



April 26, 2013

Regulations and Rulings, Office of International Trade
U.S. Customs and Border Protection
Attention: Border Security Regulations Branch
90 K Street, NE, 10th Floor
Washington, DC 20229

Re: CBP, DHS – Docket No. USCBP-2013-0011

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To Whom It May Concern:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the interim final rule published by the Department of Homeland Security (DHS) concerning changes to the process of documenting the admission or parole of certain aliens and the arrival and departure of such persons.¹

AILA is a voluntary bar association of more than 12,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the interim final rule and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views that we believe will benefit the public and the government.

AILA supports the enhancement of our national security through the efficient and effective control of the cross-border flow of goods and people, with appropriate allocation of resources. AILA submits these comments to the interim final rule changing the definition of Form I-94 to include an electronic format.

I. Description of the Proposed Rule

DHS has announced the interim final rule amending its regulations to authorize Customs and Border Protection (CBP) to add a new definition of the term "Form I-94" to include the collection of arrival/departure and admission or parole information by DHS in a paper or electronic format. The new definition also seeks to clarify various terms associated with

¹ 78 Fed. Reg. 18457 (3/27/13), *CBP Notice on Automation of Form I-94 Arrival/Departure Record*, AILA Doc. No. 13032640, <http://www.aila.org/content/default.aspx?docid=43791>

Form I-94, broadening them to include information gathered, stored, and presented in an electronic format. Finally, under the interim final rule, a valid, unexpired nonimmigrant DHS admission or parole stamp in a foreign passport is recognized as evidence of alien registration.

DHS explained that these changes are being introduced in order to enable it to transition to an automated admission or parole process based on data collected from air and sea carriers through the Advance Passenger Information System (APIS), from the U.S. Department of State, and through the inspection process.

The notice published in the Federal Register on March 27, 2013 announcing these changes becomes effective on April 26, 2013.

II. AILA Comments on the Proposed Regulation

AILA commends the plan by DHS to transition to an electronic format for the admission or parole process for certain aliens. Certain features of the interim final rule, however, present as yet unanswered questions. Among them are the following:

Training Is Essential

Admissions errors at ports of entry frequently result from officers' misapplication of or apparent lack of awareness of regulations relating to authorized periods of stay corresponding with the various nonimmigrant visa categories, particularly those that authorize employment. In addition, admission errors occur in relation to the automatic visa revalidation provisions of 22 CFR §41.112(d). Local AILA liaison meetings with CBP at various ports of entry suggest that little additional training, if any, has been or will be provided to address the automation of Form I-94.

AILA urges CBP to plan and provide training for officers on appropriate periods of stay authorized for each of the nonimmigrant visa categories, as well as the automatic visa revalidation provisions of 22 CFR §41.112(d) in order to minimize errors following the elimination of paper Form I-94 at air and sea ports.

Electronic Records for Nonimmigrant Aliens Utilizing Automatic Visa Revalidation

1. Training for CBP Officers

CBP indicated that nonimmigrants seeking to use the automatic visa revalidation process which requires presentation of, *inter alia*, a Form I-94, will not be required to print and carry a copy of their I-94 admission record. This is consistent with interim final rule 8 CFR §1.4(d) providing a new definition of "original I-94" as including "...any printout or electronic transmission of information from DHS systems containing the electronic record of admission or arrival/departure." CBP explained that since officers will be able to access the electronic record, aliens reapplying for admission from a contiguous territory under the automatic visa revalidation provisions should experience no difficulty upon readmission, even though they will have no tangible document to demonstrate status.

AILA is concerned that this assessment may be overly optimistic. Persistent, widespread anecdotal evidence suggests that many CBP officers fail to understand or properly implement the automatic visa revalidation process provided by 22 CFR §41.112(d). It is not difficult to imagine

that nonimmigrants without a paper I-94 who present either an expired visa, or a visa in a class other than the one in which admission is sought, may experience challenges during the inspection process when seeking visa revalidation. Focused and effective training of officers will be vitally important to avoid errors or refusal of admission for qualified nonimmigrants.

2. Training for Common Carrier Personnel

Aliens seeking to utilize the automatic visa revalidation provisions when traveling by air or sea will also have to demonstrate to the satisfaction of carrier personnel (who, presumably, do not have ready access to the DHS electronic record of admission) that they are legally allowed to board the plane or vessel with an expired visa and a passport stamp that reflects a change or extension of status.

AILA encourages CBP to require air and sea carriers to provide instructions to their personnel regarding the documentation required for such persons. In addition, AILA encourages CBP to update its [Carrier Information Guide](#) in all languages in order to provide instruction if a common carrier refuses to board a documentarily qualified nonimmigrant alien.² Information about automatic visa revalidation and a link to the *Carrier Information Guide* should also be included on www.cpb.gov/I94. Finally, AILA encourages CBP to create a toll-free number for carrier personnel to call in order to address and resolve questions concerning documentation for nonimmigrants.

3. Printing a Form I-94 May Be Insufficient

An expedient solution for those concerned about the sufficiency of a passport stamp to serve as an adequate Form I-94 may be to print the Form I-94 from the [CBP website](#) and carry it for presentation to both airline and CBP personnel.³ Many of those presenting a pre-printed Form I-94, however, already experience re-admission challenges, and those presenting a record of admission on plain paper may experience even more difficulty.

To address this concern and as a means of educating CBP officers, common carrier personnel, and other interested parties, AILA recommends adding an endorsement to each printable I-94 admission or parole record. For example:

Effective April 26, 2013, DHS began automating the admission process. An alien lawfully admitted or paroled into the U.S. is no longer required to be in possession of a preprinted Form I-94. A record of admission printed from the CBP website constitutes a lawful record of admission. *See* 8 CFR §1.4(d). Further information about the automation of the admission or parole process may be found at www.cbp.gov/I94.

Including an endorsement of this type as part of each printable electronic record of admission or parole should help educate those stakeholders responsible for deciding eligibility for the various benefits that derive from lawful nonimmigrant status.

² *Carrier Information Guide*, http://www.cbp.gov/xp/cgov/travel/inspections_carriers_facilities/carrier_info_guide/

³ www.cpb.gov/I94

Yet another challenge may await those seeking to utilize automatic visa revalidation following the automation of Form I-94. Based on the information provided by CBP to date, it appears that officers will need to override an alien's automated departure record when an alien seeks re-admission under 22 CFR §41.112(d). Under the interim final rule, there will be no paper form to surrender to memorialize departure. Instead, CBP will draw departure information from airline manifests and the APIS record and its Arrival and Departure Information System (ADIS). Electronic transmission of departure data from a common carrier to CBP, along with an alien's compliance with departure controls under 8 CFR §215, constitutes "surrendering" or "turning in a Form I-94." In addition, CBP reported that once an alien departs, the electronic Form I-94 record will be removed from the system and will no longer be available to the nonimmigrant. AILA recommends that CBP emphasize in its training that field officers will be expected to reactivate previously closed records for purposes of automatic visa revalidation.

Arrivals by Air or Sea Departing by Land

A similar challenge confronts those who arrive by air or sea and depart the U.S. by land. Currently, there is no departure control of such cases. Presumably, the DHS database will retain the arrival and note the absence of a recorded departure for any such alien. To avoid an allegation of overstay or other status violation, an alien who arrives by air or sea and intends to depart by land may wish to request a paper Form I-94 upon arriving or print an automated I-94 from the CBP website. The paper form could then be mailed back to CBP as [currently may be done](#).⁴ It remains unclear, however, whether CBP believes that such aliens will have an affirmative obligation to take such steps and, if so, by what authority that obligation is imposed. If CBP takes the position that nonimmigrants arriving by air or sea and departing by land do have an affirmative obligation to self-report their departure, the interim final rule is silent on how CBP plans to notify such aliens of this obligation. This issue should be addressed in the rule.

Transmission of APIS Information by Common Carriers

It appears that the electronic I-94 will automatically upload certain data from the nonimmigrant's visa application through APIS. The supplementary comments to the interim final rule do not explain how the automated I-94 will determine which nonimmigrant visa classification an alien will seek at the time of admission in cases where the alien has more than one class of visa. This may occur, for example, in cases where an alien intermittently engages in H-1B employment in the U.S., but also seeks to enter the U.S. for a business visit or for pleasure on a B-1/B-2 visa. AILA encourages CBP to clarify how visa classification data will populate an automated I-94 when an alien has more than one nonimmigrant visa.

Problem Resolution and Redress Responsibility for Departure Data Errors

The interim final rule provides that electronic transmission of departure data from a common carrier to CBP, along with an alien's compliance with departure controls under 8 CFR §215, constitutes "surrendering" or "turning in a Form I-94." *See* Interim Final Rule 8 CFR §1.4 (g). Anecdotal reports suggest that when travelers book and then reschedule air travel, airlines do not always timely update their departure manifests. As a result, a nonimmigrant may find that CBP has received inaccurate departure records. Such a discrepancy may result in the alien being identified as having overstayed or as having entered without inspection, and ultimately being

⁴ CBP INFO Center: I still have my I-94, https://help.cbp.gov/app/answers/detail/a_id/752

denied benefits, such as participation in the visa waiver program or regularly being referred to secondary inspection. In such a situation, where CBP relies on carrier data and the carrier may have no on-going obligation to the alien traveler, the individual may be left with no means to seek redress.

AILA encourages CBP to create an automated Form I-94 Ombudsman office to address electronic admission and departure record errors.

Need for Interagency Clarification on Passport Admission Stamp as “Form I-94”

In light of DHS’s expansive new definition of “Form I-94” at 8 CFR 1.4, a passport stamp should be accepted by all agencies as an “I-94” and proof of valid admission. However, in the lead-up to implementation of I-94 automation, federal, State, and local agencies appear to have an incomplete understanding of this point, and its effect on their operations. In fact, agencies have already begun to issue disparate and inconsistent guidance about which document(s) are acceptable or may be required in place of a paper I-94. For example, the Social Security Administration (SSA) has published guidance in its Program Operations Manual System (POMS) indicating that either an unexpired admission stamp in an applicant’s passport *or* a printout from CBP’s I-94 website will be accepted as proof of nonimmigrant status.⁵ On the other hand, USCIS has published guidance on its website stating that USCIS and State Department of Motor Vehicles (DMV) agencies will “continue to *require* a paper copy of Form I-94.”⁶

This inconsistent guidance from the SSA and USCIS alone—two agencies that were active stakeholders with CBP in finalizing the interim final rule—suggests that new and continuing interagency dialogue with *all* federal, State, and local agencies handling benefits applications from nonimmigrants is sorely needed. AILA is concerned that inconsistent rules as applied to applications for benefits such as Social Security cards, driver’s licenses, and extensions or changes of nonimmigrant status, will materially affect foreign nationals’ access to these benefits that are necessary to work, live, and carry out business in the United States. Inconsistent rules also stand to adversely affect U.S. businesses—for example, if DHS erroneously continues to require the use of I-94 printouts bearing an admission number, employers could be fined by DHS for failure to record this I-94 “number” on Form I-9 if employers complete Section 2, List A listing information from a passport admission stamp, which bears no admission number.

To correct these misunderstandings, AILA encourages CBP to continue proactive and widespread dialogues with stakeholders affected by the I-94 automation process. We also encourage all DHS agencies to consciously adopt a uniform stance, clarifying that passport admission stamps will be accepted as proof of valid admission and work authorization in the employment eligibility verification and benefits application contexts. We also urge DHS to

⁵ *RM 10211 TN 21: Alien Evidence for an SSN*, <https://secure.ssa.gov/apps10/public/reference.nsf/links/04122013093257AM>, *SSA POMS Update on Acceptable Evidence of Nonimmigrant Status for SSN*, AILA Doc. No. 13042645, <http://www.aila.org/content/default.aspx?docid=44203>

⁶ *USCIS & Other Agencies Will Still Require Paper Copy of Form I-94*, AILA Doc. No. 13032742, <http://www.aila.org/content/default.aspx?docid=43811>, *CBP Announces Automation of Form I-94 Arrival/Departure Record*, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=0d43e122c38ad310VgnVCM100000082ca60aRCRD&vgnnextchannel=e7801c2c9be44210VgnVCM100000082ca60aRCRD>

educate other federal, State, and local agencies to improve their access to and use of DHS admission data in SAVE and other databases. Lessening and eliminating unnecessary burdens on foreign nationals to affirmatively prove their valid admission to the United States will improve efficiency for all stakeholders, public and private, affected by I-94 automation.

USCIS Practices and Accessibility of Status Records

Many of the petition and application forms promulgated by USCIS that are used to request immigration benefits, such as Forms I-129, I-130, I-539, etc., ask for a Form I-94 number. It appears that USCIS will expect those persons seeking such benefits to access the CBP website at www.cbp.gov/I94 and to print out a Form I-94. It further appears that USCIS will continue to issue Form I-797, Notice of Action, approving applications for change or extension of status with a Form I-94 at the bottom as is its current practice. The Form I-94 issued by USCIS in such cases will constitute the new, actual record of admission/extension/change of status.

1. Update the www.cbp.gov/I94 Website to Reflect a Change or Extension of Status

It is our understanding that, at present, there is no plan to update the www.cbp.gov/I94 website to reflect a change or extension of status granted by USCIS, even though such information will be available to CBP in its internally accessible database. If so, aliens will only be able to electronically access their Form I-94 during their initial period of admission but not for any subsequent extension or change of status.

This situation invites confusion on the part of all stakeholders and introduces inefficiencies in the administration of immigration laws. Stakeholders, after being trained to see a printout of Form I-94 from the CBP website, may reasonably be confused when presented with a paper Form I-94 issued by USCIS. Nonimmigrants who may readily print out a Form I-94 at will if one is lost or damaged during the initial period of admission, would be compelled to file a Form I-102, Application for Replacement of a Form I-94, following a change or extension of status. Both of these situations lead to delay, administrative burdens, and attendant costs, while tying the process of maintaining admission and maintenance of status records to arcane and anachronistic practices.

These undesirable conditions can be avoided simply by updating the www.cbp.gov/I94 website so that it includes information confirming a change or extension of status by USCIS.

2. Employment Eligibility and Identification Process

The employment eligibility and identification process also will be affected by the automation of Form I-94. Currently, 8 CFR §274a.2(b)(1)(v)(A)(5) authorizes employers to accept a foreign passport and a properly endorsed Form I-94 or Form I-94A as proof of employment eligibility and identification for I-9 purposes.

The SSA recently issued a POMS notice, effective April 30, 2013, instructing its employees that CBP has expanded the definition of a Form I-94 to include:

- A U.S. admission stamp in an unexpired passport or
- A CBP I-94 printout.⁷

The SSA POMS indicates that the I-94 printout from the CBP website will reflect the I-94 number, which assists with SAVE program. SSA also outlines a process for its employees to simply enter information from the passport and stamp for SSA card issuance purposes.

However, this latitude is not permitted in the context of the new Form I-9. In order to complete Section 1 of the I-9, a work-authorized nonimmigrant must have either an A/USCIS number or an “admission” number. Since the passport stamp will have an admission validity period but no admission number, AILA suggests that either the period of admission stamped in the passport or the passport number and country of issuance serve as the required data points in Section 1.⁸ Otherwise, employees who do not have easy access to the Internet (e.g. agricultural workers) will have difficulty completing Section 1.

As to Section 2, employers who need to review the admission number based on the employee’s selection of a List A document, for example, can enter the seven data points required by the CBP I-94 website (family name, first name, birth date, passport number, country of issuance, date of entry, and class of admission) by using information found in the employee’s passport. The other option is for the employee to have the I-94 printout in advance. Since the critical data point for I-9 purposes is validity of the authorized employment, the admission number for Section 1 or 2 is superfluous.

USCIS recently indicated that employees should present the I-94 printout for Form I-9 compliance when applicable. This policy statement ignores CBP’s definition of the term “original I-94” under 8 CFR §1.4(d). The new definition states that an “original” I-94 includes the “electronic transmission of information from DHS systems containing the electronic record of admission OR [emphasis added] arrival/departure.” So, but for the reference to the “admission number” on the Form I-9, it appears that there is latitude to use a record of admission versus the actual admission number as the I-94. AILA asks USCIS and CBP to come to an agreement regarding whether the admission number referenced on the new Form I-9 could be satisfied with the validity period on the passport admission stamp from CBP, rather than making it an absolute requirement that employers and employees access the CBP I-94 website to view the admission number.

⁷ *RM 10211 TN 20: Alien Evidence for a SSN*, <https://secure.ssa.gov/apps10/public/reference.nsf/links/04112013010840PM>; *SSA POMS Update on Acceptable Evidence of Parole Status*, AILA Doc. No. 13042643, <http://www.aila.org/content/default.aspx?docid=44201>; *RM 10211 TN 21: Alien Evidence for an SSN*, <https://secure.ssa.gov/apps10/public/reference.nsf/links/04122013093257AM>, *SSA POMS Update on Acceptable Evidence of Nonimmigrant Status for SSN*, AILA Doc. No. 13042645, <http://www.aila.org/content/default.aspx?docid=44203>; *RM 10210 TN 16: SSN Evidence Requirements*, <https://secure.ssa.gov/apps10/public/reference.nsf/links/04162013014723PM>, *SSA POMS Update on Acceptable Identity Documents*, AILA Doc. No. 13042650, <http://www.aila.org/content/default.aspx?docid=44208>
⁸ *I-94 Web Application*, https://i94.cbp.dhs.gov/CaptivateVideo_html.html

AILA is pleased to see that the definition of “original” I-94 includes an electronic transmission of the data from the DHS system. Thus, employers should be able to view the information online rather than require a printout of the admission record in order to satisfy the employer’s responsibility to view original documents. However, it appears that USCIS continues to require employers to view a printout of the I-94. Since employers will be able to access and print the I-94 for their official records, USCIS and CBP should clearly articulate their position as to whether the online view and/or the printout of the I-94 satisfy the inspection requirement.

Employers must also address the confusion between use of an admission number on an I-94 issued by CBP and use of the admission number by USCIS. Work authorized nonimmigrants *do not* have to insert the passport number and country of issuance for USCIS generated I-797s with an I-94 in Section 1 of the I-9. This bifurcation of requirements makes the Form I-9 even more complicated, and AILA again suggests that the validity period serve as the critical element.

In an effort to provide adequate training to employers, AILA encourages a delay or grace period in any enforcement actions related to the new Form I-9 regarding the entry of admission numbers.

Requiring work-authorized nonimmigrants to present a paper I-94 ties the compliance process to anachronistic paper-based systems and makes the regulation outdated upon publication. Presentation of a foreign passport with a properly annotated CBP-issued admission stamp should be sufficient to comply with Form I-9 requirements. Furthermore, accessing www.cbp.gov/I94 and showing the Form I-94 to an employer should be more than adequate to achieve the employment eligibility verification objectives of INA §274A, since the alien would still present a foreign passport to establish identity in conjunction with the electronic record.

3. B-1/B-2 Nonimmigrants Are Likely to Access the CBP Website

In concluding that B-1/B-2 travelers will not use the website to access their electronic I-94, CBP does not appear to have considered aliens who are admitted in this category for more than six-months.⁹ These include cohabiting partners or other household members (such as parents or in-laws) of a principal alien who is working temporarily in the U.S.¹⁰ Household members, who may be admitted for one year, may need their I-94 admission number to open a bank account or apply for a driver’s license. In addition, in cases where the principal alien is admitted for several years, the household member might need an I-94 to file a Form I-539 with USCIS to extend his or her stay after one year.

CBP also does not appear to have considered that a B-1/B-2 visitor may want to access the CBP website to obtain a record of his or her admission for future use. For example, such a record would be helpful in responding to the question on the nonimmigrant visa application, Form DS-160, about prior travel to the U.S. As another example, an employee of a foreign employer who is under consideration for transfer to the U.S. in L-1 status would find the record helpful in establishing time spent in the U.S. as a visitor, which cannot be counted toward the requirement of qualifying employment abroad.

⁹ Preamble, 78 Fed. Reg. at 18463.

¹⁰ 9 Foreign Affairs Manual (FAM) 41.31 N14.4.

Make Archival Arrival/Departure Records Continuously Available

AILA understands that CBP plans to make arrival/departure records from the past two years available via the I-94 portal and any access to such records will be denied once an alien departs the U.S. We encourage CBP to make all archival records of an alien's arrival and departure available indefinitely. The availability of such records will significantly reduce the administrative burden placed on CBP to respond to Freedom of Information Act (FOIA) inquiries that seek such information which will in turn, free up resources that can be dedicated to its primary law enforcement and security mission.

Ancillary Benefits from Other Federal or State Stakeholders

All of the observations made above relating to challenges that may be encountered when dealing with CBP, USCIS, or common carriers also may be experienced when nonimmigrant workers seek a Social Security number or a driver's license. Until federal and state offices, such as SSA field offices and DMV offices, become familiar with the new regime, nonimmigrant workers filing an application for an account number and/or driver's license may be well advised to bring a copy of both the Form I-94 and a copy of the CBP announcement of the automation process in order to minimize the possibility of delay.

Carrying a paper printout of Form I-94 from www.cbp.gov/I94 will continue to have all of the challenges discussed above. For the same reasons, AILA encourages CBP to:

1. Continue communicating with stakeholders on a regular basis to provide necessary training;
2. Create a website with plain language guidance on the sufficiency of a properly annotated passport stamp to establish class and term of admission and the validity of a printout of Form I-94;
3. Create a toll-free number to address and resolve questions from stakeholders;
4. Include an endorsement on Form I-94 printed from the CBP website that specifically mentions the regulatory change and directs those with questions to the site.

III. CONCLUSION

AILA appreciates the opportunity to comment on this interim final rule, and we look forward to a continuing dialogue with CBP on issues concerning this important matter.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION