

**PETITION FOR RULEMAKING
TO PROMULGATE REGULATIONS GOVERNING
ACCESS TO COUNSEL**

SUBMITTED TO

THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY

AND

THE UNITED STATES DEPARTMENT OF STATE

MAY 24, 2017

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

THE AMERICAN IMMIGRATION COUNCIL

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I. STATEMENT OF PETITION

The American Immigration Lawyers Association and the American Immigration Council hereby petition the Department of Homeland Security (DHS) and the Department of State (DOS or State) to initiate rulemaking proceedings pursuant to the Administrative Procedure Act, 5 U.S.C. §553(e), to provide access to legal counsel for petitioning individuals and employers, as well as noncitizens applying for nonimmigrant and immigrant visas at a U.S. Embassy or Consulate, for U.S. citizens and nationals seeking recognition or relinquishment of their citizen or nationality status, and for individuals seeking admission to the United States who are placed in secondary or deferred inspection.¹ Congress has delegated to DHS the authority to promulgate rules to address the issues identified in this petition. The Secretary of Homeland Security is “charged with the administration and enforcement of [all] laws relating to the immigration and naturalization of aliens, except insofar as [those] laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers”² and shall “establish such regulations” as are necessary for “carrying out his authority” under the Immigration and Nationality Act (INA).³ The Secretary of Homeland Security may establish and administer rules “governing the granting of visas or other forms of permission, including parole, to enter the United States” to noncitizens, in accordance with the Homeland Security Act of 2002.⁴

Access to and the assistance of counsel in administrative proceedings before government agencies is fundamental to ensuring that our laws are properly executed and that due process is afforded to those seeking benefits or redress from the U.S. government. In addition, the presence of counsel in administrative proceedings can substantially assist in the timely disposition of government business. Thus, the role of attorneys in the interpretation of U.S. immigration laws and in the adjudication of petitions and applications for immigration benefits should be meaningful and support fundamental principles of due process and fairness.

U.S. immigration laws have been termed “second only to the Internal Revenue Code in complexity... A lawyer is often the only person who could thread the labyrinth.”⁵ Many immigration benefits applications are complex and time-consuming to adjudicate. Some are so difficult to process that specialists must handle them.”⁶ The Department of State recognized the value of attorney contributions to the visa issuance process more than 30 years ago:

In the sometimes-complex world of visas, a good attorney can prepare a case properly; weed out “bad” cases; and alert applicants to the risks of falsifying

¹ This petition is *not* asking for a rule that would mandate government-appointed or government-funded counsel, though petitioners do not concede that the government is not, in some or all situations, required to appoint counsel.

² INA § 103(a)(1); 8 U.S.C. § 1103(a)(1).

³ INA § 103(a)(3); 8 U.S.C. § 1103(a)(3).

⁴ Homeland Security Act of 2002, Pub. L. No. 107-296, tit. I, IV, Subtitle A, §§ 102(a)(3), 402(4), 116 Stat. 2135, 2142, 2187 (Nov. 25, 2002), 6 U.S.C. §§ 112(a)(3), 202(4).

⁵ *Castro-O’Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988) (citations omitted).

⁶ *9/11 and Terrorist Travel*, Staff Report of the National Commission on Terrorist Attacks upon the United States, at 98 (Aug. 21, 2004), http://govinfo.library.unt.edu/911/staff_statements/911_TerrTrav_Monograph.pdf.

information. The attorney can help the consular officer by organizing a case in a logical manner, by clarifying issues of concern, by avoiding duplication of effort and by providing the applicant with the necessary understanding of the visa process.⁷

In 1990, the Department of State Visa Office reiterated the value of counsel, as recounted in the minutes of a meeting with AILA.⁸ Nearly a decade later, a February 1999 cable on the subject of “Working Constructively with Immigration Attorneys” included points such as:

- “The relationship between consular officers and immigration attorneys can be productive. Consular officers can often learn a great deal from a conscientious attorney, and vice versa.”
- “The INA and its underlying bureaucracy is often compared to the Internal Revenue Code as being one of the two most complicated statutes in the U.S. Code. The employment of a lawyer does not constitute a red flag or signal the existence of a problem in a case.”
- “The best immigration attorneys know the law very well. They know the regulations.”⁹

The cable also provides that even when an individual consular post’s policy was generally not to permit attorneys at interviews, individual consular officers could request that an attorney respond to questions in complicated cases.¹⁰

The principles enunciated then remain valid today, but their application has fallen into disuse over the past two decades. In practice today, a lack of access to counsel in visa interviews and other proceedings at U.S. Embassies and Consulates, as well as during the secondary and deferred inspection processes, is the norm. Even close relatives of U.S. citizens and lawful permanent residents, and employees of U.S. corporations and non-profit entities are often denied access to their attorneys at these critical stages of the immigration and inspection process. Further, individuals seeking to pursue complex claims to U.S. citizenship or nationality, or relinquishment of citizenship status, are denied access. When a complicated legal issue arises and counsel is barred from participating meaningfully in proceedings, both citizens and noncitizens may be subject to prolonged and unnecessary administrative processing of a benefit or extended detention and questioning at a port of entry. Moreover, the lack of meaningful access to counsel can result in an unjust refusal of a visa, denial of admission, or expedited removal

⁷ DOS Cable, 83 State 323769 from C.D. Scully (Nov. 1983), III, Director, Office of Legislation, Regulations and Advisory Assistance, Visa Office, to U.S. Consulate Taipei, *quoted in* Jan M. Pederson & Michelle T. Kobler, *The Fundamentals of Lawyering at Consular Posts*, *The Consular Practice Handbook* 91, 113 (AILA 2012 ed.).

⁸ *See* Minutes of the AILA/VO Liaison Meeting (May 10, 1990), *reported and reproduced in* 67 Interpreter Releases 950, 967, 969-70 (Aug. 27, 1990), *quoted in* Andrew T. Chan, *The Lawyer’s Role in Consular Visa Refusals*, *Consular Practice Handbook* 167, 169 (AILA 2010-11 ed).

⁹ IV Processing and Procedure, [99 STATE 21138—Working with Attorneys](#), at ¶¶ 1, 4, 12, AILA Doc. No. 03010241 (*posted* Jan. 2, 2003).

¹⁰ *Id.* at 7.

from the United States. Either way, significant government resources are expended in many situations where the presence of counsel could have helped resolve the problem more quickly.

This petition suggests a joint approach to amending the regulations to provide for access to counsel in visa interviews and other proceedings at U.S. Embassies and Consulates, and during the secondary and deferred inspection processes. For purposes of this proposed rule, counsel is defined to encompass only attorneys who are members of, and are thus subject to discipline by, a bar within the jurisdiction of the United States.

II. INTEREST OF PETITIONERS

The American Immigration Lawyers Association (AILA) is the national association of more than 14,000 attorneys and law professors who practice and teach immigration law. AILA member attorneys represent U.S. citizens and permanent residents petitioning for permanent residence for close family members, as well as U.S. businesses seeking talent from the global marketplace. AILA members also represent foreign students, entertainers, athletes, and asylum seekers, often on a pro bono basis. Founded in 1946, AILA is a nonpartisan, not-for-profit organization that provides continuing legal education, information, professional services, and expertise through its 39 chapters and more than 45 national committees.

The American Immigration Council (Immigration Council) is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. Both AILA and the Immigration Council previously submitted information on the subject of this petition to the Departments of State and Homeland Security in response to a request for information.¹¹

III. STATUTORY AND REGULATORY AUTHORITY TO GRANT THE PETITION

Congress has delegated to the Secretary of Homeland Security the authority to promulgate regulations to: (1) provide for access to counsel for noncitizens and petitioners during all phases of the visa application process, including the presence and participation of counsel during consular visa interviews; (2) provide for access to counsel for individuals in connection with requests for recognition or relinquishment of U.S. citizenship or nationality status; and (3) provide for access to counsel for applicants for admission at U.S. ports of entry during secondary inspection and deferred inspection proceedings.

The authority to promulgate regulations as requested in this petition lies with the Secretary of Homeland Security. Though the Secretary of State is authorized to administer and enforce the provisions of the immigration and nationality laws relating to the powers, duties, and functions

¹¹ Letter from AILA, Request for Information: Modernizing and Streamlining the Visa System (Jan. 29, 2015), available at http://www.aila.org/infonet/aila-on-modernizing--streamlining-us-visa-system?utm_source=aila.org&utm_medium=InfoNet%20Search; Letter from the American Immigration Council, Request for Information: Modernizing and Streamlining the Visa System (Jan. 29, 2015), available at https://www.americanimmigrationcouncil.org/sites/default/files/letter_request_for_information_uscis-2014-0014_modernizing_and_streamlining_the visa_system.pdf.

of diplomatic and consular officers of the United States,¹² and is generally authorized to promulgate such rules and regulations as may be necessary to carry out the functions of the Department of State,¹³ the Secretary of Homeland Security has broad rulemaking authority over immigration and nationality matters under INA § 103(a)(3),¹⁴ and may establish and administer rules “governing the granting of visas or other forms of permission, including parole, to [noncitizens seeking to] enter the United States,” in accordance with the Homeland Security Act of 2002.¹⁵ In addition, Congress delegated to the Secretary of Homeland Security regulatory authority over the functions of consular officers in connection with the granting or refusal of visas.¹⁶

Notwithstanding its delegation of this authority to the Secretary of Homeland Security, Congress recognized and maintained the authority of the Secretary of State in several key areas of the visa process, including the authority to direct a consular officer to refuse a visa where foreign policy or security interests are at stake.¹⁷ Given this division of authority, and the fact that these rules will partially impact the operations of consular officers in adjudicating visas and considering citizenship and nationality claims, we address this petition to both the Department of Homeland Security and the Department of State in an effort to facilitate consultation and coordination as the agencies deem necessary to promulgate these rules.¹⁸

This petition for rulemaking is submitted in accordance with 5 U.S.C. § 553(e) and with respect to DHS, the process set forth for such petitions under 6 C.F.R. Part 3.

¹² INA § 104(a); 8 U.S.C. § 1104(a).

¹³ State Department Basic Authorities Act of 1956, Act of Aug. 1, 1956, ch. 841, title I, § 1, 70 Stat. 890; § 1(4), as amended, 22 U.S.C. § 2651a(a)(4).

¹⁴ 8 U.S.C. § 1103(a)(3).

¹⁵ Homeland Security Act of 2002, Pub. L. No. 107-296, tit. I, IV, Subtitle A, §§ 102(a)(3), 402(4), 116 Stat. 2135, 2142, 2187 (Nov. 25, 2002), 6 U.S.C. §§ 112(a)(3), 202(4).

¹⁶ 6 U.S.C. § 236(b)(1).

¹⁷ HSA § 428(c)(1); 6 U.S.C. § 236(c)(1). Additional exceptions and rules of construction can be found at HSA § 428(c)(2); 6 U.S.C. § 236(c)(2), (d).

¹⁸ Congress recognized that this cross-departmental delegation posed significant difficulties for the administration of the two Departments; thus, the HSA required the Secretaries of State and Homeland Security to negotiate a memorandum of understanding (MOU) to facilitate the implementation of operational functions. HSA § 428(e)(8), 6 U.S.C. § 236(e)(8). See Colin L. Powell, Secretary of State, and Tom Ridge, Secretary of Homeland Security, *Memorandum of Understanding between the Secretaries of State and Homeland Security Concerning Implementation of the Homeland Security Act of 2002* (Sept. 28, 2003) (MOU); cf., George W. Bush, *Report to the Congress on the Memorandum of Understanding Between the Secretaries of State and Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act of 2002*, 68 Fed. Reg. 56,517 (Sept. 30, 2003).

IV. REASONS FOR ADOPTING A RULE GOVERNING ACCESS TO COUNSEL

A. Current Laws, Regulations, and Guidance

1. Administrative Procedure Act

The Administrative Procedure Act (APA) provides for a right to counsel for individuals who are “compelled” to appear before an agency or agency representative.¹⁹ This means that a person who is “compelled or commanded”²⁰ to appear, or whose appearance is brought about by “overwhelming pressure,”²¹ has a statutory right to counsel. To the degree that virtually all interactions with DHS and DOS officers involve compulsion, the right to counsel seems clear.

For example, the CBP Inspector’s Field Manual states that referral of a noncitizen to secondary inspection commences that individual’s “detention.”²² At that point, the noncitizen may not unilaterally withdraw an application for admission and depart from the United States.²³ Given that the person is not free to leave or withdraw the application without permission, his appearance is “compelled” under the APA.

2. Immigration and Nationality Act

The Immigration and Nationality Act (INA) of 1952, as amended, provides a limited privilege of counsel of the individual’s choice in removal proceedings, at no expense to the U.S. government.²⁴ The INA is silent on the issue of counsel in all other proceedings. Accordingly,

¹⁹ 5 U.S.C. § 555(b) (“A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.”).

²⁰ See Attorney General’s Manual on the Administrative Procedure Act 61-62 (1947) (finding that the APA’s counsel provision applies where the appearance is “compelled or commanded”).

²¹ *Black’s Law Dictionary* 118 (2d pocket ed. 2001) (defining “compel” as “[t]o cause or bring about by force or overwhelming pressure.”).

²² “During an inspection at a port-of-entry, detention begins when the applicant is referred into secondary and waits for processing.” See U.S. Customs and Border Protection Inspector’s Field Manual § 17.8.

²³ See 8 C.F.R. § 235.4 (2011) (providing that “[t]he alien’s decision to withdraw his or her application for admission must be made voluntarily, but nothing in this section shall be construed as to give an alien the right to withdraw his or her application for admission.”).

²⁴ INA § 292, 8 U.S.C. § 1362 (2012) (“In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.”). See also 8 U.S.C. § 1229a(b)(4)(A) (2012) (“(4) Alien’s rights in proceedings. In proceedings under this section, under regulations of the Attorney General – (A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings,”).

the APA requirements would apply. Thus, to the extent that an individual's response to an inquiry is compelled during an interview involving a visa application or citizenship/nationality-related claim, or when seeking admission, the APA requires that the individual be permitted access to counsel.

3. DHS Regulations

The Department of Homeland Security recognizes that an individual may be represented not only by an attorney in an examination, but also more broadly by certain non-attorneys with specific limitations:

Whenever an examination is provided for in [8 C.F.R. Chapter 1], the person involved shall have the right to be represented by an attorney or representative who shall be permitted to examine or cross-examine such person and witnesses, to introduce evidence, to make objections which shall be stated succinctly and entered on the record, and to submit briefs. *Provided*, that nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody.²⁵

The regulation at 8 C.F.R. § 103.2(a)(3) reinforces this right, providing that any applicant or petitioner may be represented by an attorney. The well-recognized right to counsel in administrative proceedings before USCIS was reiterated by the agency in its 2012 amendments to the Adjudicator's Field Manual.²⁶

The provenance of these provisions dates to a time before the consolidation of exclusion and deportation proceedings into removal proceedings and attendant procedural changes. As explained by the Department of Justice (DOJ) in adopting this language:

8 CFR 292.5(b) states that whenever an examination is provided for by Service regulations, the person involved has the right to be represented by an attorney or representative for such proceeding. This right to representation does not apply to a person who is being processed through primary or secondary inspection at a port of entry. Every alien seeking to enter the United States must apply in person at a place designated as a port of entry for aliens. The alien must present any required documents and establish admissibility to the satisfaction of an immigration officer during such primary or secondary inspection. If upon inspection the immigration officer is satisfied that the applicant is entitled to enter he has authority to grant admission to the United States. While the inspector has authority to admit an applicant for entry, he is not authorized to finally bar the alien or to waive causes for exclusion. Subsequent administrative proceedings will determine whether or not an alien is admissible or excludable and it is at this point that the alien has the right to representation. To avoid

²⁵ 8 C.F.R. § 292.5(b). *See also Administrative Naturalization*, 60 Fed. Reg. 6647, 6648 (Feb. 3, 1995) (stating that attorneys may engage in "full representation" during examinations before immigration officers).

²⁶ *See* "[Representation and Appearances and Interview Techniques: Revisions to Adjudicator's Field Manual \(AFM\) Chapters 12 and 15](#)"; AFM Update AD11-42 (May 23, 2012), *available at* AILA Doc. No. 12052940.

possible confusion as to when the right to representation attaches, 8 CFR 292.5(b) is amended to provide that an applicant for admission processing through primary or secondary inspection does not have the right to representation unless the applicant has become the focus of a criminal investigation or has been taken into custody.²⁷

The immigration regulations provide for examinations in a variety of contexts, including when individuals apply to lawfully enter the United States at a port of entry and during deferred inspections.²⁸ The 1980 rulemaking added the exception to explicitly exclude any examination occurring in primary or secondary inspection. The INS justified the limitation on the regulatory right to counsel because, as noted above, if the inspecting officer believed that an individual seeking admission was not entitled to enter, the individual was entitled to a hearing to determine admissibility or excludability, at which point he or she would have the right to an attorney.²⁹ Though this was true at that time, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996³⁰ substantially altered the inspection process, with the result that many individuals found inadmissible during inspections may be immediately subject to expedited removal without such a hearing, and, therefore, without an opportunity to consult counsel.³¹ Despite the substantial statutory change, the regulations were never amended to provide access to counsel.

4. CBP Policy

Primary inspection is designed to permit rapid clearance of travelers through immigration and customs inspections. Referral to secondary inspection permits officers to conduct additional screening and research to verify information and admissibility without causing delays for other arriving passengers. Customs and Border Protection (CBP) officers may refer an individual to secondary inspection for a number of reasons, including information in law enforcement databases, the circumstances of specific travel, or even random selection.³² If primary and secondary inspections prove inconclusive, DHS regulations permit an officer to parole an individual into the United States and defer completion of inspection to a later date.³³

²⁷ *Representation and Appearances: Clarifying Right to Representation*, 45 Fed. Reg. 81,732 (Dec. 12, 1980).

²⁸ *See, e.g.*, 8 C.F.R. §§ 235.1, 235.2, 287.3(a).

²⁹ *See* 45 Fed. Reg. at 81,732.

³⁰ Pub. L. No. 104-208 (Sep. 30, 1996). *See* 8 U.S.C. §§ 1225(b), 1226(a), 1362 (1994).

³¹ *See* 8 U.S.C. § 1225(b)(1)(A); *see also Designating Aliens for Expedited Removal*, 69 Fed. Reg. 48,877 (Aug. 11, 2004).

³² The DHS Travel Redress Inquiry Program (DHS TRIP) can be used to resolve some issues, including denied or delayed entry into and exit from the United States at a port of entry or border checkpoint, multiple referrals to secondary inspection, and some other immigration-related issues. While that function may be useful after the fact, or even prospectively for those who frequently cross international borders, TRIP does not resolve or lessen the impact of individualized issues regarding admissibility or eligibility for admission in the classification requested, that commonly would benefit from the presence of counsel.

³³ 8 C.F.R. § 235.2, Parole for deferred inspection, provides:

(a) A district director may, in his or her discretion, defer the inspection of any vessel or aircraft, or of any alien, to another Service office or port-of-entry. Any alien coming to a United States port from a foreign port, from an outlying possession of the United States, from Guam, Puerto Rico, or the Virgin Islands of the United States, or from another port of the United States at which examination under this part was deferred, shall be regarded as an applicant for admission at that onward port.

CBP has not only failed to amend the regulations to recognize a right to counsel during the inspection process, but also attempted to expand the scope of the prohibition on counsel: even though deferred inspection is a distinct process that is not addressed in the text of § 292.5(b),³⁴ CBP has interpreted the restriction on counsel to cover individuals in deferred inspection.³⁵

CBP recognizes, as a matter of policy, that individuals in secondary and deferred inspection may be allowed access to a legal representative where the inspecting officer considers it appropriate. In secondary inspection, CBP officers may allow “a relative, friend *or representative* access to the inspectional area to provide assistance when the situation warrants such action.”³⁶ This policy is critically important because referral to secondary inspection commences detention and signals the existence of an issue regarding admissibility. Referral to secondary inspection is a natural preliminary step to deferred inspection if the issue cannot be easily resolved.

(b) An examining immigration officer may defer further examination and refer the alien’s case to the district director having jurisdiction over the place where the alien is seeking admission, or over the place of the alien’s residence or destination in the United States, if the examining immigration officer has reason to believe that the alien can overcome a finding of inadmissibility by:

- (1) Posting a bond under section 213 of the Act;
- (2) Seeking and obtaining a waiver under section 211 or 212(d)(3) or (4) of the Act; or
- (3) Presenting additional evidence of admissibility not available at the time and place of the initial examination.

(c) Such deferral shall be accomplished pursuant to the provisions of section 212(d)(5) of the Act for the period of time necessary to complete the deferred inspection.

(d) Refusal of a district director to authorize admission under section 213 of the Act, or to grant an application for the benefits of section 211 or section 212(d)(3) or (4) of the Act, shall be without prejudice to the renewal of such application or the authorizing of such admission by the immigration judge without additional fee.

(e) Whenever an alien on arrival is found or believed to be suffering from a disability that renders it impractical to proceed with the examination under the Act, the examination of such alien, members of his or her family concerning whose admissibility it is necessary to have such alien testify, and any accompanying aliens whose protection or guardianship will be required should such alien be found inadmissible shall be deferred for such time and under such conditions as the district director in whose district the port is located imposes.

³⁴ Neither the deferred inspection regulation nor the Federal Register notice regarding that regulation identify deferred inspection as a form of secondary inspection. *See* 8 C.F.R. § 235.2; *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10,312 (Mar. 6, 1997). Further, deferred and secondary inspections serve different purposes. Individuals are referred to secondary inspection “[i]f there appear to be discrepancies in documents presented or answers given, or if there are any other problems, questions, or suspicions that cannot be resolved within the exceedingly brief period allowed for primary inspection.” 62 Fed. Reg. at 10,318. In contrast, deferred inspection is “further examination” following parole, permitted only when the examining officer “has reason to believe” that the person can overcome a finding of inadmissibility by presenting, *inter alia*, “additional evidence of admissibility not available at the time and place of the initial examination.” 8 C.F.R. § 235.2.

³⁵ *See* U.S. Customs and Border Protection Inspector’s Field Manual, § 17.1(e) (citing § 292.5(b)). Regardless of any potential amendment to DHS’s regulatory recognition of the right to counsel, we encourage the agency to abandon this unwarranted expansion of the §292.5(b) secondary inspection exception. We understand that the Inspector’s Field Manual (IFM) has been at least partially replaced by the electronic Officer’s Reference Tool (ORT). Since the ORT is not publicly available, it is unclear what guidance is currently in use.

³⁶ IFM, § 2.9 (emphasis added); *see also* Jayson P. Ahern, Assistant Commissioner, Office of Field Operations, Attorney Representation During the Inspection Process (July 2003), *available at* https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/access_to_counsel_cbp_requests_and_documents_10-12-12.pdf, at 1-2 (allowing an “accompanying helper . . . in appropriate circumstances”).

Deferred inspection of a foreign national may occur for a variety of reasons. On a case-by-case basis, the port of entry may schedule a traveler to report to a Deferred Inspection office at a future date in order to present requested documentation and/or information. In these instances, the foreign national is provided at secondary inspection with an *Order to Appear – Deferred Inspection*, Form I-546, explaining what information and/or documentation is required. CBP can grant deferred inspection rather than admission based on several criteria, including:

- The likelihood that the individual will be able to prove admissibility;
- The types of documents that are missing and the ability of the individual to acquire those documents;
- Whether the individual made a good faith effort to present the needed documents before arriving at the U.S. port of entry;
- Whether CBP can verify the individual’s identity and nationality;
- The individual’s age, health, and family and other ties to the United States;
- Other humanitarian considerations;
- The likelihood that the individual will appear for deferred inspection;
- Whether the apparent type of inadmissibility can be waived and the apparent nature of the inadmissibility; and
- The possible danger to society posed by paroling the individual into the United States pending resolution of the issues presented for deferred inspection.

CBP operates more than 70 deferred inspection sites throughout the United States and its outlying territories. These deferred inspection sites are often separate from the ports of entry in an office building, and present a different set of security requirements than a port of entry. During deferred inspection, “an attorney may be allowed to be present upon request if the supervisory CBP officer on duty deems it appropriate” to serve as an “observer and consultant to the applicant.”³⁷

In practice, individuals in secondary and deferred inspection face a patchwork of unpredictable access to counsel policies. Access may vary by location or officer on duty, and the details of the policies may be difficult for travelers and their attorneys to clearly and quickly understand. Several examples may help make this clear.

- As of several years ago, CBP officials at the Logan Airport port of entry, Boston, uniformly barred attorneys from secondary and deferred inspections. In 2011, the port changed its policy to generally permit attorney access during deferred inspections but apparently made no further clarification of its policy with regard to secondary

³⁷ IFM, §17.1(e); *see also* Ahern, Attorney Representation During the Inspection Process, at 1.

inspections.³⁸ Other ports within the jurisdiction of the Boston Field Office also were directed to generally permit attorney access during deferred inspections in 2011.³⁹

- By contrast, the Miami Field Office has stated that, in response to a complaint about lack of attorney access to deferred inspections, its officers evaluate “the totality of circumstances ... on a case-by-case basis[,] and discretionary authority permitting attorney presence during the inspection process is exercised when deemed appropriate.”⁴⁰
- As of March 2010, at Los Angeles International Airport (LAX), CBP management did not permit attorney representation in primary or secondary inspection, but, as a courtesy, had in the past communicated directly with attorneys whose clients are in secondary inspection. The officers could also accept certain documents from attorneys, inform attorneys of the disposition in a secondary inspection, and allow clients to call counsel after processing is completed if doing so would not cause delay.⁴¹
- As of several years ago, St. Albans, VT Area Port, Highgate and Derby Line ports of entry did not have a policy of barring attorneys during inspections involving L and TN adjudications, and permitted attorneys to enter the ports of entry to speak with officers, sit and confer with their clients in the lobby, and interact with officers at the officers’ request.⁴²

Attorneys practicing in a variety of cities have reported inconsistent access to counsel during deferred and secondary inspections at different ports of entry. AILA and the Immigration Council in 2011 highlighted some of the instances in which attorneys were barred from accompanying clients to deferred inspections at ports across the country.⁴³

³⁸ Email from Assistant Director, Border Security, Boston Field Office (May 27, 2011); Email from Assistant Executive Director, Admissibility and Passenger Programs, CBP (May 15, 2011), *available at* https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/access_to_counsel_cbp_requests_and_documents_12-18-12.pdf, at 87-88.

³⁹ Email from CBP Area Port Director (acting), Boston, MA (June 24, 2011); Email from Port Director, CBP Service Port of Providence (Jun. 24, 2011), *available at* https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/access_to_counsel_cbp_requests_and_documents_10-12-12.pdf, at 19-21.

⁴⁰ Email from Chief, CBP Miami Field Office (May 20, 2011), *available at*, https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/access_to_counsel_cbp_requests_and_documents_1-17-13.pdf at 27-28.

⁴¹ Los Angeles Airport Passport Control Muster: Attorney Inquiries Regarding Admissibility Issues and attachment (draft) (Mar. 2010 and undated), https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/access_to_counsel_cbp_requests_and_documents_10-17-12.pdf, at 7-11; https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/access_to_counsel_cbp_requests_and_documents_12-18-12.pdf, at 111-112.

⁴² Memorandum, Restrictions on Access to Counsel at Ports of Entry (undated), https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/access_to_counsel_cbp_requests_and_documents_10-12-12.pdf, at 8-9.

⁴³ Letter from AILA and the Immigration Council to CBP Commissioner Alan Bersin (May 11, 2011) at 1-9, *available at* https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/AIC%20Letter%20to%20Commissioner%20Bersin%20on%20Counsel%20Issues.5-11-11-Confidential.pdf.

5. Department of State Consular Guidance

DOS regulations now require that all immigrants and most nonimmigrants personally appear before a consular officer for an interview.⁴⁴ Under current DOS guidance, each consular section decides whether an attorney can be present during a visa interview:⁴⁵

Each post has the discretion to set its own policies regarding the extent to which attorneys and other representatives may have physical access to the consulate or attend visa interviews, taking into consideration such factors as a particular consulate's physical layout and any space limitations or special security concerns. Whatever policies are set must be consistent and applied equally to all. For example, either all attorneys at a particular post must be permitted to attend consular interviews or all attorneys must be prohibited from attending interviews.⁴⁶

Anecdotally, we are aware that different posts have adopted differing positions regarding access to counsel during consular interviews. In recent years, several posts, in response to questions from AILA, have either stated that they bar attorneys from participating in consular interviews or that attorneys are permitted to participate only in very limited circumstances:

- **U.S. Consulate, Lima, Peru** (around May 2015): “Attorneys and other guests are generally not permitted to accompany their clients to NIV or IV interviews. Exceptions are unusual and are on a case-by-case basis. ... Only applicants and those assisting minors, elderly, or incapacitated applicants, or providing translation services, are permitted to attend interviews.”⁴⁷
- **U.S. Consulate, Ho Chi Minh City** (around March 2013): “No, unfortunately, Post does not allow attorneys to accompany applicants to the interview.”⁴⁸
- **U.S. Embassy Paris** (Mar. 2013): Referring to space limitations and concerns about minimizing outside waiting lines and providing “efficient service,” the Embassy “limit[s] access to the applicants.”⁴⁹

⁴⁴ 22 C.F.R. §§ 42.62, 41.102.

⁴⁵ There is a limited exception to this general rule for applicants under the Iraqi and Afghan special immigrant visa programs. Sections 1218 and 1219, respectively, of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 (127 Stat. 672), authorize representation throughout the special immigrant visa process for applicants under the Refugee Crisis in Iraq Act of 2007, Special Immigrant Status for Certain Iraqis, § 1244 of Pub. L. No. 110-181, National Defense Authorization Act for Fiscal Year 2008, *as amended*, and Afghan Allies Protection Act of 2009, § 602 of Pub. L. No. 111-8, Omnibus Appropriations Act, 2009, *as amended*. DOS guidance to consular officers for attorney representation of these applicants is provided in 9 FAM 502.05-12(B)(b)(8).

⁴⁶ 9 FAM 602.1-2(b), Attorneys and Representatives of Record.

⁴⁷ [“Q&As from AILA Meeting with the U.S. Embassy and USCIS Field Office in Lima, Peru”](#) (May 19, 2015), AILA Doc. No. 15060511.

⁴⁸ [“Q&A with AILA Bangkok District Chapter”](#) (June 17, 2013), AILA Doc. No. 13061745.

⁴⁹ [“AILA RDC Q&As with U.S. Embassy, Paris”](#) (Apr. 22, 2013), AILA Doc. No. 13042248.

- **U.S. Embassy, Warsaw:** (Mar. 2013) “Due to security and space constraints, Embassy Warsaw does not allow third parties to attend visa interviews” except for “special cases” (such as a caretaker for an individual with disabilities).⁵⁰
- **U.S. Embassy, London** (Oct. 2012): “Due to security requirements and space restrictions post does not allow counsel to be present at the time of interview.”⁵¹

B. Legal Representation During Secondary and Deferred Inspections and Embassy/Consular Interviews

The presence of counsel could also improve the quality and efficiency of immigration decision-making by providing relevant evidence and legal analysis and encouraging clients to be more forthcoming with immigration officers. Even more importantly, attorneys could protect the rights of their clients, who often lack the specialized knowledge required to properly present their own claims, whether the issue is eligibility for a visa or admission, or a claim to U.S. citizenship.

Absent this protection, individuals subject to inspection or interviews at U.S. Embassies and Consulates could be improperly refused an immigration benefit or visa, or could be denied admission to the United States and subjected to expedited removal. For example, a U.S. business may invest many thousands of dollars in a process that ends in the unnecessary denial of a visa at the consulate. A U.S. citizen can be separated from family for years due to an easily correctable issue. While many consular adjudications and admissions decisions are based on sound reasoning, there are also countless examples of improper and unjust refusals of admission and visa denials that are ultimately overturned. Access to counsel can make a critical difference.

C. Problems under the Current Rules

Legal representatives are effective when they can accompany and advise their clients in proceedings before a government agency, receive timely and meaningful information during and at the conclusion of the adjudication process, and communicate with the adjudicator in an atmosphere of mutual respect. When access to the U.S. Embassy/Consular Section or inspection area is denied, or when avenues of communication are closed, attorneys cannot adequately protect their clients’ interests, and the government agency may lose an opportunity to avoid costly mistakes.

1. Secondary and Deferred Inspection

Customs and Border Protection in many cases denies access to counsel for applicants who are placed in secondary inspection, a sometimes lengthy process involving interviews and records checks. Some ports allow representation in secondary and deferred inspection, on a case-by-case basis. The denial of access to counsel in secondary and deferred inspection proceedings undermines due process and unnecessarily diverts agency resources.

⁵⁰ “[AILA RDC Q&As with U.S. Embassy, Warsaw](#)” (Apr. 22, 2013), AILA Doc. No. 13042246.

⁵¹ “[AILA RDC Q&As with U.S. Embassy, London](#)” (Apr. 22, 2013), AILA Doc. No. 13042243.

The implementation of President Trump’s January 27, 2017 Executive Order, “Protecting the Nation from Foreign Terrorist Entry into the United States,” is evidence of the vital role attorneys can and should play in the inspection process.⁵² Section 3 of the Executive Order suspended the immigrant and nonimmigrant entry of nationals from seven designated countries – Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen – for 90 days from the date of the order. Section 5 imposed a temporary ban on the U.S. Refugee Admissions Program and an indefinite ban on the admission of Syrian refugees. The order was effective immediately upon signing, leaving CBP to implement its provisions while flights with affected individuals on board were in route to the United States.

The ensuing chaos at airports around the country disrupted the lawful travel of hundreds of lawful permanent residents, immigrant visa holders, and nonimmigrant visa holders. People were placed in secondary inspection for hours, sometimes overnight, and were unable to talk to family members or attorneys while DHS struggled to interpret the scope of the directive and navigate numerous court orders that sprung swiftly from litigation.⁵³ For example, the Iraqi mother of a sergeant in the 82nd Airborne Division was held at JFK airport for more than 33 hours.⁵⁴ She was handcuffed for some of that time, and was denied access to a wheelchair. A U.S. citizen, Masoud Zarepisheh, waited more than 30 hours for his Iranian brother and father to be released from CBP custody.⁵⁵ CBP released them suddenly, allegedly saying “The problem has been solved, and you can leave now.”⁵⁶ Some individuals remained detained even after a court ordered their release.⁵⁷

In the days that followed, CBP often refused to communicate with attorneys, which meant that affected travelers may not have been aware of or in a position to assert their due process rights.⁵⁸ For example, the New York Times reported that two brothers were allegedly forced to sign a form giving up their permanent residency rights. They claim that they were told by officers: “Your visa has been canceled. You need to sign this form. If you don’t sign this form, you are going to be barred from the United States for five years.”⁵⁹ Even after the ban had been

⁵² Available at: <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

⁵³ *Lives Rewritten with the Stroke of a Pen*, N.Y. Times (Jan. 29, 2017), available at <https://www.nytimes.com/interactive/2017/01/29/nyregion/detainees-trump-travel-ban.html>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Jonah Engel Bromwich, *Lawyers Mobilize at Nation’s Airports after Trump’s Order*, N. Y. Times (Jan. 29, 2017), available at https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html?_r=1.

⁵⁸ *Id.* (“Ms. Das...described the scene on Sunday morning, saying that it was ‘incredibly difficult to get an answer on whether our clients were going to be sent back or whether they were being processed for release’”); *Lives Rewritten with the Stroke of a Pen*, *supra* note 53.

⁵⁹ *Lives Rewritten with the Stroke of a Pen*, *supra* note 53.

lifted by a court order,⁶⁰ reports of the prolonged detention in secondary inspection of individuals traveling to the United States for lawful purposes, including U.S. citizens, continued.

- Henry Rousso, a French World War II historian and scholar, who was scheduled to deliver the keynote address at a conference organized by Texas A&M University, was detained at George Bush Intercontinental Airport in Houston for more than 10 hours. Had it not been for the intervention of immigration lawyers and the academic team that had invited him to speak, Mr. Rousso would have been refused admission and possibly deported.⁶¹
- Mem Fox, an Australian children's book author was stopped at LAX airport on her way to a conference in Milwaukee where she was scheduled to deliver the keynote speech. Though over the course of her life, she had traveled to the United States more than 100 times without incident, this time she was detained and interrogated about the purpose of her entry for close to two hours.⁶²
- Celestine Omin, a software engineer from Nigeria was detained in secondary inspection and asked to complete a rudimentary test to confirm that he was in fact a software engineer. Mr. Omin had obtained a B-1 business visa to come to the United States to consult with a New York-based financial start up on a JavaScript application though Andela, a startup that connects top talent in Africa with employers in the U.S. Andela accepts less than 1% of applicants into its program and is backed by Facebook's Mark Zuckerberg and Priscilla Chan.⁶³

⁶⁰ On February 3, 2017, a nationwide temporary restraining order that effectively lifted the travel and refugee ban was granted in *State of Washington v. Trump*, 2:17-cv-00141 (W.D. Wash. 2017); the federal government's request for an emergency stay was denied by the Ninth Circuit on February 9, 2017. On March 6, 2017, President Trump issued a second Executive Order, also titled "Protecting the Nation from Foreign Terrorist Entry into the United States," which included a revised version of the January 27, 2017 travel and refugee ban and was to take effect on March 16, 2017. On March 15, 2017, the U.S. District Court for the District of Hawaii granted a nationwide temporary restraining order preventing implementation of the travel and refugee-related portions of the Executive Order. The TRO was converted to a preliminary injunction by the court on March 29, 2017. See *State of Hawaii v. Trump*, 1:17-cv-00050-DKW-KSC (D. Haw. 2017). On March 16, 2017, the U.S. District Court for the District of Maryland issued an injunction barring implementation of the travel ban portion of the Order. See *International Refugee Assistance Project v. Trump*, 8:17-cv-00361-TDC (D. Md. 2017). As of the date of filing this petition, the travel and refugee portions of the revised Executive Order remain enjoined, pending decisions of the Ninth and Fourth Circuits.

⁶¹ Erin McCann, *French Historian Says He Was Threatened with Deportation at Houston Airport*, New York Times (Feb. 26, 2017), available at https://mobile.nytimes.com/2017/02/26/us/french-historian-detained-immigration-henry-rousso.html?_r=0&referrer=http://m.facebook.com.

⁶² "Australian Children's Author Mem Fox Detained by U.S. Border Control: 'I Sobbed like a Baby,'" The Guardian (Feb. 24, 2017), available at <https://www.theguardian.com/us-news/2017/feb/25/australian-childrens-author-mem-fox-detained-by-us-border-control-i-sobbed-like-a-baby>

⁶³ Caroline Fairchild, *A Software Engineer is Detained for Several Hours by U.S. Customs — and Given a Test to Prove he's an Engineer*," LinkedIn (Feb. 28, 2017), available at https://www.linkedin.com/pulse/software-engineer-detained-several-hours-us-customs-given-fairchild?trk=v-feed&lipi=urn%3Ali%3Apage%3Ad_flagship3_feed%3BZV1MeEkW66GWwXewAmbfgQ%3D%3D.

- Juan Garcia Mosqueda, an Argentinian curator who has held a U.S. green card for ten years and runs Chamber NYC, an architecture and design studio in Manhattan, was denied entry into the United States on February 24, 2017 after a trip to Buenos Aires. His request for counsel during his ensuing detention and interrogation was denied by a CBP officer, who allegedly claimed, “lawyers ha[ve] no jurisdiction at the borders.”⁶⁴
- Mohammad Ali, Jr., a U.S. citizen and son of American boxing legend Mohammad Ali, was detained for almost two hours and questioned about his Muslim faith, at Ft. Lauderdale-Hollywood International Airport.⁶⁵

The critical role that counsel can play in the inspection and admissions process has also been recognized by Congress in recent weeks. On February 9, 2017, Senators Harris (D-CA), Blumenthal (D-CT), Booker (D-NJ), Carper (D-DE), Gillibrand (D-NY), Markey (D-MA), and Warren (D-MA) introduced a bill to guarantee access to counsel to those who are held or detained at a port of entry or at a detention facility overseen by CBP or ICE.⁶⁶ A companion bill was introduced in the House on February 13, 2017 by Representative Jayapal (D-WA).⁶⁷

2. Visa Interviews and U.S. Citizenship/Nationality Issues

The exclusion of counsel from the visa application process can result in unnecessary procedural delays and wasted government resources. For example, if a consular officer is unable to render a decision on a visa application following the interview, Department of State policy dictates that the case be held for “administrative processing.” According to 9 FAM 601.7-4(e), “The phrase ‘necessary administrative processing’ should be used to refer to clearance procedures or the submission of a case to the Department.” A case may be held for administrative processing for any number of reasons, including a database or watchlist “hit,” or internal consultation on a legal or factual question. Though the Department of State website indicates that “[m]ost administrative processing is resolved within 60 days of the visa interview,” many cases languish in administrative processing for months and sometimes years. Though the presence of counsel may not help expedite administrative processing in cases involving security issues, counsel certainly could be effective in resolving cases involving legal or factual questions.

Moreover, statistics released by the State Department show a substantial number of “consular returns” from U.S. Embassies and Consulates that could be attributed to erroneous decisions or factual misinterpretations that could have been avoided had counsel been present.⁶⁸ A consular return occurs when the State Department decides to return a petition to USCIS for consideration of revocation based on information received after the petition was approved. For example, during

⁶⁴ *Argentinian Curator and Legal American Resident Denied Entry into U.S.*, Artforum (Feb. 28, 2017) available at <https://www.artforum.com/news/id=66941>.

⁶⁵ Sedria Renne, *Muhammad Ali Jr. on Airport Detainment: “I’m Not American?”*, (Feb. 27, 2017) available at <http://www.nbcnews.com/news/us-news/muhammad-ali-jr-airport-detainment-i-m-not-american-n726246>

⁶⁶ S. 349, 115th Cong. (2017), available at <https://www.congress.gov/bill/115th-congress/senate-bill/349>.

⁶⁷ H.R. 1006, 115th Cong. (2017), available at https://jayapal.house.gov/sites/jayapal.house.gov/files/wysiwyg_uploaded/Access%20to%20Council_HR.pdf

⁶⁸ *DOS Releases I-129F and K-1 Statistics*, (Oct. 1, 2013), AILA Doc. No. 13100102.

the 2011 Fiscal Year, out of 1,792 K-1 (fiancé) cases in Guangzhou, 728 were returned, and at Ho Chi Minh City, out of 1,037 K-1 cases, 530 were returned. Based on reports from attorneys, many petitions are reapproved after rebuttal evidence is reviewed by USCIS; in other cases, new petitions are approved when the petitioner elects to refile. The return of petitions to USCIS and the subsequent transfer back to State after reapproval place a significant administrative burden on both agencies and often take many months or even years to resolve. Permitting counsel to play a more robust role in the process could facilitate final adjudication in a more efficient, timely, just, and cost-effective manner for the U.S. government as well as the petitioner and visa applicant. Other examples where the presence of counsel could have helped avoid lengthy delays and consumption of resources include:

- In December 2014 at the U.S. Consulate in Sydney, an applicant attended an interview for an E-3 visa. The applicant recounted to counsel that the consular officer had concluded that employment as a Fashion Designer did not qualify as a “specialty occupation.” Counsel understood that this view was based on the consular officer’s review of the Standard Occupational Classification (SOC) code (27-1022) to determine that a degree is not normally the minimum requirement for entry into the position. However, under 8 CFR §214.2(h)(4)(iii)(A), a position may also be deemed a specialty occupation upon review of other evidence, such as evidence that a degree is common to the industry in parallel positions among similar organizations, or that the employer normally requires a degree for the position. Although the applicant had submitted a detailed job description and printouts of job openings from similar employers for similar positions showing that a Bachelor’s degree in Fashion Design was a standard industry requirement, the application was denied.

While the individual applicant was sophisticated in her trade, counsel could not prepare her fully to discuss the technical aspects of the E-3 regulations and how those regulations applied to her application. Ultimately, her visa was approved, but only after significant delay and cost to both the consular post and the applicant. This issue could have been resolved more expeditiously if the attorney had been allowed to attend the first interview and discuss the applicable regulatory requirements and FAM guidance and how they applied to the employment offered. Excluding the attorney from the first interview created the need for a second interview.

- A few years ago, an applicant was refused an employment-based immigrant visa in Santo Domingo because the underlying labor certification had expired “and needed to be renewed.” In the underlying case, the I-140 immigrant visa petition was filed well within the 180-day validity period of the labor certification, thereby establishing eligibility and alleviating any need to renew the labor certification.⁶⁹ Had counsel been permitted to attend the interview and explain the applicable legal authority, the applicant’s visa petition could have been adjudicated more efficiently and effectively.
- A U.S. citizen software engineer for Boeing filed a K-1 petition for his fiancée. The petition was approved and sent to the Embassy in Ho Chi Minh City. Following a December 2009 visa interview, the case was summarily returned to USCIS based on

⁶⁹ 20 C.F.R. § 656.30(b).

allegations that the marriage was not bona fide. Neither the applicant's counsel nor her fiancé were allowed to attend the interview. Without any way to rebut the allegations, the U.S. citizen filed another petition, which was also approved. After a long and unnecessary separation, the applicant was issued a K-1 fiancée visa more than a year after the wrongful denial of the original petition. The couple married in March 2011, and the applicant ultimately became a permanent resident. Involvement of counsel during the first interview could have avoided unnecessary costs and delays for the relevant government agencies, as well as the affected petitioner and visa applicant.

Unless President Trump's March 6, 2017 Executive Order 13780, "Protecting the Nation from Foreign Terrorist Entry into the United States" remains enjoined, it will further complicate the visa application process for individuals from affected countries.⁷⁰ The new Executive Order includes a provision that would permit a consular officer to decide, on a case-by-case basis, to authorize the issuance of a visa to a foreign national for whom entry is otherwise suspended if denying entry during the suspension period would cause undue hardship, and that entry would not pose a threat to national security and would be in the national interest. Individuals seeking a waiver of the travel ban provisions would benefit from the presence of counsel, who could help facilitate processing by submitting the waiver application and supporting documentation in accordance with applicable guidelines, by assisting the applicant at the visa interview, and by ensuring prompt responses to requests for additional information from the consular officer.

In the case of requests for recognition of U.S. citizenship at consular posts, the issues surrounding acquisition at birth or derivation through naturalization are complex even for legal scholars. Applicants for acquisition of citizenship lack knowledge of applicable laws, which are often based upon repealed statutes and modified by court decisions, and are thus at a disadvantage when submitting their claims. The presence and involvement of counsel can make the difference between an effectively presented application and an unsuccessful attempt which causes frustration and wastes time and resources of both the applicant and the consular post. In addition, given the extreme consequences associated with loss of citizenship, individuals seeking to renounce their U.S. citizenship should also be entitled to legal representation during renunciation proceedings.

D. Parallel Policies and Support for Recognizing the Meaningful Role of Counsel

DHS already has recognized the significant contribution attorneys can make in ensuring the integrity of the immigration system. In 2012, U.S. Citizenship and Immigration Services (USCIS) amended its Adjudicators Field Manual (AFM) to address some of the most serious access to counsel problems.⁷¹

⁷⁰ Available at <https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

⁷¹ For example, the changes ensure a beneficiary's right to representation at an interview (except for refugees not the focus of criminal investigation or in custody, and during site visits conducted by the Fraud Detection and National Security Division); require written waiver of representation when a person chooses to appear without his or her attorney; provide that a representative should be permitted to sit directly next to the client during an interview; clarify how individuals can change representation during the course of a proceeding; and mandate a more accommodating process for rescheduling interviews.

[USCIS] is committed to ensuring the integrity of the immigration system. ... This policy memorandum provides guidance to adjudicators and balances the meaningful role of attorneys and other representatives in the interview process with the important responsibility of adjudicators to conduct fair, orderly interviews.⁷²

That “meaningful role” is no less significant when the applicant is seeking a visa or immigration benefit abroad or seeking entry to the United States at secondary or deferred inspection.

E. Balancing Governmental Interests and Access to Counsel

In a number of instances that have come to our attention, the agency’s refusal to permit counsel to attend and assist with consular interviews or secondary/deferred inspections was not based on policy but rather security and space limitations, which allegedly made attorney participation unmanageable. While we understand that these reasons may preclude the participation of counsel in certain instances, we respectfully suggest that they cannot be applied across the board. In addition, we limit this petition to request rulemaking permitting access only by attorneys who are members of, and thus subject to discipline by, a U.S. bar.

As noted above, the interests that led the agency to carve out an exception to the regulatory right to counsel during secondary inspection no longer exist. Previously, the agency justified limiting the right to counsel in such inspections on the basis that individuals found inadmissible were entitled to further review of their cases and access to counsel in proceedings before an immigration judge. However, subsequent amendments to the immigration laws made many individuals seeking admission subject to expedited removal without a formal hearing.⁷³ As a result, inspections play an even more crucial role for individuals potentially subject to expedited removal, and the need for counsel in these examinations has correspondingly increased.

We understand that U.S. Embassies, Consulates, and ports of entry are concerned about being able to conduct interviews and examinations expeditiously. In the instances under discussion, an attorney’s presence at an interview can enhance efficiency by promptly addressing questions that arise as to the requirements for the visa classification sought, as well as complicated issues regarding admissibility. As discussed above, individuals can easily spend substantial time and funds, and adjudicators likewise spend unnecessary time grappling with complex questions that an attorney could easily address. In such cases, counsel could save the government significant time and money.

We acknowledge that certain posts or ports have space limitations which may make access to counsel less convenient. Yet, such space limitations must not dictate access to counsel policies. Officers could, for example, schedule interviews or deferred inspections for which attorneys could be present on a certain day or portion of a day so that the post could accommodate an additional person at each of those interviews. The time that would be saved by the attorney’s participation should offset any reduction in the number of interviews or examinations resulting from the presence of an additional person.

⁷² USCIS Policy Memorandum, PM-602-0055.1, “Representation and Appearances and Interview Techniques; Revisions to Adjudicator’s Field Manual (AFM), Chapters 12 and 15; AFM Update AD11-42,” at 1 (May 23, 2012).

⁷³ See discussion *supra* Part IV.A.3.

V. EXPLANATION OF PROPOSED RULE

The proposed rule recognizes the meaningful role of attorneys during U.S. citizen services appointments, visa interviews at overseas U.S. Embassies and Consulates, and in the secondary and deferred inspection processes. In these contexts, applicants and petitioners should be provided with a reasonable opportunity to seek the advice and counsel of their attorneys, and attorneys should have the opportunity to accompany their clients. In cases where the agency has decided to refuse admission to the United States or to allow an applicant to withdraw his or her application for admission, and where an attorney-client relationship has been established, the officer must communicate that decision to counsel under long-standing requirements regarding communications with a represented party.

The proposed rule would be limited to attorneys admitted to practice law in a state, territory or possession of the United States, thus assuring the agencies that concerns over competence and professionalism as well as allegations of unethical or unprofessional behavior can be addressed not only through the bar licensure process but also by State disciplinary bodies and the courts. Attorneys who enter an appearance fall under DHS authority for disciplinary purposes.⁷⁴ While all accredited representatives are subject to requirements of professionalism and discipline under that system, attorneys licensed by U.S. authorities are subject to further ethical constraints and disciplinary regimes. The limitation to licensed attorneys is also commensurate with the interests of the United States in assuring that access to counsel will be available when needed, but recognizing the limited circumstances where this is the case.

VI. PROPOSED REGULATORY TEXT

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TITLE 8 – ALIENS AND NATIONALITY

CHAPTER I – Department of Homeland Security

Subchapter B – Immigration Regulations

PART 235 – Inspection of Persons Applying for Admission

1. The authority citation for Part 235 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323, 69 FR 241, 3 CFR, 2004 Comp., p.278), 1201, 1224, 1225, 1226, 1228, 1365a note, 1365b, 1379, 1731-32;

⁷⁴ See 8 C.F.R. § 292.3 governing professional conduct for practitioners before DHS and outlining disciplinary procedures and sanctions for unprofessional conduct.

Title VII of Public Law 110-229; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108-458); Pub. L. 112-54.

2. Revise § 235.2 to read as follows:

§235.2 Parole for deferred inspection.

* * * * *

(f) Attorney representation of an applicant for admission before an immigration officer in deferred inspection is governed by 8 CFR 292.5(c).

* * * * *

PART 292—Representation and Appearances

3. The authority citation for Part 292 continues to read as follows:

Authority: 6 U.S.C. 112; 8 U.S.C. 1103, 1252b, 1362.

4. Section 292.5 is revised as follows:

a. Remove the proviso in paragraph (b): “*Provided*, that nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody.”, and

b. Insert after paragraph (b) the following:

(c) Representation by Counsel in Secondary and Deferred Inspection. In matters involving secondary or deferred inspection before U.S. Customs and Border Protection, the following provisions apply.

(1) Counsel means an attorney who is a member in good standing of the bar of any State, Territory, or possession of the United States, the District of Columbia, or Commonwealth of the

United States, and is not under any order suspending, enjoining, restraining, disbaring, or otherwise restricting the attorney in the practice of law.

(2) Access to Counsel. An applicant or petitioner, whether an individual, corporation, organization, or entity, may be accompanied, represented, and advised by counsel who meets the definition set forth in subsection (1) where an applicant is applying for admission to the United States (including, but not limited to, as a U.S. citizen, lawful permanent resident, immigrant, nonimmigrant, refugee, asylee, or parolee) and has been placed into secondary or deferred inspection. The interviewing officer shall make reasonable and timely attempts to communicate directly with counsel in order to ensure the applicant or petitioner will receive representation as specified in subsection (3).

(3) Scope of Access to Counsel. In addition to the activities articulated in paragraph (b), counsel shall be permitted to submit applications, documentation, and other evidence on behalf of the applicant or petitioner; accompany and advise the applicant or petitioner to ensure his or her rights are protected during the interview or examination; and make succinct legal arguments on behalf of the petitioner or applicant.

* * * * *

TITLE 22 – FOREIGN RELATIONS

CHAPTER I – Department of State

SUBCHAPTER E – Visas

PART 41 – Visas: Documentation of Nonimmigrants under the Immigration and Nationality Act, as amended

Subpart J – Application for Nonimmigrant Visa

5. The authority citation for Part 41 continues to read:

Authority: 8 U.S.C. 1104, 1182(d), 1185 note; 112 Stat. 2681-795.

6. Revise § 41.102 to read as follows:

§41.102 Personal appearance of applicant.

* * * * *

(f) Representation by Counsel. In nonimmigrant visa interviews before the Department of State, the following provisions apply.

(1) Counsel means an attorney who is a member in good standing of the bar of any State, Territory, or possession of the United States, the District of Columbia, or Commonwealth of the United States, and is not under any order suspending, enjoining, restraining, disbaring, or otherwise restricting the attorney in the practice of law.

(2) Access to Counsel. An applicant or petitioner, whether an individual, corporation, organization, or entity may be accompanied, represented, and advised by counsel who meets the definition set forth in subsection (1) where an applicant is applying for a nonimmigrant visa at a United States Embassy or Consulate.

(3) Scope of Access to Counsel. Counsel shall be permitted to submit applications, documentation, and other evidence on behalf of the applicant or petitioner; accompany and advise the applicant or petitioner to ensure his or her rights are protected during the interview; and make succinct legal arguments on behalf of the petitioner or applicant.

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PART 42 – Visas: Documentation of Immigrants under the Immigration and Nationality Act, as amended

Subpart G – Application for Immigrant Visas

7. The authority citation for Part 42 continues to read:

Authority: 8 U.S.C. 1104 and 1182; Pub. L. 105-277; Pub. L. 108-449; 112 Stat. 2681-795 through 2681-801; The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (done at the Hague, May 29, 1993), S. Treaty Doc. 105-51 (1998), 1870 U.N.T.S. 167 (Reg. No. 31922 (1993)); 42 U.S.C. 14901-14954, Pub. L. 106-279; Pub. L. 111-287; 8 U.S.C. 1101, 124 Stat. 3058; 8 U.S.C. 1154, Pub. Law 109-162.

8. Revise § 42.62 to read as follows:

§42.62 Personal appearance and interview of applicant.

* * * * *

(c) Representation by Counsel. In immigrant visa interviews before the Department of State, the following provisions apply.

(1) Counsel means an attorney who is a member in good standing of the bar of any State, Territory, or possession of the United States, the District of Columbia, or Commonwealth of the United States, and is not under any order suspending, enjoining, restraining, disbaring, or otherwise restricting the attorney in the practice of law.

(2) Access to Counsel. An applicant or petitioner, whether an individual, corporation, organization, or entity may be accompanied, represented, and advised by counsel who meets the definition set forth in subsection (1) where an applicant is applying for an immigrant visa at a United States Embassy or Consulate.

(3) Scope of Access to Counsel. Counsel shall be permitted to submit applications, documentation, and other evidence on behalf of the applicant or petitioner; accompany and advise the applicant or petitioner to ensure his or her rights are protected during the interview; and make succinct legal arguments on behalf of the petitioner or applicant.

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TITLE 22 – FOREIGN RELATIONS

CHAPTER I – Department of State

SUBCHAPTER F – Nationality and Passports

PART 50 – Nationality Procedures

Subpart A – Procedures for Determination of United States Nationality of a Person Abroad

9. The authority citation for Part 50 continues to read:

Authority: 22 U.S.C. 2651a; 8 U.S.C. 1104 and 1401 through 1504

10. Add new § 50.12 as follows:

(a) Representation by Counsel. In matters involving determination, retention, resumption, loss, or renunciation of U.S. citizenship or nationality before the Department of State, the following provisions apply.

(1) Counsel means an attorney who is a member in good standing of the bar of any State, Territory, or possession of the United States, the District of Columbia, or Commonwealth of the United States, and is not under any order suspending, enjoining, restraining, disbaring, or otherwise restricting the attorney in the practice of law.

(2) Access to Counsel. An applicant for determination, retention, resumption, loss, or renunciation of U.S. citizenship or nationality at a United States Embassy or Consulate may be accompanied, represented, and advised by an attorney who meets the definition set forth in subsection (1).

(3) Scope of Access to Counsel. Counsel shall be permitted to submit applications, documentation, and other evidence on behalf of the applicant; accompany and advise the applicant to ensure his or her rights are protected during the interview; and make succinct legal arguments on behalf of the applicant.

* * * * *

VII. CONCLUSION

The U.S. consular corps and the CBP officers at our nation's borders are tasked with a difficult and demanding job – to protect the American public and safeguard the integrity of the immigration system. Attorneys affiliated with U.S. bar associations undertake to safeguard the rights of U.S. citizen and non-citizen individuals, businesses, and educational and religious institutions. These obligations are not mutually exclusive. The consistent and regular participation of counsel in consular proceedings and at secondary and deferred inspection will help to ensure that the decisions of consular and CBP officers are consistent with the law and will help avoid unnecessary delays and protracted proceedings.

Access to legal counsel before U.S. government agencies is critical to ensure that our laws are implemented in a fair and just manner and that affected individuals and organizations have a meaningful opportunity to be heard. For all of the foregoing reasons, we respectfully request that the Department of State and the Department of Homeland Security act together to chart a clear course for access to counsel in accordance with the parameters outlined in this petition. We appreciate your consideration of this petition and would welcome the opportunity to discuss these important issues with appropriate agency officials.