



<b>Subject</b>  Seropositivity for HIV and relief from deportation	<b>Date</b>  February 16, 1995 <i>should be 2/16/96</i>
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<b>To</b>  All Regional Counsel All District Counsel	<b>From</b>  Office of the General Counsel
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On January 24, 1996, the White House distributed recommendations made by the Presidential Advisory Council on HIV/AIDS regarding Federal HIV/AIDS policy and programs. Recommendation E.4. states that:

when permitted by statute, the INS and the Executive Office of Immigration Review (EOIR) should grant stays of deportation, suspension of deportations, extended voluntary departure, deferred action, and asylum based on the social group category of HIV-positive individuals.

This memorandum does not purport to recognize a new class of claimants for relief from deportation; the INS and EOIR are directed to act "when permitted by statute." Nonetheless, immigration law issues involving those afflicted with HIV are relatively undeveloped, and this memorandum highlights the Administration's concern that all such cases be handled in a humanitarian manner, consistent with our obligations under international law and the INA. Seropositivity for HIV shall be considered in requests for discretionary forms of relief from deportation, and claims for asylum or withholding of deportation based upon membership in a particular social group shall be handled in accordance with the attached discussion on that subject, prepared at the request of the White House. Further guidance on this issue may be obtained from the Office of the General Counsel, Refugee and Asylum Law Division.

*David A. Martin*

David A. Martin  
 General Counsel

**Attachments:**

- Recommendation E.4. of the Presidential Advisory Council on HIV/AIDS.
- INS response to White House regarding recognition of people with AIDS as a "social category protected under asylum law."

cc: Office of International Affairs

*Copies to all attys*

26. Direct INS to recognize person with AIDS as a social category protected under the asylum law. The U.S. government cannot send persons living with AIDS/HIV to nations where they may be persecuted.

**INS Responds:** The INS cannot expand on or issue a direction inconsistent with the statutory definition of a refugee in section 101(a)(42) of the Immigration and Nationality Act. This provision includes the term “particular social group,” defining a refugee as “any person who is outside any country of such person’s nationality,” and who is “unable or unwilling to return to...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.”

Courts have interpreted the phrase “persecution on account of membership in a particular social group” to mean persecution directed at a person who is a member of a group of persons sharing a common, immutable characteristic that group members either cannot change or should not be required to change. Whether HIV/AIDS infection is a characteristic that may define a “particular social group” under asylum law therefore depends on the practices of the government of the home country. Nothing in existing law or practice precludes recognition of “persons with AIDS” as a particular social group, if the proof in the individual case supports such a conclusion.

It must be recognized, however, that qualifying for asylum also requires applicants to prove that they satisfy the other elements of the statutory definition. These elements include the requirement that a person has suffered or has a well-founded fear of suffering “persecution.” Persecution denotes extreme harm and does not include every sort of treatment that U.S. society may regard as offensive or unjust. Further, it must be the government of the refugee’s country or an entity the government cannot or will not control that persecutes the refugee. The persecutor’s motive is also key to an asylum adjudication: the persecutor must seek to harm the person specifically because of his membership in the social group.

Therefore, the fact that an asylum claimant with HIV or AIDS cannot receive medical treatment in her country of origin equivalent to that available in the United States would be insufficient to establish eligibility for asylum. Also, social ostracism, by itself, does not amount to persecution. At the other extreme, torture or execution of persons because they have AIDS would of course meet the statutory definition. In sum a conclusion, in certain circumstances, that persons with HIV or AIDS may constitute a particular social group under refugee law would not suggest “group,” blanket, or other generic determinations of asylum eligibility for sufferers of HIV/AIDS. Each case must be evaluated on its own facts to determine whether the asylum applicant satisfies all the requirements of U.S. law.

Apart from the issue of eligibility for asylum, current law as enacted by Congress designates HIV/AIDS infection as a ground for exclusion for immigrant admission purposes. An asylee who seeks to adjust to legal permanent resident status is subject to this exclusion ground, as is a person applying abroad for resettlement as a refugee. However, the statute allows the INS to waive exclusion for humanitarian purposes, to assure family unity, or when it is in the public interest.