

Immigration and HIV Positive Individuals: Common Questions and Answers

This publication addresses common questions about immigration laws and how they impact HIV positive individuals who are:

- (1) undocumented;
- (2) in the process of applying for legal status; or
- (3) who already have legal immigration status in the U.S.

This publication provides general information only. *If you are HIV positive and are planning to submit an immigration application or if you already have legal status and plan to travel outside the U.S., it is extremely important that you first consult with a qualified immigration attorney or legal services office about your specific situation.*

1. I am an undocumented immigrant and I am very ill right now. Can the U.S. government still try to deport me?

Unfortunately, the U.S. government may still try to deport you, even if you are ill. Illness itself is not a defense to deportation. However, there are some forms of discretionary relief from deportation (or “removal,” as it is now called) that may be available to you. Because immigration law is very complex, it’s best to speak with a qualified immigration attorney or legal services office to determine whether you might be eligible for some form of relief from deportation.

2. People in my country who are HIV positive are often treated very badly and the government will not protect them. Do I qualify for asylum in the U.S.?

Possibly. In order to qualify for asylum, you will need to show that you are unable or unwilling to return to your home country due to past persecution or a well-founded fear of future persecution due to your HIV status (as well as your membership in any other groups that are targeted for persecution in your country, such as persons who are persecuted because of their sexual orientation.) Persecution refers to harm that is more serious than discrimination or hardship, but can include a variety of acts including threats, physical harm, or extreme economic deprivation. You must submit your application for asylum within 1 year of entering the U.S., with very limited exceptions. If you have just learned that you are HIV positive and fear returning to your country, you may qualify for an exception to the 1 year filing rule. Asylum law is extremely complex, and it is important to apply within legal deadlines or you may lose eligibility. **If you believe you may qualify for asylum, you should consult with a qualified immigration attorney or legal services office as soon as possible.**

3. I am applying for lawful permanent residence in the U.S. Will I be asked to take an HIV antibody test?

Yes. A medical examination, which includes an HIV test, is required of all applicants for lawful permanent residence in the United States, whether they are applying for an immigrant visa at a consulate abroad or for adjustment of status to lawful permanent residence with U.S. Citizenship and Immigration Services (“USCIS,” formerly the

immigration benefits division of the Immigration and Naturalization Service) in the U.S. The examination must be performed by a doctor (known as a “civil surgeon”) who has been approved by USCIS. A list of USCIS approved doctors will be included in the packet of forms that USCIS or the State Department will send you when it is time for you to apply for adjustment of status or consular processing. The results of your HIV test will be given to you in a sealed envelope, which you must submit with your application for adjustment of status or consular processing. Because you will not be allowed to see the results of the test, it is a good idea to learn your HIV status before submitting any immigration application.

4. If the test shows I am HIV-positive, can I still become a lawful permanent resident?

The immigration laws of the U.S. provide that anyone who is HIV-positive is “inadmissible” to the U.S., meaning that such person is barred from entering or obtaining lawful permanent resident status in the U.S. However, the law also provides for a waiver of the HIV ground of inadmissibility in certain cases. If you are HIV-positive, your application for permanent residence status will be denied unless USCIS grants you an HIV waiver.

5. What will I need to show in order to be granted an HIV waiver?

In order to obtain an HIV waiver, you will need to show the following three things:

(1) The danger to the public health of the United States created by your admission is minimal

The best way to prove this is by submitting letters from your treating physician and other medical service providers stating that your health is stable and that you have received counseling about how HIV is spread.

(2) The possibility of the spread of the infection created by your admission to the U.S. is minimal

The best way to prove this is by submitting your own sworn statement that you have received HIV counseling, understand how HIV is spread, and that you do not engage in high risk behavior. You should also try to submit statements from counselors or medical providers affirming that in their opinion you display an understanding of how HIV is spread and a commitment not to engage in high risk behavior.

(3) There will be no cost incurred by any level of government agency of the U.S. for treatment of your condition without the prior consent of that agency

The best way to prove this is by submitting proof of private insurance, either through an employer or through a family member. In some cases it is possible to obtain free treatment through medical trial programs. Proof of this *may* be sufficient to meet this requirement, but is less persuasive to USCIS than proof that you are covered by private insurance. Even if a government agency does consent to provide assistance through a medical trial or other program, it is still best to provide proof of private insurance whenever possible.

NOTE: It is extremely important that your HIV waiver application include sufficient documentation to satisfy USCIS requirements. Any individual who is applying for an HIV waiver should get assistance from a qualified immigration attorney or legal services office *before* submitting anything to USCIS.

6. If I can meet the requirements of the HIV waiver, will I also have to show that I am not likely to become a “public charge”?

If you are applying for permanent residence on the basis of a visa petition filed by a family member or because you have legalized under the 1986 Immigration Reform and Control Act (“IRCA”) you will **also** need to show that you are not likely to become a public charge (i.e. you will not need to rely on government cash benefits or institutionalized medical care as your primary source of income). For more information about this, please see our publications “Will Using Benefits Hurt My Chances of Getting a Green Card or Becoming a Citizen?” and “USCIS Guidance on ‘Public Charge’” at www.washingtonlawhelp.org. If you are applying for permanent residence on the basis of having been granted refugee or asylee status, you will **not** be required to show that you are unlikely to become a public charge. However, as noted above, you will be required to show that no U.S. government agency will incur any costs in treating your condition without the prior consent of that agency in order to get an HIV waiver.

If you are undocumented and will not be eligible to adjust your immigration status at any time in the foreseeable future, you do not need to worry about whether you might be considered a public charge.

7. I am a lawful permanent resident who is HIV positive, and I am planning to travel outside the U.S. Will I have difficulties getting back in to the U.S. after my trip?

Possibly. If at all possible, you should avoid travel outside of the U.S. if you are HIV positive, as there is always some risk that you will have problems with U.S. Immigrations and Customs Enforcement (“USICE,” formerly the immigration enforcement division of the Immigration and Naturalization Service) when you try to return. The reason for this is that, as noted earlier, being HIV positive is a reason the U.S. government can use to find you inadmissible and to bar you from re-entering the U.S. after a trip abroad. If you must travel outside the country, you are somewhat less likely to encounter difficulties on your return if you limit your trip to less than 180 days. **Even so, you should consult with a qualified immigration attorney or legal services office before making any departures from the U.S.** This is true even if you are leaving to go to an immigrant visa interview at a U.S. consulate abroad.

If you become a U.S. citizen through the naturalization process, which most immigrants can apply for after five years of lawful permanent residence in the U.S., you will be able to travel freely without any risk of being barred from the U.S. For this reason (among many others), it is a good idea to become a naturalized U.S. citizen if you intend to reside in the U.S. permanently.

8. If I am HIV positive, can I still become a naturalized U.S. citizen?

Yes. Being HIV positive is not a reason that the USCIS can use to deny your application to become a naturalized U.S. citizen.

If you do decide to apply for naturalization, be sure to consult with an immigration attorney first. More information about the naturalization process can be found in “Seek Legal Help Before Applying for Citizenship” and “Some Common Questions About Naturalization” at www.washingtonlawhelp.org.

9. As an HIV positive person *who is not a U.S. citizen*, what government benefits am I eligible for?

As an immigrant the kind of benefits you are eligible for depends on a number of things: your immigration status, when you arrived in the United States, and how long you have been here. In some cases, it will also depend on whether you or a family member is in the US armed services or a veteran, whether you are a victim of domestic violence, whether you, your spouse or your parents have worked in the United States a certain number of years, and whether someone signed an affidavit of support on your behalf. For brochures on what kind of benefits you may be eligible for go to www.washingtonlawhelp.org.

- Undocumented Immigrants.

Generally if you are undocumented, you will not be eligible for cash or food assistance (except a once a year emergency cash grant for families) but may be able to get some medical treatment under the Basic Health Plan, the Alien Emergency Medical Program (apply at DSHS) or under the Hospital Charity Care Program (apply at the hospital).

- PRUCOL Immigrants

If you are “permanently residing under color of law”, which means you have some lawful status or are at least known to USICE and they are not trying to deport you, you may be eligible for state food, cash and medical programs. The cash assistance programs are for families with children under 18, or persons who are 65 and over, or persons who are disabled (unable to work for at least 90 days). You may also be able to get treatment under the Basic Health Plan, the Alien Emergency Medical Program or the Hospital Charity Care programs available to undocumented immigrants.

- “Qualified” Immigrants

This term includes the following groups:

1. Refugees;
2. Amerasians entrants;
3. Asylees;
4. Persons granted withholding of deportation/removal;
5. Persons granted conditional entry (a term used prior to 1980 to describe refugee status);
6. Cuban and Haitian entrants;
7. Victims of Trafficking;

8. Battered spouses or children approved or with application pending (abused spouses and/or child of U.S. citizen or lawful permanent resident, who can self-petition for residence);
9. Persons paroled into the U.S. for at least one year; and,
10. Lawful Permanent Residents (green card holders).

Generally those in the first seven groups are eligible for federal benefits the same as citizens. The federal benefits include TANF (cash assistance for families), SSI (cash assistance for persons who are 65 and above, blind or disabled), Food assistance, and medical programs. (The only special rule is for SSI—if you came to the US on or after 8/22/96 you will probably have to become a citizen within seven years to keep getting your SSI).

If you are a member of the other three groups and came to the US on or after 8/22/96, you may be ineligible for federal benefits during the first five years after you got your status. Some exceptions apply so be sure to read more at www.washingtonlawhelp.org or check with an advocate at a legal services office.

NOTE: Before you apply for benefits, check to see whether the information on public charge (Section 6 of this pamphlet) applies to you. Also check to see if you will need to get an HIV waiver (Section 5 of this pamphlet).

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