

AILA NATIONAL LIAISON MEETING
WITH UNITED STATES CUSTOMS AND BORDER PROTECTION

OCTOBER 28, 2013

Attendees

For CBP

Thomas Winkowski, Acting Commissioner, CBP
Susan Mitchell, Acting Assistant Commissioner, Office of Field Operations (OFO)
John Wagner, Acting Deputy Assistant Commissioner
Carey Davis, Acting Executive Director, Admissibility and Passenger Programs
Dylan Defrancisci Director of Pre-Clearance Operations, Preclearance
Anna Hinken, CBP NGO Liaison
Ryan Hutton, Deputy Executive Director, Admissibility & Passenger Programs
Brett Lozingy, [*Current title not identified*]
Curry Pastilong Acting Deputy Director of Pre-Clearance Operations, Preclearance
Xavier Rios, Associate Chief, Policy, Strategic Planning, U.S. Border Patrol
John Scanlon, Acting Associate Chief, Border Patrol
Suzanne Shepherd, Director, ESTA

AILA CBP Liaison Committee

Kenneth Harder, Chair
Ramon Curiel, Member
Leslie Dellon, Member
Brian O'Neal, Member
Farshad Owji, Member
Susan Ramos, Member
Danielle Rizzo, Member
Charlotte Slocombe, Member
Anita Sorenson, Member
Leslie Holman, AILA President Elect
Robert Deasy, AILA Senior Director, Liaison and Information
Betsy Lawrence, AILA Associate Director, Liaison and Information
Laura Lynch, AILA Liaison and Information Associate
Su Kim, Advocacy Associate

[Committee Note: CBP responses prepared in advance of the meeting, but provided to the Committee after the meeting occurred, are in red. Notes of CBP responses at the meeting include only additional information; information stated at the meeting which also was provided in the prepared responses has not been repeated.]

Introduction

The CBP Liaison Committee of the American Immigration Lawyers Association once again thanks CBP for the opportunity to meet and discuss issues of mutual concern. The Committee continues to believe that frequent and frank communication advances the mission of CBP, while providing clarity to the public in current immigration policies. The Committee continues to seek to identify and address recurrent issues in the interpretation and application of complex immigration rules, allowing CBP to enhance process efficiencies and minimize process inefficiencies, thus facilitating international travel and commerce, while allowing officers to devote necessary time to vital protection and law enforcement missions.

We look forward to a continuing dialogue with CBP.

Committee Opening Remarks at Meeting: The Committee Chair thanked the attendees for making time for discussions with AILA. Although we always talk about issues where we disagree or about events that have “gone wrong,” AILA realizes that millions of correct decisions are made by CBP employees every day and that we are discussing the exceptions.

1. Automation of Form I-94

- a. It appears that one of the most common and persistent challenges arising from the automation of Form I-94 for nonimmigrant aliens is the inability to locate the electronic admissions record on the cbp.gov/I94 web portal. This is particularly problematic for those individuals admitted to the U.S. in a nonimmigrant category that authorizes temporary employment since Section 1 of the Form I-9, Employment Eligibility Verification, must be completed on the first day of employment and USCIS policy requires those individuals to provide a Form I-94 admission number. Please confirm that:

- i. CBP officers at ports of entry will continue to issue notices to arriving nonimmigrant aliens with instructions on where to find and print their record of admission.

Yes. CBP continues to make changes to the I-94 website based on customer feedback.

AILA noted at the meeting that receipt of the notices seems to be the exception rather than the rule.

CBP Response at meeting: OFO will reissue a reminder to the field about handing out the notices and thanked AILA for getting the word out. CBP is saving \$15 - 17 million per year with the automation of the Form I-94. The top ten airports processed five percent more people in less time than before.

There is a much higher rate of matching [i.e., that the nonimmigrant alien is able to access the record from the I-94 website] than at the beginning. In late September 2013, CBP provided more details on the web site to assist travelers in locating in their passports the information needed to access their records. Director Shepherd's unit is only receiving about 4 or 5 inquiries per week from AILA about aliens unable to locate their records, down from 30 or 40 per week at the beginning. Some problems are officer error, such as the wrong class of admission, which OFO continues to monitor. If a trend is spotted, OFO sends a reminder, including a policy memo and musters to the field.

AILA commented that the trend line is very positive and expressed appreciation for CBP's responsiveness.

- ii. CBP Deferred Inspection offices will accept telephone calls from nonimmigrant aliens, or their designated representatives, to assist in locating a missing electronic record.

Yes. CBP is also addressing problems being encountered by sending out musters to the Field.

CBP Response at Meeting: An individual caller may have difficulty in resolving a matter by phone if the officer has privacy concerns about whether the person calling is the nonimmigrant alien. The officer would still be able to provide guidance to the caller by providing general information about how to locate a record on the web site. An individual can be represented by an attorney who could fax a Form G-28 to the Deferred Inspection office.

- b. Based on our previous discussions we understand that those nonimmigrant aliens requesting a paper Form I-94 at a port of entry will be referred to secondary inspection where a copy of the electronic record will be printed from the cbp.gov/I94 web portal.
 - i. As an alternative to having employment authorized nonimmigrant aliens contact Deferred Inspection offices to locate missing electronic admissions records, is it feasible to set up self-serve printers for such aliens to print a copy of the Form I-94 prior to departing the inspections area of a port of entry?
Due to the complications and costs surrounding the deployment of self-serve printers, there are currently no plans to set up those printers at ports of entry.
 - ii. As a second alternative to having employment authorized nonimmigrant aliens contact Deferred Inspection offices to locate missing electronic

admissions records, is it feasible (acknowledging the need for local variations and exceptions for exigent circumstances) to create a “fast track” secondary inspection process for employment-based nonimmigrant aliens wishing to obtain verification of their electronic admissions record and/or obtain a paper printout of their Form I-94?

This is not a viable option. Having CBP perform this function may inadvertently impede the traveler as ports of entry are focused on law enforcement functions. Travelers should visit the www.cbp.gov/i94 website and print their electronic admission number before applying for immigration or public benefits, such as driver's licenses or social security numbers.

CBP Response at meeting for 1.b.i & ii. CBP confirmed that there is no time lag between the entry of the data and data accessibility on the I-94 web site. The Committee noted that this makes it possible for the nonimmigrant alien who wants to obtain a printout at the airport to use a smartphone to confirm that the information is online. If the alien already has left the secured inspections area he or she can proceed to the deferred inspections office to obtain assistance locating the record or in obtaining a print out of the record.

CBP agreed that the problem would be eliminated if USCIS and ICE accepted the passport stamp as a Form I-94, as provided for in the regulations. CBP noted that this would have been a significant workload issue for USCIS because it accesses information based on the admission number. If USCIS could index information from an alien’s name, date of birth and passport number, the problem would be resolved. CBP views the I-94 website as an interim measure since the admission number is superfluous for its purposes, although it would consider leaving the database with the five years of admissions records on the site. [This is currently planned in coordination with the CBP FOIA Office. See the immediately following question and response.]

- c. Based on a teleconference on September 23, 2013 with representatives of the CBP FOIA office, the Committee understands that the cbp.gov/I94 web portal will soon contain historic admissions data dating back 5 years. The accuracy of historical admission data may be important to preserve eligibility for benefits such as the visa waiver program, Trusted Traveler Programs, extension, change or adjustment of status, etc. If an individual identifies an error in his or her record from a prior admission, will CBP Deferred Inspection offices be able and willing to correct the old data upon presentation of sufficient evidence from the nonimmigrant alien traveler? **OFO, the Office of Information and Technology, and the FOIA office are working together to create this web portal. The new proposed access will not change the**

formal FOIA process or any other current CBP policy. The current process for correcting errors will not change.

d. Several questions arise relating to the electronic admission record program. These include:

i. Are officers receiving training to minimize or eliminate admissions record data entry errors or inconsistency at the port of entry?

Yes, when issues are identified, corrective measures are distributed in the form of musters and memoranda.

ii. Which data points are pulled from electronic records such as Form DS160, APIS, airline manifests and which are entered by an officer at a port of entry?

I-94s are populated with information from the APIS [Committee Note: Advance Passenger Information System] and the traveler's visa, if they possess one. The CBP officers input the same information that was previously entered on the paper I-94, such as the class of admission, the admission date, and other relevant information as applicable such as SEVIS number, occupation, etc.

CBP Response at meeting: For the name, the information comes from the machine readable zone of the passport. If the traveler's passport says SuzanneMonica because the passport does not have a middle name box, then the two names may be recorded as a single name in the CBP database. The latest update to the I-94 web site has an example of "looking between the chevrons" for the name, including a picture of the passport page from which the information is taken.

iii. Is there anything that a nonimmigrant alien can do to maximize the probability of accurate or consistent data entry?

Yes, the traveler can confirm that the information provided to the airline carrier at the time of admission is correct, including the passport number. The traveler should also confirm that all information on their admission stamp in their passport is correct once they have been admitted and prior to departing the FIS.

CBP Response at Meeting: Travelers should make sure that the information they have stored in their frequent flyer programs is up to date. For example, if a traveler has not updated his passport number and the old number is prepopulated from his frequent flyer account into the carrier's records, then

this will cause a problem. Travelers with multiple visas need to be sure they identify which visa they will be using when they apply for admission.

- iv. Will the electronic admissions record software be upgraded to indicate the port of entry on the printout of I-94 available from the cbp.gov/I94 web portal?

That will be taken into consideration, however that information is already included as part of the admission stamp.

- v. Are there any other updates relating to software development for the cbp.gov/I94 web portal?

It is unclear what is being requested. CBP recently made changes to the website, including the printout of the I-94, the explanation of Last Name/Surname, and clarification in the FAQ section on the data elements. CBP will continue to monitor requests and make changes as appropriate.

Additional question presented at the meeting: Are the I-94s printed from the CBP web site multiple entry for classifications such as TN or L?

CPB Response: Multiple entry can be done electronically, but this information will not print out from the web site. While CBP may consider adding this feature, it cannot be done now. CBP confirmed that it would be clear to a CBP officer from the system that a person who has been adjudicated for an admission period of three years, leaves the U.S. and then seeks admission six months later [within the three year admission period] that the person already had been issued a Form I-94 for a three year admission. CBP also confirmed that a Canadian applying for readmission from a contiguous territory does not get readjudicated.

The Committee expressed continued concern that Mexican TNs frequently are admitted only for one year instead of the three years authorized by regulation because their TN visas have a one year validity period. The Committee noted that requests for deferred inspection would be reduced if OFO reminded the field of the three year admission period. CBP and AILA agreed that TN applicants for admission should carry with them the original letter from the employer which states that the period of employment is for three years. The Committee also requested that CBP put an explanation online in the CBP Reading Room about the TN three year admission period for Mexicans, even though their visas are valid for one year. CBP will consider this. CBP noted that the information is in the L and TN guidance, but acknowledged that a reminder would help.

Statement by Acting Commissioner Winkowski at the meeting (who arrived after the discussion of 1.c.): The Acting Commissioner expressed his thanks to AILA. He meets with NGOs [non-governmental organizations] because it is very important to have

regularly recurring dialogue. CBP makes better and more informed decisions by meeting in forums like this. The Acting Commissioner said that he learned early on the importance of AILA when he was with CBP in Miami. He learned a lot and appreciated the time spent to talk through issues. CBP has faced some difficult times, with the shutdown, the budget and the efforts to avoid furloughs. CBP will face similar issues in 2014. It is very important to transform how CBP does business and this needs to be done in consultation with the NGOs. This is particularly important in Field Operations.

The ability to eliminate [most paper] Form I-94s was a big moment as an organization to really capitalize on what the Advance Passenger Information System provides. While CBP is saving \$15 – 17 million annually, it needs to make sure that this is not hurting other parts of the operation, such as the ability of travelers to print out the I-94 information. He met with John Wagner and the Assistant Commissioner of the Office of Information Technology and is aware of the significant inroads that have been made in the ability to get the information from the web site.

CBP also has made significant inroads with FOIA and expects to be caught up by the end of 2013. CBP gets about 300 to 400 requests a day. CBP has restructured the FOIA team and hired a [division] head who has significant experience. CBP needs to make sure stakeholders are a major part of the transformation and that CBP makes well informed, educated decisions on the entire process.

The Acting Commissioner will continue to look at areas in which the organization can be transformed. CBP cannot continue to do business like it used to with today's budget. CBP has put together a very comprehensive workload management process. Upon the appropriation of the FY 2014 budget, 1600 new [*CPOs or Preclearance Officers (PCOs)?*] will be funded through user fees using different approaches. CBP is working very hard at being more transparent, more open and co-creating programs.

Committee Chair Kenneth Harder expressed thanks for the Commissioner making time for the meeting out of a very busy day and for recognizing the dichotomy between CBP's law enforcement and adjudications roles. CBP is responsible for an essential, necessary law enforcement function, and adjudications is an important part of CBP's responsibilities. Transparency in adjudications policies would help tremendously in exchanging information with CBP, not just for lawyers representing U.S. companies, but for any individuals who are applying for admission and, for nonimmigrant workers, the U.S. companies that employ them. The Commissioner recognized the need for consistency and predictability. Mr. Harder said that we need to understand CBP's expectations; transparency in current adjudication policies is essential to that understanding. AILA recognizes that some CBP documents include discussions of both

law enforcement practices with adjudication policies and when released to the public would be redacted, as necessary, to protect law enforcement and security sensitive information. AILA trusts that information outlining immigration category eligibility and documentary requirements can and should be shared. AILA members want to send applicants for admission properly prepared and be able consistently to advise clients as to who qualifies for a particular immigration classification.

2. Availability of Guidance Materials

a. During the May 2013 teleconference with CBP, the Committee was informed that CBP was withdrawing the Inspector's Field Manual (IFM) and replacing it with an "Officer's Reference Tool." As previously discussed, the IFM includes significant substantive guidance that explains or clarifies eligibility for certain nonimmigrant categories such as TN, B-1, B-2, etc. Although it appears that additional guidance to the field has been provided, such as the NAFTA Handbook, which discusses eligibility for certain nonimmigrant alien categories such as L-1 and TN, that document does not appear to include the detailed substantive guidance relating to, for example, TN classification, found in the IFM. Several questions arise from this development including:

i. Does CBP plan to expand the NAFTA Handbook to include material previously found in the IFM?

No. CBP has undertaken a comprehensive review of all admissibility policies to ensure that they accurately reflect CBP's primary mission.

ii. Is CBP willing to post in its INFO Center Reading Room substantive guidance relating to policy interpretations addressing eligibility for nonimmigrant classification in particular categories such as TN, L-1, B-1, B-2?

No. The document will be designated as "Law Enforcement Sensitive" and will not be released to the public. The Office of Chief Counsel will advise whether portions of the document, if any, can be released to any outside agency or entity.

iii. Concerning the Officer's Reference Tool:

1. Is it a paper document?

Final form has not yet been determined.

2. Does it exist solely in electronic format?

Final form has not yet been determined.

3. Is it substantially complete at this time and, if not, is there a target completion date?

A draft is scheduled to be completed in FY14.

4. Acknowledging that law enforcement and security sensitive information may be redacted, is CBP willing to make classification guidance material available to AILA and if not, why not?

No. The document will be designated as “Law Enforcement Sensitive” and will not be released to the public. The Office of Chief Counsel will advise whether portions of the document, if any, can be released to any outside agency or entity.

Additional comment by Acting Commissioner Winkowski at the meeting:

On questions such as who qualifies for an immigration benefit, CBP cannot make this a mystery. The Acting Commissioner is committed to coming up with a process that meets CBP’s and AILA’s needs. The question is how to do that.

The Committee asked if it could help with training. The Acting Commissioner said that the Committee could help by identifying regularly recurring issues. After discussion, the Acting Commissioner responded affirmatively to the Committee’s offer to identify four issues as a starting point. The Acting Commissioner responded that the Committee should identify four issues. CBP wants to centralize this process. The Committee would provide the issues to OFO, which would decide how to provide information to the field. The Committee noted that AILA members are left with the issue of how to obtain meaningful and timely review when there is a decision that is wrong as a matter of law, regulations, policy. What are the current redress mechanisms? CBP responded that national issues should be brought to OFO at headquarters, while local issues need to be presented “up the chain,” usually starting with the port director.

- b. Has CBP developed a policy for the admission of nonimmigrant workers presenting an unexpired L-1 visa valid for five (5) years following the expiration of the initial three (3) year period of validity of Form I-129S currently permitted by 8 CFR §214.2(l)(5)(ii)(E)?

- i. Are there plans to amend current regulations to allow endorsement of an initial Form I-129S for up to five (5) years consistent with the change of Department of State (DOS) regulations pertaining to L-1 visa validity?
No. This question is best addressed by USCIS as they determine the validity period of Form I-129S by their regulations.
 - ii. Is CBP engaged in discussions with DOS, USCIS or any other entity concerning policy relating to blanket L admissions following expiration of an initial Form I-129S?
CBP engages regularly with USCIS and DOS on a variety of admissibility issues.
- c. It was our understanding, from the August 28, 2013 teleconference, that OFO was drafting guidance to the field relating to the U.S. Supreme Court's ruling in United States v. Windsor, striking down Section 3 of the Defense of Marriage Act.
- i. Has OFO issued the guidance?
Not at this time. CBP OFO submitted a draft policy to the Office of Chief Counsel, which will need to be cleared by the Department of Justice. We hope to have a response soonest.
- CBP Response at meeting:** At this time, the “old” guidance is policy. Instructions from DHS and DOJ are for CBP not to take any other action until the draft policy has been cleared. OFO is not aware of any applicant for admission being deferred or denied admission because of this situation.
- ii. If so, will CBP share a copy with AILA?
CBP will coordinate with the Office of Chief Counsel to determine which parts of the policy can and/or should be shared with outside entities.
- d. Early in 2013, CBP indicated agreement with AILA's position that a non-controlled alien inspected and admitted without a Form I-94 cannot accrue unlawful presence merely by passage of time (since there is no status expiration date) until such time as a status violation determination is made by a Service officer or Immigration Judge. Subsequently, CBP reported that its Office of Chief Counsel disagreed with AILA's analysis and adopted the position that a non-controlled alien can accrue unlawful presence merely by passage of time. CBP previously indicated that it would release a copy of its policy guidance setting forth the legal basis for its position then, subsequently, declined to release its

guidance. AILA urges CBP to reconsider and release its guidance setting forth its legal reasoning for its position.

All aliens are admitted into a specific class of admission; B-2 nonimmigrants are admitted for six months, with the possibility of filing for an extension of stay. Even though a Form I-94 is not issued to a citizen of Canada, the visitor is still admitted as a B-2 visitor for pleasure and is subject to the terms of their admission. If a citizen of Canada violates the terms of admission, they may accumulate unlawful presence and be subject to 212(a)(9)(B) of the Immigration and Nationality Act.

- e. We continue to receive reports of instances in which Border Patrol has arrested and issued NTAs to aliens whose I-94 has expired but who are lawfully present in a period of authorized stay based on a pending change of status, extension of stay, or adjustment of status application. The outcome in most cases is that the NTA is cancelled by ICE District Counsel in an exercise of prosecutorial discretion, because these aliens are eligible for benefits and in most cases are authorized to work in the U.S. while awaiting adjudication of those benefits. This scenario is oft repeated and results in a waste of government resources as well as lost economic output by legally present nonimmigrant workers responding to NTAs. In light of this, would CBP consider the use of prosecutorial discretion and withhold issuance of NTAs to aliens for whom an application to extend, change, or adjust status is pending?

USBP Response: If at the time of encounter an alien is in violation of law or immigration status, is not in possession of an employment authorization document or does not meet the criteria for prosecutorial discretion under the DHS Deferred Action for Childhood Arrivals guidance, they will be processed accordingly.

At the meeting, the Committee provided examples of nonimmigrants who are in a period of authorized stay because of a non-frivolous, timely filed extension of stay or change of status, who would only have a receipt notice as proof of status. The Border Patrol officers expressed interest in learning more about these situations. They noted that one of the challenges for officers in the field is that they do not have ready access to databases. While an officer would have discretion about issuing a Notice to Appear, the officer would have to be satisfied that the person is in status [**Committee Note:** this should be lawfully present] based on the information available. The Committee said that most situations involving nonimmigrants of this type occur at checkpoints.

[Committee Note: On November 5, 2013, AILA submitted a letter to Xavier Rios, Associate Chief, Policy, Strategic Planning, U.S. Border Patrol, which

explains in detail that a nonimmigrant with a timely filed application for extension of stay or change of status and applicants for adjustment of status to lawful permanent resident are in a period of authorized stay, recommending further training of field officers on the significance of a Form I-797 receipt notice as proof of lawful presence and requesting review of current practices and requesting that CBP/Border Patrol reconsider the response to Question 2.e.]

- f. Is CBP willing to provide a copy of its policy guidance concerning the legal authority under which CBP officers seize foreign passports and Form I-551s (green cards) of aliens believed to be inadmissible? This question arises since the foreign passport belongs to a foreign government. Based on our teleconference discussions, we understand that CBP relies on Immigration and Customs Enforcement policy. Also, a resident alien retains that status pending a final decision of an Immigration Judge and may require the Resident Alien Card to demonstrate lawful presence, employment eligibility, etc.; seizing the card may require a resident alien to obtain interim proof of status from USCIS creating additional and possibly unnecessary administrative burden on all concerned. **CBP has wide authority under Title 8 and Title 19 for a variety of law enforcement issues to include admissibility (235(d)(3) INA) as well as preservation of evidence (19 CFR 210.37). Any such policy that exists would need Office of Chief Counsel review and concurrence and would be protected under attorney-client privilege. CBP provides evidence of LPR status in any instance in which a Form I-551 is retained by CBP.**

3. Admissibility Review Office

- a. Please provide an update on current processing times for waiver applications filed at:
- i. Land border ports of entry;
Please allow at least 130 days from the date of receipt by CBP. A full review of circumstances may take up to six months or longer depending on the complexity of the situation and completeness of the application.
 - ii. U.S. Consulates.
Please allow at least 130 days from submission by the U.S. Department of State.
- b. Please confirm appropriate procedures to make an inquiry about waiver applications pending substantially beyond current estimated adjudication times.

Inquiries on Form I-192, Form I-212, and Form I-824 processing should be made via email as follows:

1. inquiry.waiver.aro@dhs.gov
2. attorneyinquiry.waiver.aro@dhs.gov

Inquiries on DOS waiver recommendations should be presented to the DOS embassy or consulate where the nonimmigrant visa is being adjudicated.

4. Global Entry

- a. In August 2013 CBP published an announcement of the expansion of Global Entry pilot programs for four additional countries including the United Kingdom, Germany, South Korea and Qatar. Is there an estimated timeline for full participation implementation of Global Entry for these countries?

The Global Entry arrangement with South Korea is fully operational. U.S. citizen Global Entry members may apply for and participate in South Korea's trusted traveler program, the Smart Entry Service (SES), and South Korean citizens enrolled in SES may apply for and participate in Global Entry. CBP continues to work with the governments of Germany, Qatar, and the United Kingdom to expand Global Entry eligibility to all citizens of those countries.

- b. Are there plans to initiate pilot programs with any other countries at this time?

CBP is working with several countries to initiate additional pilot programs, such as Saudi Arabia, Panama, India, and Israel.

Additional CBP comments about Global Entry at the meeting: Close to one million people are in the program. CBP is close to re-starting talks with Japan about Global Entry. Also Mexican immigration authorities are getting very close to allowing U.S. citizens who are enrolled in Global Entry to have expedited entry procedures for Mexico. At present, Mexicans can use Global Entry when applying for admission to the U.S. It is important to CBP to get low risk people into a different program for clearance. Dulles International Airport [WAS] now has twenty-five kiosks and eight percent of travelers are using the system. CBP just opened a Global Entry office at the Ronald Reagan Building [in Washington, D.C.] , which took pressure off of Dulles in processing applications. The new office conducted 1,500 interviews in September 2013; approximately fifty per day, six days per week. CBP would like to expand the program with the United Kingdom but the United Kingdom needs to increase capacity for vetting applicants. Frequently, the problem is that different government agencies "own" different parts of the vetting process and it is hard for them to reach agreement on

a single system. The Committee responded that AILA may be able to work with various business interests in the countries with pilot programs or considering pilot programs to encourage participation.

5. Automatic Visa Revalidation

Pursuant to 22 CFR §41.112(d), a nonimmigrant alien can be readmitted to the U.S. following travel to contiguous territory of 30 days or less with an expired visa and a valid Form I-94 under certain circumstances including, *inter alia*, that he or she “has not applied for a new visa while abroad.” Under procedures currently in place at U.S. consulates in Mexico, an individual applying to renew an E-1 Treaty Trader or E-2 Treaty investor visa must attend a biometrics appointment at an Application Support Center (ASC) prior to being scheduled for a visa application interview. There is routinely a wait of 3 to 5 weeks between the ASC appointment and the consular visa application appointment. Such an interruption in the presence of entrepreneurs at their places of business in the U.S. can be ruinous. Please confirm that an individual who has attended a biometric appointment at an ASC “has not applied for a new visa while abroad” under 22 CFR §41.112(d)(2)(vii) and would be eligible for readmission to the U.S.

Consideration of each application for admission is made on a case-by-case basis, including the totality of circumstances and intent of the alien at the time of application for admission. In order to be eligible for automatic visa revalidation, one of the conditions is that the alien has not applied for a new visa while abroad. Appearing at the ASC is part of the application process for a new visa and is subsequent to filing the DS-160 (application for non-immigrant visa). Under the hypothetical given, the person would not qualify for visa revalidation; however CBP will not render an admissibility decision unless and until the person is an applicant for admission at a POE.

6. Pre-Clearance Operations

- a. Which CBP Field Office has jurisdiction over Pre-Clearance Operation locations at foreign airports?

Preclearance Operations is located at the Ronald Reagan Building in Washington, D.C. The Director, Preclearance is Dylan DeFrancisci.

- b. AILA members frequently report that PCO locations are difficult to communicate with, due to inconsistent practices in answering the phone and/or returning voicemail messages. If no CBP Field Office has such jurisdiction, in the case that PCOs are unresponsive to phone inquiries regarding questions or apparently erroneous adjudications, which CBP office may an attorney or an AILA liaison contact to discuss case-specific problems arising at PCOs?

The following Branch Chiefs may be contacted with inquiries within their Areas of Responsibility for dissemination to the appropriate port:

Toronto: Acting Deputy Director Kurry Pastilong

Western Canada (Calgary/Edmonton/Vancouver/Victoria): Branch Chief Kellie McInnis

Eastern Canada (Halifax/Montreal/Ottawa/Winnipeg): Branch Chief Lynn Ruscoe,

Caribbean (Aruba/Bermuda/Freeport/Nassau): Acting Branch Chief James Rector,

Ireland (Dublin/Shannon): Branch Chief Adam Rottman,

[**Committee Note:** At CBP's request, contact information was redacted.]

7. Officer Identification

A question arises concerning CBP officers at ports of entry wearing bulletproof vests or other clothing which covers or obscures officer name tags. Some such officers, when asked their names, refuse to give them to attorneys or applicants for admission. Can OFO please remind the field that officers engaged in passenger processing at ports of entry should wear clearly visible name tags at all times?

CBP Uniform policy requires all uniformed employees to wear a nameplate with their legal last name. Exceptions to this policy may be granted on a case by case basis. The ballistic outer vest is for increased officer safety and the uniform policy does not address wearing of name plate on ballistic vest. CBP is working to establish a policy to incorporate the ballistic vest and will require modification of the uniform contract. In any instance in which an officer refuses to identify themselves, the traveler is encouraged to ask for a duty supervisor.

8. Refusal of Admission to Nonimmigrants in Employment-Authorized Categories

In the case of applications for admission by aliens in nonimmigrant categories that authorize temporary employment in the United States based on a petition already approved by USCIS (such as L-1, H-1B, O-1 or, in some cases, TN) or a visa application adjudicated by a consular officer (such as a blanket L, E-1, E-2, E-3 or, in some cases, TN), AILA questions whether it is appropriate to refuse admission based solely on an inspection interview, without affording the applicant for admission or the applicant's petitioner the opportunity to provide additional documents information, or to address questions of law.

As an alternative course of action supported by existing CBP processes, AILA strongly encourages referral of such cases to Deferred Inspection offices to allow for production of documentation or other evidence needed to clarify eligibility for the classification being sought by a nonimmigrant worker. Referring these cases to Deferred Inspection would also allow CBP time to review the petition filed by the employer in more detail, and if appropriate, work together with other agencies such as USCIS and DOS to investigate or further develop the facts relevant to the matter. In addition, the petitioning U.S. employer should be allowed a meaningful opportunity to rebut any perceived adverse information and discuss any questions concerning interpretation of the law.

In summary, a limited class of applicants for admission—nonimmigrant workers with an approved petition adjudicated by USCIS or a visa issued by DOS, or both—should not be refused admission or have a visa canceled solely on the basis of an inspection interview. Before overturning such a determination, CBP should afford both the U.S. business seeking the services of the foreign worker and the nonimmigrant worker the opportunity to address questions of law or facts raised by inspecting officers.

- a. Please confirm CBP agrees that:
 - i. Deferred Inspection offices are the appropriate venue to address questions of fact and law concerning the eligibility of admission of nonimmigrant workers applying for admission based on an approved petition or visa application or both.

Deferred inspection is not the proper venue for this type of admissibility decision. Deferred inspections are not to be used as method for a *de novo* review of an admissibility decision at the port of entry. All applicants must prove to the satisfaction of the inspecting officer that they fall into a non-immigrant category (214(b) INA). Applicants are encouraged to present all necessary documentation prior to being an applicant for admission. Ports, at their discretion, may ask the employer for additional information.
 - ii. U.S. employers or their designated representatives should normally be afforded an opportunity to address questions of fact and law concerning the underlying visa petition or offer of employment, as well as the eligibility of their prospective nonimmigrant workers for the classifications they are seeking when under review by a Deferred Inspection officer.

CBP officers are charged with making admissibility decisions and the burden of proof is on the applicant that he/she falls into the category for which they are seeking admission (214(b) and 291 INA).

Applicants are not entitled to representation at the port of entry while seeking admission (292 INA). Applicants are encouraged to present all necessary documentation prior to being an applicant for admission. Ports, at their discretion, may ask the employer for additional information.

- b. Please confirm if CBP would be willing to set up a taskforce to collaborate on ideas to streamline and add consistency and fairness to the determination of eligibility for classification for business and employment visa categories. CBP is willing to support collaborative efforts and the current process of regular reoccurring meetings accomplishes this goal. CBP is willing to devote additional meeting time for specific topics of interest.

9. Forfeiture of Trusted Traveler Authorizations

Members report an increased incidence of forfeiture, or threatened forfeiture, of Trusted Traveler authorizations in connection with applications for admission when officers disagree with the category of admission sought by the applicant. The Trusted Traveler program indicates that ineligibility for Nexus is, among other things, inappropriate when the applicant is not inadmissible. However, such determinations regarding admissibility are often incorrect, such as an officer incorrectly disagreeing with the category of eligibility chosen by the applicant when they are in fact, eligible for more than one category (e.g., an applicant eligible for both TN and L-1 status).

- a. Can officers be advised that mere determinations regarding eligibility for the category of admission sought is not an appropriate ground to require forfeiture of Trusted Traveler eligibility, and also that warning of the potential of such termination is inappropriate?

Revocations are considered on a case-by-case basis. Generally, an admissibility determination is made at the time the Trusted Traveler enrolls, however membership does not insulate the traveler from further admissibility determinations.

- b. When such determinations are made and they are incorrect, please advise of the exact chain of command for redress, as applying to the Trusted Traveler Ombudsman has not resulted in resolution.

If the Trusted Traveler believes CBP revoked their membership in error or due to incomplete or incorrect information, the method of redress is to write to the CBP Ombudsman to request reconsideration, presenting any relevant information or evidence. If the applicant believes that the basis for revocation has been overcome, the applicant may address the revocation with CBP supervisors or managers at the port of entry or by writing to CBP Headquarters.

10. Denial of Credible Fear Interviews

AILA members report encountering aliens who have entered without inspection along the U.S./Mexico border who were stopped by Border Patrol and questioned without ever being asked about fear of return. They have then been issued removal orders under INA §235(b) and released. However, they are never given the opportunity for a credible fear interview, when they actually have valid asylum claims. This problem has later surfaced when these individuals have hired attorneys to prepare affirmative asylum cases, only to then discover that they have prior removal orders.

- a. What training do officers receive concerning the requirement to provide a reasonable opportunity for credible fear interviews?

USBP Response: All U.S. Border Patrol agents receive extensive training on the Expedited Removal (ER) process, which includes: identifying the applicable charges, recognizing the conditions making an alien amenable to ER, proper processing and recognizing circumstances that require referral to U.S. Citizenship and Immigration Services (USCIS) for a credible fear interview or judicial review.

During processing, agents must inquire whether the alien has any fear of persecution or torture, or a fear of return to his/her home country. If the alien expresses an intention to apply for asylum, or a fear of persecution or torture, or a fear of return to his/her home country, the alien must be referred to a USCIS Asylum officer for a credible fear interview. Processing agents **do not** make eligibility determinations, **do not** weigh the strength of the claims and **do not** make credibility determinations concerning alien's statements.

Before remanding the alien to the custody of Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO), agents are responsible for contacting the local USCIS Asylum Office, generally by fax or electronically, and providing the relevant case forms and location of the ICE detention facility where the alien is being transferred to. The credible fear interview is conducted after the alien is remanded to ICE-ERO custody.

CBP officers are trained to initiate and prepare a case file for travelers who express a fear of returning to their home country under existing section 235 Expedited Removal provisions. The final determination to grant or deny the asylum claim is made by the USCIS Asylum officer.

- b. Please advise whether CBP engages with discussions with USCIS and ICE to make sure that officers of all immigration services are properly trained to provide reasonable opportunity for credible fear interviews.
The processing of credible fear cases is a collaborative effort by CBP, ICE and USCIS Asylum officers. CBP routinely notifies the USCIS Asylum office and ICE of port of entry cases involving credible fear.

[**Committee Note:** In response to his request at the meeting, AILA provided a document on November 5, 2013, to Xavier Rios, Associate Chief, Policy, Strategic Planning, U.S. Border Patrol, with examples of the encounters by aliens with Border Patrol officers.]

11. Recent CBP-AILA Meeting Minutes

- a. Has CBP completed a final review of the meeting minutes prepared by AILA for the April 11, 2013 liaison meeting and, if so, does AILA have CBP's authorization to indicate that the meeting minutes are approved by CBP? **Yes**
- b. Has CBP completed a final review of the teleconference minutes prepared by AILA for the May, June, July and August, 2013 liaison discussions and, if so, does AILA have CBP's authorization to indicate that the meeting minutes are approved by CBP? **Yes**

12. Government Shutdown

During an October 1, 2013 teleconference with stakeholders following the lapse in appropriations, CBP advised that the ports of entry remain open and that the public should not see any change in the clearance of people and cargo; that ARO remains open; that the trusted traveler programs continue to function and that the Border Patrol and the Office of Air and Marine continue to operate. CBP also advised that about 6,000 employees, a majority of whom are technicians and support staff, were not exempt and could not continue working. As of this meeting, what effect has the lapse in appropriations had on operations?

Operations are currently status quo.