Thus, the conference report does *not* codify any current policies or practices concerning those authorities.¹⁵⁹

In addition, at least three senators relied on the availability of a waiver for refugees when they voted for the exclusion.¹⁶⁰

Neither the 1993 HIV exclusion itself nor the legislative history of the exclusion in congressional floor debates supports the conclusion that Congress

155. See 139 CONG. REC. H1204 (daily ed. Mar. 11, 1993).

156. *Id.* at H1208.

157. *Id.* at H1209.

158. *Id.*

159. 139 CONG. REC. H2739 (daily ed. May 25, 1993) (emphasis added). Representative Thomas Bliley noted that "[w]aiver authority under the current law remains unchanged." *Id.* at H2736.

160. See *supra* text accompanying notes 153-54 (noting comments of Senators Kassebaum, Kennedy, and Simpson).

expressly intended to change the previous law or to codify administrative practices regarding refugee exclusion waivers. The legislative enactment of the HIV exclusion, without an express overruling of the 1980 Refugee Act, will not support the argument that the INS is acting within the bounds of its discretion in interpreting its authority to apply the public charge exclusion.

In sum, the INS HIV Rule is a public charge exclusion because it is used to exclude aliens based on the cost of admitting them. The application of this administrative regulation to refugees violates the plain language of the Refugee Act and its legislative purpose of eliminating public charge issues from the refugee admission process. The codification of the HIV exclusion as a general immigration law does not in and of itself indicate an express intention on the part of Congress to change how the general public health exclusions are applied to refugees, nor does the legislative history of the HIV exclusion establish any express congressional intent to change the policy under the Refugee Act of exempting refugees from the public charge exclusion. It therefore does not make the INS HIV Rule a legally valid exercise of administrative discretion.

III. CHALLENGING THE INS HIV RULE: DISCRETION GONE AWRY

While the INS has clearly overstepped its authority by implementing the INS HIV Rule, challenging the imposition of the rule is difficult because of the discretionary nature of refugee, asylum, and adjustment of status decisions.¹⁶¹ The optimal solution would be for Congress to clarify the refugee waiver provision in subsequent legislative amendments. Independent of this action, the INS should voluntarily rescind this regulation as an unwarranted contravention of the Refugee Act. Yet it seems unlikely that either of these actions will be taken in the near future. Consequently, those affected by the rule are left with the option of seeking judicial review of a waiver denial in the federal courts.

A. *Challenging the INS HIV Rule in Court: Limited Judicial Review*

Several factors limit judicial review of the INS HIV Rule.¹⁶² Refugees abroad who apply for an HIV waiver are not entitled to judicial review of waiver denials.¹⁶³ In addition, nonresident aliens located outside the United

161. See DEBORAH E. ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES* 165-71 (2d ed. 1991) (discussing discretionary nature of asylum).

162. It may be possible to claim that the INS guidelines are a regulation within the meaning of the Administrative Procedure Act and therefore may be challenged on the basis that the INS did not follow the appropriate notice and comment requirements of the Administrative Procedure Act. See Bartz, *supra* note 21, at 169-70; Bean & Hilliard, *supra* note 14, at 495. For alternative views on judicial review of waiver denials, see Kerry A. Krzynowek, Note, *Haitian Centers Council, Inc. v. Sale: Rejecting the Indefinite Detention of HIV-Infected Aliens*, 11 J. CONTEMP. HEALTH L. & POL'Y 541 (1995).

163. See 8 C.F.R. § 207.3 (1995). The UNHCR has indicated that

States do not have standing to sue in U.S. courts for visa denials.¹⁶⁴ Thus refugees are effectively precluded from challenging waiver denials in U.S. courts. The only groups that can challenge the INS HIV Rule are refugees and asylees attempting to adjust to permanent resident status.

Unfortunately, the precarious status of refugees and asylees in the United States deters them from challenging the exclusion policy. The statutes and federal regulations are not clear on whether asylum status can be revoked if a refugee or asylee is found excludable during an adjustment interview. The federal regulations state that if the District Director denies an application for adjustment of status by a refugee or asylee, "[n]o appeal shall lie from the denial . . . but such denial will be without prejudice to the alien's right to renew the application" in deportation or exclusion proceedings.¹⁶⁵ This suggests that the INS believes that they may deport refugees and asylees if they are excludable. Contrary to the presumption under this regulation, the INA does not say that excludable refugees or asylees may be deported if the INS denies them permanent residence.¹⁶⁶ In addition, the refugee regulations allow termination of refugee status only if an alien was "not a refugee . . . at the time of admission."¹⁶⁷ The asylum regulation allows revocation of asylum only if the alien no longer has a well-founded fear of persecution because of changed country conditions, the alien committed fraud and was not entitled to asylum in the first place, the alien is a danger to the security of the United States, or the alien was convicted of an aggravated felony or a crime that presents a danger to the community.¹⁶⁸ Since Congress has not suggested an intention to repatriate recognized refugees, courts should not construe the INS regulations to allow repatriation simply because a refugee is HIV-positive.¹⁶⁹

Even if the ambiguity in the INS regulations does not deter a refugee or asylee, an adjustment applicant will only receive limited judicial review of a waiver denial. The decision to grant asylum status is subject to the

The INS field officer with jurisdiction over the case . . . reviews the HIV waiver application and makes a recommendation. This recommendation is certified to the INS Administrative Appeals Unit (AAU) in Washington, D.C. The AAU makes the final decision, either agreeing or disagreeing with the field officer . . . There is no appeal from the AAU's decision.

UNHCR Memo, *supra* note 14, at 2; *see also* Cimini, *supra* note 61, at 370.

164. *See* Chinese Am. Civic Council v. Attorney Gen., 566 F.2d 321, 324 (D.C. Cir. 1977) (holding that aliens denied refugee status under former INA § 203(a)(7) lacked standing because they had not entered United States). It is unclear whether the INS applies the HIV exclusion to asylum applicants. If the INS does not apply the HIV Rule to asylum applicants, then they do not have a "case or controversy" upon which to base a challenge to the HIV waiver policy of the INS. *See* County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (explaining two-part test to determine mootness).

165. 8 C.F.R. § 209.2(f) (1995).

166. *See* Immigration and Nationality Act § 209, 8 U.S.C. § 1159 (1994).

167. 8 C.F.R. § 207.8; *see also* Matter of Garcia-Alzugaray, 19 I. & N. Dec. 407 (B.I.A. 1986) (affirming immigration judges' refusal to adjudicate excludability of asylee).

168. *See* 8 C.F.R. § 208.24(a).

169. *See* ANKER, *supra* note 161, at 67 n.339 (noting that asylum may not be revoked unless initial grant was unwarranted or country conditions have changed).

discretionary authority of the Attorney General.¹⁷⁰ Thus a court will only review a decision to deny adjustment of status to decide if the denial was arbitrary, capricious, or an abuse of discretion.¹⁷¹ However limited the judicial review given to administrative rules and regulations is, the preceding parts of this Note suggest that a litigant has a strong cause of action for invalidating the HIV Rule under the first prong of the *Chevron* test. In instituting the HIV Rule, the INS has illegally considered factors "Congress could not have intended to make relevant."¹⁷²

B. Policy Reasons for the INS to Voluntarily Rescind the HIV Rule

The INS should rescind the application of the INS HIV Rule voluntarily as an unwise policy for two reasons. First, the rule undermines international refugee protection for HIV-positive refugees and for the most economically vulnerable refugees. Second, the exclusion lacks empirical foundation as a measure to contain health care costs.

1. Undermining International Refugee Protection

Congress passed the Refugee Act to encourage other nations to accept refugees regardless of physical condition, gender, age, or race.¹⁷³ By

170. While there have not been any reported decisions denying adjustment of status to refugees or asylees as a matter of discretion, the courts have indicated that adjustment of status for other applicants is discretionary. See, e.g., *Fulgencio v. INS*, 573 F.2d 596, 597 (9th Cir. 1978) (holding that only abuse of discretion justifies overturning decision to deny adjustment); *Eun-Hee Lee v. United States*, 651 F. Supp. 1264, 1267 (D.D.C. 1987) (noting that adjustment of status is matter of discretion). Although a refugee whose status is terminated is still eligible for withholding of deportation, the burden of proof for this remedy is higher than the burden of proof for asylum status. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 444-45 (1987). Thus, if an asylee or refugee has her status revoked, there would be a direct challenge to the international obligation of nonrefoulement. See generally Andrew G. Pizor, Comment, *Sale v. Haitian Centers Council: The Return of Haitian Refugees*, 17 *FORDHAM INT'L L.J.* 1062 (1994) (discussing right to nonrefoulement after *Sale v. Haitian Centers Council* decision).

171. Cf. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (noting in context of Environmental Protection Agency that regulations of congressionally created agency are controlling unless arbitrary, capricious, or manifestly contrary to statute). For a discussion of discretion in asylum and refugee law, see ANKER, *supra* note 161; Arthur C. Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 *SAN DIEGO L. REV.* 999 (1985); Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 *SAN DIEGO L. REV.* 861 (1994).

172. *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950); see also *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.") (citing *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849)); *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 6 (1932) (stating phrase must be interpreted in light of purpose of statute); *White v. INS*, 75 F.3d 213, 214 (5th Cir. 1994) (stating administrative agency interpretations are only entitled to deference when congressional intent is unclear); *St. James Hosp. v. Heckler*, 760 F.2d 1460, 1465 (7th Cir. 1985) (holding agency rule is arbitrary when agency relies on factors Congress had not intended to consider); *Usery v. Kennecott Copper*, 577 F.2d 1113, 1117-18 (10th Cir. 1977) (noting administrative regulation should not be followed when it conflicts with design of statute or exceeds administrative authority).

173. See *Senate Hearings*, *supra* note 117, at 37 (statement of Sen. Kennedy) ("[I]t is important, as we are trying to gain support with other countries for refugees, for us to have this legislation."); 126 CONG.

considering resettlement costs, the INS regulations encourage other nations to make distinctions among individual refugees based on their earning capacity. The INS HIV Rule thus undermines congressional intent by indicating to other nations that they will be justified in resettling refugees on the basis of their health, education, or any other supposed indicators of earning capacity.

Use of the INS HIV Rule in the refugee exclusion waiver process also signals that the United States believes that all HIV-positive refugees are presumptively a burden on the health care system and thereby encourages discrimination against HIV-positive people.¹⁷⁴ The ultimate result may be that other nations will feel free to refuse resettlement to refugees on any grounds, including reasoning based upon empirically unfounded presumptions similar to those contained in the U.S. policy.¹⁷⁵

As the preceding Part demonstrates, if the Attorney General may consider public charge concerns in the waiver process, then the Attorney General may also consider other factors Congress explicitly made inapplicable to refugees. This breakdown ultimately sends a signal to other countries that once refugees may be excluded for one reason, they can be excluded for any reason at all, without regard to the humanitarian implications of the decision to exclude. The ultimate result of applying the INS HIV Rule to HIV-positive refugee applicants is to encourage other nations to deny resettlement to HIV-positive refugees or refugees with other "undesirable" characteristics. Such a result is clearly contrary to the original purpose of the Refugee Act: to encourage other nations to admit refugees on a humanitarian basis.¹⁷⁶

There is a final problem with applying the INS HIV Rule to refugees. The rule eviscerates the distinction between refugee and immigration policies. U.S. refugee policy has been based on humanitarian considerations ever since the enactment of the Refugee Act. U.S. immigration policy, on the other hand, has always been concerned with screening out undesirables and promoting the economic interests of the United States. By applying cost considerations to each individual refugee, the INS signals its willingness to treat refugees as immigrants.

Congressional failure to fight this breakdown foreshadows more measures to curtail refugee and asylum protections.¹⁷⁷ Unless Congress and the INS recognize that cost considerations are only relevant to the overall number of

REC. 4502 (1980) (statement of Rep. Fish) ("It is clearly in our self-interest to continue efforts to encourage participation of other countries in refugee resettlement efforts.").

174. See Mary C. Dunlap, *AIDS and Discrimination in the United States: Reflections on the Nature of Prejudice in a Virus*, 34 VILL. L. REV. 909, 912-17 (1989); Lynn Acker Starr, Note, *The Ineffectiveness and Impact of the Human Immunodeficiency Virus (HIV) Exclusion in U.S. Immigration Law*, 3 GEO. IMMIGR. L.J. 87, 106 (1989).

175. See *supra* Section I.D.

176. See *supra* text accompanying note 173.

177. See Congress' Proposed Immigration Bill: *Severe New Restrictions for Asylum Seekers*, ASYLUM PROGRAM (Lawyer's Comm. for Human Rights), Oct. 10, 1995, at 1.

refugees we admit, Congress will freely pass legislation that promotes unequal treatment of refugee groups and therefore undermines the basis for international refugee protection.

2. *Health Care Costs for HIV-Positive Refugees Will Not Harm the Health Care System*

One plausible argument why the INS HIV Rule is a public health exclusion is that treating refugees who develop AIDS may create a crisis in the health care industry. There is no doubt that a major concern behind the enactment of the HIV exclusion in 1993 was the rising cost of medical care.¹⁷⁸ Requiring refugees to prove that they will not need government funding is a measure to ensure that they do not drain health care resources. It is true that the cost of HIV treatment is tremendous.¹⁷⁹ One researcher has estimated that the annual cost of treating AIDS and HIV was between \$10.3 billion and \$15.2 billion in 1995, based on an average cost of \$102,000 per patient.¹⁸⁰

While protecting health care resources is a legitimate public health rationale, the INS HIV Rule does not necessarily reduce health care expenditures; it only ensures that government funds will not be used. This, of course, places the INS HIV Rule squarely in the province of public charge considerations. The concern is not with the overall amount of health care resources used, but rather, with the burden on government Medicaid spending. HIV-positive refugees do not pose a significant threat to the health care system because the number of HIV-positive refugees likely to be admitted is not very large.¹⁸¹ The cost of detaining HIV-positive refugees at Guantanamo Bay was estimated to be between five hundred thousand and one million dollars a month.¹⁸² It is estimated that detention for two years cost the United States between twelve and fifty-five million dollars.¹⁸³ In addition, the cost of

178. See Juan P. Osuna, *The Exclusion from the United States of Aliens Infected with the AIDS Virus: Recent Developments and Prospects for the Future*, 16 Hous. J. INT'L L. 1, 29-30 (1993).

179. See Green & Arno, *supra* note 33, at 1261 ("Lifetime medical care costs of individuals with acquired immuno deficiency syndrome (AIDS) average \$40,000 to \$75,000.").

180. See Fred J. Hellinger, *Forecasts of the Costs of Medical Care for Persons with HIV: 1992-1995*, 29 INQUIRY 356, 356 (1992). Hellinger has modified this estimate downward by \$30,000 per patient, and predicts that costs will continue to decline. Even so, the cost for treating HIV over the course of a lifetime can reach \$72,000. See Fred J. Hellinger, *The Lifetime Cost of Treating a Person With HIV*, 270 JAMA 475, 477 (1993).

181. See Memorandum from the U.S. Department of State to Charles McCance, Director, Division of Quarantine, Center for Prevention Services, Centers for Disease Control 8 (Aug. 3, 1987) (on file with the Yale Law Journal) ("[T]hose designated 'of special humanitarian concern' to the United States by the President . . . exhibit a very low incidence of the AIDS virus.").

182. See Andrew A. Skolnick, *Doctors Help HIV-Positive Haitian Refugees Gain Freedom from US Government Detention Camp*, 270 JAMA 563, 564 (1993).

183. I arrived at this figure by using the base cost of \$500,000 a month for two years. See *id.*; see also Creola Johnson, *Quarantining HIV-Infected Haitians: United States' Violations of International Law at*

testing all refugees for HIV, a cost born by the United States, far exceeds the medical savings gained through exclusion.¹⁸⁴

Finally, the INS HIV Rule apparently assumes that HIV-positive refugees would be unable to work to support themselves. The assumption that all persons with HIV are incapable of working recalls the assumptions made about immigrants in the early 1900s.¹⁸⁵ The INS has not provided evidence that refugees with HIV are less likely to be self-sufficient than other refugees. If the INS is truly concerned about the burden that aliens place on the health care system, it could apply the public charge exclusion to other disorders that are just as expensive as HIV.¹⁸⁶ Distinguishing HIV-positive refugees is arbitrary; other refugees are also eligible for Medicaid, special refugee medical funds, and state benefits.¹⁸⁷ The cost of providing Medicaid to a sick refugee may meet or exceed the cost of treating HIV.¹⁸⁸ Furthermore, special programs were set up under the Refugee Act to assist refugees requiring

Guantanamo Bay, 37 How. L.J. 305, 327 (1994) (noting that Professor Harold Koh estimated annual cost at \$55 million).

184. See Douglas Scott Johnson, Note, *The United States' Denial of the Immigration of People with AIDS*, 6 TEMP. INT'L & COMP. L.J. 145, 149-50 (1992).

185. See, e.g., *Tambara v. Weedon*, 299 F. 299 (9th Cir. 1924) (excluding alien as likely to become public charge because he appeared to be deaf); *Ex parte Hosaye Sakaguchi*, 277 F. 913, 916 (9th Cir. 1922). The *Sakaguchi* court noted that:

If there were in this case any evidence whatever of mental or physical disability or any fact tending to show that the burden of supporting the appellant is likely to be cast upon the public, we should have no hesitation in saying that the conclusion of the board of special inquiry would be unassailable in a court.

Id. at 916; see also Margulies, *supra* note 44, at 539. Yet, because of the long incubation period of HIV, most HIV-positive people are asymptomatic for five to eight years. See Sarah N. Qureshi, *Global Ostracism of HIV-Positive Aliens: International Restrictions Barring HIV-Positive Aliens*, 19 MD. J. INT'L L. & TRADE 81, 84 (1995); Fernandez, *supra* note 13, at 84-85. The assumption that people with HIV are incapable of self-support only reinforces ostracism and discrimination against people with HIV. See Dunlap, *supra* note 174, at 912-17 (1989).

186. A Canadian report found that treatment of immigrants with heart disease emigrating to Canada would cost \$23.2 million over ten years, while treating immigrants with AIDS would cost \$18.5 million. See Cimini, *supra* note 61, at 384. The cost of treating nonlymphocytic leukemia over a five-year period is estimated at \$193,000 for transplantation and \$136,000 for chemotherapy. See H. Gilbert Welch & Eric B. Larson, *Cost Effectiveness of Bone Marrow Transplantation in Acute Nonlymphocytic Leukemia*, 321 NEW ENG. J. MED. 807, 807 (1989). The cost of liver transplantation in 1984 was estimated at \$250,000 per life year, and the cost has risen since that time. See 86 J. NAT'L CANCER INST. 415 (1994); see also David V. Schapira et al., *Intensive Care, Survival, and Expense of Treating Critically Ill Cancer Patients*, 269 JAMA 783, 783 (1993) (finding that cost per year of life gained was \$82,845 for patients with solid tumors and \$189,339 for patients with hematologic cancers); Thomas J. Smith et al., *Efficacy and Cost Effectiveness of Cancer Treatment: Rational Allocation of Resources Based on Decision Analysis*, 85 J. NAT'L CANCER INST. 1460, 1460 (1993) (summarizing other studies on cost of cancer treatment); Konvicka, *supra* note 141, at 545-46 (arguing that overall cost of treating heart disease for immigrants is higher than cost of treating HIV). In comparison, the annual costs for arthritis care are above \$150 billion and the annual expenditures on cancer care in 1990 were \$35 billion. See *Costs for Arthritis Care Hit \$150 Billion and Keep Rising*, AM. MED. NEWS, Dec. 11, 1995, at 16; Smith, *supra*, at 1460.

187. See *Overview of Aliens' Eligibility for Federal Programs*, 14 IMMIGR. L. REP. 109, 109 (1995).

188. The mean Medicare payment in the last year of life for all recipients was \$13,316 in 1988. See Ezekiel J. Emanuel & Linda L. Emanuel, *The Economics of Dying*, 330 NEW ENG. J. MED. 540, 540 (1994). In contrast, the mean Medicaid payments to AIDS patients over the entire course of the illness in 1986 was \$11,972. See Roxanne Andrews et al., *Longitudinal Patterns of California Medicaid Recipients with Acquired Immunodeficiency Syndrome*, 13 HEALTH CARE FINANCING REV. 1, 7 (1991).

medical attention.¹⁸⁹ Preserving health care resources is not a reason to deny HIV-positive refugees access to these programs.

IV. CONCLUSION

The current INS policy regarding HIV waivers not only reflects a profound misunderstanding of the 1980 Refugee Act, but also reveals a lack of accountability in the administration of immigration law. The INS has overstepped its authority by considering public charge concerns in the HIV exclusion waiver process for refugees, and refugees and asylees applying for permanent resident status. The INS HIV Rule is a unique administrative regulation; for the first time ever, the INS is using a public charge concern as a criterion for waiver eligibility.

While HIV may present unique health cost concerns that justify considering public charge issues, Congress explicitly stated in the Refugee Act that the public charge exclusion does not apply to refugees. As an administrative agency subject to the will of Congress, the INS has no authority to make a unilateral decision to extend the scope of the public charge exclusion to include HIV-positive refugees. If Congress wants to change the admission criteria to ensure the self-sufficiency of individual refugees, it should do so expressly through legislative action.

To impose the burden of this extraconstitutional exercise of power on refugees and asylees, groups that are uniquely vulnerable to abuse because their members are stateless, is both unconscionable and contrary to the basic principle that a democratic government abides by the rule of law. It is not the prerogative of any executive agency to contravene express congressional mandates simply because it can do so without getting caught by the courts or reprimanded by Congress.

189. See Bartz, *supra* note 21, at 157-58.