

**AILA NATIONAL LIAISON COMMITTEE MEETING  
LIAISON AGENDA  
DECEMBER 9, 2010 – PART I**

**THIS MEETING REPORT IS BASED UPON NOTES OF CBP VERBAL RESPONSES.  
CBP HAS NOT REVIEWED THIS REPORT.**

**Meeting Participants:**

**CBP Representatives**

Maureen Dugan, Assistant Director for Admissibility and Passenger Programs  
Ken Sava, Director of Passenger Programs  
Michael Olzsak, Director of Admissibility Review Office  
Rafael Henry, Program Manager Passenger Programs  
Suzanne Shepherd, Director, ESTA

**AILA CBP Liaison Committee**

Reginald Pacis, Chair  
Kenneth Harder, Vice Chair  
Leslie Holman, AILA Secretary  
Leslie Dellon, Committee Member  
Andrew Stevenson, Committee Member  
Gregg Rodgers, Committee Member

**AILA**

Robert Deasy, Director of Liaison and Information  
Lynn M. Lee, Liaison and Information Associate

**INTRODUCTION**

Thank you for arranging this meeting between the members of AILA's CBP Liaison Committee and CBP representatives.

We believe that continued communication will serve to foster a sense of fairness in the processes, as well as enhance CBP's goals. AILA recognizes that CBP must balance its responsibilities to protect the U.S. border and national security and to administer complex immigration laws fairly during the admissions process. We have selected our agenda items with goals of improving communications and making the process work better for all involved. We appreciate your willingness to meet with us to listen to our concerns.

This agenda is divided into two parts. The first part consists of issues that have been brought to the Committee's attention since our last meeting on March 25, 2010. The second part consists of issues from the last meeting where it was indicated that follow up discussion would be appropriate. Both sections are followed by addenda containing rationale or background behind the indicated question where applicable. We look forward to a productive discussion.

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*Ms. Dugan opened the meeting with an update on some recent activities.*

- *John Wagner is now Director, Admissibility and Passenger Programs*
  - *formerly Director, Trusted Traveler Program*
  - *Goal is to have 100,000 enrolled in Global Entry by end of calendar year 2010 (passed 98,000 [the week of Dec. 5])*
  - *CBP aims to consolidate all trusted traveler programs into one central program (Global Entry), with one uniform document for program members*
  
- *ESTA: CBP successfully introduced the automated I-94W for air environment this past summer. CBP is actively searching for ways to automate other forms.*
  - *Possible roll-out of paperless I-94 in the future since most information on the I-94 is already collected by other sources (visa, APIS, etc.), but land borders are harder to address*

*The Commissioner is focused on security and facilitation. He is interested in public/private partnerships. The vetting process for applicants for entry has become more complicated since the 12/25/2009 incident [thwarted attempt to explode a passenger airliner] and the recent printer cartridge incident.*

#### **LOCAL AILA AND CBP LIAISON EFFORTS**

1. AILA currently has established liaison committees in most of the United States that engage in a dialogue with local CBP counterparts. Some AILA state chapters report an open dialogue with the counterparts and some report little dialogue. To avert potential situations in the future and to open further communication with local CBP counterparts, would CBP at the national level be willing to direct the field offices to open a dialogue with their AILA local counterparts?

*Reply: Our understanding is that liaison is occurring and that local offices are cooperating with AILA. Each of the twenty Field Offices should have a Point of Contact (POC) for AILA. CBP HQ receives positive feedback from Field Offices that do have active AILA liaison efforts, and those Field Offices have raised legal issues to HQ after AILA members have raised them locally. Rafael Henry will make sure that each Field Office has one and will provide a POC list. Until a POC is identified, AILA contact for such issues should be with the Field Office Director. Annual meetings, if not more often, are appropriate. The focus of meetings with the Field Offices should be policy issues, not case-specific questions.*

2. We would like clarification regarding the processing of L-1 Petitions presented on behalf of Canadian nationals at the U.S. Port of Entry. The Regulations 8 CFR 214.2(1)(17)(iv) provide a procedure when dealing with deficient or deniable petitions. Members have reported that CBP officers are sending L-1 Petitions to the U.S. Citizenship and Immigration Services (“USCIS”) Service Centers recommending denial of L-1 Petitions without first allowing the Canadian national to withdraw his or her entry to obtain documents to address the perceived deficiencies. We request that guidance be send to the

field clarifying the ability of an application for entry in an L-1 Petition situation to withdraw an application for admission to the U.S. in accordance with the Regulations prior to accepting the filing fee and recommending and forwarding the matter to the U.S. Citizenship and Immigration Services for denying the L-1 Petition. (See [Addendum to Part I for additional information related to this question.](#))

*Reply: An L filing is an adjudication normally under the control of USCIS. CBP has been in discussion with USCIS to improve the knowledge of officers at the POE. CBP is in the process of preparing a checklist for officers to use when receiving Canadian L petitions at a POE and will consider AILA's input regarding compliance with the regulation. In the meantime, CBP will issue a reminder to the Ports of Entry regarding the procedure established in 8 CFR §214.2(l)(17)(iv), which is to review the submission first and, if there is a lack of necessary supporting documentation or any other deficiency, to return the petition and supporting documents to the applicant allowing the applicant to obtain the necessary documentation from the petitioner or otherwise to overcome the deficiency. The L petition filing fee is to be accepted only if and when a petition with all necessary supporting documentation and no deficiencies is presented. Denials are to be made only if the petition is "clearly deniable," at which time the filing should be sent to the appropriate USCIS service center with a denial recommendation.*

**NEW ISSUE:** *AILA has become aware of cases in which a TN submission by a Canadian or Mexican has been approved at a POE, but the subsequent visa application by the non-Canadian/non-Mexican spouse and/or child has been delayed due to the lack of entry of that information into PIMS. What action does CBP take in such case, and what can AILA members do to eliminate this problem?*

*Reply: This occurs in Canadian L cases, also. CBP has issued guidance that when an applicant indicates to the officer that there is a "follow to join" third country dependent, the officer is to fax a copy of the pending petition to the Kentucky Consular Center ("KCC") for entry into the Department of State's Petition Information Management Service ("PIMS"). CBP will provide AILA with a modified muster or fact sheet for people to take with them to the POE and present. CBP will also consider preparing a Q&A to post on the CBP website.*

3. AILA members continue to report issues for aliens admitted under the blanket L category. An L-1 nonimmigrant initially seeking admission under a blanket petition may be admitted for a period of three years even though the initial validity of the blanket petition may expire before the end of the 3-year period provided that the alien's passport is valid for the three year period (unless an alien is passport exempt). On subsequent applications for admission to the United State by a blanket L applicant, inspecting officers are required to determine the length of time that the alien has previously been in the United States as an L-1 alien. An L-1 alien may not be admitted for a period of time that exceeds the statutory limitations on L-1 stay in the United States – either seven years in the United States in a managerial or executive capacity or five years in a specialized knowledge capacity (unless the alien has resided and been physically present outside the

United States for the immediate previous year, except for brief visits for business or pleasure).

Please confirm that an alien with a valid, unexpired blanket L visa may be admitted to the U.S. in initial and subsequent applications for admission for a period of three (3) years, provided that:

- a. the alien's passport is valid for the three year period (unless an alien is passport exempt);
- b. the three (3) year period of admission will not exceed the statutory limit of seven (7) or five (5) year limit for L-1A or L-1B nonimmigrant aliens, respectively.

Please confirm that for the blanket L aliens making subsequent applications for admission CBP inspectors at a port of entry should determine the amount of time that the individual has previously been present in the U.S. in L (or H-1B) status and admit the alien for either a three year period or for a period of time consistent with the statutory limit applicable to his or her L-1A or L-1B classification. (See Addendum to Part I for additional information related to this question.)

*Reply: CBP officers do not necessarily have quick access to all of the information needed to be considered in these situations, but will work with its technical support personnel so that officers are provided with the right questions to focus on and the right database queries to make when these situations occur. CBP officers should only authorize entry up to the legal limit, particular to each applicant's prior immigration history.*

*AILA: The CBP Committee will prepare a list of questions that it believes will aid CBP in making the appropriate admission decision.*

4. At the CBP open forum session of the 2010 AILA Conference, it was suggested that the issue of admissions of Canadians visiting the U.S. under a Duration of Status ("D/S") authorized period of stay was being revisited. We believe that to admit Canadian visitors under any other type of authorized period of stay would be contrary to an established policy by the legacy Immigration and Naturalization Service ("INS"), U.S. Citizenship and Immigration Services, and the U.S. Department of State. We recommend that the CBP continue consider as admitted for Duration of Status visa-exempt Canadian nonimmigrant visitors not issued a Form I-94. (See Addendum to Part I for additional information related to this question.)

*Reply: The lack of documentation issued to Canadians at land POEs presents significant challenges. CBP makes inadmissibility decisions not only based on whether an applicant has exceeded the authorized period of stay (normally six months for a B-1/B-2 visitor), but also the totality of the circumstances to determine whether the applicant is a bona fide visitor, such as "where are the job, residence, family members, assets, etc." CBP must make decisions about a person's admissibility based on the evidence presented. By regulation, B1/B2 admissions should be for a minimum period of six (6) months, 8 C.F.R.*

*§ 214.2(b)(2) unless by exception for good cause, and not more than one year, 8 C.F.R. § 214.2(b)(1). CBP will consider the USCIS inadmissibility memo and factor in the non-control aspect of Canadians land POE admissions (AILA Doc. No. 09051468). CBP will investigate how to ensure uniformity in these inadmissibility decisions. CBP also will consider making explicit public disclosures about authorized periods of admission for Canadian visitors if it wishes to enforce unlawful presence inadmissibility bars in these cases.*

*AILA suggests that, unless the Canadian has been provided with some documentation from CBP specifically limiting the period of admission after which unlawful presence begins accruing, a CBP officer should not be authorized to deny admission based on an overstay, but based solely on INA 212(a)(7)(A)(i)(I) as an intending immigrant.*

5. ARO & Waiver related issues:

- a. Members have reported that both consular and CBP officers have been culling out and/or refusing to accept all of the evidence and/or documents submitted by waiver applicants in support of applications for nonimmigrant waivers. Since neither Consular nor CBP officers ultimately adjudicate the waiver it is essential that ARO receive all of the evidence submitted by the applicant. ARO has, on several occasions, indicated that all documents submitted by an applicant with his or her packet should be forwarded. Would headquarters remind both CBP officers and DOS that all documents and forms presented by an applicant for a nonimmigrant waiver under INA 212(d) (3) should be accepted and forwarded to ARO?
- b. Particularly at the consular level, members are concerned that DOS internal review of waiver requests prior to ARO referral (as per 9 FAM 40.301 N6.2), sometimes result in severe limitations on cases that are ultimately considered by the ARO. It appears from member reports that different regions of the world, and different consular posts under particular leadership, may be less inclined to consider INA 212(d)(3) waivers and such cases never reach the ARO for consideration. Independent of the broad discretion provided by the FAM for individual consular officers to recommend or refuse to recommend a waiver, does the ARO provide training or protocol instructions to DOS regarding INA 212(d)(3) waivers?
- c. Members report that when an INA 212(d) (3) waiver request is initially submitted to a U.S. Embassy or Consulate, the ARO refuses to respond to emails made to [attorneyinquiry.waiver.aro@dhs.gov](mailto:attorneyinquiry.waiver.aro@dhs.gov), stating that all inquiries regarding pending waivers must be made directly to the receiving consular post. In these cases, U.S. Embassies and Consulates often provide no meaningful updates whatsoever, simply stating that the case is under the ARO's consideration. Since INA 212(d) (3) waiver determinations – regardless of whether the waiver request was received by CBP or DOS—fall under the ARO's decision making authority, why does the ARO refuse to communicate with attorneys regarding consular waiver cases?

*Reply: The package is to be accepted in its entirety as presented and sent to the ARO as presented, whether at a POE or consulate. INA 212(d)(3)(A)(i). CBP officers are not authorized to cull or pick and choose what to send to ARO. CBP asks AILA to provide specific examples of cases where officers have taken documents out of a waiver application package, and present them to local POE or Field Office. In cases where attorneys and applicants suspect that a consular officer has not submitted all materials presented at Post, attorneys should attempt to communicate with the Post first regarding this issue, and if no satisfactory response is received, then contact ARO.*

*If a G-28 has been submitted, ARO's practice is to contact the attorney directly, not the POE, if it appears that documentation is missing.*

*[CBP Committee reminder: Always include a G-28, an index, and a list of supporting documents. The Committee also recommends using an Acco fastener to discourage removal of documents.]*

*The ARO will not see a waiver application from DOS unless DOS makes a favorable recommendation. ARO would like to see examples of cases where DOS has not forwarded all documents submitted in a waiver application. If members are concerned that DOS has not forwarded all material submitted in support of a waiver application, examples should be sent to CBP liaison, and CBP liaison will bring them to the attention of the ARO.*

6. Recent changes to Mexican visa reciprocity resulted in visa validities that are shorter than in the past. The result is that visa validities are often shorter than the authorized period of admission for the visa holder. For example, E visas are valid for one year; however, the visa holder is eligible for a 2-year period of admission. Similarly, TN visas are valid for a period of only one year, yet the visa holder is eligible for a three-year period of admission. Similar situations exist with H and L visa classifications where the visa is limited to one year, but the period of admissibility is tied to the underlying nonimmigrant visa petition. Please confirm that it is CBP policy that an individual who is otherwise admissible based on a valid nonimmigrant visa should be admitted for the period to which the individual is otherwise entitled, notwithstanding the expiration date of the individual's visa. (See Addendum to Part I for additional information related to this question.)

*Reply: CBP would need to consult with DOS as to why a visa has been annotated. CBP requested, and the Committee will provide, an example of such an annotation.*

7. Members on the Southern border are reporting issues with processing automatic visa revalidation cases at the Southern border. Foreign nationals with expired visas or visas in another category but with an approval notice and I-94 card in a work-authorized classification are facing challenges returning to the U.S. despite the fact that they were in Mexico for less than 30 days, did not apply for a visa while in Mexico, and are not national from one of the countries listed in the Department of State's report entitled

Patters of Global Terrorism. We request that guidance be sent to the field regarding the automatic visa revalidation provisions of 22 CFR § 41.112(d) so that aliens qualifying for admission under this regulation do not find their admissibility questioned for lack of an unexpired visa in the classification for which they are seeking admission. (See [Addendum to Part I for additional information related to this question.](#))

*Reply: This is not new or extraordinarily complex. The POE should know how to process this. The IFM and our memo “[CBP Automatic Revalidation Fact Sheet](#)” show what to do (AILA Doc. No. 09061967). These should be resolved in secondary or at the supervisor level, with questions raised to the supervisor. Sometimes there is a reason to consider issues of fraud or other issues. We will remind the officers again, but we’re also mindful of other issues. We also work with Field Training Coordinators (Training Officers) to reiterate with trainees what they’re supposed to do.*

**NEW ISSUE:** *Would you consider allowing AILA members to present information at Regional DFO (Director of Field Operations) CBP Conference?*

*Reply: Yes, CBP has no problem with having AILA presenters.*

8. If CBP encounters an alien who has a pending and timely filed application to adjust status, extension of status, or change of status either at an internal border checkpoint or while he or she is traveling domestically by air:
  - a. What documents will CBP accept as satisfactory proof that the traveler has a valid application pending and is in a period of authorized stay?
  - b. Under what circumstances will CBP detain the individual, issue a Notice to Appear, or refer the individual to ICE?

*Reply: CBP accepts the I-797 receipt notice as proof that the individual is an Applicant for Adjustment of Status or has a pending extension of stay or change of status, but CBP may verify information regarding pending applications against DHS databases (for example, to confirm that a pending extension was timely filed). A person presenting a current, valid Advance Parole should be admitted without regard to the expiration date of an I-94 that was previously issued based on presentation of an Advance Parole.*

9. How will CBP implement the H-1B and L-1 Fee Increase according to P.L. 111-230? (See [Addendum to Part I for additional information related to this question.](#))

*Reply: Guidance has already been issued and cash registers updated for both the Nov. 23, 2010 fee increases and the P.L. 111-230 fees. Information is also on the CBP website (The Committee would like confirmation from CBP about whether there is any guidance to this issue on the CBP website or if CBP is relying on the information found on the [USCIS website](#)).*

10. AILA members report that their ongoing E-2 clients receive inconsistent treatment at ports of entry upon return to the U.S.; some being issued two-year Form I-94s, others receiving Form I-94s valid only to the expiration date of the E-2 visa (in those cases in which the visa expiration date occurs in less than two years), and others issued Form I-94s only to the date of the most recently issued Form I-94 or USCIS approval (both being less than two years). These all assume that the individual's passport validity period is not an issue pursuant to 8 CFR § 214.1(a)(3)(i.) It is our understanding that the standard period of admission for a principal applicant should be two years with each new admission, without regarding to the visa expiration date or USCIS approval, so long as the visa is valid on the date of presentation. We ask that CBP consider provision of additional guidance regarding admission in E status, clarifying that each admission of the principal applicant should be for a period of two years, so long as the visa is valid at the time of entry and the passport validity complies with 8 CFR § 214.1(a)(3)(i). (Regulations further provide the "an alien shall not be admitted in E classification for a period of time extension more than 6 months beyond the expiration date of the alien's passport. 8 CFR § 214.2(e)(19)(iii).) **(See Addendum to Part I for additional information related to this question.)**

*Reply: Rafael Henry will look into this issue. CBP requested that the Committee provide examples.*

*AILA proposes that CBP's role in admission of E visa admission applicants is to either (a) confirm visa validity (in such cases in which there is one) and to issue a two-year I-94 (absent contravening reasons such as passport expiration) each time, or (b) confirm validity of an I-94 issued related to E status (either issued by USCIS or CBP) and the existence of a prior but expired visa (most likely an E visa for a Canadian, but not required that it be an E) and to admit for the remaining period of the I-94.*

11. 9 FAM 41.31 N14.4 and DOS cable July 1, 2001 (attached to this agenda) provide that accompanying one's work-authorized partner to the U.S. is consistent with B-2 status provided the applicant can show nonimmigrant intent. Members have been reporting that CBP officers consistently admit such partners only for only six months. Can CBP please explain what factors are used to limit the applicant's admission for six months? **(See Addendum to Part I for additional information related to this question.)**

- a. Whether musters, guidance or other related memoranda have been issued to the field which provides guidance on the admission of same sex partners?
- b. Whether CBP would issue a muster to the field reminding officers that same sex partners can and should be admitted for one year rather than six months absent specific circumstances that warrant limiting the applicant's stay?

*Reply: Such admissions are dealt with on a case-by-case basis. CBP recognizes that regulations provide for admissions of up to one year and will consider issuance of guidance on this issue.*

12. Does CBP provide training to officers at ports of entry regarding B-1 visas annotated with “B-1 IN LIEU OF H-1B”? The “B-1 in lieu of H-1B” is available when the foreign national meets the specialty occupation requirements but (a) he is employed by a “foreign firm” (i.e., that has its office abroad and disburses its payroll abroad); (b) the source of, and payment of, his salary is abroad while he is temporarily performing services in the U.S.; and (c) he does not receive any funds from a U.S. source other than an expense allowance or other reimbursement of incidental expenses. It is important to note that an employee of a foreign company which is related to a U.S. company can still qualify for this classification. 9 FAM 41.31 N11 which defines this classification is included in the addendum for reference. (See Addendum to Part I for additional information related to this question.)
- a. Does such an annotation help CBP officers in determining that the foreign national is eligible for a B-1 classification (i.e., that he is not coming to work in the U.S. for a U.S. employer)?
  - b. Does CBP have a different admission policy for “B-1 in lieu of H-1B,” so that officers could admit a foreign national for longer than the 6 month maximum for B-1s (assuming that the documentation presented established a need for a longer stay)?

*Reply: Not addressed. The AILA CBP liaison committee will continue to follow up with CBP on this issue.*

13. What is the form of payment generally accepted at ports of entry for payment of fees? Clients like to know, in advance of their appearance, whether they can pay by cash in U.S. currency, check or money order, or credit card, and any special considerations or annotations required. (See Addendum to Part I for additional information related to this question.)

*Reply: Not addressed. The AILA CBP liaison committee will continue to follow up with CBP on this issue.*

*(CBP Committee suggests that an answer to this question can be found at 19 C.F.R. §24.1.)*

14. Members have reported that CBP officers in the field have required that applicants for admission as an O-2 nonimmigrant must have 1 year experience with the O-1 nonimmigrant that they are accompanying. We request that guidance be sent to the field confirming that the O-2 classification is NOT required to have 1 year experience with the O-1 nonimmigrant. (See Addendum to Part I for additional information related to this question.)

*Reply: Not addressed. The AILA CBP liaison committee will continue to follow up with CBP on this issue.*

15. A variety of issues have been raised at various ports of entry concerning the applicable period of validity of a Reentry Permit and the effectiveness of the document for demonstrating that a resident alien is returning from a temporary absence abroad. (See [Addendum to Part I for additional information related to this question.](#))
- a. Please confirm that CBP recognizes a Reentry Permit is a valid travel document that may be presented by a returning resident alien any time during a period of two years from its date of issuance.
  - b. Please confirm that a valid, unexpired Reentry Permit unequivocally demonstrates that the alien to whom it was issued is returning from a temporary visit abroad (Please see appendix for further discussion; we recognize that CBP may appropriately evaluate all other issues affecting admissibility).
  - c. Members report that CBP officers at various Ports of Entry have cited Re-entry permits as affirmative evidence that returning resident aliens have abandoned their U.S. resident status and have accordingly initiated removal proceedings notwithstanding applicants' possession of valid Re-entry permits. 8 CFR § 223.3(d)(1) provides: “[a] permanent resident ... in possession of a valid reentry permit who is otherwise admissible shall not be deemed to have abandoned status based solely on the duration of an absence or absences while the permit is valid.” Please confirm that it is inappropriate to initiate removal proceedings based solely on the duration of an absence or absences against a resident alien in possession of a valid, unexpired Reentry Permit when returning from an absence abroad. Please provide a copy of any musters regarding abandonment of resident alien status by a resident presenting a Reentry Permit upon application for admission.

*Reply: Not addressed. The AILA CBP liaison committee will continue to follow up with CBP on this issue.*

16. Please provide an update of the complete entry and exit NSEERS processing procedures at the air and land Ports of Entry?

*Reply: Not addressed. The AILA CBP liaison committee will continue to follow up with CBP on this issue.*

## ADDENDUM TO PART I

### *Question 2:*

To seek L-1 status for a Canadian citizen, an L-1 petition can be adjudicated by CBP at Ports of Entry in Canada. 8 CFR 214.2(l)(17)(i) (“a United States or foreign employer seeking to classify a citizen of Canada as an intracompany transferee may file an individual petition in duplicate on Form I-129 in conjunction with an application for admission of the citizen of Canada... with an immigration officer at a Class A port of entry located on the United States-Canada land border or at a United States pre-clearance/pre-flight station in Canada.”) The petitioning employer, not the beneficiary is a party to the petition, as beneficiaries cannot self-petition. 8 CFR 214.2(l)(1)(i) (“the organization which seeks the [L-1] classification of an alien as an intracompany transferee is referred to as the petitioner.”) However, as a practical matter, it is the beneficiary that presents the evidence: “The petitioning employer need not appear, but Form I-129 must bear the authorized signature of the petitioner.” 8 CFR 214.2(l)(17)(i). At the Ports of Entries (“POE”), the employer generally is not present and has no opportunity to provide evidence.

Regulatory and procedural authority for CBP sending an L-1 petition to USCIS for adjudication appears to be lacking. Where the petition is deficient, the L-1 should be refused, and CBP should return the petition to the beneficiary and give the beneficiary the opportunity to withdraw:

*Deficient or deniable petitions or certificates of eligibility.* If a petition or certificate of eligibility submitted concurrently with an application for admission is lacking necessary supporting documentation or is otherwise deficient, the inspecting immigration officer shall return it to the applicant for admission in order to obtain the necessary documentation from the petitioner or for the deficiency to be overcome. 8 CFR 214.2(l)(17)(iv) [emphasis added].

In the event a Canadian citizen applying for admission pursuant to NAFTA cannot demonstrate to the admitting officer that he or she satisfies the requirements for admission pursuant to the NAFTA, Appendix 1603.D.1, he/she *should normally be offered the opportunity to withdraw* his/her application for admission. If the inspector believes that the alien is inadmissible under section 212(a)(7)(A) (intending immigrant) or section 212(a)(6)(C) of the Act (seeking admission by fraud or willful and material misrepresentation) *and the alien does not wish to withdraw* his/her application for admission, the inspector should place the alien into an expedited removal proceeding. CBP IFM 17.2 [emphasis added].

CBP has authority to adjudicate L-1 petitions, including to refuse or deny L-1 petitions it adjudicates. If CBP has refrained from flat-out refusal or denial, there may be a discrepancy at issue that CBP believes USCIS is better positioned to review. Where USCIS is charged with adjudication, adjudicators “should strive to request the evidence needed for thorough, correct decision-making.” AFM ch. 10.5(a)(2). Without a Request for Evidence (RFE), there is greater risk that decision-making will not be thorough or will misapply the facts.

Further, denial without an RFE precludes giving the petitioning employer an opportunity to explain or even address any discrepancies in the petition documentation. Some denial decisions contain the following assertion: “The discrepancies in the petitioner’s submissions have not been explained satisfactorily.” However, where no RFE is issued, the reason for the lack of an explanation is that the USCIS did not ask the petitioner for any explanation of the discrepancy. Such an inequitable result could be avoided by implementing a policy not to deny without an RFE.

**When CBP sends the L-1 petition to the Service Center, prolonged adjudication for an undetermined processing time period may occur, during which time the beneficiary is effectively precluded from seeking entry into the United States. For L-1 port of entry adjudications where CBP determined ineligibility and sent the file to a Service Center, it may take one or two months before a receipt notice is generated. In the meantime, the petitioning employer’s needs are unmet, and the beneficiary’s plans are on hold. This obstacle defeats the purpose under NAFTA of permitting while-you-wait processing at a POE. If CBP allowed withdrawal and made its own decision about eligibility, then the petitioner and beneficiary could make alternative plans in accordance with the determination.**

***Question 3:***

**a. Statutory and Regulatory References**

INA§101(a)(15)(L) & §214(c)(2); 8 CFR §§(1)(4), (1)(11) & (1)(12).

**b. Previous CBP Position; excerpt from [March 22, 2006 AILA/CBP Liaison Meeting Minutes](#) (AILA Doc. No. 06100666)**

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**Meeting Participants:**

**CBP Representatives**

Jayson P. Ahern, Assistant Commissioner for the Office of Field Operations

John B. Klow, Interim Director, Admissibility Review Office

Paul Morris, Executive Director, Admissibility Requirements and Migration Control

Bob Jacksta, Executive Director, Office for Travel Security & Immigration

Debra Rodriguez, Assistant Director, CBP Tucson Field Office

Invited but unable to attend:

Jennifer Sava, Assistant Commissioner for the Office of Preclearance Operations

Michael Hrinyak, Acting Executive Director, Admissibility Requirements and Migration Control

AILA CBP Liaison Committee

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**L Adjudication**

12. Blanket L. CBP officers sometimes ask for I-797s for those seeking admission under a blanket L. In addition, they sometimes put the wrong expiration date for individuals entering under a blanket L

approval (instead of 3 years, they put the shorter visa expiration date or the initial Blanket L approval expiration date). Even when petition documentation includes a copy of 8 CFR 214.2(l)(11) explaining that the I-94 should be valid for three years, officers have said that the "computer" requires that they put the shorter date on the I-94 card. As a training issue, can a muster be sent to remind officers that the I-129S packet and blanket approval is sufficient and that I-94s under blanket L are to be issued for three years?

RESPONSE. CBP concurs and has issued guidance to the field.

c. **Previous INS Position; excerpt from [Thomas Cook memo](#)** (AILA Doc. No. 01022003)

*INS Provides Instructions on Blanket L-1 Admissions*

U.S. Department of Justice  
Immigration and Naturalization Service  
HQ 70/6.2.8  
425 I Street NW  
Washington, DC 20536

MEMORANDUM FOR: All Regional Directors  
All Service Center Directors  
Director, Administrative Appeals Office

FROM: Thomas Cook  
Acting Assistant Commissioner  
For Adjudications

SUBJECT: L-1 Blanket Petitions

The purpose of this memorandum is to provide information about the L-1 Blanket Petition process to officers involved in the inspection of L-1 nonimmigrant aliens.

Background

The Immigration and Naturalization Service (the Service) created the current L-1 Blanket Petition process through regulations published in 1987 in order to accommodate the needs of large businesses that desired to transfer key personnel to the United States. The current process involves two separate steps and relies heavily on coordination between the Department of State and the Service. This memorandum describes each of the two steps in more detail.

...

Validity of an Approved Blanket Petition

The initial validity of an approved blanket petition is three years. The petitioner is required to file for an indefinite extension of the blanket petition. If the petitioner fails to apply for a extension

of the blanket petition, or the Service denies the extension, the petitioner may not file a new blanket petition for three years.

...

#### Period of Admission-Initial Entry

An L-1 nonimmigrant initially seeking admission under a blanket petition may be admitted for a period of three years even though the initial validity of the blanket petition may expire before the end of the 3-year period. The validity period of the supporting blanket petition will be listed on the Form I-797. Inspectors should not limit an L-1 alien's initial admission to the United States to less than 3 years unless an issue arises concerning the validity of the alien's passport. The alien's passport must be valid in accordance with section 212(a)(7)(B)(i)(I) of the Act and IFM Appendix 15-2, unless an alien is passport exempt. An L-1 alien may not be admitted beyond the validity period of his or her passport.

#### Period of Admission-Subsequent Applications for Admission

An L-1 alien may apply for admission to the United States during the validity period of the blanket petition. An L-1 alien may not be admitted for a period of time that exceeds the statutory limitations on L-1 stay in the United States. An L-1 alien who has spent either seven years in the United States in a managerial or executive capacity or five years in a specialized knowledge capacity may not be readmitted to the United States as an L-1 unless the alien has resided and been physically present outside the United States for the immediate previous year, except for brief visits for business or pleasure.

An L-1 alien who departs the United States and applies for admission to the United States is making a new application for admission to the United States. The L-1 Blanket Petition must also be valid at the time that the alien applies for a subsequent admission as an L-1 nonimmigrant. **On subsequent applications for admission to the United States, inspecting officers must determine the length of time that the alien has previously been in the United States as an L-1 alien.** In no case may the alien be admitted for a period of time in excess of three years on any individual (or subsequent application for) admission. In addition, on subsequent applications for admission the L-1 alien should present to the inspecting officer Form I-797, showing that the L-1 petition remains valid, and a Form I-129S. Of course, the normal passport and visa requirements for admission continue to apply on subsequent admissions to the United States.

...

Should you have any questions regarding this memorandum, please contact Irene Hoffman, Office of Adjudications, at 202-353-8177, 202-353-8177 or Patrice Ward, Office of Inspections, at 202-514-3019, 202-514-3019.

Source: Reproduced from [AILA Doc. No. 01022003](#) (posted Feb. 20, 2001)

#### d. Excerpt from CBP Field Inspector's Manual

(l) Intracompany Transferees.

(1) Classification: **L-1** Includes aliens entering to render services to a branch, parent, subsidiary, or affiliate of the company of previous employment outside the United States.

(Revised IN01-06)

Documents required: Passport valid for 6 months at time of entry unless exempt

...

(A) Blanket Petition. Aliens may qualify for L visas after having worked for the company (branch, parent, subsidiary, or affiliate), outside the United States, for 6 months within the preceding 3 years if the company has filed a blanket L petition and has met the blanket petitions' requirements.

(Revised IN 02-12)

Terms of admission: If the alien is otherwise admissible as an individual L-1, admit for validity of petition (up to 3 years initially). If the alien is otherwise admissible as a Blanket L-1, initially admit for 3 years, regardless of the expiration date of the petition, provided the petition is valid at the time of the initial admission. If the alien is seeking readmission as a Blanket L-1, the Blanket Petition is still valid, and the alien is otherwise admissible, admit for an additional three years regardless of the balance of the time left on the original admission. (IN01-06)

Notations on I-94: Front: L-1, (date to which admitted). Reverse: Petition number and occupation from list in Adjudicator's Field Manual Appendix 31-1.

Special notes:

...

(B) Petition limitations. Petition may be approved for up to 3 years, except start-up companies which are limited initially to 1 year. Expiration date of visa will usually be the same as the validity of the petition. The maximum stay in the U.S. for an L-1 specialized knowledge employee is 5 years. The maximum stay in the U.S. for an L-1, executive or manager is 7 years.

(C) Blanket petitions. Some L aliens may be admitted on blanket petitions, which are petitions approved for large companies where corporate requirements are not readjudicated with each individual L alien. A blanket L-1 alien may apply for admission or readmission to the United States as long as the blanket petition is valid at the time of admission. A blanket L-1 should be admitted for 3 years, unless that period of time will exceed the statutory limitations on the L-1 alien's stay in the United States. An L-1 alien who has spent either seven years in the United States in a managerial or executive capacity or five years in a specialized knowledge capacity may not be readmitted to the United States as an L-1 unless the alien has resided and been physically present outside the United States for the immediate previous year. Blanket petition applicants will have Form I-129S, Certificate of Eligibility for Intracompany Transferee Under a Blanket Petition, in their possession.

#### ***Question 4:***

Canadian D/S issue.

USCIS and Department of State have held the position that a person who enters the United States who is Canadian as a visitor is admitted for an authorized period of D/S. CBP officials have stated to AILA that a visa-exempt Canadian nonimmigrant visitor is admitted up to 6 months and after 6 months the person begins to accrue unlawful presence. CBP's position is contrary to established policy by the INS, U.S. Citizenship and Immigration Services, and the U.S.

Department of State. A Department of State Cable entitled, “Advisory Opinion: INA 212(A)(9)(B) and Canadians” (R070408Z NOV 98) provides, “The INS General Counsel’s office has informed VO that, a Canadian... who has not been issued an in I-94, should be treated in the same manner as a Duration of Status case, similar to an F or J.” This Cable not only confirms the Department of State’s position on this issue, but that the Department of State, in stating this position, confirmed the legal issue with the INS general counsel prior to issuing this guidance. The USCIS in its Adjudicator’s Field manual and more recently in a Field Guidance memorandum provide that “Nonimmigrants who are not issued a Form I-94, Arrival/ Departure Record, are treated as nonimmigrants admitted for D/S for purposes of determining unlawful presence.” [[USCIS Field Memorandum by Donald Neufeld](#), “Consolidation of Guidance Concerning Unlawful Presences for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act/ Revision to the Re-designation of *Adjudicator’s Field Manual (AFM)* Chapter 30.1(d) as Chapter 40.9 (*AFM* Update AD 08-03). (AILA Doc. No. 09051468).

### **Question 6:**

#### **9 FAM 41.112 N1 VISA VALIDITY VERSUS PERIOD OF ADMISSION**

(*CT:VISA-1138; 01-06-2009*)

- a. A visa is not the same as immigration status. Many travelers confuse the two. A visa does not entitle the bearer to enter or remain in the United States.
- b. **The validity of a visa refers to the time in which an applicant may make application to an immigration officer at a port of entry for admittance into the United States. It has no bearing on the length of time for which the alien may be admitted.** For example, an alien whose B-1 visa may expire a month after entry into the United States, could be admitted by a Department of Homeland Security (DHS) officer at a port of entry (POE) for a stay of up to one year. On the other hand, an alien whose B-1 visa has a validity of one year may be granted a stay of only one month, as may be determined by a DHS official at a port of entry. (Emphasis added)

The IFM is silent on this specific issue; however, implicit in the IFM is a recognition that individuals are entitled to the period of admission associated with their specific nonimmigrant visa classifications. Specifically, IFM §15.3 Visas does not state anything with respect to limiting a period of admission to the visa validity period. Rather, IFM §15.4 lists all of the nonimmigrant visa classifications and their respective periods of admission, without reference to the visa validity period.

There are countless examples in which the visa reciprocity rules limit the validity of a particular visa, yet established practice is to admit the foreign national for the period of stay authorized by that visa classification or an underlying petition. As but one example, Chinese H-1B beneficiaries are routinely admitted for the period of validity of the relevant H-1B petition, even though their visas are limited to a validity period of one year. Similarly, Brazilian H-1B and L-1 beneficiaries are limited to a visa validity period of 24 months, yet they are regularly and properly admitted for the period of validity of their respective nonimmigrant visa petitions.

Also, the Department of Homeland Security amended its regulations to allow an increased period of admission and extension of stay for Canadian and Mexican citizens who seek temporary entry

to the United States as professionals pursuant to the TN classification, as established by the North American Free Trade Agreement (NAFTA or Agreement). [See 73 Fed. Reg. 61332 (October 16, 2008).]“This final rule increases the maximum allowable period of admission for TN nonimmigrants from one year to three years, and allows otherwise eligible TN nonimmigrants to be granted an extension of stay in increments of up to three years instead of the current maximum of one year. In addition, this rule grants the same periods of admission or extension to TD nonimmigrants, the spouses and unmarried minor children of TN nonimmigrants to run concurrent.”

Accordingly, we respectfully request that a muster be sent to ports of entry, and in particular those on the U.S.-Mexico border, reiterating that CBP’s long-standing policy coincides with that of the Department of State:” **“The validity of a visa refers to the time in which an applicant may make application to an immigration officer at a port of entry for admittance into the United States. It has no bearing on the length of time for which the alien may be admitted.”** In the absence of some other contraindication, a visa holder should be admitted for the period of admission that corresponds to the individual’s nonimmigrant status.

***Question 7:***

The Regulations at 22 C.F.R. § 41.112(d) provides the following.

(d) *Automatic extension of validity at ports of entry.* (1) Provided that the requirements set out in paragraph (d)(2) of this section are fully met, the following provisions apply to nonimmigrant aliens seeking readmission at ports of entry:

(i) The validity of an expired nonimmigrant visa issued under INA 101(a)(15) may be considered to be automatically extended to the date of application for readmission; and

(ii) In cases **where the original nonimmigrant classification of an alien has been changed by DHS to another nonimmigrant classification, the validity of an expired or unexpired nonimmigrant visa may be considered to be automatically extended to the date of application for readmission, and the visa may be converted as necessary to that changed classification.**

(2) The provisions in paragraph (d)(1) of this section are applicable only in the case of a nonimmigrant alien who:

(i) **Is in possession of a Form I–94, Arrival-Departure Record, endorsed by DHS to show an unexpired period of initial admission or extension of stay,** or, in the case of a qualified F or J student or exchange visitor or the accompanying spouse or child of such an alien, is in possession of a current Form I–20, Certificate of Eligibility for Nonimmigrant Student Status, or Form IAP–66, Certificate of Eligibility for Exchange Visitor Status, issued by the school the student has been authorized to attend by DHS, or by the sponsor of the exchange program in

which the alien has been authorized to participate by DHS, and endorsed by the issuing school official or program sponsor to indicate the period of initial admission or extension of stay authorized by DHS;

(ii) **Is applying for readmission after an absence not exceeding 30 days solely in contiguous territory**, or, in the case of a student or exchange visitor or accompanying spouse or child meeting the stipulations of paragraph (d)(2)(i) of this section, after an absence not exceeding 30 days in contiguous territory or adjacent islands other than Cuba;

(iii) **Has maintained and intends to resume nonimmigrant status;**

(iv) **Is applying for readmission within the authorized period of initial admission or extension of stay;**

(v) **Is in possession of a valid passport;**

(vi) **Does not require authorization for admission under INA 212(d)(3) ; and**

(vii) **Has not applied for a new visa while abroad.**

(3) The provisions in paragraphs (d)(1) and (d)(2) of this section shall not apply to the nationals of countries identified as supporting terrorism in the Department's annual report to Congress entitled Patterns of Global Terrorism.

***Question 9:***

Public Law 111-230 requires the submission of an additional fee of \$2,000.00 for certain H-1B petitions and \$2,250.00 for certain L-1A and L-1B petitions. Because CBP generally does not administer the adjudication process of the H-1B petition, this question focuses only on the administration of this new fee when CBP adjudicates L-1 petitions. USCIS guidance regarding this fee may be found on the [USCIS' website](#).

The following items from the USCIS website are relevant to this issue.

**Q5. To which L-1A and L-1B petitions does the new fee apply?**

A5. L-1 petitioners subject to the new law must submit the fee with an L-1A or L-1B petition filed:

- To seek initial nonimmigrant status for an alien described in subparagraph (L) of INA section 101(a)(15), or

- To obtain authorization for an alien having that status to change employers.

The new fee does not apply to extension requests filed by the same petitioner for the same employee.

**Q7. What is the additional fee for L-1 petitions?**

A7. Public Law 111-230 requires an additional fee of \$2,250 for covered L-1A and L-1B petitions. This fee is in addition to the base processing fee and the existing Fraud Prevention and Detection Fee required for a Petition for a Nonimmigrant Worker (Form-129) (or, in the case of certain visa exempt aliens, the Nonimmigrant Petition Based on Blanket L Petition (Form I-129S) filed with USCIS), as well as any premium processing fees.

**Q8. Must the petitioner or the beneficiary pay the additional fee?**

A8. The petitioner, not the beneficiary, should pay the additional fee, where it applies.

**Q9. How does the petitioner indicate whether it is subject to the new fee?**

A9. Until the Petition for Nonimmigrant Worker (Form I-129) and the Nonimmigrant Petition Based on Blanket L Petition (Form I-129S) are revised, USCIS recommends that all H-1B, L-1A, and L-1B petitioners include, as part of the filing packet, the new fee or a statement or other evidence outlining why this new fee does not apply. USCIS requests that petitioners include a notation indicating whether or not the fee is required in bold capital letters at the top of the cover letter. The fee, statement, notation, or other evidence should be provided with each petition submitted. Where the fee or documentation is not submitted with the filing, or where questions remain, USCIS may issue a Request for Evidence to determine whether the additional fee applies to the petition.

**Q10. How will USCIS address petitions filed without the new fee or an explanation of why the new fee does not apply?**

A10. Where the fee or explanation is not submitted with the petition, or where questions remain, USCIS may issue a Request for Evidence to determine whether the additional fee applies to the petition. Because an RFE will be issued for the fee, rather than a rejection for the omission of the fee, USCIS will maintain the original filing date as the receipt date. Petitioners should wait to respond to the RFE before sending in the additional fee or an explanation of why the new fee does not apply. Once the revised Form I-129 and Form I-129S are in place, USCIS will reject covered petitions submitted without the new fee.

**Q11. When will the revised Form I-129 and its instructions be available?**

A11. USCIS is revising the Form I-129 and Form I-129S and their accompanying instructions and will release them as soon as possible.

**Q12. Does USCIS require the new fee to be written in a separate check?**

A12. USCIS recommends that petitioners include the new fee in a separate check. The check should be made payable to the Department of Homeland Security.

**Q13. How will USCIS define “employer” for purposes of implementing Public Law 111-230?**

A13. To implement Public Law 111-230, USCIS will apply the definition of “employer” found at 8 CFR §214.2(h)(4)(ii), which states:

[A] person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) engages a person to work within the United States
- (2) has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) has an Internal Revenue Service Tax Identification number.

The use of this definition for purposes of determining the application of this new fee does not extend or authorize its application beyond Public Law 111-230 and the H-1B rules and regulations.

**Q14. How will USCIS define “employee” for purposes of implementing Public Law 111-230?**

A14. All employees, whether full-time or part-time, will count towards the calculation of whether an employer is subject to the new fee.

**Q15. When calculating the percentage of employees in H-1B or L-1 status, will USCIS compare the number of nonimmigrant workers in the petitioner’s workforce to the number of employees in the United States only or to the number of employees worldwide? Will USCIS include employees in L-1 status who remain on foreign payroll?**

A15. USCIS will calculate the percentage based on the number of employees in the United States. All employees in the United States, regardless of whether they are paid through a U.S. or foreign payroll, will count toward the calculation.

**Q16. Does the new fee apply to derivative beneficiaries?**

A16. No. The new fee does not apply to derivatives.

**Q.17 Does this new fee apply to any other employment-based visa category (e.g., H-2A, H-2B, etc.)?**

A17. No. The new fee applies only to certain H-1B, L-1A, and L-1B petitions.

**Q18. Does an employee in L-2 status count as an employee for purposes of determining whether or not the employer has more than 50 percent of its employees in an H-1B or L status?**

A18. No. Only H-1B, L-1A, and L-1B employees are counted towards the 50% calculation.

**Question 10:**

Federal regulations provide for a no more than a two-year admission at a U.S. port of entry and not more than a two-year extension of stay. 8 C.F.R. § 214.2(e)(19), (20). We understand that this is a procedure noted in the Inspector's Field Manual at Chapter 15.4(e). The practice was most recently expressed in a cable dated October 10, 1989 from the Assistant INS Commissioner for Inspections (file CO 235-C), which stated in part:

Nonimmigrant visas issued to E-1 and E-2 treaty traders and investors are, for terms of admission purposes, utilized like "B" nonimmigrant visas. For example, if an "E" visa is issued on 6/15/89 valid to 9/14/89 that means that the holder of the visa may make an initial entry at any time between those dates. Upon presentation of the visa and valid passport, and if otherwise admissible, the holder should be admitted for the "[full period of admission authorized under the USCIS rules".]

At the time of that cable, the period of admission in E status was one year every time. However, since then, the regulations have been revised so that the period of admission for E admissions is now standardized at two years. (See 8 CFR § 214.2(e)(19), (20)).

The October 10 cable also states that the full period of admission "may be granted to the holder even if the visa is presented [on the day of its expiration] as the visa must be valid only at time of entry."

***Question 11:***

9 FAM 41.31 N14.4 and DOS cable dated July 1, 2001 provide that accompanying one's work authorized of student partner to the U.S. is consistent with B-2 status provided the applicant can show nonimmigrant intent. That section provides:

9 FAM 41.31 N14.4 Cohabiting Partners, Extended Family Members, and Other Household Members not Eligible for Derivative Status

*The B-2 classification is appropriate for aliens who are members of the household of another alien in long-term nonimmigrant status, but who are not eligible for derivative status under that alien's visa classification. Such aliens may include cohabiting partners or elderly parents of temporary workers, students, and diplomats posted to the United States, etc. B-2 classification may also be accorded to a spouse or child who qualifies for derivative status (other than derivative A or G status) but for whom it may be inconvenient or impossible to apply for the proper H-4, L-2, F-2, or other derivative visa. If such individuals plan to stay in the United States for more than six months, they should be advised to ask the Department of Homeland Security (DHS) for a one-year stay at the time they apply for admission. If needed, they may thereafter apply for extensions of stay, in increments of up to six months, for the duration of the principal alien's nonimmigrant status in the United States.*

The IFM Chapter 15.4(b)(2)(B)(9) also recognizes that same sex domestic partners may be entitled to B-2 visitor status. It provides:

*A dependent of a nonimmigrant who is not entitled to derivative status, such as in the case of an elderly parent of an E-1 alien, or a domestic partner (Revised by CBP 3-04);*

**Question 12:**

The Foreign Affairs Manual provides background concerning the “B-1 in lieu of H-1B” issue:

**9 FAM 41.31 N11 ALIENS NORMALLY CLASSIFIABLE H-1 OR H-3**

*(CT:VISA-1034; 09-24-2008)*

There are cases in which aliens who qualify for H-1 or H-3 visas may more appropriately be classified as B-1 visa applicants in certain circumstances; e.g., a qualified H-1 or H-3 visa applicant coming to the United States to perform H-1 services or to participate in a training program. In such a case, the applicant must not receive any salary or other remuneration from a U.S. source other than an expense allowance or other reimbursement for expenses incidental to the alien’s temporary stay. For purposes of this Note, it is essential that the remuneration or source of income for services performed in the United States continue to be provided by the business entity located abroad, and that the alien meets the following criteria:

- (1) With regard to foreign-sourced remuneration for services performed by aliens admitted under the provisions of INA 101(a)(15)(B), the Department has maintained that where a U.S. business enterprise or entity has a separate business enterprise abroad, the salary paid by such foreign entity shall not be considered as coming from a “U.S. source;”
- (2) In order for an employer to be considered a “foreign firm” the entity must have an office abroad and its payroll must be disbursed abroad. To qualify for a B-1 visa, the employee must customarily be employed by the foreign firm, the employing entity must pay the employee’s salary, and the source of the employee’s salary must be abroad; and
- (3) (3) An alien classifiable H-2 shall be classified as such notwithstanding the fact that the salary or other remuneration is being paid by a source outside the United States, or the fact that the alien is working without compensation (other than a voluntary service worker classifiable B-1 in accordance with 9 FAM 41.31 N9.1-5). A nonimmigrant visa petition accompanied by an approved labor certification must be filed on behalf of the alien.

**Question 13:**

We understand that remittance may be made by a bank international money order or foreign draft which is (1) payable in United States currency, and (2) drawn on a financial institution located in the United States.

We understand that the *CBP Collections and Deposits Handbook (2004)* provided that checks should be made out to the "*Bureau of Customs and Border Protection*," but that checks made payable to the "*U.S. Customs Service*," "U.S. Treasury," "U.S. Government," or any reasonable variation such as "currency, bearer, cash" could also be accepted. Has there been an update to this, especially considering that CBP no longer uses either "Bureau" or "U.S." as a part of its name and that "Department of Homeland Security" is widely accepted. (For example, the I-193 Application for Waiver of Passport and/or Visa" provides

"If the application is being made in Guam, a check or money order must be payable to the "Treasurer, Guam." If the application is being made in the U.S. Virgin Islands, a check or money order must be payable to the "Commissioner of Finance of the Virgin Islands." Some filing locations have the capability to accept credit cards. Please inquire with the individual filing location as to their ability to accept credit cards. All other applicants must make a check or money order payable to U.S. Customs and Border Protection or Department of Homeland Security. When a check is drawn on the account of a person other than the applicant, the name of the applicant must be entered on the face of the check. If the application is submitted from outside the United States, remittance may be made by a bank international money order or foreign draft which is payable in United States currency, drawn on a financial institution located in the United States and made payable to U.S. Customs and Border Protection or Department of Homeland Security.

Please provide any updated guidance available.

**Question 14:**

O-2 nonimmigrants are NOT required to have 1 year experience with the O-1 nonimmigrant. The INA § 101(15)(o)(ii) provides that an O-2 nonimmigrant

- (ii)(I) seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an alien who is admitted under clause (i) for a specific event or events,
- (II) is an integral part of such actual performance,
- (III)(a) has critical skills and experience with such alien which are not of a general nature and which cannot be performed by other individuals,

The regulations at 8 CFR § 214.2(o)(1)(ii)(B) provide,

(B) An O-2 classification applies to an accompanying alien who is coming temporarily to the United States solely to assist in the artistic or athletic performance by an O-1. The O-2 alien must:

- ( 1 ) Be an integral part of the actual performances or events and possess critical skills and experience with the O-1 alien that are not of a general nature and which are not possessed by others; or
- ( 2 ) In the case of a motion picture or television production, have skills and experience with the O-1 alien which are not of a general nature and which are critical, either based on a pre-existing and longstanding working relationship or, if in connection with a

specific production only, because significant production (including pre- and post-production) will take place both inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production.

**Question 15:**

**How long is a Reentry Permit valid?**

- a. A Reentry Permit “shall be valid for not more than two years from the date of issuance.” INA §223(b)(3). A Reentry Permit is a document that, when in possession of a qualified alien, may be accepted in lieu of a visa when applying for admission to the U.S. INA §223(e), 8 CFR §211.1(a)(3). A Reentry Permit allows a resident alien to apply for admission to the U.S. upon returning from abroad without the need to obtain a returning resident visa. 8 CFR §223.1.

The statutory language used in §223(b)(3) places a two year limit on a permit’s period of validity. The language used (“not more than”) also appears to contemplate issuance of a permit for a shorter period of time. Governing regulations, however, state that a permit “*shall be valid for 2 years from the date of issuance.*” 8 CFR §223.3(a)(1)(*emphasis added*), 1 Adjudicator’s Field Manual--Redacted Public Version, 52.3(c) & 52.4(a) .

There are various exceptions. A Reentry Permit issued to a conditional resident will be limited to the date that he must apply to remove the conditions on his status. *id.* When a permit is issued, however, it has a specific expiration date. The USCIS Adjudicator’s Field Manual clarifies that a permit “may not be valid beyond the date on which a conditional resident’s status will expire.” 1 Adjudicator’s Field Manual--Redacted Public Version, 52.3(b)(9).

Provided that a permit is unexpired at the time that its holder embarks or enplanes in travel to the U.S. and, provided further, that the vessel or plane arrives in the U.S. on a continuous voyage, the permit shall be regarded as unexpired when presented as an entry document. 8 CFR §211.3.

**Does a Reentry Permit Unequivocally demonstrate that a Resident Alien is Returning from a Temporary Absence Abroad?**

- b. A valid, unexpired Reentry Permit demonstrates that the alien to whom it was issued is returning from a temporary visit abroad. INA §223(e), *see Matter of V--*, 4 I.&A. Dec. 143 (1950). Consequently, a resident alien in possession of an unexpired permit shall not be deemed to have abandoned resident status solely based on the duration of his absence(s). 8 CFR §223.3(d).

A Reentry Permit may not be renewed. INA §223(b)(3), 8 CFR §223.3(c). There is no prohibition, however, against filing sequential applications for permits. Furthermore, a permit may be issued to a resident alien even if he has had

extended absences from the U.S. If the applicant is a resident alien who has been absent from the U.S. for an aggregate period of more than four years since becoming a resident alien or during the past five years, whichever is less, a permit shall be issued with a validity period of one year. 8 CFR §223.2(c)(2). We note that this rule does not mandate issuance of a permit to a resident alien who has been absent from the U.S. for extended periods of time. The rule, however, does recognize that a resident alien may be able to demonstrate that he intends to depart temporarily from the U.S., and thereby qualify for a Reentry Permit, even if he has been absent for extended periods of time. Consequently, CBP should not re-adjudicate the issue of whether the alien is returning from a temporary absence abroad even though there may have been extended absence(s) during the period of validity of a Reentry Permit. *see Matter of V---*, *supra*.

While, under INA §223(e), a Reentry Permit provides proof that a resident alien is returning from a temporary absence abroad, all grounds of inadmissibility under any provision of law relating to entry of aliens to the U.S. apply to a resident alien in possession of a valid Reentry Permit. INA §215(d). While CBP officers may always appropriately question a resident alien applying for admission (after an absence of greater than 180 days) to determine admissibility, it would be inappropriate to question whether such an alien in possession of a valid, unexpired Reentry Permit has abandoned his resident status solely due to the amount of time spent abroad.

## **AILA NATIONAL LIAISON COMMITTEE MEETING LIAISON AGENDA-Follow up from March 2010 meeting FALL 2010- Part 2**

### **Immigration Law Complexity**

1. We are aware of at least some of the challenges faced by CBP as to the training of new personnel and providing updates to long term employees while addressing the issues of security, trade, and business facilitation. We appreciate the difficulty of this mission and the dedication of CBP personnel. Our membership though is experiencing increasing difficulties with issues related to a lack of knowledge about immigration law at ports of entry. We instruct our membership to provide examples and to use the chain of command at the ports of entry, but these efforts do not increase the port's efficiency and certainly concerns about access to someone with a strong immigration law background to address valid points do not enhance facilitation of legitimate travel or encouraging trade and travel to the U.S.

In the air environment, at least there is a listing on [cbp.gov](http://www.cbp.gov) of passenger service managers at: [http://www.cbp.gov/xp/cgov/toolbox/contacts/ports/cbp\\_psm1.xml](http://www.cbp.gov/xp/cgov/toolbox/contacts/ports/cbp_psm1.xml). At land borders, some ports will have an accessible passenger service manager, but many still do not have sufficient comfort and training with our unfortunately complex immigration laws. In the Pre-Clearance Operation (PCO) environment, we are not aware of any passenger service manager officers. In addition, the CBP customer service number, which is also used as the number on the CBP website for the Port Director level contact for PCO issues, is not available on weekends. See [http://www.cbp.gov/xp/cgov/toolbox/contacts/preclean\\_locations.xml](http://www.cbp.gov/xp/cgov/toolbox/contacts/preclean_locations.xml). We are also very concerned about increasing reports of use of expedited removal versus a withdrawal of application for admission and of inspectors using what are described to us as acts of intimidation to force an applicant to sign a record of intercept with allegedly inaccurate facts.

We would like to discuss the following suggestions:

a. Providing a website posting notice of passenger service manager number and names for all ports similar to the CBP listing for certain airports referenced above. If not, have certain 24/7 contacts designated for immigration related legal matters for all ports. Applications for admission are critical to the traveling public and without expedited access to subject matter experts, CBP as well as the public faces increased time addressing problems on the back end after the incident. *(Please note that some AILA members have been advised though that passenger service managers may not answer legal questions.)*

Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.

b. Providing a CBP e-mail address(es) for attorneys to submit urgent legal issues at ports on a regional or state basis, if they have gone through an agreed protocol and been unable to reach a resolution to the matter. To a degree, we have something similar with the State Department for issues arising at consulates ([legalnet@state.gov](mailto:legalnet@state.gov)) and with the State Department's National Visa Center for issues arising there ([nvcattorney@state.gov](mailto:nvcattorney@state.gov)). *(At present the ability to timely request help on legal issues for admissions purposes is not addressed by the customer service number, since it is not set up to address legal issues.)*

Reply: CBP confirmed that the proper protocol for all case issues is through the Port or the Field Office. Legal issues that connote an improper legal trend should be brought to the attention of CBP National through the AILA National CBP Committee. CBP does seek efficiency and consistency. However, CBP felt that the idea of a CBP email address has potential and it will be discussed in the future.

- c. CBP's website should provide access to redacted musters/notices to the field regarding legal issues. The State Department has an area on their website for Visa Telegrams, which helps to serve this purpose. Often a CBP employee does not appreciate our copies of regulations and statutes with an explanatory letter and will only review CBP issued material even though we are both trying to apply the same regulations and statutes. We would hope that referencing a posted muster might help reduce interpretative concerns. In addition, inspectors have limited time and it appears to our members that access to the field manual and updates to policy are apparently difficult for inspectors.

**Reply: CBP supports a training dialog and an opportunity to increase training.**

- d. Some type of public education campaign that advises members of the public of a contemporaneous protocol to follow, if they believe they have been forced to sign inaccurate factual statements prepared by a CBP officer. We understand the use of the on-line complaint option after the fact, but we need to discuss how to decrease these alleged incidents for the benefit of CBP in assuring that officers are applying their procedures and the public in being able to rely upon them.

**Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.**

### **Transparency and Security**

2. From an enforcement perspective as well as achieving mission objectives, we know that CBP officers strive to follow standardized and consistent practices. Applicants for admission are typically not provided a copy of a Record of Intercept or of any document they sign during an admission process. When Freedom of Information Act requests are submitted, redactions of material for law enforcement or security purposes often leave the applicant with hardly any ability to address errors. Would CBP reconsider its current redaction policy for FOIA requests as to applications for admission to provide more transparency without impacting security? An applicant for admission should be able to easily determine at least the legal allegation for the applicant's inadmissibility. Would CBP consider implementing a policy to require applicants for admission to be provided a copy of their record of intercept and any associated testimony executed by the applicant before CBP?

**Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.**

### **Trade NAFTA**

3. Given current instantaneous communication through e-mail, videoconferencing, virtual meetings, etc., and the likely continuation of this technological trend, it appears that a TN Scientific Technologist can perform duties that are inter-related with and provide input to his supervisory professional's work while remaining under the management, coordination and review of that supervising professional located at a different physical location. Please refer to the attached reference from the IFM. The IFM does not require that the TN Scientific Technologist must work at the same job site as the supervisory professional.

If an individual otherwise meets all requirements for classification as a TN Scientific Technologist, performs duties that are inter-related with and provides input to his supervisory professional's work and is managed, coordinated and reviewed by the professional supervisor, is it necessary for the TN Scientific Technologist to be located at the same work facility?

**Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.**

### **Business Visitor**

4. AILA members report that individuals are receiving contradictory determinations from CBP Officers at PCO in Toronto and the Peace Bridge in Buffalo, N.Y. concerning whether proposed activities

in the U.S. may be performed by a business visitor (B-1) or require employment authorization. For example, an individual applying for admission to the U.S. at the Peace Bridge may be told that his activities do not qualify for a business visit and that he must obtain a nonimmigrant classification that authorizes employment in the U.S. After obtaining TN authorization from CBP at the Peace Bridge, when applying for admission to the U.S. at PCO Toronto to perform identical duties in the U.S., the individual may be told that his proposed activities do not qualify for TN classification and that he may be admitted as a business visitor.

The TN Form I-94, Admission/Departure Record may be canceled under such circumstances. This problem is particularly acute with TN determinations made by ports of entry since this classification is based on neither a petition approved by USCIS nor a visa issued by a consular officer. Is CBP willing to establish guidance to the field requiring ports to defer to determinations made by other ports absent fraud?

Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.

## ESTA

5. We understand that CBP is working with the U.S. Department of State (DOS) to harmonize the terminology used when an INA §221(g) refusal is made by a Consular Officer in the context of a nonimmigrant visa application. CBP and DOS appear to have had different understandings of the meaning and legal effect of the terms “refusal” and “denial” when INA §221(g) notice is used to refuse a visa application. Would CBP please provide an update on the status of the discussion with DOS concerning this issue? (Please refer to the addendum for our practice advisory to the AILA membership regarding this issue.)

Reply: CBP is working closely with DOS on ESTA issues, including 221(g). There is a “link” on the ESTA site to the DOS site. CBP is working on “framing” the 221(g) question on the ESTA site.

6. We respectfully request that CBP consider creating a more user-friendly ESTA form or add additional explanations to the system to assist applicants in answering the questions accurately. Specifically:

a. Question D) Are you seeking to work in the U.S.? We are concerned that an applicant may believe that the phrase, “work in the U.S.,” may include business travel if the applicant is traveling to the U.S. for business on behalf of his foreign employer, and thus mark “Yes” when the answer should be “No.” This confusion can also happen when a person is coming to the U.S. on a pre-trip to look at housing or schooling in anticipation of a work visa. It is quite helpful that the form is in numerous languages. However, just saying “seeking to work” may not be enough of a distinction, or with enough clarification, even for fluent or native English speakers, to discern the difference.

Perhaps the question could be partially re-phrased to include “Are you coming to the U.S. to seek new employment?” Alternatively, would it be possible to create a hyperlink for some or part of that question that provides either further clarification or exclusions? One possible hyperlink would be to the U.S. Department of State Foreign Affairs Manual, which contains examples of activities which are not “seeking to work in the U.S.” <http://www.state.gov/documents/organization/87206.pdf> Or CBP could add a note advising applicants that temporary business travel on behalf of a foreign employer or attending conferences, meetings, etc., although FOR WORK abroad is not “work in the U.S.” and thus the answer to the question would be “no.” Another option would be to describe any type of “work” in a comment box for review by CBP.

Reply: CBP supports changing the language in the ESTA questions, and is working through the interagency, regulatory and internal CBP processes to examine how best to make these changes.

ESTA Statistics: Compliance of persons arriving at US ports-of-entry via air or sea (none needed at this time for land entries) is 96.97%. 99.5% of ESTA applicants are approved. CBP receives more than 40,000 ESTA applications per day. Most approvals are issued within 5-10 seconds. A small number go to "pending" for review by an ESTA review team. While the official response is up to 72 hours, the average is 4 hours. CBP is working on enforcing fines against air carriers that do not ensure ESTA applications are completed before persons board a plane.

In late April or in May 2010, the I-94W will be eliminated for air and sea ESTA entries. A pilot project involving travelers from Ireland and New Zealand was very successful. Over 92% of the people with electronic I-94s have a confirmed departure (out of 70,000). Applicants are given a passport stamp in lieu of the I-94W that confirms the duration of stay. CIS and ICE have been notified of this change and the SAVE system has been changed accordingly. Persons reentering the US from Canada or Mexico during the 90 day duration can still be admitted without the I-94W.

Under the Travel Promotion Act, signed into law on March 4, 2010, every ESTA entry will require a \$10 fee to promote travel to the US. It is unclear how this charge will be implemented at this time. The law requires implementation in 6 months, but this will be a challenge.

ESTA is a registered trademark, and CBP is working to prosecute those who use it improperly.

Members are reminded that while ESTA is not needed for a land entry (i.e., UK citizen with Canadian landed immigrant status who is entering the US from Canada), ESTA is required if a person flies from the US to a foreign destination, and then back to the US before returning to Canada.

- b. Similarly, in the context of acceptable B-1 after sales services, many applicants believe they are "seeking to work in the U.S." and, unless they consult with an immigration attorney, may respond "YES" when this answer likely will lead to an ESTA denial. If possible, could the hyperlink also include the definition of after sales service? There is a definition of "after sales service" in IFM Appendix 15.3 (NAFTA), which could easily be modified for general business visitor use.<sup>1</sup> Or, could an additional clarification question be added if the applicant marks "YES," to ensure that the trip is not to perform after sales service. For example: "You have marked YES, however, if you will be engaging in after sales service, you are not considered to be seeking work in the U.S." To make the form even more user friendly, perhaps CBP could add a notation that the applicant should be prepared to present a copy of the relevant agreement and/or a letter from the foreign employer about the specific travel, if so requested.

Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.

- c. Question B) Have you been arrested or convicted..." We propose a hyperlink to arrest and conviction which explains that even if the applicant has had an arrest record and/or conviction expunged, the applicant must disclose it. We also propose that CBP reformat Question B into multiple parts. Hyperlinks also would be helpful for certain other confusing terms such as moral

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<sup>1</sup> \*From Appendix 15.3: "After-Sales Service. Installers, repair and maintenance personnel, and supervisors, possessing specialized knowledge essential to a seller's contractual obligation, performing services or training workers to perform services, pursuant to a warranty or other service contract incidental to the sale of commercial or industrial equipment or machinery, including computer software, purchased from an enterprise located outside the territory of the Party into which temporary entry is sought, during the life of the warranty or service agreement." The phrase "outside the territory of the Party" could be replaced with "outside the United States."

turpitude, controlled substance, etc., so that the applicant can answer completely and correctly and avoid the ESTA denial and either a delay or a possible visa application. This practice would be similar to what CBP has already done with the first question on the form that defines communicable diseases, etc.

**Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.**

### **Notice to Appear (NTA) Errors**

7. In light of the recent policy implemented on 10/1/09 affecting LPRs with criminal records, NTA issuance by CBP at U.S. Ports of Entry has become much more commonplace across the country. However, despite reports by AILA chapters that NTA issuance at Ports has uniformly increased, procedures regarding NTA issuance and review seem to vary greatly in different jurisdictions. Please clarify the following points:

- a. Does CBP protocol mandate seizure of foreign passports when an NTA is issued for non-detained cases? (*Members report that certain Ports routinely seize passports “to prove alienage” and will only release them upon a formal written request, which often takes weeks to months. If this is the justification for seizure, could CBP simply retain a photocopy of the passport instead of seizing it? We note that all passports are property of a foreign government as well as the traveler.*)

**Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.**

- b. Does CBP protocol exist regarding a timeline for filing an NTA to the Immigration Court? (*Members report that certain Ports file NTAs with the Court within 1-2 days, whereas others send NTAs to Deferred Inspection offices and officers take weeks to months to compile judgment and conviction documents and file with Court.*)

**Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.**

- c. Given the apparent preference to issue an NTA against an LPR with a criminal record, under what circumstances would such a case still be referred to Deferred Inspection instead of NTA issuance? (*Members have noted that many LPRs do not travel with any criminal documentation and are thus completely unprepared and unable to discuss or present their case at the Port of Entry.*)

**Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.**

- d. Under what circumstances would an LPR be detained at the time of issuance of the NTA?

**Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.**

- e. CBP addressed this question in its responses recorded in the March 25, 2010 AILA/ CBP meeting minutes.

- f. 8 CFR 239.2 states that certain NTAs that are legally erroneous or improvidently issued may only be rescinded “only by the issuing officer.” Does this apply to CBP’s issuance of NTAs under the new policy; if so, in what context(s)?

**Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.**

### **Western Hemisphere Travel Initiative (WHTI)**

8. We understand that CBP has provided WHTI guidance for the field. Would CBP provide an update on the status of this guidance and a redacted copy as needed of such guidance?

Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.

### **Port Communication of Approvals to USCIS**

9. On October 11, 2009 the AILA CBP Liaison Committee presented a question concerning the protocol for CBP stationed at northern ports of entry to forward L-1 approvals to USCIS. Delays in the USCIS receipt of such notifications is causing further delay for visa issuance to non-Canadian L-2 dependents filing visa applications at U.S. Consulates. Can CBP provide an update this protocol? In addition, we would request that CBP adopt a procedure to require communication with legal counsel on L port applications when a question is raised by the inspector before referral to the Service Center.

Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.

### **Returning Legal Permanent Residents and NTAs**

10. Based on our [liaison conference call on September 29, 2009](#), we had understood that CBP would be able to provide either an FAQ or redacted memorandum addressing guidance on the incarceration and issuance of an NTA to a returning lawful permanent resident alien with a criminal conviction (AILA Doc. No. 09102962). Would CBP provide an update on the status of this FAQ or memorandum and hopefully a copy of such memorandum?

Reply: No update has been issued.

### **TRIP**

11. CBP addressed this question in its responses recorded in the [March 25, 2010 AILA/ CBP meeting minutes](#) (AILA Doc. No. 10072870).

### **Training Issues**

12. Members report that nonimmigrant aliens with H-1B and L-1 visas frequently are admitted through the expiration date of the visa, rather than the date of the approved petition. Is CBP willing to issue a reminder to the field instructing that, assuming there is no issue as to passport validity, the petition date, not the visa date controls the period of time that H and L nonimmigrant aliens may be admitted (e.g. State Department reciprocity schedule provides for shorter term validity of visa than petition approval from USCIS)?

Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.

13. Members report that nonimmigrant aliens possessing both a valid, unexpired H-1B, H-4 L-1, or L-2 visa and an Advance Parole document based on a pending Application for Adjustment of Status ("AOS") are being told by CBP officers upon applying for admission to the U.S. that they must be paroled rather than admitted as a nonimmigrant alien. Is CBP willing to issue a reminder to the field instructing that an alien with a valid H-1B, H-4, L-1, or L-2 nonimmigrant visa may be admitted in nonimmigrant status regardless of whether he has an AOS pending? Would CBP confirm that the appropriate procedure to correct a record of entry to reflect an admission rather than parole would be to contact the CBP Deferred Inspection Officer either at the port of entry where the alien arrived or with the CBP Deferred Inspection Officer nearest the alien's place of temporary residence in the U.S.? (See the attached .pdf copy of the [March 14, 2000 Cronin memo](#) from the INS - Specifically, the question and answer to Number 5 (AILA Doc. No. 00052603). In addition, this issue was addressed by CBP at the [August 2008 AILA National CBP liaison meeting](#). See Q 3 below (AILA Doc. No. 08110768).

### **Adjustment of Status Applicants Seeking Admission in H or L Status**

There have been numerous instances where CBP officers have refused to admit foreign nationals in H or L status when these foreign nationals have pending adjustment of status applications, present valid H or L visas, and are returning to resume employment with a sponsoring H or L employer. Such instances are contrary to 8 CFR 245.2(a)(4)(ii)(C). We addressed this issue at a prior liaison meeting. Would it be possible for CBP to give us a copy of the musters related to this issue for release to our member?

A: CBP is aware of the regulation and agrees that it is up to the traveler how they wish to present themselves for entry (by using a valid advance parole document or using an H or L visa). Musters on this subject have gone out to the field previously. However, CBP will issue another muster on this matter and share a copy with AILA (with the understanding that any law enforcement sensitive information would be redacted).

**Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.**

**14.** Cuban parolees at some ports of entry are issued Form I-94 parole documents that are only valid for 90 days and the individuals are informed that they have to return to deferred inspection every 90 days to have the Form I-94 renewed. Persons issued a Form I-94 valid for less than a one-year period have tremendous difficulty obtaining employment authorization documents from USCIS and state drivers licenses. See [attached .pdf of USCIS memorandum to issue Cuban parolee Form I-94 documents](#) for a 2 year period from John M. Bulger, Chief, Office of Field Operations USCIS, February 3, 2009 (AILA Doc. No. 09030962). Is CBP willing to issue Cuban parolees a Form I-94 valid for 2 years?

**Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.**

### **Port of Entry Fraud Investigations**

**15.** CBP addressed this question in its responses recorded in the March 25, 2010 AILA/ CBP meeting minutes.

### **Returning Legal Permanent Residents Presenting I-551 Stamp**

**16.** It appears that every applicant for admission to the U.S., who presents a temporary Form I-551 stamp or Form I-829 receipt is uniformly referred to secondary inspection. Would CBP confirm whether this is a mandatory, national policy? If so, would CBP confirm the reason for this policy, since our understanding is that this information would be readily available in primary via primary accessible databases and through APIS when applicable?

**Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.**

### **G-28I**

**17.** This question concerns the appropriate use of Form G-28I, Notice of Appearance as Attorney in Matters Outside the Geographical Confines of the U.S. We understand that the purpose of the form is to provide notice that an attorney admitted to practice law in a country other than the U.S. seeks to appear before DHS in a matter outside the geographical confines of the U.S. Certain questions arise concerning how CBP interprets the phrase "matters outside the geographical confines of the United States?" For example:

- a. May a Form G-28I be used by an attorney not licensed in the U.S. as to applications made for clients outside of the U.S. when the "proceeding" may be in the U.S.? (e.g., a waiver application adjudicated at the Admissibility Review Office in the U.S.)

Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.

- b. May a Form G-28I be used appropriately by an attorney not licensed in the U.S. as to applications for admission at U.S. ports of entry?

Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.

- c. Is the use of a Form G-28I by an attorney not licensed in the U.S. appropriate for applications or petitions filed at DHS PCOs?

Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.

### **Admissibility Review Office (ARO)**

18. CBP addressed this question in its responses recorded in the March 25, 2010 AILA/ CBP meeting minutes.

### **INA §212(d)(3) waivers**

19. We have not received any response to our point that INA §276(c) provides an exception to incarceration when the Attorney General has consented to the readmission of those who were deported, which supports our position that an INA §212(d)(3) waiver would not also require an I-212. (Of course, INA §242(h)(2), which is referenced in INA § 276c, no longer exists.) Waivers under INA § 212(d)(3) cover all grounds except those specifically excluded. Thus, INA §212(a) grounds of inadmissibility include those under § 212(a)(9). Can this issue be addressed with CBP legal counsel as soon as possible?

Reply: CBP is still looking into it.

### **SENTRI and NEXUS**

20. We applaud CBP for the support and expansion of these program as well as Global Entry at certain airports. We are concerned about the current policy being applied as to Sentri and Nexus applications apparently that any knowing or unknowing violation of a policy regarding these programs result in the removal of all family members from the program. (See attached CBP Warning Notice) If a spouse forgets a grocery item in the car and is removed from SENTRI or NEXUS, we do not believe that such an action should result in the removal of other family members from the program as if they are not still a low risk user of the program. See 8 CFR §235.7. We believe that in specific, the provision concerning when a PORTPASS may be revoked may be subject to potential avoidance for vagueness. We encourage CBP to engage in a dialogue with AILA and other stakeholders to apply the use of discretion in the context of certain types of immigration and/or customs violations, based on when the incident occurred and the severity of the incident. The current practice of typically finding any immigration or customs violation which happened at any time to cause a person to be ineligible for the program does not serve the mission of this program in balancing security and travel issues.

Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.

### **US VISIT**

21. Based on prior government reports, we understand that one of the goals of the US VISIT system is to include all "immigration violations" in the US VISIT database. We respectfully request an update on how DHS intends to implement this provision and how an "immigration violation" is being defined.

Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.

22. We would request an update from US VISIT as to implementation of exit control at the air, sea, and land environments.

Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.

#### **I-94 Land Border**

23. CBP addressed this question in its responses recorded in the March 25, 2010 AILA/ CBP meeting minutes.

#### **TSA Inspection of Immigration Documents on Domestic Flights and Border Patrol Inspections of Immigration Documents at Interior Checkpoints**

24. We continue to see increased incidences of the inspection by TSA of immigration related documents and the referral of those attempting to fly domestically for removal. While AILA supports the application of law, we are concerned about the training and oversight provided to TSA's employees as to immigration related documents. We request a copy of any training material as to the interpretation of immigration status documents by TSA. In addition, we would request the implementation of a standard point of contact for legal counsel as to errors in immigration document review by TSA. This same situation occurs at Border Patrol interior checkpoints and we would request the same type of training material and point of contact from Border Patrol. We hope to discuss realistic alternatives to address this issue at the meeting.

Reply: Answer pending review by agency. Follow up expected at next Liaison meeting.

## ADDENDUM TO PART II

Question 3:

**Chapter 15 of the IFM states:**

The following principles will be used to evaluate the admissibility of scientific technician/technologist applicants:

(i) Individuals for whom scientific technicians/technologists wish to provide direct support must qualify as a professional in their own right in one of the following fields: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics.

(ii) A general offer of employment by such a professional is not sufficient, by itself, to qualify for admission as a Scientific Technician or Technologist (ST/T). The offer must demonstrate that the work of the ST/T will be inter-related with that of the supervisory professional. That is, the work of the ST/T must be managed, coordinated and reviewed by the professional supervisor, and must also provide input to the supervisory professional's own work.

Question 6:

**CBP Practice Alert: Consular INA § 221(g) Notices Including those for “Administrative Processing” Should Be Disclosed as “Visa Denials” For ESTA Registration  
By AILA National CBP Liaison Committee**

CBP recently informed AILA that it, after consultation with the Department of State (DOS), is classifying all §221(g) actions on visa applications as visa “denials.” Thus, Visa Waiver Program (VWP) applicants, who are subject to INA §221(g) refusals, should answer affirmatively in their ESTA applications that they have been denied a visa. This suggestion applies even if the reason for the refusal is due to consular administrative processing. If VWP travelers do not disclose such a “denial” on their ESTA applications or provide an update regarding such “denials,” they may have their ESTA registration rejected, or be sent to secondary inspection and potentially refused entry when they apply for admission to the U.S.

INA §221(g) sets forth a standard for “non-issuance of visas or other documents” when it appears that an applicant may be ineligible to receive a visa. The Department of State (DOS) frequently cites INA §221(g) as a basis to continue visa applications after interview for “administrative processing.” This use of §221(g) may include requests for additional documents or information, as well as delays caused by pending background checks. Typically, a consular officer will give the visa applicant a worksheet on U.S. Embassy or Consulate letterhead; and this document may have a list or a checked box explaining the specific reason for the delay in adjudicating the application. In the first paragraph of a §221(g) notice from DOS, there will usually be some advisory that “further action in your case has been suspended” or “your application is incomplete or requires further processing.” Technically, the FAM classifies a §221(g) action as a visa “refusal,” but DOS explicitly retains authority to “reactivate” the visa application upon receipt of required documents or completion of a government-mandated administrative clearance. See 9 FAM 41.121 N2.4.

This practice alert applies to clients if they have been issued a §221(g) notice, and they wish to travel to the U.S. as a VWP visitor while their visa application remains pending. We use the phrase “pending” to apply to those cases requiring further documentation, security checks, administrative processing, etc. Basically, the nature of a §221(g) refusal is that requires further action for issuance.

***If my client was issued a § 221(g) notice, how does this issue come up in ESTA registration?***

As part of the ESTA application process, prospective VWP visitors must answer a number of questions online before they can receive authorization to visit the U.S. One of these questions is, "Have you ever been denied a U.S. visa...?" According to CBP, any §221(g) notice of "non-issuance" is technically the same as a "denial," even though DOS classifies such a notice as a "refused" application that can be reactivated rather than a denial. Consequently, all ESTA applicants **should** answer such question in the affirmative—that they "have been denied a U.S. visa"—if they have been issued a §221(g) notice by a U.S. Embassy or Consulate.

The question on the ESTA application reads:

**F) Have you ever been denied a U.S. visa or entry into the U.S. or had a U.S. visa canceled?** Yes  No

If yes:

When  
Where


To maximize chances of ESTA approval, attorneys should consider advising their clients to clearly state **why** the §221(g) notice was issued in the "Where" box (e.g. "Dublin – 221(g), Embassy requested additional documents" or "Helsinki – 221(g), Embassy initiated administrative checks").

CBP has firmly stated that a "yes" answer to this question will not automatically result in denial of an ESTA application by CBP. (However, the ESTA FAQ section of CBP's website states that if an applicant discloses a prior visa denial, "Your ESTA application will most likely be denied.") What is certain is that a "yes" answer will trigger a manual review of the ESTA application by a CBP officer. This manual review is supposed to be completed within 72 hours of submission of the ESTA application and might take as little as one hour. It remains to be seen whether any explanation of a §221(g) "denial" will facilitate ESTA approval. Based on preliminary responses from CBP, it seems that all § 221(g) "denials" based on DOS-initiated administrative checks will probably result in ESTA denial; however, "denials" based on requests for additional documentation may result in ESTA approval. Applicants must check the ESTA website during the 72 hours following submission for a final decision on their application. If the application is not adjudicated within 72 hours, CBP encourages individuals to submit a new application.

***What should I advise my client if they have already obtained ESTA approval without answering "yes" to this question? What if they did not answer "yes" and their ESTA application is still pending?***

If applicants do not disclose receiving a §221(g) notice as a "denial" and still obtain an ESTA approval, or if their ESTA application was approved before they applied for the visa, they should make a new ESTA application. A new ESTA is required when there are "material" changes in an applicant's eligibility. CBP considers a §221(g) DOS notice a material change. CBP has also stated that applicants should not attempt to modify their answer to the visa "denial" question using the "update" feature on the ESTA website, if their visa application is pending a decision. Rather, they should make a new ESTA application. New ESTA applications can be initiated on CBP's website as soon as 24 hours after submitting a previous application.

***What's the worst that can happen if my client or I overlook this issue?***

Applicants who innocently (and justifiably) think that a §221(g) notice is just an administrative delay may be refused entry by CBP for failing to disclose a visa "denial" on their ESTA application. In a worst-case scenario (failure to update an ESTA registration, for example), CBP could accuse VWP travelers of fraud for failing to disclose this information, and this finding could then render them permanently inadmissible.

This issue is confusing because §221(g) notices issued by DOS do not clearly state that a visa application has been “refused,” and even if they did, the ESTA application asks applicants whether they have ever been “denied” a visa. Thus, it is advisable to instruct VWP-national clients to disclose a §221(g) notice as a “visa denial” in their ESTA application.

AILA is currently advocating for CBP and DOS to publicly clarify this issue to ESTA applicants.

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