UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL

Plaintiff,

Case No. 1:11-cv-01972 JEB

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff American Immigration Council ("AIC"), by and through undersigned counsel, respectfully requests that the Court deny Defendants' Motion for Summary Judgment on the basis that a genuine issue of material fact exists, and Defendants are not entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In support of Plaintiff's Opposition, the Court is respectfully referred to the accompanying Declarations of David Blair-Loy, Melissa Crow, Benjamin Johnson, Cathy J. Potter, John P. Pratt, and Karen Tumlin, with exhibits attached thereto; Plaintiff's Response to Defendants' Statement of Material Facts as to Which There Is No Genuine Issue and Plaintiff's Statement of Genuine Material Issues; and Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment. A Proposed Order consistent with the relief sought herein is also attached.

Dated: March 26, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of March, 2012, a copy of the foregoing Opposition to Defendant's Motion for Summary Judgment, Memorandum of Law, Statement of Facts and Order was served upon Defendants' counsel, via the Court's Electronic Filing System, as follows:

MARIAN L. BORUM
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/s/ Creighton R. Magid
CREIGHTON R. MAGID

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Plaintiff,

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PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Plaintiff American Immigration Council ("AIC") respectfully submits this memorandum of law in opposition to the motion of Defendants United States Department of Homeland Security ("DHS") and United States Customs and Border Protection ("CBP") for summary judgment.

I. INTRODUCTION

Plaintiff AIC's suit under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, seeks records from DHS and its component CBP concerning individuals' access to counsel during their interactions with CBP. In response to AIC's FOIA request (but only after an administrative appeal), Defendants released two pages of excerpts from agency guidance, claiming that their diligent search had revealed no more. Defendants now move for summary judgment, relying on a declaration from Ms. Shari Suzuki, the FOIA Appeals Officer and Chief of the FOIA Appeals, Policy and Litigation Branch, Regulations and Rulings, Office of International Trade, U.S. Customs and Border Protection. Ms. Suzuki's declaration outlines what Defendants contend is a reasonable and adequate search for documents responsive to AIC's FOIA request. This declaration, however, is deficient under D.C. Circuit case law because it describes neither the scope of the search Defendants undertook nor the search methods they employed. Additionally, AIC has found a significant number of responsive records that Defendants failed to produce. Taken together, these facts demonstrate that Defendants have failed to meet their burden under Fed. R. Civ. P. 56(a). Thus, their motion must be denied.

II. ARGUMENT

A. Summary Judgment Standard

Summary judgment is warranted when no genuine dispute of material fact exists and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A material fact dispute is "'genuine' if 'the evidence

is such that a reasonable jury could return a verdict for the nonmoving party.'" *George v. Leavitt*, 407 F.3d 405, 410 (D.C. Cir. 2005) (quoting *Anderson*, 477 U.S. at 248). Thus, in considering a motion for summary judgment, the court must view the evidence "in the light most favorable to the nonmoving party." *Id*.

FOIA requires an agency to release all records that are responsive to a proper request unless a listed exemption protects the records from disclosure. *See* 5 U.S.C. § 552(b); *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980) ("The defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from [FOIA's] inspection requirements.") (internal citation and quotation omitted). The agency bears the burden of proving that it has fulfilled its FOIA obligations. *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994).

For summary judgment purposes, an agency may rely on an affidavit or declaration that is relatively detailed, nonconclusory, and made in good faith. *Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1116 (D.C. Cir. 2007). Conclusory and nonspecific declarations or affidavits are insufficient to support a grant of summary judgment. *Gallant v. NLRB*, 26 F.3d 168, 171 (D.C. Cir. 1994) ("Summary judgment may be granted on the basis of agency affidavits if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith.") (internal citation and quotation omitted).

Good faith searches are critical to the congressional intent of FOIA — to ensure that community members can access government records and thereby be informed about "*what their government is up to*." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (emphasis in original) (internal citation and quotation omitted). Production

of the requested documents will vindicate the public's right to be part of "an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 242 (1978).

B. Defendants Failed to Show That They Conducted an Adequate Search.

Defendants have failed to demonstrate that their search was adequate. Ms. Suzuki's declaration is nonspecific and conclusory and therefore fails to sustain the agency's burden of proof for summary judgment. Additionally, substantial countervailing evidence affirmatively demonstrates that Defendants' search was inadequate. Because Defendants' burden under Fed. R. Civ. P. 56 has not been met, their motion for summary judgment must be denied.

1. Defendants' Declaration Lacks Sufficient Detail.

The government must conduct a reasonable search for records responsive to a FOIA request. *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Specifically, the government must show "beyond material doubt that its search was reasonably calculated to uncover all relevant documents" and must search all records systems likely to contain responsive records. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325-26 (D.C. Cir. 1999) (internal citation and quotation omitted); *Concepcion v. U.S. Customs & Border Prot.,* 767 F. Supp. 2d 141, 145 (D.D.C. 2011). An agency's search must be "more than perfunctory" and must "follow through on obvious leads to discover requested documents." *Valencia-Lucena*, 180 F.3d at 325 (internal citation omitted).

To support a motion for summary judgment in a FOIA case, an agency may proffer a "reasonably detailed affidavit" describing the search terms used, the nature of the search performed, and "averring that all files likely to contain responsive materials (if such records exist) were searched." *Oglesby*, 920 F.2d at 68. This Court has held that such an affidavit must

describe "*what records* were searched, *by whom,* and through *what process*." *Steinberg*, 23 F.3d at 551-52 (emphasis added); *see Weisberg*, 627 F.2d at 371 (agency affidavits that "do not denote which files were searched, or by whom, do not reflect any systematic approach to document location, and do not provide information specific enough to enable [the requestor] to challenge the procedures utilized" cannot support summary judgment). The affidavit must also "describe at least generally the structure of the agency's file system" which renders any further search unlikely to disclose additional relevant information. *Church of Scientology of California v. IRS*, 792 F.2d 146, 151 (D.C. Cir. 1986), *aff'd*, 484 U.S. 9 (1987). Such information is needed to allow a requester to challenge the search's adequacy and to allow the court to assess the search's adequacy for summary judgment purposes. *See Oglesby*, 920 F.2d at 68.

When an agency's affidavit or declaration fails to describe the nature of its record keeping system, what files were searched or how the search was conducted, the D.C. Circuit and other courts have determined that the agency's search was inadequate. *Compare Nation Magazine, Wash. Bureau v. U.S. Customs Service*, 71 F.3d 885, 891 (D.C. Cir. 1995) (determining that Customs failed to "describe its recordkeeping system in sufficient detail" to allow the court to identify what subject matter files might have information responsive to the FOIA requests), *Steinberg*, 23 F.3d at 552 (remanding to assess adequacy of the U.S. Attorney's search because agency did not describe the search's mechanics and relied on a conclusory statement from one office that no responsive records existed) *and El Badrawi v. Dep't of Homeland Sec.*, 583 F. Supp. 2d 285, 300 (D. Conn. 2008) (determining that CBP's declaration was insufficient because it did not describe the general scheme of CBP's file system and did not give detailed reasons for not searching other databases) *with Poulsen v. U.S. Customs & Border Prot.*, No. 06-1743, 2006 WL 2788239, at *5 (N.D. Cal. Sept. 26, 2006) (unpublished) (finding

CBP's search reasonable because its declaration detailed the search of over 200,000 records in three different systems) *and Petit-Frere v. U.S. Attorney's Office for the S. Dist. of Florida*, 800 F. Supp. 2d 276, 280 (D.D.C. 2011) (finding the search adequate because the declaration specified what files were searched, why those files were searched, the search terms employed, and the search method used). Without "an elementary description of the general scheme of an agency's file system," a FOIA requester lacks a basis to challenge an agency's claim that "any further search [is] unlikely to disclose additional relevant information." *El Badrawi*, 583 F. Supp. 2d at 300 (internal citation and quotation omitted) (alteration in original).

Ms. Suzuki's declaration fails to satisfy the D.C. Circuit's standard for specificity and thus does not demonstrate that the government's search was adequate. The declaration generally explains the role of each of the three offices within CBP identified as potentially having responsive records, namely the Office of Border Patrol ("OBP"), the Office of Field Operations ("OFO"), and the Office of Chief Counsel ("OCC"). Ms. Suzuki states that she directed her staff attorney to contact the identified offices and request that they search for responsive records. Suzuki Decl. ¶ 14. She also indicates that she forwarded a copy of AIC's appeal to OBP, OFO headquarters, the Admissibility and Passenger Programs ("APP") Office within OFO, and APP's Enforcement Programs Division. Suzuki Decl. ¶¶ 15, 17, 19. In response, OBP and OFO collectively identified and provided portions of three manuals that were responsive to AIC's FOIA requests. Suzuki Decl. ¶¶ 16, 18, 20. Ms. Suzuki states further that her office "consulted with" the OCC, which "conducted a separate search, and confirmed that no other responsive records exist." *Id.* ¶¶ 21-22.[1] Significantly, however, the declaration does not explain the

[1] The declaration does not indicate whether OCC received a copy of the appeal. It merely indicates that "OCC reviewed the aforementioned documents" before conducting a search.

agency's system of recordkeeping, the scope of the searches undertaken by each of the identified CBP offices, what files were searched and why, the search terms employed, the search methods used, who conducted the searches within each office, why additional searches would have been futile, and whether Ms. Suzuki is personally aware of the search procedures used within each office. Neither Plaintiff nor this Court can fully evaluate the adequacy of Defendants' search without this information.

Ms. Suzuki's declaration is also legally insufficient because it fails to explain why offices other than OBP, OFO (including APP), and OCC would not have responsive records. Moreover, other than noting that APP searched for responsive records in its Enforcement Programs Division, the scope of the searches conducted by OBP, OFO and OCC is unclear. In addition, neither Plaintiff nor this Court has any way of knowing whether OFO's field operations offices and OBP's offices at ports of entry, among other divisions, were engaged in searching.[2]

Defendants appear to attribute the paucity of responsive documents to the proviso of 8 C.F.R. § 292.5(b), which states that this regulation should not "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." Suzuki Decl. ¶ 12; Compl. Ex. F at 9-10. By its terms, however, 8 C.F.R. § 292.5(b) relates exclusively to "applicants for admission"[3] in either primary or secondary

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Suzuki Decl. ¶ 22.

2 Plaintiff's request encompassed "any and all records which have been prepared, received, transmitted, collected and/or maintained by [DHS] and/or [CBP], whether issued or maintained by CBP Headquarters offices, including any divisions, subdivisions or sections therein; CBP field operations offices, including any divisions, subdivisions or sections therein; CBP offices at ports of entry, including any divisions, subdivisions or sections therein; and/or any other CBP organizational structure[.]" Compl., Ex. A at 1.

3 Under the Immigration and Nationality Act, the term "applicant for admission" does not

inspection. AIC's FOIA request addressed many other contexts, including deferred inspection, questioning regarding alleged abandonment of lawful permanent resident ("LPR") status in the United States, questioning regarding alleged lack of proper immigration documents, questioning in the context of the National Security Entry-Exit Registration System (NSEERS),[4] decision making regarding the return of an unaccompanied alien child to Mexico, and decision making regarding release of an unaccompanied immigrant child to a responsible adult who is not a family member. Compl., Ex. A at 1-2. Because AIC's FOIA request encompassed encounters between CBP and noncitizens who were not "applicants for admission," as well as encounters with CBP that took place outside of primary and secondary inspection, Defendants' reliance on 8 C.F.R. § 292.5(b) is misplaced.

Quoting CBP's final administrative appeal decision, Ms. Suzuki's declaration states that "comprehensive CBP guidance governing attorney representation and conduct, where in most instances applicants for admission have no such right, is unnecessary." Suzuki Decl. ¶ 12. While the need for detailed guidance may be debatable, AIC's request was not limited to "comprehensive" guidance. Instead the FOIA request encompasses any and all instructions to implement the legal authority set forth in the manual excerpts that CBP did produce, as well as internal communications, through e-mail or otherwise, about attorney participation during

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encompass lawful permanent residents of the United States except under very narrow circumstances. *See* 8 U.S.C. § 1101(a)(13)(C) (2011).

4 CBP incorrectly suggests that the government is not obligated to produce any documents relating to NSEERS because DHS stopped using this program on April 28, 2011. *See* Suzuki Decl. ¶ 7, n. 1 (noting that DHS no longer registered noncitizens under NSEERS as of April 28, 2011). However, AIC made its request before April 28, 2011 and in no way limited it to a particular time period. Because, AIC's request covers the period predating the end of NSEERS, Defendants should either have produce any responsive documents regarding NSEERS or explained why they were either unidentifiable or exempt under FOIA. *Weisberg*, 627 F.2d at 368. Instead, Defendants have merely stated that NSEERS is no longer in use.

inspections. The existence of such guidance is likely, given Defendants' admission that "[e]xceptions are made for instances in which the applicant has become the focus of a criminal investigation or is taken into custody." Suzuki Decl. ¶ 12, n.2. It is doubtful that the circumstances under which such exceptions would be warranted were never reduced to writing.

The foregoing deficiencies undermine the sufficiency of Defendants' declaration. *See Morley*, 508 F.3d at 1122 (finding declaration insufficient to carry the agency's burden on summary judgment due to failure to provide information about search strategies, search terms used, or how the search was conducted.). Accordingly, Defendants have failed to meet their burden to show that they conducted an adequate search, and their motion for summary judgment should be denied.

2. Substantial Countervailing Evidence Further Demonstrates that Defendants Did Not Conduct an Adequate Search.

Even if the government's affidavits were detailed, nonconclusory and submitted in good faith, "the requester may nonetheless produce *countervailing evidence*, and if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order." *Morley*, 508 F.3d at 1116 (emphasis added) (quotation omitted).

As discussed above, the Defendants' supporting declaration lacks critical details and is conclusory. In addition, substantial countervailing evidence demonstrates that the government's search was not adequate.

a. The Government Failed to Identify, Produce or Even Mention Documents Reflecting Prior Communications with Immigration Advocacy Organizations Regarding Access to Counsel in Interactions with CBP.

CBP's far-reaching restrictions on access to counsel have been a longstanding concern for immigration lawyers across the country. Compl. ¶ 4; Declaration of Melissa Crow ("Crow Decl."), ¶ 2. This topic has been the subject of significant correspondence between immigration

advocacy organizations and CBP. However, Defendants' production failed to identify, produce or even mention these communications. Illustrative examples include:

- A December 4, 2008, letter from the American Civil Liberties Union ("ACLU") Foundation of San Diego and Imperial Counties to CBP's San Diego Field Operations Director expressing concern about the alleged denial of access to counsel to detainees held at a Border Patrol temporary detention facility in San Ysidro. Declaration of David Blair-Loy ("Blair-Loy Decl."), Ex. A.

- A February 13, 2009, letter from CBP to the ACLU responding to the ACLU's December 8, 2008 letter. *Id.*, Ex. B.

- A December 2, 2010, letter from the President of the South Florida Chapter of the American Immigration Lawyers Association to DHS's Office of Inspector General requesting an investigation of an alleged pattern and practice of denial of the right to counsel in deferred inspection by the Miami CBP office. Declaration of John P. Pratt ("Pratt Decl."), Ex. A.

- An April 29, 2011, letter from the Assistant Port Director at Miami International Airport to the President of the South Florida Chapter of the American Immigration Lawyers Association ("AILA") responding to an "inquiry regarding recent interactions between AILA attorneys and U.S. Customs and Border Protection (CBP) staff at the Office of Deferred Inspection in Miami, Florida." Pratt Decl., Ex. D.

- A May 11, 2011, e-mail from the Executive Director of the American Immigration Council ("AIC") to CBP Commissioner Alan Bersin transmitting a joint letter from AIC and the American Immigration Lawyers Association addressing "the issue of restrictions on access to counsel by CBP officers." Declaration of Benjamin Johnson ("Johnson Decl."), Exs. A & B.[5]

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[5] The April 29, 2011 and May 11, 2011 letters were created after AIC's initial March 14, 2011, FOIA request. Based on CBP's September 29, 2011 letter, however, it appears that CBP conducted an additional search after AIC made its May 26, 2011, appeal, by which time these documents would have existed. *See* Compl., Ex. F. at 1 (indicating that CBP and AIC had a call on June 23, 2011, to discuss what AIC's FOIA requests encompassed); *see id.* at 10 ("In response to your appeal and contention that the search conducted in response to the initial request was inadequate, we contacted several offices within the CBP in which responsive records would likely be found…."). An agency may establish a reasonable cut-off date for searching records pursuant to a FOIA request, consistent with its obligation to conduct a reasonably thorough search. *McGhee v. Cent. Intelligence Agency*, 697 F.2d 1095, 1104

b. The Government Failed to Identify or Produce all Relevant Documents Relating to the Inspector's Field Manual.

In response to AIC's FOIA request, Defendants produced only two pages of excerpts from three separate manuals. Compl., Ex. G. In its May 12, 2011, response letter, CBP noted that one of those manuals, the Inspector's Field Manual, was "currently under review for determination and release" and that once it was "approved for release" AIC could view it on the internet. *See* Compl., Ex. C.

CBP's characterization of the status of the Inspector's Field Manual as "under review" implies the existence of a draft manual and other documents relating to the review and revision of the manual. To the extent that such documents are responsive to AIC's FOIA request, Defendants are obligated to produce them. *See* 5 U.S.C. § 552. If Defendants believe that portions of these documents fall within exemptions to the FOIA, they should have produced redacted versions of the documents, along with a *Vaughn* index. *See* 5 U.S.C. § 552(b); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Defendants have done neither.

Given Ms. Suzuki's description in her declaration of the mandate of the OCC, which provides legal advice regarding all aspects of CBP's operations, Suzuki Decl. ¶ 21, it is reasonable to assume that OCC was involved in the overhaul of the manual. Responsive documents that AIC received from U.S. Citizenship and Immigration Services ("USCIS"),

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(D.C. Cir. 1983). Courts in this jurisdiction have frequently upheld date-of-search cut-off dates to be reasonable. *See, e.g., Public Citizen v. Department of State*, 276 F.3d 634, 643-44 (D.C. Cir. 2002) (rejecting the State Department's date-of-request cut-off date as unreasonable and noting that the agency could apply a date-of-search cut-off date "with minimal administrative hassle"); *Edmonds Institute v. Dep't of Interior*, 383 F. Supp. 2d 105, 110-11 (D.D.C. 2005) (finding the agency's use of a date-of-search rather than a date-of-document-release cut-off date to be reasonable); *cf. Vento v. IRS*, 714 F. Supp. 2d 137, 144-45 (D.D.C. 2010) (finding the IRS's use of a date-of-request cut-off date to be reasonable where the agency had initiated its search for responsive records within five days of the FOIA request).

another DHS component, in response to a similar FOIA request lend credence to this assumption.[6] USCIS produced over 2,000 pages of responsive records, which included extensive discussions via e-mail regarding revisions to the USCIS Adjudicator's Field Manual. *See* Crow Decl., ¶¶ 3-4, Exs. A-C. Specifically, USCIS produced communications among USCIS divisions, including its own Office of the Chief Counsel, and between USCIS and stakeholders outside the agency. *See id.*, ¶ 4, Ex. C at 226-30 and 1490-1502 (correspondence among various USCIS divisions, including Office of the Chief Counsel); 1872-76 (USCIS answers to questions posted by stakeholders); 1939-41 (correspondence with stakeholders). Defendants in this case are obligated to produce any comparable records relating to CBP's revision of the Inspector's Field Manual.

Defendants also failed to identify other responsive sections of the Inspector's Field Manual, which are publicly available in the FOIA Library of CBP's website.[7] Notably, the following sections include references to the role of attorneys during interactions with CBP:

- Chapter 15.1(d) (requiring CBP officers to advise a noncitizen or his representative to submit information to local port of entry or local CBP office to correct previously recorded, but allegedly erroneous, Form I-94 arrival and departure dates that result in "confirmed" overstay lookouts);

- Chapter 17.1(e) (stating that an applicant for admission is not entitled to representation at a deferred inspection but that an attorney may be present upon request if deemed appropriate by the supervisory CBP Officer on duty, and stating that the attorney's role is limited to that of an observer and consultant to the applicant);

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6 AIC's FOIA request to USCIS requested the same four broad categories of documents regarding individuals' access to counsel in interactions with USCIS. *Compare* Crow Decl., Ex. A *with* Compl., Ex. A at 1.

7 *See* http://foia.cbp.gov/index.asp?ps=1&search=&category=Manuals_and_Instructions

- Chapter 17.15(d) (requiring an officer to notify the port of entry if notified by an attorney, friend, or relative that an individual in expedited removal proceedings is planning to apply for asylum or has a fear of return and noting that a Form G-28 Notice of Representation is not required in this instance);

- Chapter 31.7 (discussing inquiries from private individuals and attorneys regarding possible reasons for questioning an individual at the time of application for admission to the United States);

- Chapter 43.5(f) (permitting the National Fines Office to correspond with an attorney or representative on behalf of a responsible carrier only if a Form G-28, Notice of Representation has been filed);

- Chapter 44.8 (d) (explaining that an attorney should file a Form G-28, Notice of Representation, after which the attorney must be sent copies of all notification letters, previous correspondence from the client(s), decision letters, and any sworn statement executed by the client, and that the attorney may attend personal interviews with the client regarding conveyance seizures);

- Chapter 44.9 (stating that owners of seized conveyances are entitled to representation by an attorney during a personal interview relating to forfeiture proceedings).

See Crow Decl. ¶ 6, Ex. D.

In addition, the version of Chapter 2.9 of the Inspector's Field Manual (Dealing with Attorneys and Other Representatives), which is also available in the FOIA library of CBP's website, includes an additional sentence not found in the version of this document produced by Defendants. The additional sentence states: "A more comprehensive treatment of this topic is contained in the [USCIS] *Adjudicator's Field Manual*, Chapter 12, and 8 C.F.R. 292.5(b)." *See* Crow Decl. ¶ 7, Ex. E. Defendants should have identified this document, as well as sections of any other prior versions of the Inspector's Field Manual concerning individuals' access to counsel before CBP, which should have been produced.[8]

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[8] To the extent that sections of the *Adjudicator's Field Manual* govern individuals' access to

Defendants' production also excluded a 2002 Immigration and Naturalization memorandum that relates directly to Inspector's Field Manual Chapter 17.1.g (Attorney Representation at Deferred Inspection), which Defendants did produce. This memorandum, which discusses, among other subjects, "Attorney representation at deferred inspection," was attached to AIC's Complaint. *See* Compl., Ex. H. Given CBP's size and mandate, the practical need for such an agency to periodically review, update, and/or modify its policies, and the imperative to communicate policies to its many agents and subdivisions, it is probable over the past decade Defendants have issued other similar memoranda, directives, e-mails, or other documents that discuss, explain, update, or communicate the policies set forth in the manual excerpts produced by Defendants (as well as the other relevant sections of the Inspector's Field Manual). Such documents would be responsive to Plaintiff's FOIA request, but Defendants have not disclosed them.

Chapter 17.1.g of the Inspector's Field Manual provides that "an attorney may be allowed to present [at deferred inspection] upon request if the supervisory CBPO on duty deems it appropriate…. Any questions regarding attorney presence in the deferred inspection process may be referred to CBP Field Counsel." *See* Comp., Ex. G. CBP policy thus contemplates that CBP officers may make particularized decisions on requests for access to counsel in certain proceedings, and that they may consult with CBP counsel in reaching such decisions. It is highly likely that DHS and/or CBP are in possession of records containing guidance on how to make such decisions and/or memorializing discussions of particular decisions. Any such documents would be responsive to AIC's request, but CBP and DHS have not disclosed them.

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counsel during their interactions with CBP, Defendants also should have produced those records.

c. The Government Also Failed to Identify, Produce or Discuss Documents Stemming from Litigation Regarding CBP's Policies and Practices Regarding Access to Counsel.

Defendants failed to disclose any documents regarding three lawsuits against DHS and/or CBP that bear directly on the issue of access to counsel:

- *Torres, et al. v. Ridge, et al.*, Case No. 2:04-cv-00525 (W.D. Wa. *filed* March 12, 2004) (alleging right to counsel in deferred inspection pursuant to Administrative Procedure Act and Due Process Clause). *See* Crow Decl. ¶ 9, Ex. F. This case was dismissed without prejudice pursuant to stipulation by the parties in June 2004. *Id.*, ¶ 9.

- *Castro, et al. v. Freeman, et al.*, Case No. 1:09-cv-00208 (S.D. Tex. *filed* Sept. 7, 2009) (Petition for Writ of Habeas Corpus, Class Action Complaint for Declaratory and Injunctive Relief, Application for Temporary Restraining Order, and Motion for Preliminary Injunction) This case includes claims regarding the right to counsel for people with facially valid documents showing U.S. citizenship who seek entry into the United States. *See* Crow Decl. ¶ 10, Ex. G. During discovery in *Castro*, which remains pending, the defendants made the following admission regarding counsel during questioning by CBP officers at ports of entry:

  > Request for Admission No. 44: Admit that it is the position of the Department of Homeland Security that an applicant for entry with facially valid documents indicating birth in the United States, but whose U.S. citizenship is questioned by the examining officer, has no right to counsel while detained at a port of entry unless criminal charges are contemplated.
  >
  > Response to Request for Admission No. 44: … Subject to, and without waiving these objections, Defendants admit that prior to the issuance of a Notice to Appear, individuals applying for entry at a port of entry who are not facing criminal prosecution are not entitled to consult with an attorney or have an attorney present when interviewed by officers of the Department of Homeland Security.

  See Crow Decl. ¶ 10, Ex. H.

- *Esquivel v. Freeman, et al.*, No. 1:11-cv-00028 (S.D. Tex. *filed* Feb. 11, 2011) (Petition for Writ of Habeas Corpus, Complaint for Declaratory and Injunctive Relief, and Motion for Preliminary Injunction with Incorporated Points and Authorities) (seeking review of DHS's

> determination that plaintiff "does not have a right to have an attorney present when she applies for parole"). *See* Declaration of Cathy Potter ("Potter Decl."), ¶ 2, Ex. A.. An exhibit to this petition, which was filed under seal, includes a publicly available e-mail string among counsel indicating CBP's position. *See* Potter Decl., ¶ 2, Ex. B. At the request of the Petitioner, the case was dismissed without prejudice in March 2011. Potter Decl., ¶ 3.

Given the centrality of access to counsel in these cases, CBP and/or DHS must have drafts, legal memoranda or other documents analyzing the agency's position on this issue in the different contexts in which the cases arose. Even if some of these documents are subject to exemptions under the FOIA, Defendants were obligated to identify them and release redacted versions.

d. The Government Overlooked Other Responsive Documents.

Finally, the government failed to disclose previously released agency documents concerning CBP's practices on access to counsel during questioning regarding stipulated removals. In response to FOIA litigation filed by the Stanford Law School Immigrants' Rights Clinic and the National Immigration Law Center, CBP released 124 pages of documents, including three pages that indicate that U.S. Border Patrol officers must notify individuals of their right to consult counsel and have counsel present during questioning regarding stipulated removal. *See* Declaration of Karen Tumlin ("Tumlin Decl.") ¶¶ 2-30, Ex. A; Stanford Legal Clinic, *Deportation Without Due Process: Documents Obtained Through Freedom of Information Act Lawsuit About Federal Government's Stipulated Removal Program* (Sept. 1, 2011), http://blogs.law.stanford.edu/stipulatedremoval.

An agency's failure to turn up a particular document in a search does not make the search inadequate per se. *See, e.g.*, *Ancient Coin Collector's Guild v. U.S. Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011). However, Defendants' failure to identify and produce so many known and obviously responsive documents strongly undermines its claim to have conducted an adequate

search.[9] This countervailing evidence further bolsters AIC's argument that Defendants' motion for summary judgment should be denied. *See Valencia-Lucena*, 180 F.3d at 326 (stating that summary judgment is inappropriate if "a review of the record raises substantial doubt, particularly in view of well defined requests and positive indications of overlooked materials" (internal citation and quotation omitted)); *Friends of Blackwater v. U.S. Dep't of the Interior*, 391 F. Supp. 2d 115, 121 (D.D.C. 2005) (concluding that the failure to provide search terms and the failure to produce documents originating from the agency that turned up in related searches by other bureaus rendered the search inadequate).

III. CONCLUSION

Defendants failed to sustain their burden to demonstrate that they conducted an adequate search for records responsive to AIC's FOIA request. Defendants' declaration omits critical aspects of the mechanics of the government's search. Additionally, substantial countervailing evidence undermines Defendants' claims to have conducted a comprehensive search. For these reasons, Plaintiff respectfully requests that the Court deny Defendants' motion for summary judgment.

---

[9] AIC's request for records "include[d] all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, training materials, and studies." Compl., Ex. A at 1, n.1. Defendants' production includes very few of these categories.

Respectfully submitted,

Dated: March 26, 2012

/s/ Creighton R. Magid
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Melissa Crow (#453487)
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American Immigration Council
1331 G Street, N.W., Suite 200
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Telephone: (202) 507-7500
Facsimile: (202) 742-5619

Attorneys for Plaintiff American Immigration Council

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL

Plaintiff,

Case No. 1:11-cv-01972 JEB

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE AND PLAINTIFF'S STATEMENT OF GENUINE MATERIAL ISSUES

Plaintiff responds as follows to numbered paragraphs of Defendants' Statement of Material Facts as to Which There Is No Genuine Issue:

1. Plaintiff denies that its FOIA request to Defendants U.S. Customs and Border Protection ("CBP") and U.S. Department of Homeland Security ("DHS") was limited to the four bullet points listed in paragraph 1 of Defendants' Statement of Material Facts as to Which There Is No Genuine Issue. The four bullet points are the topic areas of Plaintiff's FOIA request, but — as noted in Ms. Suzuki's declaration — Plaintiff describes ten different, non-exclusive categories in its March 14, 2011, request that may be found within those four topic areas:

1) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning in primary inspection, or what role the attorney may play during such questioning;

2) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning in secondary inspection, or what role the attorney may play during such questioning;

3) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during

questioning in deferred inspection, or what role the attorney may play during such questioning;

4) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to alleged abandonment of U.S. residence, or what role the attorney may play during such questioning;

5) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to alleged lack of proper immigration documents, or what role the attorney may play during such questioning;

6) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to the National Security Entry-Exit Registration System (NSEERS), or what role the attorney may play during such questioning;

7) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during any other questioning by a CBP agent, or what role the attorney may play during such questioning;

8) Guidance or any information obtained by the agency regarding procedures for notification of attorneys with Form G-28 and/or EOIR-28 on file of CBP's intention to question their clients;

9) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may be involved in the CBP's decision to return an unaccompanied alien child to Mexico without referring the child to ICE or HHS/ ORR/ Department of Unaccompanied Children;

10) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may be involved in CBP's decision to release an unaccompanied immigrant child to a responsible adult who is not a family member.

Plaintiff notes further that Defendants omitted critical language from the excerpt of the FOIA request reprinted in Defendants' Statement of Material Facts as to Which There is No Genuine Issue. Plaintiffs actually requested:

[A]ny and all records which have been prepared, received, transmitted, collected

> and/or maintained by the U.S. Department of Homeland Security and/or U.S. Customs and Border Protection (CBP), whether issued or maintained by CBP Headquarters offices, including any divisions, subdivisions, or sections therein; CBP field operations offices, including any divisions, subdivisions or sections therein; *CBP offices at ports of entry, including any divisions, subdivisions or sections therein;* and/or any other CBP organizational structure; and which relate or refer in any way to any of the following:
>
> - Attorneys' ability to be present during their clients' interactions with CBP;
> - What role attorneys may play during their clients' interactions with CBP;
> - Attorney conduct during interactions with CBP on behalf of their clients;
> - Attorney appearances at CBP offices or other facilities.

(Emphasis added).

2. Plaintiff denies that a thorough search was conducted for records responsive to the March 14, 2011 request. Plaintiff also denies that "much of the information AIC requested was already publicly available."

5. Plaintiff denies that its FOIA request sought only "records regarding CBP policies, directives and guidance." Plaintiff explicitly defined "records" to include "all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, training materials and studies." Moreover, the records sought by Plaintiff did not relate to "the accessibility of counsel," but rather to individuals' access to counsel during their interactions with CBP. In a telephone call on June 23, 2011, Plaintiff confirmed to CBP that its FOIA request did not concern the permissible roles of attorneys in trade matters, but did not limit the request in any other way.

6. Plaintiff denies that 8 U.S.C. § 1357, 8 U.S.C. § 287.3(c) and 8 C.F.R. § 292.5 "state unequivocally that generally 'applicants for admission' into the United States have no right to counsel." Plaintiff also denies that only applicants for admission who have become the focus of a criminal investigation or who are detained have the right to legal representation. In addition, Plaintiff denies that "it is logical that CBP does not have extensive responsive documents" concerning access to counsel in interactions with CBP," along with CBP's underlying rationale that "comprehensive CBP guidance governing attorney representation and conduct . . . is unnecessary" and that "it is sufficient for CBP personnel to be informed that generally there is no right to counsel at the border."

Plaintiff notes that its request addressed many contexts other than primary or secondary inspection, including deferred inspection, questioning regarding alleged abandonment of U.S. residence, questioning regarding alleged lack of proper immigration documents, questioning in the context of NSEERS, decision making regarding the return of an unaccompanied immigrant child to Mexico, and decision making regarding release of an unaccompanied alien child to a responsible adult who is not a family member.

7. Plaintiff, not Defendant, filed the instant complaint on November 8, 2011.

This record presents the following genuine issue of material fact:

1. Whether CBP has conducted an adequate search for responsive documents.

Respectfully submitted,

Dated: March 26, 2012

/s/ Creighton R. Magid
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Attorneys for Plaintiff American Immigration Council

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL

Plaintiff,

Case No. 1:11-CV-01972 JEB

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

ORDER

Upon consideration of Defendants' Motion for Summary Judgment, and Plaintiff's Opposition thereto, it is hereby this _____ day of _____, 2012,

ORDERED that Defendants' Motion for Summary Judgment is hereby DENIED.

_____
James E. Boasberg
United States District Judge

COPIES:

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Washington, D.C. 20006

Melissa Crow, Esq.
Beth Werlin, Esq.
American Immigration Council
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Marian L. Borum, Esq.
Assistant United States Attorney
Civil Division
555 Fourth Street, N.W.
Washington, D.C. 20530

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL

Plaintiff,

v.

No. 1:11-cv-01972 (JEB)

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

DECLARATION OF DAVID BLAIR-LOY IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, David Blair-Loy, declare as follows:

1. I am the Legal Director of the ACLU Foundation of San Diego and Imperial Counties. I submit this Declaration in support of Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment in the above-captioned case.

2. In the Fall of 2008, immigration lawyers in San Diego contacted our office to complain about being denied access to meet with their clients at a Customs and Border Protection facility in San Ysidro known as "the barracks" or "Barracks 5." Our investigation corroborated their complaints.

3. Attached as **Exhibit A** is a true and correct copy of a December 4, 2008 letter from me and cooperating co-counsel to CBP's Field Operations Director in San Diego expressing concern that immigration attorneys have been denied access to their clients at "the barracks."

4. In February 2009, CBP responded in writing to our letter. CBP indicated that it would provide access to counsel to immigration detainees at "Barracks 5." The letter outlined steps an immigration attorney should take to arrange for visitation of clients at "Barracks 5." A

true and correct copy of the February 2009 letter from CBP to the ACLU is attached hereto as **Exhibit B.**

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Dated: March 20, 2012

David Blair-Loy

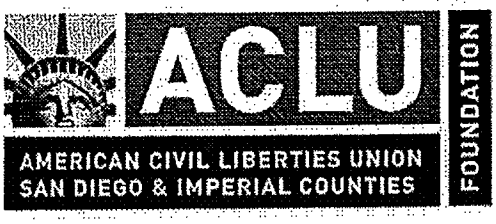
AMERICAN IMMIGRATION COUNCIL,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

Civil Action No. 11-1972 (JEB)

EXHIBIT A TO DECLARATION OF DAVID BLAIR-LOY



Cooley
GODWARD KRONISH LLP

December 4, 2008

Mr. Gurdit Dhillon
Field Operations Director
U.S. Customs and Border Protection
610 W. Ash Street, Suite 1200
San Diego, CA 92101

Dear Mr. Dhillon:

The ACLU has been contacted by immigration attorneys who have been denied access to their clients at a Border Patrol temporary detention facility in San Ysidro commonly referred to as "the barracks." The ACLU is very concerned with protecting detainees' constitutional right of access to counsel and lawyers' right to meet with clients. Prompt access to counsel after detention is essential for many reasons, including but not limited to the ability to seek immediate release on bond.

We understand Customs and Border Protection has an upcoming meeting with the San Diego chapter of the American Immigration Lawyers Association to discuss various concerns that the Association has already raised, which may include detainees' access to counsel. We view this as a step in the right direction and hope that the issues can be resolved, as well as the concern raised by way of this letter.

We also want to inform you that we are prepared to proceed with litigation and have enlisted the assistance of Cooley Godward Kronish to take the lead in litigation on a pro bono basis to rectify this problem should it prove necessary. However, before resorting to intervention by the federal courts and needlessly spending taxpayer dollars, we propose a meeting to discuss this serious problem, with the hope of identifying a mutually agreeable resolution. Please contact us at your earliest convenience to schedule a convenient time to discuss this issue.

Sincerely yours,

David Blair-Loy
Legal Director
ACLU Foundation of San Diego & Imperial Counties

Philip Tencer
Cooley Godward Kronish LLP

cc: Robert Nadalin, Esq.

ACLU of San Diego & Imperial Counties
PO Box 87131
San Diego, CA 92138-7131
p/619.232.2121 f/619.232.0036

Cooley Godward Kronish LLP
4401 Eastgate Mall
San Diego, CA 92121-1909
p/858.550.6000 f/858.550.6420

AMERICAN IMMIGRATION COUNCIL,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

Civil Action No. 11-1972 (JEB)

EXHIBIT B TO DECLARATION OF DAVID BLAIR-LOY

2411 Boswell Road
Chula Vista, CA 91914-3519

U.S. Customs and Border Protection

FEB 18 2009

FEB 18 2009

David Blair-Loy
Legal Director
ACLU of San Diego & Imperial Counties
P.O. Box 87131
San Diego, California 92138-7131

Dear Mr. Blair-Loy:

Please accept the following in reply to your letter dated December 4, 2008, to Gurdit Dhillon, former Director of Field Operations, U.S. Customs and Border Protection, San Diego. Your letter was referred to me because the Barracks 5 transit staging area is a Border Patrol operation under my command.

Please be advised that we will provide access to counsel by immigration detainees at Barracks 5 as follows. The immigration attorney should call the San Diego Sector "NTA Coordinator" to make an appointment for visitation during business hours. I have designated Senior Patrol Agent Adriana Finau as the primary NTA Coordinator, and she may be reached at (619) 498-9836. In the event that SPA Finau is unable to return the call within one hour, the immigration attorney may contact Supervisory Border Patrol Agent Stephen Harkenrider, who I have designated as the back-up NTA Coordinator, at (619) 498-9983 or (619) 498-9777. The immigration attorney should be prepared to provide their bar membership number, which the NTA Coordinator will verify prior to the visitation appointment. The NTA Coordinator will instruct the immigration attorney when and where to report in order to be escorted onto the Border Patrol facility located at 311 Athey Avenue, in San Ysidro.

Upon arriving for visitation, the immigration attorney should be prepared to present their bar card and photo identification, which will be examined and returned by the NTA Coordinator. A G-28 is helpful but not required for visitation. Upon receipt of a G-28 or similar notice bearing a detainee's original signature and date, we will regard the detainee as represented by counsel for immigration purposes.

Last, please note that immigration detainees at Barracks 5 have access to telephones, and those who have requested removal hearings before the Immigration Court have been provided with a list of free legal services pursuant to 8 C.F.R. 287.3(c). See, http://www.usdoj.gov/eoir/probono/freelglchtCA.htm. As such, we are confident that the immigration detainees in transit through Barracks 5 have been accorded appropriate access to counsel while in Border Patrol custody.

Thank you for bringing this important matter to my attention. If you have any questions or need any further information or assistance, please feel free to contact the NTA Coordinator.

Sincerely,

Mike J. Fisher
Chief Patrol Agent

cc: Sean Riordan, ACLU Foundation of San Diego & Imperial Counties
Philip Tencer, Cooley Godward Kronish LLP

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL

Plaintiff,

v. **Case No. 1:11-cv-01972 (JEB)**

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

DECLARATION OF MELISSA CROW IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, Melissa Crow, declare as follows:

1. I am the Director of the Legal Action Center at the American Immigration Council. I submit this Declaration in support of Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment in the above-captioned case.

2. For many years, the American Immigration Council ("AIC") has received reports from immigration lawyers across the country of unwarranted restrictions on access to counsel by U.S. Customs and Border Protection ("CBP") officers.

3. In addition to the FOIA request that AIC served on CBP, on March 14, 2011, AIC served a FOIA request on U.S. Citizenship and Immigration Services ("USCIS"). A true and correct copy of that request is attached as **Exhibit A.**

4. In response to AIC's FOIA request, USCIS conducted a search and identified over 2,000 pages of responsive records. USCIS produced those documents to AIC on February 6, 2012. Attached as **Exhibit B** is a true and correct copy of USCIS's February 6, 2012, letter explaining its production. USCIS produced numerous communications among USCIS divisions, including its own Office of Chief Counsel, and between USCIS and stakeholders outside the

agency. Attached as **Exhibit C** are true and correct copies of examples of these communications excerpted from USCIS's February 6, 2012 production. All of the records that USCIS released in response to AIC's FOIA request are available on AIC's website at http://www.legalactioncenter.org/sites/default/files/docs/lac/FOIA%20Response_2-6-12_Condensed_File.pdf.

5. In response to the FOIA request AIC served on CBP, the agency produced excerpts from three chapters of the Inspector's Field Manual. These excerpts came from Chapter 2.9 (Dealing with Attorneys and Other Representatives), Chapter 17.1.g (Attorney Representation at Deferred Inspection), and Chapter 17.9.11.2 (Notification for Detainees in Baggage Control Secondary).

6. A redacted copy of the Inspector's Field Manual can be found in the FOIA library of CBP's website at http://foia.cbp.gov/index.asp?ps=1&search=&category=Manuals_and_Instructions. A review of the version of the Inspector's Field Manual on CBP's website shows that there are additional sections of this manual that include references to the role of attorneys during interactions with CBP. These sections include:

- Chapter 15.1(d) (requiring CBP officers to advise a noncitizen or his representative to submit information to local port of entry or local CBP office to correct previously recorded, but allegedly erroneous, Form I-94 arrival and departure dates that result in "confirmed" overstay lookouts);
- Chapter 17.1(e) (stating that an applicant for admission is not entitled to representation at a deferred inspection, but that an attorney may be present upon request if deemed appropriate by the supervisory CBP Officer on duty, and stating that the attorney's role is limited to that of an observer and consultant to the applicant);
- Chapter 17.15(d) (requiring an officer to notify the port of entry if notified by an attorney, friend, or relative that an individual in expedited removal proceedings is planning to apply for asylum or has a fear of return and noting that a Form G-28 Notice of Representation is not required in this instance);

- Chapter 31.7 (discussing inquiries from private individuals and attorneys regarding possible reasons for questioning an individual at the time of application for admission to the United States);
- Chapter 43.5(f) (requiring the National Fines Office to correspond with an attorney or representative on behalf of a responsible carrier only if a Form G-28, Notice of Representation, has been filed);
- Chapter 44.8(d) (explaining that an attorney should file a Form G-28, Notice of Representation, after which the attorney must be sent copies of all notification letters, previous correspondence from the client, decision letters, and any sworn statement executed by the client, and that the attorney may attend personal interviews with the client regarding conveyance seizures);
- Chapter 44.9 (stating that owners of seized conveyances are entitled to representation by an attorney during personal interviews relating to forfeiture proceedings).

Attached as **Exhibit D** are true and correct copies of Chapters 15.1(d), 17.1(e), 17.15(d), 31.7, 43.5(f), 44.8(d), and 44.9 of the Inspector's Field Manual found on CBP's website in IFM-Part B (Chapter 15.1(d)), IFM-Part E (Chapter 17.1(e)), IFM-Part F (Chapter 17.15(d)), IFM-Part I (Chapter 31.7) and IFM-Part J (Chapters 43.5(f), 44.8(d), 44.9).

7. The version of Chapter 2.9 (Dealing with Attorneys and Other Representatives) available in the FOIA library of CBP's website in the folder labeled "Inspector's Field Manual (Parent Document)" includes an additional sentence not found in the version of this document that was produced by Defendants. The additional sentence states: "A more comprehensive treatment of this topic is contained in the [USCIS] *Adjudicator's Field Manual*, Chapter 12, and 8 CFR 292.5(b)." Attached as **Exhibit E** is a true and correct copy of Chapter 2.9 of the Inspector's Field Manual found on CBP's website.

8. Both DHS and/or CBP have been engaged in lawsuits that bear directly on the issue of access to counsel in interactions with CBP. However, Defendants failed to disclose any documents in response to AIC's FOIA request regarding these lawsuits.

9. One such case is *Torres, et al. v. Ridge, et al.*, Case No. 2:04-cv-00525 (W.D. Wa. *filed* Mar. 12, 2004) which alleged a right to counsel in deferred inspection pursuant to the Administrative Procedure Act and the Due Process Clause of the Constitution. Attached as **Exhibit F** is a true and correct copy of the complaint from *Torres*. According to the docket available on PACER, this case was dismissed without prejudice pursuant to stipulation by the parties in June 2004.

10. Another such case is *Castro, et. al. v. Freeman, et al.*, Case No. 1:09-cv-00208 (S.D. Tex. *filed* Sept. 7, 2011) which includes claims regarding the right to counsel for people with facially valid documents showing U.S. citizenship who seek entry into the United States. Attached as **Exhibit G** is a true and correct copy of the Petition for Writ of Habeas Corpus, Class Action Complaint for Declaratory and Injunctive Relief, Application for Temporary Restraining Order, and Motion for Preliminary Injunction, from *Castro*. Plaintiffs filed exhibits to their opposed motion for discovery which included the government's amended responses to the plaintiffs' first set of requests for admission. Attached as **Exhibit H** is a true and correct excerpt from Plaintiffs' Exhibit "S," Document No. 122, from *Castro*, which includes Defendants' Response to Request For Admission No. 44. According to the docket on PACER, this case remains pending.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Melissa Crow

Dated: March 26, 2012

AMERICAN IMMIGRATION COUNCIL,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

Civil Action No. 11-1972 (JEB)

EXHIBIT A TO DECLARATION OF MELISSA CROW

AMERICAN IMMIGRATION COUNCIL

COMMUNITY EDUCATION CENTER · IMMIGRATION POLICY CENTER · INTERNATIONAL EXCHANGE CENTER · LEGAL ACTION CENTER

March 14, 2011

FOIA Office
U.S. Citizenship and Immigration Services
National Records Center, FOIA/PA Office
P.O. Box 648010
Lee's Summit, MO 64064-8010

Re: Freedom of Information Act Request

Dear Sir or Madam:

The American Immigration Council (AIC) submits this letter as a request for information under the Freedom of Information Act (FOIA), 5 U.S.C. §552, *et. seq.*

1. RECORDS SOUGHT

AIC requests any and all records[1] which have been prepared, received, transmitted, collected and/or maintained by the U.S. Department of Homeland Security and/or U.S. Citizenship and Immigration Services (USCIS), whether issued or maintained by USCIS Headquarters offices, regional offices, district offices, field offices and/or any other organizational structure, and which relate or refer in any way to any of the following:

- Attorneys' ability to be present during their clients' interactions with USCIS;
- What role attorneys may play during their clients' interactions with USCIS;
- Attorney conduct during interactions with USCIS on behalf of their clients;
- Attorney appearances at USCIS offices or other facilities.

The above records may include, but are not limited to:

1) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client to an interview regarding an I-485, Application to Register for Permanent Resident or Adjust Status, or what role the attorney may play during such questioning;

2) Guidance or any information obtained by the agency regarding circumstances under which an attorney may accompany a client to an interview regarding an I-130, Petition for Alien Relative, if the client is the *petitioner*, or what role the attorney may play during such questioning;

[1] The term "records" as used herein includes all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, training manuals, and studies.

3) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client to an interview regarding an I-130, Petition for Alien Relative, if the client is the *beneficiary* of the Petition, or what role the attorney may play during such questioning;

4) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning pursuant to the client's I-140, Immigrant Petition for Alien Worker, or what role the attorney may play during such questioning;

5) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client to an interview regarding an I-751, Petition to Remove the Conditions of Residence, or what role the attorney may play during such questioning;

6) Guidance or any information obtained by the agency regarding circumstances under which an attorney may accompany a client to an interview regarding an N-400, Application for Naturalization, or what role the attorney may play during such questioning;

7) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to the National Security Entry-Exit Registration System (NSEERS), or what role the attorney may play during such questioning;

8) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a minor during any USCIS interview, or what role the attorney may play during such interviews;

9) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client to an interview regarding an I-918, Petition for U Nonimmigrant Status, or what role the attorney may play during such interviews;

10) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client to an interview regarding an I-914, Application for T Nonimmigrant Status, or what role the attorney may play during such interviews;

11) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client to an interview regarding an I-360, Petition for Amerasian, Widow(er), or Special Immigrant, or what role the attorney may play during such interviews;

12) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during "credible fear" screenings, or what role the attorney may play during such screenings;

13) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during "reasonable fear" screenings, or what role the attorney may play during such screenings;

14) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during an asylum interview, or what role the attorney may play during such interviews;

15) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning by USCIS regarding any other pending application for benefits, or what role the attorney may play during such questioning;

16) Guidance or any information obtained by the agency regarding procedures for notification of attorneys with Form G-28 on file of USCIS's intention to question their clients.

AIC requests that records existing in electronic form be provided in electronic format or on a compact disc. If any of the requested records or information is not in a succinct format, we request the opportunity to view the documents in your offices.

If under applicable law any of the information requested is considered exempt, please describe in detail the nature of the information withheld, the specific exemption or privilege upon which the information is withheld, and whether the portions of withheld documents containing non-exempt or non-privileged information have been provided.

2. REQUEST FOR WAIVER OF ALL COSTS

AIC requests that all fees associated with this FOIA request be waived. AIC is entitled to a waiver of all costs because disclosure of the information is "...likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). *See also* 6 C.F.R. § 5.11 (k) (Records furnished without charge or at a reduced rate if the information is in the public interest, and disclosure is not in commercial interest of institution). In addition, AIC has the ability to widely disseminate the requested information. *See Judicial Watch v. Rossotti*, 326 F.3d 1309 (D.C. Cir. 2003) (finding a fee waiver appropriate when the requester explained, in detailed and non-conclusory terms, how and to whom it would disseminate the information it received).

i. Disclosure of the Information Is in the Public Interest

AIC educates citizens about the enduring contributions of America's immigrants, supports sensible and humane immigration policies that reflect American values, and works to ensure that immigration laws are enacted and implemented in compliance with fundamental constitutional and human rights. AIC's Immigration Policy Center (IPC) and Legal Action Center (LAC) help carry out this mission by reaching out to the general public to promote a better understanding of immigration law, policy and practice. The IPC researches issues related to immigration (such as the impact of immigration on the economy, jobs and crime), and regularly provides information to leaders on Capitol Hill and the media. The LAC works with other immigrants' rights organizations and immigration attorneys across the United States to advance the fair administration of immigration laws. Relevant to this FOIA request, the LAC has historically focused on

access to counsel issues. Specifically, the LAC educates the public about the law surrounding access to counsel for immigrants in removal proceedings, advocates for fair standards and procedures to remedy the effects of ineffective assistance of counsel, and encourages better access to counsel in proceedings before the Department of Homeland Security and its sub-agencies.

Disclosure of the requested information will contribute significantly to public understanding of non-citizens' access to counsel in interactions with ICE. The disclosed records will inform attorneys who represent non-citizens at risk of removal from the United States; the noncitizens themselves; and other members of the public who are concerned with immigration agency proceedings and policies. Because there is no publicly available comprehensive guidance directly governing attorney representation and conduct in interactions with USCIS, the dissemination of these records will significantly inform significantly public understanding of the scope of representation permitted before USCIS. AIC has the capacity and intent to disseminate widely the requested information to the public. To this end, the LAC and the IPC will post the information on the AIC website, a website that is accessible by any member of the public. In addition, the LAC and IPC will publish this information in an LAC report, an LAC newsletter and an IPC blog. The LAC newsletter is directly distributed to 12,000 recipients and the IPC blog is distributed to 25,000 recipients. These publications also are available on the AIC website.

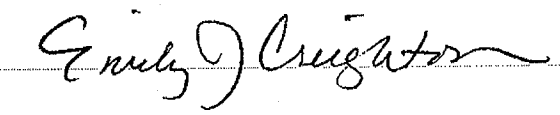
ii. Disclosure of the Information Is Not Primarily in the Commercial Interest of the Requester

AIC is a 501(c)(3), tax-exempt, not-for-profit educational, charitable organization. Immigration attorneys, noncitizens and any other interested member of the public may obtain information about counsel-related issues on AIC's frequently updated website. AIC seeks the requested information for the purpose of disseminating it to members of the public who access AIC's website and other AIC publications, and not for the purpose of commercial gain.

Please inform us if the charges for this FOIA production will exceed $25.00.

Thank you in advance for your response to this request within twenty working days, as FOIA requires. *See* 5 U.S.C. § 552(a)(6)(A)(i). If you have any questions, please feel free to contact me at (202) 507-7505.

Sincerely,



Emily Creighton
Staff Attorney
American Immigration Council
Suite 200
1331 G Street, NW
Washington, DC 20005-3141
Telephone: (202) 507-7505
Fax: (202) 742-5619
E-mail: ecreighton@immcouncil.org

AMERICAN IMMIGRATION COUNCIL,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

Civil Action No. 11-1972 (JEB)

EXHIBIT B TO DECLARATION OF MELISSA CROW

U.S. Department of Homeland Security
National Records Center
P.O. Box 648010
Lee's Summit, MO 64064-8010

U.S. Citizenship and Immigration Services

February 6, 2012

COW2011000252

Emily Creighton
American Immigration Council
1331 G Street, NW, Suite 200
Washington, DC 20005-3141

Dear Emily Creighton:

This is in response to your Freedom of Information Act/Privacy Act (FOIA/PA) request received in this office March 31, 2011 seeking records related to any of the following:

- Attorneys' ability to be present during their clients' interactions with USCIS,
- Role attorneys may play during their clients' interactions with USCIS,
- Attorney conduct during interactions with USCIS on behalf of their clients,
- Attorney appearances at USCIS offices or other facilities.

We have completed the review of all documents and have identified 2042 pages that are responsive to your request. Enclosed are 455 pages released in their entirety, and 418 pages released in part. We are withholding 1169 pages in full. In our review of these pages, we have determined that they contain no reasonably segregable portion(s) of non-exempt information. We have reviewed and have determined to release all information except those portions that are exempt pursuant to 5 U.S.C. § 552 (b)(5) and (b)(6) of the FOIA.

The following exemptions are applicable:

Exemption (b)(5) provides protection for inter-agency or intra-agency memorandums or letters, which would not be available by law to a party other than an agency in litigation with the agency. The types of documents and/or information that we have withheld under this exemption may consist of documents containing pre-decisional information, documents or other memoranda prepared in contemplation of litigation, or confidential communications between attorney and client.

Exemption (b)(6) permits the government to withhold all information about individuals in personnel, medical and similar files where the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy. The types of documents and/or information that we have withheld may consist of birth certificates, naturalization certificates, driver's license, social security numbers, home addresses, dates of birth, or various other documents and/or information belonging to a third party that are considered personal.

The enclosed record consists of the best reproducible copies available. Certain pages contain marks that appear to be blacked-out information. The black marks were made prior to our receipt of the file and are not information we have withheld under the provisions of the FOIA or PA.

In accordance with Department of Homeland Security Regulations (6 C.F.R. § 5.4(a)), USCIS uses a "cut-off" date to delineate the scope of a FOIA request by treating records created after that date as not responsive to that request. Therefore, in determining which records are responsive to your request, we included only records in the possession of this agency as of April 8, 2011, the date we began the search for records.

If you wish to appeal this determination, you may write to the USCIS FOIA/PA Appeals Office, 150 Space Center Loop, Suite 500, Lee's Summit, MO 64064-2139, within 60 days of the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

The National Records Center does not process petitions, applications or any other type of benefit under the Immigration and Nationality Act. If you have questions or wish to submit documentation relating to a matter pending with the bureau, you must address these issues with your nearest District Office.

All FOIA/PA related requests, including address changes, must be submitted in writing and be signed by the requester. Please include the control number listed above on all correspondence with this office. Requests may be mailed to the FOIA/PA Officer at the PO Box listed at the top of the letterhead, or sent by fax to (816) 350-5785. You may also submit FOIA/PA related requests to our e-mail address at uscis.foia@uscis.dhs.gov.

Sincerely,

Jill A. Eggleston

Director, FOIA Operations

AMERICAN IMMIGRATION COUNCIL,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

Civil Action No. 11-1972 (JEB)

EXHIBIT C TO DECLARATION OF MELISSA CROW

Greenwood, Tembra A

From: OCC-Clearance
Sent: Friday, December 02, 2011 11:08 AM
To: Greenwood, Tembra A
Subject: FW: KTC08162011-01 Role of Private Attorneys PM
Attachments: PM The Role of Private Attorneys and other Representatives (2) RAM EDITS 081611.doc

---

From: McCarthy, Rachel A
Sent: Tuesday, August 16, 2011 1:16 PM
To: OCC-Clearance
Subject: RE: KTC08162011-01 Role of Private Attorneys PM

Rachel A. McCarthy
Disciplinary Counsel
U.S. Citizenship and Immigration Services
Department of Homeland Security
70 Kimball Avenue, Room 103
S. Burlington, VT 05403
(802) 660-1779
(802) 660-5067 (FAX)
website: http://uscis.dhs.gov/bc/

From: OCC-Clearance
Sent: Tuesday, August 16, 2011 11:19 AM
To: McCarthy, Rachel A
Cc: Hinds, Ian; Gallagher, Ellen M; Flynn, Patricia H; Tournay, Frederick H; Muhletaler, Catherine
Subject: FW: KTC08162011-01 Role of Private Attorneys PM

Hi Rachel,

Please review the attached document. Please respond to the OCC-Clearance Box with your edits/comments by next Tuesday, August 23.

Since this is an Exec Sec ECN tracked review, the Box will upload the OCC response to ECN. Thanks, Cathy

---

From: Contaldi, Kerry **On Behalf Of** USCIS Exec Sec
Sent: Tuesday, August 16, 2011 11:08 AM
To: Rhew, Perry J; Grissom, John F; Rix, Donna L; OCC-Clearance; Patching, Laura; Eccleston, Hermene; Alfonso-Royals, Angelica M; Wheeler, Shannon L; Parisi, Thomas M; Higdon, Jamie C; Simpson, Baxter; McCament, James W; Tintary, Ruth E; Roles, Rebecca J; Moore, Joseph; Quimby, Chris M; Croons, Patricia A; Graziadio, Josie; Kvortek, Steve P; Hawkins, Donald K; David, Lashaunne G; Samuels, Paulette M; Ratliff, Gerri; Gerety, Jacqueline; Patterson, Katherine R; Wilson, Lynn M; Lacot, Rosalina; Gradowski, Leonard S; #USCIS - ESD Tasking List; FDNS Front Office Tasking; Atkinson, Ronald A; Crewson, Jean C; Karam, Lauren J; Kellner, Aris R; Fleet, Andrea B; Conway, Kathleen B; USCIS RAIO; Arroyo, Susan K
Cc: Mattice, Michael; Carter, Constance L; Drake, Johnetta; Harrison, Julia L; Davis, Marla J; USCIS Exec Sec; exsotaskcoordination@dhsconnect.dhs.gov; HQ Field Operations; Chang, Pearl B; Melero, Mariela; Herrmann, Mary K; Ellis, Rachel; Murnane, Kristin M; Simpson, Pamela R; Crocetti, Don; Coffin, Richard H; Jones, Rendell L; Correa, Soraya;

Neufeld, Donald; Velarde, Barbara Q
Subject: KTC08162011-01 Role of Private Attorneys PM

My apologies all, this is actually due Thursday, August 25th, not Friday, August 26th.

Kerry T. Contaldi
USCIS Office of the Executive Secretariat
202-272-8306 (Desk)
202-272-0990 (Office)
EXSO Connect Page
EXSO ECN Page
Please send all official actions to uscisexecsec@dhs.gov.

From: Contaldi, Kerry **On Behalf Of** USCIS Exec Sec
Sent: Tuesday, August 16, 2011 11:01 AM
To: Rhew, Perry J; Grissom, John F; Rix, Donna L; OCC-Clearance; Patching, Laura; Eccleston, Hermene; Alfonso-Royals, Angelica M; Wheeler, Shannon L; Parisi, Thomas M; Higdon, Jamie C; Simpson, Baxter; McCament, James W; Tintary, Ruth E; Roles, Rebecca J; Moore, Joseph; Quimby, Chris M; Croons, Patricia A; Graziadio, Josie; Kvortek, Steve P; Hawkins, Donald K; David, Lashaunne G; Samuels, Paulette M; Ratliff, Gerri; Gerety, Jacqueline; Patterson, Katherine R; Wilson, Lynn M; Lacot, Rosalina; Gradowski, Leonard S; #USCIS - ESD Tasking List; FDNS Front Office Tasking; Atkinson, Ronald A; Crewson, Jean C; Karam, Lauren J; Kellner, Aris R; Fleet, Andrea B; Conway, Kathleen B; USCIS RAIO; Arroyo, Susan K
Cc: Mattice, Michael; Carter, Constance L; Drake, Johnetta; USCIS Exec Sec; Harrison, Julia L; Davis, Marla J; HQ Field Operations; Chang, Pearl B; Melero, Mariela; Herrmann, Mary K; Ellis, Rachel; Murnane, Kristin M; Simpson, Pamela R; Crocetti, Don; Coffin, Richard H; Jones, Rendell L; Correa, Soraya; Neufeld, Donald; Velarde, Barbara Q
Subject: KTC08162011-01 Role of Private Attorneys PM

HCP TASK

Please copy uscisexecsec@dhs.gov and EXSOTaskCoordination@dhsconnect.dhs.gov on all e-mail traffic regarding this task and include the Action Item name provided below in the subject line of your e-mails. Thank you.

All:

Draft materials are available for your review on EXSO-ECN.

Action Item: KTC08162011-01 Role of Private Attorneys PM
Originating POD/POC: FOD/Julia Harrison; 2-1709
EXSO POC: Kerry Contaldi; 2-8306
Required to Respond: FDNS, OCC, P&S and RAIO
FYI: AAO, CSD, ESD, EXSO, MGMT, OCOMM, OLA, OoC, OPE, OPQ, OTC, PRIV, and SCOPS
Level of Urgency: Routine
Suspense Date: Thursday, August 25, 2011

USCIS Office of the Executive Secretariat
(202) 272-0990 – office
(202) 272-0970 – fax
EXSO Connect Page
EXSO ECN Page

Please upload all actions for which Forms G-1056 are used to EXSO-ECN.
Please send all official actions to uscisexecsec@dhs.gov.

Greenwood, Tembra A

From: OCC-Clearance
Sent: Friday, December 02, 2011 11:08 AM
To: Greenwood, Tembra A
Subject: FW: KTC08162011-01 Role of Private Attorneys PM
Attachments: PM The Role of Private Attorneys and other Representatives (2) RAM EDITS 081611.doc

---

From: McCarthy, Rachel A
Sent: Tuesday, August 16, 2011 1:16 PM
To: OCC-Clearance
Subject: RE: KTC08162011-01 Role of Private Attorneys PM

Rachel A. McCarthy
Disciplinary Counsel
U.S. Citizenship and Immigration Services
Department of Homeland Security
70 Kimball Avenue, Room 103
S. Burlington, VT 05403
(802) 660-1779
(802) 660-5067 (FAX)
website: http://uscis.dhs.gov/bc/

From: OCC-Clearance
Sent: Tuesday, August 16, 2011 11:19 AM
To: McCarthy, Rachel A
Cc: Hinds, Ian; Gallagher, Ellen M; Flynn, Patricia H; Tournay, Frederick H; Muhletaler, Catherine
Subject: FW: KTC08162011-01 Role of Private Attorneys PM

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Sent: Tuesday, August 16, 2011 11:08 AM
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Cc: Mattice, Michael; Carter, Constance L; Drake, Johnetta; Harrison, Julia L; Davis, Marla J; USCIS Exec Sec; exsotaskcoordination@dhsconnect.dhs.gov; HQ Field Operations; Chang, Pearl B; Melero, Mariela; Herrmann, Mary K; Ellis, Rachel; Murnane, Kristin M; Simpson, Pamela R; Crocetti, Don; Coffin, Richard H; Jones, Rendell L; Correa, Soraya;

Neufeld, Donald; Velarde, Barbara Q
Subject: KTC08162011-01 Role of Private Attorneys PM

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Kerry T. Contaldi
USCIS Office of the Executive Secretariat
202-272-8306 (Desk)
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Cc: Mattice, Michael; Carter, Constance L; Drake, Johnetta; USCIS Exec Sec; Harrison, Julia L; Davis, Marla J; HQ Field Operations; Chang, Pearl B; Melero, Mariela; Herrmann, Mary K; Ellis, Rachel; Murnane, Kristin M; Simpson, Pamela R; Crocetti, Don; Coffin, Richard H; Jones, Rendell L; Correa, Soraya; Neufeld, Donald; Velarde, Barbara Q
Subject: KTC08162011-01 Role of Private Attorneys PM

HCP TASK

Please copy uscisexecsec@dhs.gov and EXSOTaskCoordination@dhsconnect.dhs.gov on all e-mail traffic regarding this task and include the Action Item name provided below in the subject line of your e-mails. Thank you.

All:

Draft materials are available for your review on EXSO-ECN.

Action Item: KTC08162011-01 Role of Private Attorneys PM
Originating POD/POC: FOD/Julia Harrison; 2-1709
EXSO POC: Kerry Contaldi; 2-8306
Required to Respond: FDNS, OCC, P&S and RAIO
FYI: AAO, CSD, ESD, EXSO, MGMT, OCOMM, OLA, OoC, OPE, OPQ, OTC, PRIV, and SCOPS
Level of Urgency: Routine
Suspense Date: Thursday, August 25, 2011

USCIS Office of the Executive Secretariat
(202) 272-0990 – office
(202) 272-0970 – fax
EXSO Connect Page
EXSO ECN Page

S. Burlington, VT 05403
(802) 660-1779
(802) 660-5067 (facsimile)

From: Muhletaler, Catherine
Sent: Monday, January 08, 2007 10:12 AM
To: McCarthy, Rachel A; Mcgee, Ramona L; Salem, Claudia S; Raymond, Robert R
Cc: Tournay, Frederick H; Carpenter, Dea D; Muhletaler, Catherine
Subject: AFM Chapter 12 - final draft
Importance: High

All,

Attached is the most current draft of AFM Chapter 12 containing and incorporating all OCC edits and comments thus far. Ops is requesting that counsel finalize its comments so it can be circulated and cleared to update the AFM. Please give one final review and provide me with any comments/edits by COB 1/10/07 (Wednesday). If you need more time let me know - but OCC needs to clear this asap. Many thanks for your comments on the previous versions. If you have any questions, please let me know. Cathy

<< File: AMF CHAPTER 12 with OCC comments 1-8-07.DOC >>

Catherine Muhletaler
Special Counsel to the Deputy Chief Counsel
USCIS - Office of the Chief Counsel
(202) 272-1448 office
(202) 272-1405 fax

Greenwood, Tembra A

To: Luong, Quan K
Subject: FW: revisions oct 4
Attachments: CHAPTER 12 - RD LATEST REVISIONS.DOC

Rachel A. McCarthy
Disciplinary Counsel
U.S. Citizenship and Immigration Services
Department of Homeland Security
70 Kimball Avenue, Room 103
S. Burlington, VT 05403
(802) 660-1779
(802) 660-5067 (FAX)
website: http://dhsconnect.dhs.gov/uscis/org/OCC/disciplinarycounsel/Pages/default.aspx

---

From: McCarthy, Rachel A
Sent: Thursday, October 05, 2006 12:34 PM
To: Mcgee, Ramona L
Cc: Divine, Robert; Carpenter, Dea D; Muhletaler, Catherine
Subject: RE: revisions oct 4

Ramona -
per Robert's message below.
Rachel

Rachel A. McCarthy
Ethics Counsel
U.S. Citizenship and Immigration Services
70 Kimball Avenue, Room 103
S. Burlington, VT 05403
(802) 660-1779
(802) 660-5067 (facsimile)

From: Divine, Robert
Sent: Wednesday, October 04, 2006 2:07 PM
To: OCC Conference Room
Cc: Carpenter, Dea D; Muhletaler, Catherine; McCarthy, Rachel A
Subject: RE: revisions oct 4

Rachel, I have edited this some more using track changes. At this point I'd like you to let the Adjudications Law Division put this within a very brief memo introducing the AFM revisions and circulate it for clearance. Great work, and thanks to Cathy for assisting.

Robert C. Divine
Chief Counsel, USCIS
202-272-1400

From: OCC Conference Room
Sent: Wednesday, October 04, 2006 11:28 AM
To: Divine, Robert
Cc: Carpenter, Dea D; Muhletaler, Catherine; McCarthy, Rachel A
Subject: revisions oct 4

Greenwood, Tembra A

To: Luong, Quan K
Subject: FW: Chapter 12

Rachel A. McCarthy
Disciplinary Counsel
U.S. Citizenship and Immigration Services
Department of Homeland Security
70 Kimball Avenue, Room 103
S. Burlington, VT 05403
(802) 660-1779
(802) 660-5067 (FAX)
website: http://dhsconnect.dhs.gov/uscis/org/OCC/disciplinarycounsel/Pages/default.aspx

---

From: McCarthy, Rachel A
Sent: Tuesday, January 16, 2007 11:47 AM
To: Muhletaler, Catherine (b)(5)
Subject: Chapter 12

Cathy -

Rachel A. McCarthy
Bar Counsel
U.S. Citizenship and Immigration Services
70 Kimball Avenue, Room 103
S. Burlington, VT 05403
(802) 660-1779
(802) 660-5067 (facsimile)

Greenwood, Tembra A

To: Luong, Quan K
Subject: FW: revision to chapter 12

Rachel A. McCarthy
Disciplinary Counsel
U.S. Citizenship and Immigration Services
Department of Homeland Security
70 Kimball Avenue, Room 103
S. Burlington, VT 05403
(802) 660-1779
(802) 660-5067 (FAX)
website: http://dhsconnect.dhs.gov/uscis/org/OCC/disciplinarycounsel/Pages/default.aspx

---

From: McCarthy, Rachel A
Sent: Tuesday, October 17, 2006 12:49 PM
To: Muhletaler, Catherine
Subject: RE: revision to chapter 12

the last time I worked on this it was thru Andy Dalal. I cannot remember the name of the ops person, but hopefully Andy will.

Rachel A. McCarthy
Ethics Counsel
U.S. Citizenship and Immigration Services
70 Kimball Avenue, Room 103
S. Burlington, VT 05403
(802) 660-1779
(802) 660-5067 (facsimile)

From: Muhletaler, Catherine
Sent: Tuesday, October 17, 2006 12:46 PM
To: McCarthy, Rachel A
Subject: FW: revision to chapter 12

Rachel,

do you have a poc re: publishing the revised chpt on the AFM on the intranet. I'm looking to see if I could include include this info in the cover memo to the ops folks. thanks, cathy

---

From: Divine, Robert
Sent: Monday, October 16, 2006 11:50 PM
To: Muhletaler, Catherine; Mcgee, Ramona L; Groom, Molly M
Cc: Carpenter, Dea D; McCarthy, Rachel A
Subject: FW: revision to chapter 12

I think this addresses the one change I had suggested from the most recent version, so I think this is ready to go. I ask Ramona and Molly to have someone take one more look at it, and Cathy to prepare a cover sheet to clear this, I guess with a cover memo from someone (Aytes and Scialabba? Scharfen? Me?). Thanks for pushing through this.

Robert C. Divine
Chief Counsel, USCIS
202-272-1400

From: McCarthy, Rachel A
Sent: Thursday, October 12, 2006 11:16 AM
To: Divine, Robert; Carpenter, Dea D; Muhletaler, Catherine
Subject: revision to chapter 12

the additional information regarding foreign attorneys is in the attachment using track changes.

Rachel A. McCarthy
Ethics Counsel
U.S. Citizenship and Immigration Services
70 Kimball Avenue, Room 103
S. Burlington, VT 05403
(802) 660-1779
(802) 660-5067 (facsimile)

Greenwood, Tembra A

To: Luong, Quan K
Subject: FW: AFM Chapter 12 - final draft

Rachel A. McCarthy
Disciplinary Counsel
U.S. Citizenship and Immigration Services
Department of Homeland Security
70 Kimball Avenue, Room 103
S. Burlington, VT 05403
(802) 660-1779
(802) 660-5067 (FAX)
website: http://dhsconnect.dhs.gov/uscis/org/OCC/disciplinarycounsel/Pages/default.aspx

---

From: McCarthy, Rachel A
Sent: Tuesday, January 16, 2007 1:06 PM
To: Muhletaler, Catherine
Subject: FW: AFM Chapter 12 - final draft

I made changes to 12.1(a) and (b)

Rachel A. McCarthy
Bar Counsel
U.S. Citizenship and Immigration Services
70 Kimball Avenue, Room 103
S. Burlington, VT 05403
(802) 660-1779
(802) 660-5067 (facsimile)

From: McCarthy, Rachel A
Sent: Tuesday, January 09, 2007 9:36 AM
To: Muhletaler, Catherine; Mcgee, Ramona L; Salem, Claudia S; Raymond, Robert R
Cc: Tournay, Frederick H; Carpenter, Dea D
Subject: RE: AFM Chapter 12 - final draft

AMF CHAPTER 12 with OCC ...

(b)(5)

(b)(5)

Rachel A. McCarthy
Bar Counsel
U.S. Citizenship and Immigration Services70 Kimball Avenue, Room 103
S. Burlington, VT 05403
(802) 660-1779
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Sent: Monday, January 08, 2007 10:12 AM
To: McCarthy, Rachel A; Mcgee, Ramona L; Salem, Claudia S; Raymond, Robert R
Cc: Tournay, Frederick H; Carpenter, Dea D; Muhletaler, Catherine
Subject: AFM Chapter 12 - final draft
Importance: High

All,

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<< File: AMF CHAPTER 12 with OCC comments 1-8-07.DOC >>

Catherine Muhletaler
Special Counsel to the Deputy Chief Counsel
USCIS - Office of the Chief Counsel
(202) 272-1448 office
(202) 272-1405 fax

Greenwood, Tembra A

To: Luong, Quan K
Subject: FW: AFM Chapter 12
Attachments: Rees Memo.pdf

Rachel A. McCarthy
Disciplinary Counsel
U.S. Citizenship and Immigration Services Department of Homeland Security
70 Kimball Avenue, Room 103
S. Burlington, VT 05403
(802) 660-1779
(802) 660-5067 (FAX)
website: http://dhsconnect.dhs.gov/uscis/org/OCC/disciplinarycounsel/Pages/default.aspx

-----Original Message-----
From: Raymond, Robert R
Sent: Wednesday, November 01, 2006 4:49 PM
To: Muhletaler, Catherine; McCarthy, Rachel A
Subject: FW: AFM Chapter 12

Cathy, Rachel, (b)(5)

[redacted]

Bob

-----Original Message-----
From: Muhletaler, Catherine
Sent: Tuesday, October 31, 2006 3:27 PM
To: Raymond, Robert R
Subject: RE: AFM Chapter 12

Sorry ... Didn't realize you did not receive the attachment. Here it is. Thanks, Cathy

-----Original Message-----
From: Raymond, Robert R

(b)(5)

Sent: Tuesday, October 31, 2006 3:21 PM
To: Muhletaler, Catherine
Subject: RE: AFM Chapter 12

[redacted]

-----Original Message-----
From: Muhletaler, Catherine
Sent: Tuesday, October 31, 2006 11:31 AM
To: Mcgee, Ramona L
Cc: Carpenter, Dea D; Hinds, Ian; Raymond, Robert R
Subject: RE: AFM Chapter 12

Hi Bob,

Have you had a chance to look at this? Pls let me know. Thanks, Cathy

-----Original Message-----
From: Mcgee, Ramona L
Sent: Friday, October 20, 2006 6:10 PM
To: Muhletaler, Catherine
Cc: Carpenter, Dea D; Hinds, Ian; Raymond, Robert R
Subject: AFM Chapter 12

(b)(5)

Cathy:

[redacted]

Thanks

Ramona

Ramona L. McGee
Chief, Adjudications Law Division
USCIS-Office of Chief Counsel
Department of Homeland Security
email: Ramona.McGee@dhs.gov <mailto:Ramona.McGee@dhs.gov>
work: (202) 272-1431
fax: (202) 272-1405

-----Original Message-----
From: Mcgee, Ramona L
Sent: Friday, October 20, 2006 1:19 PM

(b)(5)

To: Muhletaler, Catherine
Cc: Carpenter, Dea D
Subject: RE: revision to chapter 12

[redacted]

Ramona L. McGee
Chief, Adjudications Law Division
USCIS-Office of Chief Counsel
Department of Homeland Security
email: Ramona.McGee@dhs.gov <mailto:Ramona.McGee@dhs.gov>
work: (202) 272-1431
fax: (202) 272-1405

-----Original Message-----
From: Muhletaler, Catherine
Sent: Friday, October 20, 2006 12:30 PM
To: Mcgee, Ramona L
Cc: Carpenter, Dea D
Subject: Re: revision to chapter 12

Hi Ramona,

Just wanted to touch base with you to make certain that your team had taken a look at it and were OK with it. I have a draft cover letter from Robert to the Directorate heads ready to circulate as he requested. Thanks, cathy

---

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Divine, Robert
To: McCarthy, Rachel A; Whitney, Ronald W; Groom, Molly M; Muhletaler, Catherine; Mcgee, Ramona L
CC: Carpenter, Dea D
Sent: Thu Oct 19 23:34:35 2006
Subject: RE: revision to chapter 12

Can we get this circulating?

Robert C. Divine
Chief Counsel, USCIS
202-272-1400

(b)(5)

From: McCarthy, Rachel A
Sent: Wednesday, October 18, 2006 11:20 AM
To: Whitney, Ronald W; Groom, Molly M; Divine, Robert; Muhletaler, Catherine; Mcgee, Ramona L
Cc: Carpenter, Dea D
Subject: RE: revision to chapter 12

[redacted]

Ramona -
Can someone on your team address the issue regarding the right to representation in marriage interviews as noted in the case cited in the Rees memo? I think the case is wrongly decided - and does not reflect the practice within the agency with regard to representation during the marriage interview process. My observation is based on the complaints I have received regarding the conduct of some attorneys during interviews.
Rachel

Rachel A. McCarthy
Ethics Counsel
U.S. Citizenship and Immigration Services 70 Kimball Avenue, Room 103 S. Burlington, VT 05403
(802) 660-1779
(802) 660-5067 (facsimile)

From: Whitney, Ronald W
Sent: Tuesday, October 17, 2006 5:26 PM
To: Groom, Molly M; Divine, Robert; Muhletaler, Catherine; Mcgee, Ramona L
Cc: Carpenter, Dea D; McCarthy, Rachel A
Subject: RE: revision to chapter 12

[redacted]

--Ron

-----Original Message-----
From: Groom, Molly M
Sent: Tuesday, October 17, 2006 5:18 PM
To: Divine, Robert; Muhletaler, Catherine; Mcgee, Ramona L; Whitney, Ronald W
Cc: Carpenter, Dea D; McCarthy, Rachel A

(b)(5)

Subject: RE: revision to chapter 12

Including Ron for his thoughts particularly with regrda to representation in refugee interviews.

-----Original Message-----
From: Divine, Robert
Sent: Monday, October 16, 2006 11:50 PM
To: Muhletaler, Catherine; Mcgee, Ramona L; Groom, Molly M
Cc: Carpenter, Dea D; McCarthy, Rachel A
Subject: FW: revision to chapter 12

I think this addresses the one change I had suggested from the most recent version, so I think this is ready to go. I ask Ramona and Molly to have someone take one more look at it, and Cathy to prepare a cover sheet to clear this, I guess with a cover memo from someone (Aytes and Scialabba? Scharfen? Me?). Thanks for pushing through this.

Robert C. Divine
Chief Counsel, USCIS
202-272-1400

From: McCarthy, Rachel A
Sent: Thursday, October 12, 2006 11:16 AM
To: Divine, Robert; Carpenter, Dea D; Muhletaler, Catherine
Subject: revision to chapter 12

(b)(5)

[redacted]

Rachel A. McCarthy
Ethics Counsel
U.S. Citizenship and Immigration Services
70 Kimball Avenue, Room 103
S. Burlington, VT 05403
(802) 660-1779
(802) 660-5067 (facsimile)

Out-of-Scope

- **Role of the Attorney/Representative**

Stakeholders continue to be concerned about how some attorneys are treated by USCIS adjudicators in the context of benefit interviews, particularly with regard to seating arrangements. FO leaders agree that, barring safety or security concerns, attorneys and/or accredited representatives should be able to sit next to their clients during benefit interviews. We are working on guidance to address concerns expressed by stakeholders and will post it once available on the USCIS website.

If an attorney or accredited representative feels that an adjudicator is asking inappropriate questions during the interview, they should ask to speak with a supervisor. USCIS has spent a considerable amount of time training the ISOs on interview techniques; the FO Directorate also has a quality assurance process on test administration to identify and address issues of concern.

The Agency respects the attorney-client relationship and asks that attorneys and accredited representatives likewise respect USCIS staff in the context of benefit and other interviews/interactions. Future guidance will address how ISOs should report instances involving perceived inappropriate conduct by attorneys and/or accredited representatives and also the reverse (i.e., how attorneys and/or accredited representatives should report perceived inappropriate behavior by ISOs).

USCIS Response: Over the past several years USCIS has instituted several tools to assist customers in obtaining information about their case status. These tools include "My Case Status," the National Customer Service Center, and Infopass appointments. For general case status inquiries, all customers, including attorneys, should use these tools. Field Operations has discouraged the use of special email addresses for certain stakeholders as it provides unequal access and is fundamentally unfair particularly for applicants who file *pro se*. If you have an inquiry, we recommend that you submit your questions through established processes. If you feel that your inquiry was not responded to appropriately, you are encouraged to raise your concerns to a supervisor.

b. Where attorneys are scheduled for multiple interviews simultaneously, there appears to be no policy or procedure to communicate with the field office to work out a resolution and re-schedule appointments. When two interviews are scheduled for the same attorney on the same date, at the same time, what steps should the attorney take to notify the Field Office of the scheduling conflict? Will the field office reschedule the interviews to ensure that the attorney can appear with both clients?

USCIS Response: Please follow the instructions on the appointment notice to request that one of the interviews be rescheduled. You may also make a rescheduling request by contacting the National Customer Service Center (NCSC) at 1-800-375-5283.

c. Appointments are sometimes scheduled with only ten days notice between the mailing and notice date and the date of the interview. This leaves little time for the applicants to make any necessary arrangements to attend the interview (request time off from work, secure child care, etc.) and to adequately prepare for the interview. Is it possible to extend the period of notice for the interview to a more reasonable time?

USCIS Response: USCIS strives to process and adjudicate applications in a timely manner and we believe that customers appreciate these efforts. If an applicant cannot attend a scheduled interview, he or she may request that the interview be rescheduled. Please keep in mind, however, that a request to reschedule an interview may delay the processing of the case.

Question 4: Right to Effective Representation during Interviews of Applicants and Petitioners

a. Section 15.8 of the USCIS *Adjudicator's Field Manual* (AFM), "Role of Attorney or Representative in the Interview Process" states:

> *The attorney's role at an interview is to ensure that the subject's legal rights are protected. An attorney may advise his client(s) on points of law but he/she cannot respond to questions the interviewing officer has directed to the subject.*
>
> *Officers should not engage in personal conversations with attorneys during the course of an interview.*

Additionally, Subsection (b) of Chapter 15.4 provides that:

> An adjudicator may terminate an interview, even when all essential information has not been elicited, but when "[a]n attorney insists on responding to questions or coaching the person being interviewed."

However, 8 CFR §292.5(b) states:

> ***Right to representation.*** *Whenever an examination is provided for in this chapter, 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.*

The regulation permits counsel to play a much broader role in the representation of clients during interviews than that set forth in the AFM. We respectfully request that this issue be studied with a view toward amending the AFM to better conform with the scope of the regulations.

USCIS Response: On April 23, 2011, USCIS Director Alejandro Mayorkas met with representatives from AILA and the American Immigration Council (AIC) to discuss this issue. The Agency respects the attorney-client relationship and asks that attorneys and accredited representatives likewise respect USCIS staff in the context of benefit and other interviews/ interactions. Attorneys or accredited representatives may voice objections to questions, point out errors on points of law, and provide a closing statement on behalf of their client. They may not, however, answer questions for their client unless requested to do so by the adjudicator, or impede proper questioning by the adjudicator. Where a private attorney or accredited representative believes that an interview is being conducted improperly or in disregard of the law, he or she may bring their concern to the attention of a supervisor as directed locally. Adjudicators are likewise responsible for reporting through proper supervisory channels behavior by an attorney or accredited representative that they believe is unethical or in violation of the law.

Future guidance will address how ISOs should report instances involving perceived inappropriate conduct by attorneys and/or accredited representatives and also the reverse (i.e., how attorneys and/or accredited representatives should report perceived inappropriate behavior by ISOs).

b. **Role of the Attorney.** We have received reports that some field offices restrict the involvement of the attorney during the interview process. The USCIS Milwaukee Field Office has stated that it follows AFM §15.8, which explains that the attorney's role at the interview is limited to advising his or her clients on points of law, and that the attorney may not respond to questions the interviewing officer has asked the applicant. The office has stated that after the interview, the attorney may follow-up with any concerns regarding the interview and interview questions, or may submit additional information in response to a Notice of Intent to Deny. While we understand the attorney may not answer any questions on

behalf of the applicant, there are often times where it is not only appropriate, but helpful to the examiner for an attorney to help clarify a point of confusion, provide prepared documents on a legal issue, or explain a complicated procedural issue in the applicant's immigration history that the applicant might not fully understand. What guidance, if any, in addition to the AFM, has been provided to USCIS examiners regarding the role of the attorney in the interview process?

USCIS Response: USCIS has spent a considerable amount of time training the ISOs on interview techniques. This training is provided at the field offices and at the ISO Basic training and includes information on the role of the attorney or representative in the interview. Also, as discussed at the meeting with AILA, AIC, and USCIS in April 2011, we welcome suggested language from AILA to potentially incorporate into any guidance USCIS creates regarding this topic.

c. **Attorney Seating.** We have been informed that during interview for immigration benefits, attorneys are sometimes instructed to sit in a corner of the room, behind or otherwise apart from the applicant. Examiners have remarked that this rule is to prevent attorneys from participating in the interview. Such a rule conflicts with the right to representation as provided under 8 CFR §292.5(b). Would Field Operations send clear guidance to the field offices stating that attorneys have a right to attend and represent their clients at interviews for immigration benefits, and should be permitted to sit next to their clients, or make other comparable arrangements if space does not easily permit, that would allow the attorney to properly observe the interview and provide appropriate legal assistance?

USCIS Response: Field Operations provided guidance to its offices regarding seating of attorneys during interviews in May 2010 and again in April 2011.

It is critical that USCIS respect the integrity of the attorney/client relationship. Attorneys and/or accredited representatives should, barring safety or security concerns, be permitted to sit next to their clients during interviews. In terms of safety and security, in directing seating during benefit interviews, adjudicators should ensure that:

- Officers have a full view of everyone in the room,
- No one in the room, other than the officer, is seated in view of a government computer/monitor screen, and
- Egress is not blocked for any of those present in the interview room.

Please understand that some interview rooms are not large enough to accommodate the applicant(s) and attorney all sitting in the same row. In these situations, an attorney may be asked to sit behind his or her client.

Question 5: Post-Interview Follow-up Notices Not Sent to Attorneys

Members have reported instances where USCIS concluded an interview with the G-28 attorney present, and USCIS has later contacted the applicant without notifying the attorney, to request

that the applicant return to USCIS for a second interview, to sign a sworn statement, or to request more evidence. Absent an attorney's written waiver of appearance or withdrawal of representation, what is the protocol for a field office to contact a represented individual without counsel present?

USCIS Response: ISOs should contact the attorney or representative of record; however, on occasion this does not happen. USCIS believes that these are isolated incidents and would welcome examples. We have asked field leadership to remind ISOs that represented applicants should not be contacted without first notifying the attorney and any notices or correspondence should also be sent to the attorney.

Question 6: Adjudications of Form I-751

At the January 2011 Field Operations Directorate Liaison Meeting, AILA asked if, in the wake of a series of reports of harsh treatment of petitioner interviewees under the I-751 hardship and abuse category, USCIS would establish training of officers interviewing these cases similar to that of the VAWA adjudicators at the Vermont Service Center.

While we understand that unprofessional conduct by an adjudicator may also be reported to a supervisor, we believe that an officer who adjudicates cases under this category is in a similar situation to those adjudicating I-360 petitions and should, therefore, have a heightened level of training in the effects of abuse which is afforded to the VAWA adjudicators. Could USCIS designate specific officers with training in that area to adjudicate these petitions?

USCIS Response: It is not always feasible nor is it efficient, particularly in smaller offices, to designate officers for specific types of cases. USCIS is working with the training division to develop a training module focusing on interviewing techniques for victims of abuse or trauma.

Question 7: Defense of Marriage Act Cases

Same-sex marriage is legal in many jurisdictions within the United States, and the Administration recently announced it will no longer defend the constitutionality of section 3 of the Defense of Marriage Act (DOMA) (AILA Doc. No. 11032830).[3]

a. After stating that USCIS would hold I-130 same-sex marriage cases in abeyance while awaiting judicial review, USCIS reversed its position and announced that these cases will move forward. What instructions have field offices received, or will they receive, on these cases, and in particular, how will USCIS adjudicate these I-130s in districts where federal courts have struck down DOMA?

USCIS Response: USCIS briefly held cases to await guidance; USCIS's actions regarding DOMA were misconstrued in the media. USCIS stated on March 28, 2011, "USCIS has issued

[3] See AILA Doc. No. 11032830, http://www.aila.org/content/default.aspx?docid=34956

Wicks, Joyce M

From: Enzer, Ethan
Sent: Wednesday, November 18, 2009 4:34 PM
To: Andrew Wizner
Cc: Holmes, M Frances; Bonilla, Iris G; Wicks, Joyce M; Keck, Peggy M; Dyer, Amanda; Kunver, Raj
Subject: RE: New Hartford Policy Regarding Attorney Representation?

Andy:

Thanks for the note. Here is a more official notice:

Hartford is now in compliance with the regulations as well as agency policy concerning G-28's insofar those persons eligible for representation per 8 CFR 103.2(a)(3). The G-28 form has been revised as you know. In the past we took a somewhat permissive / relaxed position on whether a beneficiary of an I-130 is entitled to sign and therefore be represented by counsel, and permitted such representation. Now we have been reminded, along with the issuance of the new G-28, to not honor any notice of appearance with the alien beneficiary named or signed for as a represented party.

In fairness to the interests of the represented petitioner we will permit the attorney of record to be present in separation interviews (Q&A's) involving the beneficiary only, and the attorney may take notes. The attorney is not permitted to participate in the interview, to elicit or clarify the beneficiary's responses, or to verbally or otherwise engage the beneficiary or the officer.

I-751's are viewed differently in that they are joint petitions. Likewise, in the case of a removal of conditions petition filed by the alien spouse based on the good faith waiver, the alien is the petitioner.

Ethan Enzer
Field Office Director - Hartford Field Office
United States Citizenship and Immigration Services
450 Main Street, First Floor
Hartford, CT 06103
Tel: (860) 728 2360 Fax: (860) 728 2355

From: Andrew Wizner [mailto:AWizner@lkwvisa.com]
Sent: Wednesday, November 18, 2009 3:42 PM
To: Enzer, Ethan
Subject: RE: New Hartford Policy Regarding Attorney Representation?

Ethan, thanks for that clarification. Could I impose on you to provide the policy in a brief statement that we could distribute directly to our members? I think we will want to explore this new policy with you after I fully understand it. Thanks. --Andy

Andrew L. Wizner, Esq.
Leete, Kosto & Wizner, LLP
999 Asylum Avenue, Suite 202
Hartford, Connecticut 06105
Tel.: 860-249-8100
Fax: 860-727-9184
awizner@lkwvisa.com

From: Enzer, Ethan [mailto:ethan.enzer@dhs.gov]
Sent: Monday, November 16, 2009 1:25 PM
To: Andrew Wizner
Subject: FW: New Hartford Policy Regarding Attorney Representation?

Andy:

Could you share with me which file # had the simultaneous I-130 and I-751 tha[redacted] mentioned in his notes?

Also, we recognize that in the context of an I-751 alone that there are representational rights for the alien.

(b)(6)

Ethan Enzer
Field Office Director - Hartford Field Office
United States Citizenship and Immigration Services
450 Main Street, First Floor
Hartford, CT 06103
Tel: (860) 728 2360 Fax: (860) 728 2355

From: Enzer, Ethan
Sent: Monday, November 16, 2009 12:50 PM
To: Andrew Wizner
Cc: Holmes, M Frances
Subject: RE: New Hartford Policy Regarding Attorney Representation?

Andy:

I do apologize for not getting this office practice out to you beforehand. Over the last 30 days there has been a lot of traffic on the updated G-28. We have been reminded that beneficiaries are not included as eligible for representation per 8 CFR 103.2(a)(3). In the past, we'd not made it an issue because so many G-28's have been signed by the beneficiary. That should not have been the case and we're to be consistent. We've also consulted USCIS Counsel again on exactly who can be represented, and I have been closely involved in those discussions. Because we view the petitioner's interests are represented but not the beneficiary per se, we are going to permit the attorneys to observe when a separation interview occurs (with the beneficiary only) and to take notes, but the attorney is not to advise or clarify or otherwise engage with the beneficiary or the officer. And I remind the attorneys that there is no Stokes precedent controlling in CT.

Ethan Enzer
Field Office Director - Hartford Field Office
United States Citizenship and Immigration Services
450 Main Street, First Floor
Hartford, CT 06103
Tel: (860) 728 2360 Fax: (860) 728 2355

From: Andrew Wizner [mailto:AWizner@lkwvisa.com]
Sent: Friday, November 13, 2009 1:24 PM
To: Enzer, Ethan; Holmes, M Frances
Subject: New Hartford Policy Regarding Attorney Representation?

(b)(6)

DD Holmes and Ethan: I am writing to inquire whether there is in fact a new Hartford policy relating to Attorney representation. Below is a portion of an e-mail that I received from Attorney [redacted] ollowing an initial interview (that turned into a Q&A) he had yesterday in Hartford with ISO[redacted]

****

(b)(6)

Hartford Exams has a new policy that in marriage cases the attorney can only speak on behalf of or review documents that pertain to the petitioner, not the beneficiary. Permission to remain in the room while the beneficiary is questioned is "a courtesy," not a right under this policy. So in my Stokes interview I was told I could not speak or pose questions relating to the beneficiary and could not review her Q+A with her. Examin[redacted] were quite clear that this is a new policy, which the supervisor is entirely aware of.

(b)(6)

****

I spoke with Michael about the interview. The case involved an I-130 and an I-751.

I am wondering why AILA did not receive advance notice of this new policy. Could you please provide a copy of the policy so that we can distribute it to our members?

While we are aware of the regulation at 8 C.F.R. 103.2(a)(3), we do not understand how anybody being questioned by the USCIS could be deprived of representation by an attorney. We would like some further clarification of this issue prior to our December 1st meeting.

Meanwhile, we would appreciate advance notice of future policy changes at HAR CIS.

--Andy Wizner

Andrew L. Wizner, Esq.
Leete, Kosto & Wizner, LLP
999 Asylum Avenue, Suite 202
Hartford, Connecticut 06105
Tel.: 860-249-8100
Fax: 860-727-9184
awizner@lkwvisa.com

AMERICAN IMMIGRATION COUNCIL,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

Civil Action No. 11-1972 (JEB)

EXHIBIT D TO DECLARATION OF MELISSA CROW

Other law: Pub. L. 99-396 (Omnibus Territories Act).

Regulations: 8 CFR 212, 214, 231, 232, 233, 235; 22 CFR 41.

15.1 General Considerations and Processing Instructions. (Revised 5/16/05; CBP 9-05)

(a) General. As a primary inspector, the majority of your workload will deal with nonimmigrant aliens. You must be thoroughly familiar with the requirements for admission of the many nonimmigrant classes you encounter in order to function effectively as an inspector. Familiarity with the requirements for various categories will increase your efficiency in detecting inadmissible aliens and will accelerate the admission process for those who meet the necessary requirements.

(b) Preparation of Forms I-94 and other INS documents.

General: You perform a vital role in creating an accurate record of admission, the basis for all further immigration-related activity that a nonimmigrant may engage in while in the United States. Your processing of the basic Form I-94, Arrival-Departure Record, and other documents you encounter during the inspection process is a critical part of the agencies' system of records. It is important that you properly record relevant notations such as file numbers, waivers, and any restrictions on admission in the appropriate places on agency forms. Precise adherence to standards for entries on these forms is critical to creating reliable databases. In turn, reliable databases are essential to the CBP law enforcement and intelligence missions.

The specific requirements for issuing Form I-94 are set forth in 8 CFR 235.1(f). The Form I-94 may be issued for a single entry, or, at land border ports-of-entry, it may be valid for multiple entries for frequent border crossers. See Chapter 21.7. A special edition of Form I-94 is required for Visa Waiver Program aliens (Form I-94W) and certain land border POEs generating the form electronically (Form I-94A).

Forms I-94A are issued at designated land border POEs. The Form I-94A is identical to the Form I-94; however, the biographical, visa, passport and U.S. destination data is electronically printed on the Form I-94A, Departure Record. This information is electronically captured in IBIS eliminating the need to produce a hardcopy of the Form I-94 Arrival Record for submission to the contractor for data entry. This system is also used to generate the Form I-94W.

(A) Airport/seaport Processing: As a CBP Officer, you must take such reasonable time as needed to ensure that all Forms I-94 presented to you during your inspection activities are filled out completely, are legible, and accurately reflect the nonimmigrant's passport or other appropriate travel document information.

You must ensure that each nonimmigrant alien presents the correct version of Form I-94. Aliens seeking admission with a nonimmigrant visa must never submit a green Form I-94W. Only nonimmigrant aliens seeking entry under the Visa Waiver Program (VWP) may use this version of Form I-94. Conversely, an alien seeking entry under the Visa Waiver Program must never submit a white Form I-94. You must not process an alien for admission if they present the incorrect version of Form I-94.

A valid B-1/B-2 visa takes precedence over any application for admission made under the VWP. Thus, if a national from a VWP country presents a Form I-94W but has a valid B-1/2 visa in his or her passport, the alien must be issued a regular Form I-94 and processed as a B-1/2 visitor.

In particular, it is critical that all arriving aliens that are required to be documented on Form I-94 or I-94W provide an adequate address in the United States. An adequate address is one at which any law enforcement official could locate the nonimmigrant alien without undue delay. Nonimmigrant aliens who claim to be touring (e.g. by bicycle or car) must still provide an adequate address for their first night's lodging. In some situations, the address provided might be that of another person who will know the actual whereabouts or itinerary of the named nonimmigrant alien. Nearly all travelers know where they are going - how else are they going to give a taxi driver directions? Many carry printed itineraries from travel agents, or receipts from Internet web sites. They also usually know a relative or sponsor's phone number or address.

You must not process an alien until and unless they provide full and correct information on Form I-94 or I-94W. If you encounter an alien with an incomplete or improperly completed Form I-94, as the situation warrants and depending on local operating conditions, you should first refer these aliens to carrier personnel for assistance in completing the arrival and departure information properly. If this does not result in an acceptable Form I-94, you may refer nonimmigrants that are unwilling to provide complete arrival and departure Form I-94 information, including an adequate address, for secondary processing so they do not delay primary inspection processing.

(B) Land Border Processing: During the primary inspection, determine if additional documentation is required. If so, refer the alien to secondary inspection for further review and processing. Aliens seeking entry under the Visa Waiver Program must be documented on a green Form I-94W. You must document those aliens seeking admission with a nonimmigrant visa, and aliens applying for nonimmigrant classification other than a visitor status and exempt nonimmigrant visas on a white Form I-94. Generally, the inspector will complete the Form I-94, Form I-94W or I-94A, where available. However, there are no restrictions preventing the alien or a third party from filling out the form (except for the Form I-94A). Review the data to ensure that it is complete, legible, and accurately reflects the nonimmigrant's passport or other appropriate travel document information. It is critical that all arriving aliens who are required to be documented on Form I-94, Form I-94W or Form I-94A provide an adequate address in the United States. An adequate address is one at which any law enforcement official could locate the nonimmigrant alien without undue delay.

Nonimmigrant aliens who claim to be touring (e.g. by bicycle or car) must still provide an adequate address for their first night's lodging, unless the alien is making a short day trip to visit or shop.

(2) Securing Form I-94: Once you complete your primary inspection and separate the departure and arrival portions of Form I-94, you must staple the departure portion of the Form I-94 to the nonimmigrant alien's passport at the bottom edge of the form, at or next to the words "STAPLE HERE." The departure Form I-94 contains this perforated tab specifically for stapling. Do not staple the departure portion of Form I-94 in any other manner. Advise the alien of the requirement to surrender the Form I-94 upon departure, as instructed on the reverse side of the form. When the alien departs the United States, carrier personnel can easily remove the departure card from the alien's passport by tearing along the perforation, without damaging the important information on the departure card.

(3) Special Endorsements: The reverse of Form I-94 contains a series of blocks that must be completed by the inspecting officer in certain instances. Specific requirements are included below, in the discussion of each nonimmigrant category – see Chapter 15.4. This information is entered into CBP automated records. CBP uses these records for a variety of reports to Congress and others. Thus, accurate entry of data into these fields is very important. Item 18 on Form I-94 is of particular Congressional interest and is required for a variety of international agreements. The following table explains the usage of each block on the reverse of Form I-94.

#	Block Title	Usage
1	Occupation	Complete for principal H, J, L, O, P, Q, R, and NAFTA
1	Waivers	Insert section of law for any type of waiver granted
2	INS file	Insert any known "A" number relating to this alien
2	INS FCO	Insert files control office (FCO) when known
2	Petition Number	Complete for H, L, O, P, and Q principals. For F, J, and M record the 10 digit SEVIS ID number.
2	Program Number	Complete for J-1
2	Bond	Check block if bond posted
2	Prospective Student	Check block if prospective student status was indicated by the alien or the U.S. consulate

2	Itinerary/Comments	Various (see notes for each nonimmigrant class)

(4) Exemptions to Form I-94 Requirements: A Form I-94 is not required for the following classes of nonimmigrants:

(A) A Canadian national or other nonimmigrant described in 8 CFR 212.1(a) or 22 CFR 41.33 admitted as a visitor for pleasure or business or in transit through the U.S.;

(B) A nonimmigrant alien residing in the British Virgin Islands admitted solely to the U.S. Virgin Islands for business or pleasure under 8 CFR 212.1(b);

(C) A Mexican national seeking admission for business or pleasure, within 25 miles of the Mexican border, for less than 72 hours, holding a valid Mexican Border Crossing Card (any form) or valid Mexican passport and multiple entry B-1 or B-2 visa;

(D) A Mexican national seeking admission for business or pleasure through the Arizona land border ports-of-entry at Naco, Sasabe, Nogales, Mariposa, and Douglas, traveling within 75 miles of the Mexican border, for less than 72 hours, who holds either a valid Mexican Border Crossing Card (any form) or valid Mexican passport and multiple entry B-1 or B-2 visa;

(E) A Mexican national, holder of a diplomatic or official passport, as described in 8 CFR 212.1(c)(1); or

(F) Certain NATO nonimmigrant aliens described at 8 CFR 214.2, who are exempt from the control provision of the Act (refer to 8 CFR 235.1(c)).
You will handle other Department of Homeland Security (DHS) documents that are used as primary data entry documents, notably for employment authorization and alien registration. In any situation where you are required to enter data on such forms or capture a signature specimen, fingerprint, or photograph, review the materials carefully to insure full compliance with the specifications for the form. Historically, the ports-of-entry have had a high rejection rate for such forms, resulting in extra work for the agency and serious inconvenience for travelers. Take the time to review data collection forms before the applicant leaves the area. Periodically review local data collection and quality control procedures to insure full compliance with set standards.

(5) Departure Form I-94 in Passport of Arriving Nonimmigrant Alien: If a nonimmigrant alien arrives with an unexpired Form I-94 that will not be replaced during the course of the inspection due to automatic revalidation provisions as discussed in Chapter 15.3(b), you may readmit for the time remaining after you are satisfied that the alien is admissible.

Special Note for Students: You must issue a new Form I-94 to:

- Academic students (F-1) and their dependents (F-2) in possession of a properly

endorsed SEVIS Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, who are returning from other than contiguous territory or adjacent islands, or who are returning from contiguous territory or adjacent islands from a departure of more than 30 days, unless the alien is continuing as a student returning from a single break between classes/semesters and has not departed beyond those contiguous territories or adjacent islands during the break.

- Vocational students (M-1) and their dependents (M-2) in possession of a properly endorsed SEVIS Form I-20 who are returning from other than contiguous territory, or who are returning from contiguous territory from a departure of more than 30 days. You must not use the initial or previously issued Form I-94 and former admission number upon readmission. Endorse the new Form I-94 in the manner described below.

[redacted]

(6) Signifying departure on Form I-94 with a CBP Admission Stamp: In the routine course of operations, you will receive departure portions of Form I-94, Form I-94W or Form I-94A. This may occur when individual aliens seek to report their departure, or carriers and border management officials return departure Forms I-94 under a local operating agreement. Regardless of the method you received the departure Form I-94[redacted] this date is entered as the departure date during the data entry process, the system may determine that the alien overstayed his or her earlier authorized period of admission. This error could have serious implications for the nonimmigrant for future travel to the United States. However, in some circumstances, at some locations, border control officials from Canada or Mexico may apply their admission stamp to the reverse of a departure Form I-94. If the date on a Canadian or Mexican admission stamp reflects a current departure from the U.S. and entry to contiguous foreign territory, this is acceptable as evidence of departure from the U.S. Forward these Form I-94s for data entry.

(c) Procedures for Processing Form I-94s: All arrival Forms I-94 collected by CBP officers and departure Forms I-94 collected by carrier personnel (or, at land borders directly by CBP) must be promptly routed for data entry to the CBP contractor. See handling procedures in Chapters

21.8 (land), 22.7 (airport), and 23.4 (seaport).

In addition, remove all staples, paper clips, or other foreign materials from any Form I-94 prepared for sending to data entry before bundling with other Forms I-94. The only exceptions are that Form I-94 should remain stapled to Form I-736, Guam Visa Waiver Information. The properly annotated, sorted, and bundled arrival and departure Forms I-94 and I-94W for all nonimmigrant aliens must be shipped daily, but not later than the following business day, via overnight express package delivery services, or fastest available surface mail service to the CBP data entry contractor at the address contained at Appendix 15-8.

(d) Miscellaneous Procedures for Handling Certain Form I-94s: In addition to Forms I-94 encountered at the ports-of-entry during routine primary inspection processing, you may frequently encounter situations which cause serious complications if arrival and departure records are not corrected or properly recorded to the IBIS. These situations and procedures for addressing them include:

(1) Departure Form I-94 not immediately available: When a nonimmigrant visitor asks how to return a departure Form I-94 that a carrier failed to collect on departure, you should advise the nonimmigrant alien that, if he/she returned home with the Form I-94/Form I-94A (white) or Form I-94W (green) in their passport, he/she must correct CBP records. He/she must provide CBP sufficient information to enable us to connect their claimed departure to their original arrival into the United States, so we can close the prior record. Provide the alien(s) the material contained at **IFM** Appendix 15-10.

(2) Correcting "Confirmed" Overstay Lookouts: When a previously recorded, but allegedly erroneous, Form I-94 arrival or departure date causes an automatic lookout entry because the system determined a confirmed overstay condition existed, CBP must try to determine the correct arrival and departure date sequence. Once the arrival or departure date is entered to the IBIS, only the CBP Lookout Unit can change these dates. There are internal procedures to accommodate this. These situations frequently occur as written complaints from aliens, Congressional inquiries, or letters from attorneys or employers.

To address these alleged mistakes, officers handling complaints or inquiries must advise the alien or their representative to submit the information referenced in (d)(1) above to the local port-of-entry or local CBP office, not directly to the CBP' contractor, specified at Appendix 15-10. When the alien or their representative return the supporting information, personnel at the local port-of-entry or field office must forward the information, with an explanation of the issue, the current facts contained in IBIS, and a formal request to the CBP Lookout Unit to request the Lookout Unit to modify the dates shown in the IBIS database.

Under no circumstances are CBP personnel to advise aliens or members of the public to communicate with or write to the Lookout Unit directly.

15.2 Passports.

Chapter 17: Inadmissible Aliens

References:

INA: Sections 212, 235, 240, 241.

Regulations: 8 CFR 212, 235, 240, 241.

17.1 Deferred Inspection. (Revised 5/16/05; CBP 9-05)

(a) General. A deferred inspection may be used when an immediate decision concerning admissibility cannot be made at a port-of-entry (POE) and the officer has reason to believe that doubts about the alien's admissibility can be overcome through:

- presentation of additional evidence;
- further review of the case (including perhaps a review of an existing A file);

- the posting of a maintenance of status and departure bond; or
- other similar action that can only be conducted at the onward location.

In such cases the inspecting officer shall defer the inspection to the office having jurisdiction over the area where the alien will be staying. Deferred inspections may be necessary to review an existing file or some other documentary evidence essential to clarifying admissibility. The inspecting officer shall defer for a specific purpose, and not as a way to transfer a difficult case to another office. The inspecting officer should normally only use deferrals when it appears the case would probably be resolved in the alien's favor, with limited exceptions. The officer shall not defer an alien who is not expected to establish his or her admissibility. Before an alien is deferred, the inspecting officer shall consider the likelihood that the alien will abscond or pose a security risk.

When deferring an alien, the inspecting officer shall query at a minimum the IDENT, SQ11, Central Index and IAFIS, if available, databases in order to determine if any adverse information exists that would preclude the alien being paroled into the United States for deferred inspection and to provide additional information regarding the case. The deferring officer shall note the results on Form I-546, Order to Appear for Deferred Inspection as noted below.

The deferring officer should take the following factors into consideration when making a decision on whether to defer the inspection:

- The likelihood that the alien will be able to establish admissibility;
- The type of documents lacking, and the ability to obtain necessary documentation;
- The alien's good faith efforts to obtain necessary documents prior to arrival at the POE;
- The verification or establishment of the alien's identity and nationality;
- Age, health, and family ties;
- Other humanitarian considerations;
- The likelihood that the alien will appear;
- The nature of possible inadmissibility (i.e. criminal history, previous violations, etc.); and,
- The potential danger posed to society if the alien were to be paroled.

If the alien is clearly inadmissible or may pose a security risk or danger to society, the officer shall not defer the inspection. Instead, the officer shall place the alien in removal proceedings or allow him or her to withdraw his or her application for admission. For information regarding clearance of certain air cargo crewmembers, see Chapter 22.5(f)

(b) Deferral Procedures.

(1) Authorization: The responsibility to authorize a deferred inspection is delegated to the level of port director, assistant port director, or chief inspector at the GS-13 level and above. Express approval from the designated official is required before any inspection can be deferred. Current field guidance on approval authority can be found in CBP policy memorandum "Delegation of Immigration Authority Under Customs and Border Protection (CBP) (T# 03-0495)" dated May 22, 2003 and Exercise of Discretion – Additional Guidance, dated July 20, 2004.

(2) A-file: If an A-file does not exist, the deferring officer shall open one. To determine if an A-file exists, query the Central Index System. If there is an existing A-file, the deferring officer should indicate the file number and files control office on the Form I-546 so that the onward office can locate or request the file before the alien appears. In the event of an existing A-file, the deferring officer shall place all documentation in a temporary "T" file (unless the deferring officer has access to the A-file itself). The deferring officer shall forward the A-file or T-file containing the Form I-546 to the onward office within 24-hours of the scheduling of the deferred inspection.

(3) Each applicant whose inspection is deferred shall be photographed and fingerprinted on Form FD-249. Only one set needs to be completed. The set of fingerprints shall be maintained with the other information related to the alien and forwarded to the onward office in the A-file. This set of fingerprints is kept in the A-file or T-file (until consolidated with the A-File) and used if the alien fails to appear for his or her scheduled deferred inspection.

(4) Form I-94: Parole the applicant for a brief period, generally not to exceed 30 days, sufficient for the paperwork to arrive at the onward office and for the applicant to obtain any necessary evidence to establish admissibility (additional guidelines related to parole can be found in Chapter 16.1 of this field manual).

Stamp the departure and arrival portion of the Form I-94, with a parole stamp and endorse to indicate:

- Date to which deferred/paroled
- "DE, Deferred Inspection" (Purpose)
- Deferring port code
- Action date
- The officer's admission stamp number
- Onward office code

Place the alien's right index fingerprint on the reverse of the departure portion of the Form I-94.

(5) Deferred Inspection Documentation. All individuals scheduled for a deferred inspection are to be enrolled in the Enforcement Tracking System (ENFORCE). Generally, deferred inspections are documented on a Form I-546 and a Form I-259, Notice to Detain, Remove or Present Alien, if appropriate. General guidelines for creating a deferred inspection record in ENFORCE are as follows:

(A) Complete the Biographical Screen; an A-number is required. When finished, click on the Apprehension Screen.

(B)Apprehension Screen:

- Record the documents presented and arrival information.
- The Arrival/Departure Form I-94 number is mandatory.

- Click "Charges" then record the section of law and description of the inadmissibility.
- Record the U.S. and foreign address fields.
- Capture as much information as possible on the remaining tabs i.e. relatives, work information, scars etc.

(C) Select "Forms", then generate the forms necessary to document the deferred inspection.

i. Form I-546 Data Collection Screen: A deferred inspection places additional unscheduled work on the onward office. Appearance for deferred inspection may place additional burdens on the applicant who may, in many cases, be required to spend considerable time and money to comply with the required deferral procedures. Ensure that the information provided to the onward office is sufficient to allow the onward office to complete the deferred inspection in a single appearance.

ENFORCE contains a table of all deferred inspection sites. To retrieve the list, type in the first three-letters of the desired deferred inspection location or scroll through the alphabetical list in the "Address (Site)" data entry field. When selecting the "deferred inspection" disposition category, ENFORCE will display only deferred inspection sites in the "Reporting Address" drop down menu. Specific scheduling information such as hours and days of operation, telephone number and zip code are not encoded in the table. Some local offices conduct deferred inspections only on certain days of the week, or during certain hours, and may have specific room numbers for deferred applicants. Therefore, all secondary stations at POEs are to have current information on hours of operation, addresses and telephone numbers of CBP offices that handle deferred inspections available to verify scheduling information. Refer to http://cgovstaging/xp/cgov__Stage/toolbox/contacts/deferred_inspection/ for a complete listing. When scheduling the deferred inspection, identify a specific reporting date and a time block, rather than a specific time. There may be instances where the applicant is required to call the deferred inspection office directly to schedule an appointment. All individuals scheduled for a deferred inspection are to be given the telephone number of the onward office's deferred inspection unit.

The recommending officer must complete the "Detail" block in the following manner:

- Ensure that the information is complete and accurate for the inspector at the onward office by specifically stating the purpose of the deferral;
- Identify any documentation that the applicant is expected to produce;
- Record the results of the database queries;
- Annotate the name and title of the official that authorized the deferred inspection;
- Record the telephone number of the deferred inspection office: and,
- Identify the FCO of the existing A-file, if available.

ii. Form I-259 Data Collection Screen: The creation of the Form I-259 is required for deferred inspections created at the air and sea ports-of-entry. Form I-259 shall be served on the affected carrier or on the captain of a private aircraft or vessel. Generally,

the CBP Officer should select the fourth block "Notice of potential liability under section 241(c), (d), or (e) of the Act". In the event the alien is formally ordered removed, an amended Form I-259 should be created by checking the second block "Notice to Remove the Alien from The United States on __ at __", inserting the appropriate date and POE. The amended Form I-259 should be issued to the carrier responsible for removing the alien to the last port of embarkation prior to arrival in the United States. Follow local guidelines and procedures for authorization to detain an alien for removal.

iii. Q & A: Depending on the complexity of the case, the deferring office may wish to capture additional information using a question and answer format.

(E) Print Forms:

- Review the data for accuracy.
- Place a legible parole stamp in the "Details" block of the applicant's copy of the Form I-546. Endorse in the same manner as the Form I-94, as described above.
- Attach copies of the amended Form I-259 to the Form I-546 in the A-file or T-file.
- The CBP Officer processing the deferred inspection is to sign the line identified as "Signature of Recommending Officer".

The supervisory CBP Officer will verify that the details on the forms are correct and sign the Form I-546 in the space provided.

(F) Return to the IDENT screen and perform a search and enroll. Do not book the individual in IAFIS.

(6) Close Out:

(A) Verify that the applicant understands what documentation is necessary to overcome the inadmissibility when appearing for the deferred inspection. Prior to departing the secondary processing area, the applicant shall be given:

- the departure section of the Form I-94
- the appointment copy of the Form I-546 with a specific reporting date and a time block, rather than a specific time. In some instances, the applicant will need to contact the deferred inspection office to schedule the appointment.

(B) The deferring officer shall complete the Interagency Border Inspection System (IBIS) secondary screen indicating a deferral. In the remarks section, enter the office deferred to, date of inspection, and reason for deferral.

(C) A-file/T-file: The deferring officer shall include all forms generated in the A-file or T-file along with any other documents relevant to the inspection. The A-file or T-file is to be forwarded to the onward office within 24 hours of scheduling the deferred inspection. Follow local procedures for deferrals within the same field office.

(D) Reporting Requirements: The Form G-22.1 should be completed to indicate the

category and reason for the deferred inspection.

(E) Retention Requirements: A copy of Form I-546 shall be maintained at the deferring office until the ENFORCE record reflects that the case has been completed. Once completed, the deferring office may shred/destroy the original paperwork. POEs are responsible for monitoring the cases deferred to an onward office by reviewing the results of the deferred inspection in IO-95 or ENFORCE.

(c) Processing a Deferred Inspection at the Onward Office. The inspecting officer at the onward office should have received the deferral paperwork in advance of the applicant's appearance. It is the responsibility of the onward office to locate and request an already existing A-file, which should be reviewed prior to the applicant's appearance.

- If the applicant is found admissible, a new Form I-94 shall be executed using the office symbol of the onward office and the current date as the date of admission. The officer should ensure that the name, date of birth and country of citizenship written on the new Form I-94 is exactly the same as the information recorded on the Form I-94 issued at the time of the deferred inspection.
- If the inspecting officer concludes that the alien is inadmissible, the officer shall complete processing according to appropriate guidelines, which can be found in Chapters 17.2 through 17.17 of this field manual.

Upon completion of the deferred inspection, use IO-95 to create a new record within IBIS to show the deferred inspection results. Indicate the disposition on the Form I-546 included in the A-file. Forward the original deferred Form I-94 departure section and the new arrival section to the recipient indicated in Appendix 15-8 for data entry, if required. Record the final disposition of the deferral in ENFORCE. Query by event number, then record the outcome of the deferred inspection in the disposition data entry field located in the Form I-546 Data Collection Screen.

The Form G-22.1 should be completed to indicate the disposition of the deferred inspection. The disposition shall be noted on the Form G-22.1 under other (PORT = Other) secondary inspections operation report, complete other columns as appropriate.

(d) No Shows. The onward office is to monitor the cases referred for a deferred inspection. Cases should not be pending longer than 30 days after the expiration of the scheduled appointment, unless the applicant has requested an extension. If an alien fails to appear for his or her deferred inspection, a Form I-862, Notice to Appear shall be executed using the information listed on the Form I-546 and mailed to the address provided. All information related to the case shall be added to the A-file. A lookout must be posted in IBIS. All aliens who have lookouts posted shall be reported on the G-22.1 under "IBIS lookout entered". Criminal penalties and the possible pursuit of a criminal warrant under 8 U.S.C. 1325 shall be pursued on a case-by-case basis. All related information shall be forwarded to the CBP Prosecutions Unit (CBP Enforcement Officers) and/or U.S. Immigration and Customs Enforcement to allow further follow-up of the case. All aliens who fail to appear and for whom prosecution is pursued shall be reported of the Form G-22.1 under "Prosecutable Cases Referred to INV". Query ENFORCE by event number, in the "disposition" data entry field located in the Form I-546 Data Collection Screen, to record the action taken.

(e) Attorney Representation at Deferred Inspection. At a deferred inspection, an applicant for admission is not entitled to representation. See 8 CFR 292.5(b). However, an attorney may be allowed to be present upon request if the supervisory CBP Officer on duty deems it appropriate. The role of the attorney in such a situation is limited to that of observer and consultant to the applicant.

(f) Medical Deferrals. When deferring inspection for a medical ground of inadmissibility under INA Section 212(a)(1), consult with the Public Health Service (PHS) before permitting the alien to proceed. If the alien is required to submit to further medical examination prior to reporting to the onward office, return all medical documents including local PHS certification and x-rays to the applicant in a sealed envelope for presentation to the doctor, medical clinic, or PHS facility as instructed. If the alien is to report first to the onward CBP office, forward the medical documents with the deferral papers directly to the onward office.

17.2 Withdrawal of Application for Admission.

(a) General. A nonimmigrant applicant for admission who does not appear to the inspecting officer to be admissible may be offered the opportunity to withdraw his or her application for admission rather than be detained for a removal hearing before an immigration judge or placed in expedited removal. An alien cannot, as a matter of right, withdraw his or her application for admission, but may be permitted to withdraw if it is determined to be in the best interest of justice that a removal order not be issued. Before allowing an alien to withdraw, you must be sure that the alien has both the intent and the means to depart immediately from the United States. See section 235(a)(4) of the Act and 8 CFR 235.4.

Withdrawal is strictly voluntary and should not be coerced in any way. It may only be considered as an alternative to removal proceedings when the alien is not clearly admissible. Occasionally, POE workload, personnel resources, and availability of detention space may affect whether you will allow withdrawal or pursue removal proceedings before an immigration judge. However, in cases where the alternative to withdrawal is expedited removal, workload and detention space are less significant considerations.

In exercising your discretion to permit withdrawal, you should carefully consider all facts and circumstances related to the case to determine whether permitting withdrawal would be in the best interest of justice, or conversely, that justice would be ill-served if an order of removal were issued. In light of the serious consequences of issuing an expedited removal order, which includes a 5-year bar to re-entry, the decision of whether to permit withdrawal should be based on a careful balancing of relevant favorable and unfavorable factors in order to reach an equitable decision. Such factors might include, but are not limited to:

(1) The seriousness of the immigration violation;

(2) Previous findings of inadmissibility against the alien;

(3) Intent on the part of the alien to violate the law;

17.12 Bonds.

Whenever an alien for whom a bond has been posted is admitted, endorse the reverse of the arrival portion of the I-94 with the "A" number, FCO code and the word "Bond". When a bond has been pre-posted as a condition of visa issuance, the nonimmigrant visa will be so noted by the consular officer.

17.13 Visa Waiver Program Cases. (Revised IN01-04)

See discussion in Chapter 15.7 concerning VWP refusals and limitations on removal hearings. A VWP applicant who claims asylum may be accorded a limited removal hearing , but such a hearing is limited **solely** to the issue of asylum or withholding of removal, in accordance with 8 CFR 208.2(b). In such a situation, process the applicant using Form I-863, Notice of Referral to Immigration Judge.

17.14 Lookout Intercepts.

See Chapter 31.6.

17.15 Expedited Removal.

(a) Inadmissibility. Section 302 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amended section 235(b) of the Immigration and Nationality Act (Act) to authorize the Attorney General (now the Secretary of the Department of Homeland Security (DHS)) to remove without a hearing before an immigration judge aliens arriving in the United States who are inadmissible under section 212(a)(6)(C) or 212(a)(7) of the Act. Under these expedited removal provisions, aliens who indicate an intention to apply for asylum or who assert a fear of persecution or torture are referred to an asylum officer for a credible fear interview. Those who are found to have a credible fear by the asylum officer are referred to an immigration judge for a full removal hearing on the merits of their claim or claims.

The expedited removal provisions became effective April 1, 1997. Under section 235(b)(1) of the Act, expedited removal proceedings may be applied to two categories of aliens.

First, section 235(b)(1)(A)(i) of the Act permits expedited removal proceedings for aliens who are arriving in the United States. 8 CFR 1.1(q) defines the term "arriving alien." Refer to section (a)(1) of this chapter for the meaning of "arriving alien." Pursuant to section 235(b)(1)(F) of the Act, Cuban nationals who arrive at U.S. ports-of-entry

(POEs) by aircraft are exempt from expedited removal proceedings.

Second, section 235(b)(1)(A)(iii) of the Act provides the Attorney General (now the Secretary of DHS) the discretion to designate certain other aliens to whom the expedited removal proceedings may be applied, even though they are not arriving in the United States. This provision permits application of the expedited removal proceedings to any or all aliens who have not been admitted or paroled into the United States and who have not been physically present in the United States continuously for the two-year period prior to a determination of inadmissibility by an immigration officer. The Attorney General delegated this authority to designate classes of aliens to the Commissioner of the Immigration and Naturalization Service, and this has since been delegated to the Commissioner of CBP and the Under Secretary of Immigration and Customs Enforcement (ICE). Pursuant to 8 CFR 235.3(b)(1)(ii), the designation may become effective upon publication of a notice in the Federal Register.

On November 13, 2002, the INS published in the Federal Register a notice designating an additional class of aliens who may be placed in expedited removal proceedings - aliens who arrive in the United States by sea, who are not admitted or paroled, and who have not been physically present in the United States continuously for the two-year period immediately preceding the determination of inadmissibility. Aliens falling within this newly designated class will be detained at the discretion of the government during the course of immigration proceedings. This newly designated class does not include Cuban nationals, crewmen, or stowaways.

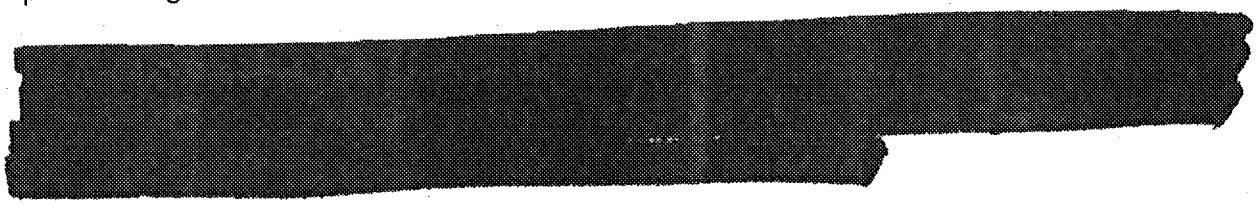
(1) Arriving Aliens. For an alien to be subject to the expedited removal provisions at a POE, the alien must first meet the definition of "arriving alien." The term "arriving alien" as defined in 8 CFR 1.1(q) means an applicant for admission coming or attempting to come into the United States at a POE, or an alien seeking transit through the United States at a POE, or an alien interdicted in international or U.S. waters and brought into the United States by any means, whether or not to a designated POE, and regardless of the means of transportation. An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the Act, except that an alien who was paroled before April 1, 1999, or an alien granted parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States shall not be considered an arriving alien for purposes of section 235(b)(1)(A)(i) the Act.

Aliens who entered the United States without inspection; aliens apprehended in the United States without legal status; and aliens who have departed the United States, are refused admission into another country and are thereafter returned back to the United States do not fall within the definition of arriving aliens. Alien stowaways on arriving vessels, lawful permanent resident aliens of the United States, or applicants under the Visa Waiver Program may be considered arriving aliens for other

purposes under the Act, but are not subject to the expedited removal provisions.

It is the responsibility of the officer to determine whether the alien is an arriving alien subject to being placed in expedited removal proceedings. Also see Chapter 17.11 for processing alien applicants for admission who claim asylum at ports-of-entry.

(2) Applicability. In general, arriving aliens who are inadmissible under section 212(a)(6)(C) and/or (7) are subject to expedited removal under section 235(b)(1) of the Act. Officers should only charge those grounds of inadmissibility that can be fully supported by the evidence and that will withstand any further scrutiny. Officers may, but need not, charge more than one ground of inadmissibility. If 212(a)(6)(C) and/or 212(a)(7) are the only charges lodged, the alien must be processed under expedited removal and may not be referred for an immigration hearing under section 240. If additional charges are lodged, the alien may be referred for a section 240 hearing, but this should only occur in extraordinary circumstances. Generally speaking, if an alien is inadmissible under 212(a)(6)(C) and/or (7), additional charges should not be brought and the alien should be placed in expedited removal. There will be very few instances where it will be advantageous to the government to lodge additional charges and institute section 240 removal proceedings if a solid expedited removal proceeding can be concluded. Even in criminal cases, an expedited removal proceeding will normally be the preferred option.



DHS retains the discretion to permit withdrawal of application for admission in lieu of issuing an expedited removal order (see Chapter 17.2). Provisions for withdrawal are contained in both statute and regulation, with specific guidance in the IFM, and should be followed by all officers with authority to permit withdrawals. As an example, in cases where a lack of proper documents is the result of inadvertent error, misinformation, or where no fraud was intended (e.g. an expired nonimmigrant visa), officers may consider, on a case-by-case basis and at the discretion of the government, any appropriate waivers, withdrawal of application for admission, or deferred inspection to resolve the ground of inadmissibility rather than issue an expedited removal order.

The authority to formally order an alien removed from the United States without a hearing or review, carries with it the responsibility to accurately and properly apply the grounds of inadmissibility.

(3) Grounds of Inadmissibility. All officers should be aware of precedent decisions

and policies relating to the relevant grounds of inadmissibility. Section 212(a)(6)(C) is an especially difficult charge to sustain unless the case involves obviously fraudulent or counterfeit documents. Misrepresentation is even more difficult to determine. Also keep in mind that an alien who is determined to be inadmissible for fraud or misrepresentation is barred forever from the United States, with few waivers available. Any one or several of the following points should be considered in determining if an alien has committed fraud or misrepresentation.

- To support a charge of having procured a document by fraud or misrepresentation, the procuring must have been done from a government official, not from a counterfeiter, and any misrepresentation must have been practiced on a U.S. Government official.

- The procurement by fraud must relate to a person who has done so to obtain his or her own admission, not someone else's.

- The fraud or misrepresentation must be material, i.e., the alien is inadmissible on the true facts, or the misrepresentation tends to shut off a relevant line of inquiry that might have resulted in a determination of inadmissibility.

- In general, an alien should not be charged with misrepresentation if he or she makes a timely retraction of the misrepresentation, in most cases at the first opportunity.

- Silence or failure to volunteer information does not in itself constitute a misrepresentation.

- Aliens who are determined to be mentally incompetent and small children judged to be incapable of independently forming an intent to defraud should not be ordered removed using section 212(a)(6)(C)(i) as the inadmissibility charge. The preferred charge in such cases would be section 212(a)(7)(A).

- Section 344 of IIRIRA did not create any waiver for immigrants found inadmissible under section 212(a)(6)(C)(ii) relating to false claims to U.S. citizenship. Therefore, immigrants found inadmissible under section 212(a)(6)(C)(ii) are permanently barred from the United States.

(4) Supervisory approval of removal orders. All expedited removal orders require supervisory approval before service upon the alien. By regulation, this approval authority is not to be delegated below the level of a second-line supervisor. Each field office may determine at what level (second-line supervisor or above) this review authority should be delegated.

The expedited removal provisions are not applicable in pre-clearance or pre-inspection operations. If DHS wishes to proceed with expedited removal of an alien inspected during an en route inspection of a vessel, action on the case will be deferred until the vessel has arrived in the United States. The alien may then be processed as an expedited removal case.

Port directors are responsible for ensuring that all officers conducting expedited removal proceedings, and supervisors approving expedited removal orders, are properly trained in the expedited removal provisions.

See Appendix 17-3 for a flow chart mapping the entire expedited removal process.

(Paragraph (a) amended 8/21/97; IN97-05)

(5)Aliens seeking asylum at land border ports of entry. Section 235(b) of the INA does not provide for an affirmative asylum application process at a port of entry. Therefore, an officer should consider an alien who arrives at a land border port-of-entry and seeks asylum to be an applicant for admission by operation of law. The alien will most likely be inadmissible under section 212(a)(7)(A)(i) of the INA as an intending immigrant without proper documentation or under section 212(a)(6)(C) of the INA as an immigration violator with fraudulent documents. As a result, he or she will be subject to expedited removal proceedings.

Except as noted below, the alien, if otherwise subject, should be placed in expedited removal proceedings, referred for a credible fear interview, and detained pending a final determination of a credible fear of persecution or torture. See INA § 235(b)(1)(B)(iii)(IV); 8 CFR § 235.3(b)(4)(ii). Once it has been determined that an alien has a credible fear of persecution or torture, DHS may continue to detain the alien or parole the alien from custody, as appropriate.
(Paragraph (a)(5) added 11-1-05; CBP 12-06)

(6) Cuban asylum seekers at land border ports-of-entry. Natives or citizens of Cuba arriving at land border ports of entry, whose immediate removal from the United States is highly unlikely, should be placed directly into section 240 proceedings in lieu of expedited removal, without lodging additional charges. These aliens may be paroled directly from the port of entry while awaiting removal proceedings if identity is firmly established, all available background checks are conducted, and the alien does not pose any terrorist or criminal threat. Pursuant to section 235(b)(2)(C) of the INA, they may also be returned to contiguous territory pending removal proceedings under section 240 of the INA. This option should only be considered if the alien is not eligible for the exercise of parole discretion, the alien has valid status in Canada or Mexico, Canadian or Mexican border officials are willing to accept the alien back, and the claim of fear of persecution is

unrelated to Canada or Mexico.

An officer should not parole a native or citizen of Cuba from a land border port of entry for the sole purpose of allowing the alien to apply for adjustment under the Cuban Adjustment Act of 1966, Pub. L. 89-732, 80 Stat. 1161 (1966), without initiating section 240 proceedings. The Cuban Adjustment Act (CAA) provides that any native or citizen of Cuba who has been admitted or paroled into the United States, *and who is otherwise admissible as an immigrant*, may adjust status to that of a lawful permanent resident after being physically present in the United States for at least one year. It does not, however, require an officer to parole a native or citizen of Cuba at a port of entry without regard to public safety. Therefore, an officer should grant parole to a native or citizen of Cuba only if the alien does not pose a criminal or terrorist threat to the United States.
(Paragraph (a)(6) added 11-1-05; CBP 12-06)

(b) Preparing a case. The expedited removal proceedings give officers a great deal of authority over removal of aliens and will remain subject to serious scrutiny by the public, advocate groups, and Congress. All officers should be especially careful to exercise objectivity and professionalism when processing aliens under this provision. Because of the sensitivity of the program and the potential consequences of a summary removal, you must take special care to ensure that the basic rights of all aliens are preserved, and that aliens who fear removal from the United States are given every opportunity to express any concerns at any point during the process. This includes conducting interviews in an area that affords sufficient privacy, whenever feasible. Since a removal order under this process is subject to very limited review, you must be absolutely certain that all required procedures have been adhered to and that the alien has understood the proceedings against him or her.

The steps to be taken in the expedited removal proceedings differ somewhat from those in which an alien is referred for a removal hearing before an immigration judge. It is important that a complete, accurate record of removal be created, and that any expedited removal be justifiable and non-arbitrary. The following steps must be taken in each case in which an order of expedited removal is contemplated or entered against an alien:

(1) Use of Form I-867A&B. Clearly explain to the alien, in a language he or she understands, the serious nature and impact of the expedited removal process, as noted on the Form I-867A&B. Officers must use an interpreter, when needed, to assist in the expedited removal process. Refer to Chapter 17.18 for Guidance on the Use of Interpreters and Interpreter Services.

Read the statement of rights and consequences contained on the first page of Form I-867A, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act, to the alien. Explain that you will be taking a statement from him or her, and

that any information given or discovered will be used in making a decision on the case and may result in his or her prompt removal. Advise the alien that if he or she is found to be inadmissible and a decision is made to order the alien removed, he or she will be immediately removed from the United States. Explain that there is no appeal to this decision and explain that this will be his or her only opportunity to provide any information or state any fear of return or removal that he or she may have.

In every expedited removal case, you must use the Form I-867A&B to take a complete sworn statement from the alien concerning all pertinent facts. If the case did not initially appear to involve inadmissibility and removal under the expedited removal proceedings, and the sworn statement was begun using other forms, you must immediately advise the alien of the rights and warnings on Form I-867A once you determine that the expedited removal proceedings will apply. The officer shall note either on the Forms I-867A&B or in a memorandum, explaining why those other forms are included.

The sworn statement will be done in question and answer format. Form I-831, Continuation Sheet, or a blank page may be used for the body of the statement. The sworn statement must cover several general areas of inquiry:

- Identity - include true name, aliases, date and place of birth and other biographical data.

- Alienage - determine citizenship, nationality, and residence. Cover any possible claim to U.S. citizenship through parents.

- Inadmissibility - questions should cover the alien's reason for coming to the United States, information about the specific facts of the case and the specific suspected grounds of inadmissibility.

- Fear of persecution or torture - if the alien indicates in any fashion or at any time during the inspections process, that he or she has a fear of persecution, or that he or she has suffered or may suffer torture, you are required to refer the alien to an asylum officer for a credible fear determination. One of the significant differences between expedited removal proceedings and regular removal proceedings is that the inspecting officer has a responsibility to ensure that anyone who indicates a fear of persecution or intent to apply for asylum in the United States is referred to an asylum officer for a credible fear determination. Inspectors should consider verbal as well as non-verbal cues given by the alien. The obligatory questions on the Form I-867B are designed to help in determining whether the alien has such fear. Ask the questions as they appear on the Form I-867B at the end of the sworn statement. If the alien indicates an intention to

apply for asylum or a fear of harm or concern about returning home, or makes any such statements or comments at any time during the inspections process, the inspector may ask a few additional follow-up questions to ascertain the general nature of the fear or concern. Any comments of concern made by the applicant must be recorded in the sworn statement, including any indications made by the alien prior to the secondary interview.

Do **not** ask detailed questions on the nature of the alien's fear of persecution or torture: leave that for the asylum officer. In determining whether to refer the alien, inspectors should not make eligibility determinations or weigh the strength of the claims, nor should they make credibility determinations concerning the alien's statements. The inspector should err on the side of caution, apply the criteria generously, and refer to the asylum officer any questionable cases, including cases that might raise a question about whether the alien faces persecution or torture. Do not make any evaluation as to the merits of such fear; that is the responsibility of the asylum officer. Officers processing aliens for expedited removal may contact the Asylum office point(s) of contact when necessary to obtain guidance on whether to refer questionable cases involving an expression of fear or a potential asylum claim. See paragraph (d) of this chapter for more detailed information regarding credible fear referrals.

- Impact of decision - once you have gathered all the facts, you will decide, in consultation with a supervisor, the best course of action. Depending on the circumstances, you may admit the alien, allow the alien to apply for any applicable waivers, defer the inspection or otherwise parole the alien, permit the alien to withdraw his or her application for admission, issue an expedited removal order, or refer the alien for a credible fear determination. Whatever decision is made, clearly advise the alien of the impact and consequences of the determination and record this in the sworn statement.

You must use the Form I-867B as the final page of the sworn statement and jurat. Be sure to obtain responses from the alien regarding the mandatory closing questions contained on the form. If the alien in any way indicates a fear of removal or return, follow the procedures in paragraph (d) of this section. Collect any additional evidence relevant to the case that is discovered during the inspections process.

After the sworn statement is completed, have the alien read the statement, or have it read to him or her in a language the alien understands. Use an interpreter if necessary. Make any necessary corrections or additions. Have the alien initial each page and each correction. Provide a copy of the completed statement, upon signature, to the alien. Retain a copy for the A file and a copy for the port file, if one is created

If at any time you feel that an amendment to the initial sworn statement is needed, you may complete a second sworn statement during the inspections process. An incident may also take place after you have completed the initial sworn statement, but before the alien is removed from the United States, where a second sworn statement may be helpful. Ask the alien enough questions under oath to address all concerns that may have arisen during the process.

The statement must be signed by the alien and by the officer taking the statement, as well as by a witness. An alien cannot avoid expedited removal by refusing to sign the statement or answer the questions. If the alien will not sign, write "Subject refused to sign" on the signature line. If the alien will not answer any questions, take a skeleton sworn statement, listing all pertinent questions, and writing after each "Subject refused to answer". An expedited removal order may still be issued, provided the removal is otherwise substantiated (e.g., if the alien presented a fraudulent document), and is not dependent solely on the alien's statements.

(2) Form I-860, Notice and Order of Expedited Removal. Prepare three copies of Form I-860. Check the appropriate ground(s) of inadmissibility under which the alien is being charged (e.g. 212(a)(6)(C)(i)), and insert a narrative description of each charge and the violation committed. Read and explain the charges to the alien in the alien's native language or in a language the alien can understand. An interpreter may be required to ensure that the alien understands the allegations and the removal order. Interpreters may not be used if they are employees of the government of the alien's home country, such as an employee of a government-owned airline, except for the most routine questioning. Never use an employee of a foreign government if there is any possibility of sensitive areas (e.g., persecution or torture) being discussed. The alien should be given an opportunity to respond to the charges, and any response must be recorded in either the sworn statement or an addendum to the statement. Expedited removal forms exist in other languages. If a form in the alien's native language or in a language the alien understands is used, place only the English version in the file and give the translated version to the alien.

After all statements are taken and other paperwork is complete, present it through your chain of command to the appropriate supervisor (not to be delegated below the second-line supervisor) or a person officially acting in that capacity for review and approval. If the appropriate supervisor is not present at the port, the supervisory review and approval may be obtained telephonically, by fax, or by other means. The approving authority must be properly advised of all facts in the case in order to make an informed decision. Print the name and title of the supervisor approving the order, and check the box on the form indicating that concurrence was obtained telephonically or by other means. The Form I-860 must be signed legibly by the

statements.

(2) Form **I-860**, Notice and Order of Expedited Removal. Prepare three copies of Form I-860. Check the appropriate ground(s) of inadmissibility under which the alien is being charged (e.g. **212(a)(6)(C)(i)**), and insert a narrative description of each charge and the violation committed. Read and explain the charges to the alien in the alien's native language or in a language the alien can understand. An interpreter may be required to ensure that the alien understands the allegations and the removal order. Interpreters may not be used if they are employees of the government of the alien's home country, such as an employee of a government-owned airline, except for the most routine questioning. Never use an employee of a foreign government if there is any possibility of sensitive areas (e.g., persecution or torture) being discussed. The alien should be given an opportunity to respond to the charges, and any response must be recorded in either the sworn statement or an addendum to the statement. Expedited removal forms exist in other languages. If a form in the alien's native language or in a language the alien understands is used, place only the English version in the file and give the translated version to the alien.

After all statements are taken and other paperwork is complete, present it through your chain of command to the appropriate supervisor (not to be delegated below the second-line supervisor) or a person officially acting in that capacity for review and approval. If the appropriate supervisor is not present at the port, the supervisory review and approval may be obtained telephonically, by fax, or by other means. The approving authority must be properly advised of all facts in the case in order to make an informed decision. Print the name and title of the supervisor approving the order, and check the box on the form indicating that concurrence was obtained telephonically or by other means. The Form **I-860** must be signed legibly by the preparing officer.

(3) Photographing and fingerprinting. Enroll the alien in [redacted] Take the alien's photograph and fingerprint the alien on FD-249 fingerprint cards (three sets—see **chapter 18.9(c)** for distribution), or electronically, if [redacted] are available at the port. Be sure to complete the entire form and properly code the fingerprint cards with the proper U.S. Code citation, since the FBI will not clear cards without such codes. Following are examples of codes that may be used:

- 18 U.S.C. 1544 Photo substitutions
- 18 U.S.C. 1546 Counterfeit immigrant visa
- 8 U.S.C. 1306 Counterfeit immigration documents, such as alien registration
- 18 U.S.C. 911 False claims to U.S. citizenship (imposters, photo substitution of U.S. passport)
- 18 U.S.C. 1001 Other (fraudulent documents, false statements, imposter, etc.)

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(4) Forensic Document Lab (FDL) analysis. Obtain forensic analysis, if appropriate. In cases involving fraudulent documents, if the sworn statement includes an admission of the fraud, no forensic analysis may be required. For the expedited removal proceedings, actual forensic examination of the document by the FDL may not be feasible. This does not mean that it is permissible to "rush to judgement", or that it is permissible to expeditiously remove an alien based on incomplete evidence. If forensic analysis is required to establish that the alien is inadmissible, such analysis must be obtained before the Form **I-860** is executed. If necessary, the alien should be detained until the analysis is performed, and then the Form I-860 can be executed. (On the other hand, if the alien's inadmissibility under section **212(a)(7)** has been established, there is little or no reason to delay the expedited removal process in order to also establish the **212(a)(6)(C)** charge.) Offices with electronic devices for transmitting quality images should use those technologies whenever possible or necessary. [See **Chapter 32** for details on using FDL services and for contributing documents or intelligence information concerning the fraud.]

(5) Tracking of ER cases. Unless an A number already exists for an alien placed into expedited removal, an A number must be

[redacted]

assigned to every expedited removal case at the POE in order to ensure proper tracking of the case from the onset.

Codes have been created for entry of expedited removal cases into the Central Index System (CIS). Those codes are:

- ERF **E**xpedited **R**emoval case has been initiated under section **235(b)(1)** of the INA and a final decision is pending a credible **F**ear determination by an asylum officer or immigration judge.
- ERP **E**xpedited **R**emoval case has been initiated under section **235(b)(1)** INA and a final decision is **P**ending for reasons other than referral for credible fear interview before an asylum officer.
- ERR **E**xpedited **R**emoval case has been initiated and alien has been **R**emoved from the United States under that program.

Entry of cases into CIS should be accomplished as quickly as possible in accordance with local policy. To ensure prompt data entry, A files for expedited removal cases should be separated from other files and flagged as expedited removal cases.

Codes have also being created to designate expedited removal cases in the National Automated Immigration Lookout System (NAILS) and the Interagency Border Inspection System (IBIS).

Search for existing records in CIS and other appropriate automated systems. If an A file exists, create a temporary file and request the permanent file. After the file is received, update it with all relevant documents completed or collected during the expedited removal process, and forward it to the proper files control office. If no previous file exists, create a new A file relating to the alien.

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6) Consular notification of alien detention. Consult **8 CFR 236.1(e)** to ensure that, if required, the appropriate consular official is immediately notified of the alien's detention, even if the alien **requests** that this **not** be done. Notify the alien that he or she may communicate with a consular official. These steps normally will only be necessary when removal of the alien cannot be accomplished immediately and the alien must be placed in detention for longer than 24 hours. When you contact a consular official, never mention any asylum claim which may have been filed, or give any indication that the alien has expressed a fear of persecution or torture.

(7) Criminal prosecution. Aliens arriving at the POEs who are subject to the expedited removal provisions may also be subject to criminal prosecution. If criminal prosecution of the alien is contemplated in addition to expedited removal, the criminal action must be completed before the alien is ordered removed. [See **Chapter 18** for procedures for criminal prosecution]. Officers must give the alien his/her Miranda warning and once the warning of rights has been given to the alien, questioning of the alien can only occur with the alien's consent. If the alien refuses to provide a sworn statement, or if the U.S. Attorney's Office prohibits the officer from taking any sworn statements or completing removal processing prior to the completion of the criminal proceedings, the administrative process must be completed after the alien's criminal proceeding is concluded.

If the alien permits questioning and the U.S. Attorney's Office does not prohibit questioning and processing of the alien, complete the sworn statement and the Form I-860. Do not serve the Form **I-860** on the alien, but place it in the A file pending the criminal processing. If the alien is to be turned over to another law enforcement agency, serve a Form **I-247**, Immigration Detainer - Notice of Action, on the other agency. Once the alien is returned to DHS custody, the Form I-860 may be served and the alien removed under the expedited removal order.

(8) Service of the Form I-860. Serve the original Form I-860 on the alien, unless the alien is to be deferred to an onward office, in which case the service is accomplished by the onward office. If the alien is being prosecuted criminally, the Form I-860 will be served after the criminal conviction. Place a copy of the Form I-860 in the A file. The third copy may be retained at the port.

(9) Form **I-296**, Notice to Alien Ordered Removed/Departure Verification. Check the appropriate box to indicate the period during which the alien must obtain permission to reenter: 5 years for the first removal; 20 years in the case of a second or subsequent removal; at any time if the alien has been **convicted** of an aggravated felony (even though the alien is not being charged as an aggravated felon in this proceeding). Do not check the 10-year box; that is for aliens removed under other provisions of the Act. At the time of actual removal, a photograph and a pressed print of the alien's right index finger should be placed on a copy of the Form I-296, the alien should sign the form, and the particulars of the departure should be entered on the form for retention in the file. Serve the alien with a copy of the Form I-296 before removal. The original form should remain in the A file.

(10) Form **I-275**, Consular Notification. Cancel the alien's visa or border crossing card, if appropriate. Complete and distribute the Form **I-275** as described in **Chapter 17.2**. Check all the boxes that apply, with a brief description of the denial and removal of the alien. Note the passport with the file number and action taken, for example: "Ordered Removed 6/1/04 NYC/Section 212(a)(6)(C)(i)". Forward a copy of the Form I-860 with the Form I-275 to the Department of State.

(11) Form I-94, Arrival/Departure Document. Prepare a new Form I-94. If the alien applied for admission at a land border, annotate the Form I-94 to read: "Form I-860 Removal Order issued pursuant to section **235(b)(1)** of the Act. (Date), (Place), (Officer)". If the alien applied for admission at an airport or seaport, use the parole stamp and endorse the I-94 to read: "For removal from the United States by (carrier name). Form I-860 Removal Order issued pursuant to section **235(b)(1)** of the Act. (Date), (Place), (Officer)".

(12) Detention. Detain the alien as appropriate. Follow local procedures to obtain detention authorization and arrange for detention. Aliens placed into expedited removal proceedings must be detained until removed from the United States. Parole may be permitted only if there is a medical emergency or if it is necessary for legitimate law enforcement purposes, such as for criminal prosecution or to testify in court. Refer to **Chapter 17.8** for the CBP policy on the detention of aliens at POEs. Aliens subject to expedited removal who claim a fear of persecution or torture must be detained pending a credible fear determination. Once an alien has established a credible fear of persecution or is otherwise referred (as provided by regulation) for a full removal proceeding under section **240**,

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release of the alien may be considered under normal parole criteria. Aliens who make false claims to U.S. citizenship, or unverified claims to lawful permanent resident, asylee, or refugee status, must be detained pending review of the removal order by the immigration judge. Aliens arriving at a land border port-of-entry who do not claim lawful status in the United States or a fear of persecution should normally be processed immediately and either returned to Canada or Mexico or detained until removed.

(13) Credible fear interview referral. See paragraph (d) of this chapter for detailed information on credible fear referrals. Credible fear interviews will normally take place at DHS or contract detention facilities. Each POE and detention facility will be provided with a point or points of contact at the Asylum office having responsibility for that geographical area. It is the responsibility of the referring (Inspections) officer to provide the alien being referred for a credible fear interview with both a Form **M-444**, Information about Credible Fear Interview, and a list of free legal services, as provided in **8 CFR part 292**. It is generally the responsibility of the detention and removal personnel to notify the appropriate Asylum office point of contact when an alien subject to the expedited removal process is being detained in DHS custody pending this interview. That officer should also provide any additional information or concerns of the alien, such as whether the alien requires an interpreter or other special requests and considerations. However, in locations where the credible fear interview requires travel by the asylum officer, the referring officer should notify the Asylum office when referring the alien in order to provide as much advance notice as possible. When aliens are detained in non-DHS facilities or at remote locations, the referring officer must notify the appropriate Asylum office. If the alien is subsequently transferred to another detention site, the detention or deportation officer must ensure that the appropriate Asylum office has been notified.

Normally the credible fear interview will not take place sooner than 48 hours after the alien arrives at the detention facility. If the alien requests that the interview be conducted sooner, the referring officer, or any other officer to whom the alien makes the request, should immediately convey that information to the appropriate Asylum office.

(14) Removal from the United States. Most aliens removed under the expedited removal provisions will be promptly removed; however, some aliens, such as those who claim asylum or LPR status, may be detained pending a decision on their claim. At the land border, ensure the alien's departure to the contiguous foreign territory. At air and seaports, serve the carrier of arrival with the Form I-259, Notice to Detain, Remove, or Present Aliens, and check the appropriate boxes to order the carrier to remove the alien when the removal process is finished. If the case cannot be timely completed, advise the carrier of potential liability.

(15) Database entries. The expedited removal process continues to be the subject of extensive inquiry and requires appropriate tracking of specific case data. Expedited removal cases will normally be processed through [redacted] In addition, every case in which an expedited removal order is issued must be entered into the Deportable Alien Control System (DACS) until that system is replaced with the [redacted] Entry of data for those aliens detained by DHS will be handled by the Detention and Removal personnel responsible for the detention facility. Entry of data for aliens who do not require detention and are removed directly from the POEs is the responsibility of CBP. Cases initiated at the POEs and referred for removal proceedings under section 240 will continue to be entered into DACS by Detention and Removal. Complete appropriate closeouts in [redacted]

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(16) Form G-22.1, Inspections Summary Report. Consult G-23 Report of Field Operations Procedures for reporting guidelines.

(c) Withdrawal of application for admission in lieu of an expedited removal order.
DHS has the discretion to allow an inadmissible alien to voluntarily withdraw his or her application for admission and to depart the United States in accordance with section **235(a)(4)** of the INA. This discretion applies to aliens subject to expedited removal, and should be applied carefully and consistently, since an officer's decision to allow withdrawal or issue a removal order is final. Officers should keep in mind that an order of expedited removal carries with it all the penalties of an order of removal issued by an immigration judge (including a bar to reentry of at least 5 years following removal pursuant to section **212(a)(9)(A)(i).**

Follow the guidelines contained in **Chapter 17.2** to determine whether an alien's withdrawal of an application for admission or asylum claim best serves the interest of justice. An officer's decision to permit withdrawal of an application for admission must be properly documented by means of a Form I-275, Withdrawal of Application for Admission/Consular Notification, to include the facts surrounding the voluntary withdrawal and the withdrawal of the asylum claim. In addition, an officer should prepare a new sworn statement, or an

[redacted]

addendum to the original sworn statement on Form I-867A&B, covering the facts pertaining to the alien's withdrawal of the asylum claim.

An alien may not be pressured into withdrawing his or her application for admission or asylum claim under any circumstances. An officer must provide adequate interpretation to ensure that the alien understands the expedited removal process and the effects of withdrawing an application for admission or an asylum claim. Furthermore, an asylum officer must be consulted before an alien who has expressed a fear of return to his or her home country may be permitted to withdraw an asylum claim.

If an officer permits an alien to withdraw his or her application for admission and elects to return the alien to Canada or Mexico, the Form I-275 should indicate the alien's status in Canada or Mexico and the basis for determination of that status. This determination may be based on contacts with Canadian or Mexican authorities, stamps in the alien's passport, or other available documentation. The narrative on Form I-275 should also indicate that the alien has not expressed concern about returning to Canada or Mexico.

If the alien expresses any concern or reluctance about returning to Canada or Mexico and wishes to pursue the asylum claim in the United States, the officer should advise the alien that he or she will be placed in the expedited removal process, unless subject to section 240 proceedings by statute, regulation, or policy, and will be detained pending the credible fear determination. The alien should not be given the Form I-589, Application for Asylum and for Withholding of Removal, nor should an affirmative asylum interview be scheduled at the port of entry.
(Paragraph (c) revised 11-1-05; CBP 12-06)

(d) Fear of persecution or request for asylum. Aliens who indicate an intention to apply for asylum or a fear of persecution or torture may not be ordered removed until an asylum officer has interviewed the alien to determine whether the alien has a credible fear of persecution or torture and warrants a full asylum hearing before an immigration judge.

When questioning or taking a sworn statement from any alien subject to the expedited removal provisions, you need not directly solicit an asylum claim. However, to ensure that an alien who may have a genuine fear of return to his or her country is not summarily ordered removed without the opportunity to express his or her concerns, you should determine, in each case, whether the alien has any concern about being returned to his or her country. Further, you should explore any statement or indications, verbal or non-verbal, that the alien actually may have a fear of persecution or torture or return to his or her country. You must fully advise the alien of the process, as indicated on the Form **I-867A**, and of the opportunity to express any fears.

Keep in mind that the alien need not use the specific terms "asylum" or "persecution" to qualify for referral to an asylum officer, nor does the fear of return have to relate specifically to one of the five grounds contained within the definition of refugee. The United States is bound by both the Protocol on Refugees and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and, except under extraordinary circumstances, may not return an alien to a country where he or she may face torture or persecution.

The alien may convey a fear of violence or harm, a need for protection, an indication of harm to, or disappearance of, relatives or associates, or dangerous conditions in his or her country. Even disputes of a personal nature sometimes may relate to asylum, such as domestic violence, sexual or child abuse, child custody problems, coercive marriage or family planning practices, or forced female genital mutilation. All officers should recognize that sometimes unusual cases have been found eligible for asylum that may not have initially appeared to relate to the five grounds contained in the definition of refugee, such as AIDS victims who face government persecution, land or money disputes with wealthy persons or persons in power, whistle blowers, witnesses to crimes and even organized crime connections. Harm sufficient for a credible fear referral can include [redacted]

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Do not make judgement decisions concerning any fear of persecution, torture, or return. Any alien who by any means indicates a fear of persecution or return **may not** be removed from the United States unless the alien has been interviewed and a credible fear determination been made by an asylum officer. An alien who does not indicate a fear of return but responds to one of the protection-

[redacted]

related questions by stating that he or she has applied for refugee or asylum status in the United States or elsewhere in the past, or mentions a relative, friend or associate who has done so (even if such claims are still pending or were denied), should be asked further questions to determine whether or not the alien is expressing a fear of return or an intention to apply for asylum indirectly. If, on more detailed questioning, the alien states that he or she has no fear of return and no interest in applying for asylum, the case need not be referred for a credible fear interview.

If the alien answers affirmatively to one the protection-related questions or requests asylum, and later changes the answer or asks to be sent home, the officer should consult with the local Asylum office or refer the case. If an attorney, friend, or relative notifies any officer that an individual in the expedited removal process is planning to apply for asylum or has a fear of return, that officer should notify the port of entry. The officer responsible for the case should either consult with an asylum supervisor or refer the alien for a credible fear interview, even if the alien does not express a fear directly. In the expedited removal process, an attorney, friend, or relative who acts as a consultant to the alien need not file a Form G-28.

Any alien who exhibits any [redacted] – that alert the office to possible fear of harm should be referred. If an officer notices signs of [redacted] the officer should consult an asylum supervisor, or the applicant should be referred. [redacted] should be noted in parentheses or brackets in the sworn statement or memo to file.

[redacted] It is important to be aware of these possible reactions. Do not dismiss t[redacted] automatically as signs of uncooperative behavior.

[redacted]

Considerations that should NOT affect the officer's decision to refer an alien for a credible fear interview include:

- [redacted]. The asylum officer will review the sworn statement and documents and ask the alien about any inconsistencies and discrepancies. Only an asylum officer can make a credibility determination for purposes of deciding whether the alien has a credible fear of persecution.
- [redacted]
- [redacted] Aliens should be referred, for example, if they claim [redacted], or if for example, that they claim [redacted]
- Country of origin: No country should be considered safe – or dangerous- for all residents. However, knowledge of conditions in the alien's home country may help alert an officer to non-verbal cues or confused or vague expressions of fear.

[redacted]

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- Whether harm is on account of the alien's race, religion, political opinion, nationality or social group: Officers should not make a determination on whether the harm feared is on account of the alien's race, religion, nationality, membership in a particular social group or political opinion. Asylum law, and particularly the definition of a "social group" is evolving – cases involving domestic violence, spousal abuse, sexual abuse of children, female genital mutilation, coercive family planning practices, organized crime, whistleblowers on government corruption, homosexuality, and AIDS, and other unresolved legal areas should be referred. An alien may also be offered protection from return under Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, when it is more likely than not that the alien would be tortured, even if the motivation for the torture is not on account of the applicant's race, religion, nationality, social group or political opinion.
- Mandatory Bars: The presence of a mandatory bar to asylum should not prevent referral. Referrals should occur even in cases where, for example, the alien appears to be firmly resettled in a third country, transited through a third country, or when there is information that appears to indicate that the alien is a criminal or a danger to national security.
- Stated Preference to Apply for Asylum Elsewhere: If an alien expresses a fear of return, but states that he or she does not want to apply for asylum in the United States because he or she plans to apply for asylum elsewhere, the alien should be referred. Some applicants may not be aware that certain countries will not accept an asylum application from them if they have transited through the United States.

The International Religious Freedom Act of 1998 (IRFA) was passed by Congress out of a growing concern about violations of religious freedom in countries around the world. IRFA requires training for certain government employees on the nature of religious persecution abroad. Violations of religious freedom can include prohibitions on, restrictions of, or punishment for:

- Assembling for peaceful religious activities
- Speaking freely about religious beliefs
- Changing religious beliefs or affiliation
- Possessing and distributing religious literature
- Raising children in the religious practices and teachings of one's choice.

Any of the following acts are violations of religious freedom if committed on account of an individual's religious belief or practice:

- Detention
- Interrogation
- Imposition of onerous financial penalties
- Forced labor
- Forced mass resettlement
- Imprisonment
- Forced religious conversion
- Beating, torture, mutilation, rape, murder, enslavement, and execution

IRFA defines "particularly severe violations of religious freedom" as systematic, ongoing, egregious violations of religious freedom, including violations such as:

- Torture or cruel, inhuman, or degrading treatment or punishment;
- Prolonged detention without charges;
- Causing the disappearance of persons by the abduction or clandestine detention of those persons; or
- Other flagrant denial of the right to a person's life, liberty, or security.

Applicants who are questioned by officers in expedited removal proceedings may not understand that religious persecution is an issue they should reveal in their interview. Sometimes an applicant will not indicate any past incidents of religious persecution, but you might become aware of it incidentally. Perhaps you learn that the applicant is a Jehovah's Witness and realize he or she is from a country in which Jehovah's Witnesses are persecuted.

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You might also come across customs and behavior that are new to you, for example, the wearing of scarves for religious reasons. In talking with that person, you might learn that there is a fear of return, but the person did not realize that religion was a protected ground for asylum at the time of inspection. Therefore, it is important to adhere to the procedural safeguards built into the expedited removal process.

IRFA requires that the State Department annually publish a report on the condition of religious freedom in the world. Specifically, the report describes the status of religious freedom in every foreign country. It also cites any violations of religious freedom or trends toward improvement or deterioration in the respect and protection of religious freedom. There is an Executive Summary at the beginning of the report, which highlights the report's findings. Each Asylum Office has bound copies of the report for reference. The report is also posted every year on the State Department's web site.

IRFA does not change the legal standard for determining refugee or asylum eligibility. It also does not give preference to religious persecution. It does require refugee and asylum officers to receive specialized training concerning religious persecution. When religious issues are involved, adjudicators must become informed about conditions in the applicant's home country by referring to the annual report on religious freedom published by the Department of State. However, a claim cannot be denied solely because an officer cannot find information in the report. As with every case, officers should consult a variety of current and reliable sources for an accurate representation of country conditions. In certain unconventional cases, determining whether an applicant's unique set of beliefs is a religion may require careful consideration and research, and when appropriate, consultation with proper DHS personnel.

While IRFA mandates that certain new processes be implemented, it does not change the basic job requirements.

- IRFA does not authorize individuals housed in DHS facilities to do anything they wish under the guise of religious practice.
- IRFA does not require officers to determine what a religion is or what constitutes religious persecution.
- And while IRFA emphasizes issues of religious persecution, it does not imply that other types of persecution are any less important.

All officers must disregard their own religious convictions and beliefs evaluating an asylum or refugee claim. For example, you may be a Muslim officer interviewing a non-Muslim asylum applicant who claims to be persecuted by Muslims on account of his religion. Upon hearing such claims, you may be surprised, offended, disbelieving, or have other adverse personal reactions because of your own religious convictions and opinions. While it may be difficult, you must evaluate such claims objectively and without personal bias.

If the alien indicates an intention to apply for asylum or asserts a fear of persecution or torture, and is being referred for a credible fear interview with an asylum officer:

(1) Create an A file, if one does not already exist.

(2) Fully process the alien as an expedited removal case. Establishing inadmissibility cannot be left to the asylum officer. Record a description of the particulars of the interview and the alien's initial claim to asylum or fear of return by means of a sworn statement using Form **I-867A&B**. Follow the instructions in paragraph (b)(1) above to ensure that the alien understands the proceedings. Although you should not pursue the asylum claim in detail, enough information should be obtained to inform the asylum officer of the alien's initial claim to asylum or fear of persecution or return. If the alien answers the closing questions on Form I-867B in the affirmative, several other questions may be necessary to determine the general nature of the fear or concern.

(3) Complete the Determination of Inadmissibility portion of the Form **I-860**, including sufficient information to support the charges of inadmissibility should the asylum officer find that alien does not have a credible fear of persecution. Sign **only** the Determination portion of the form. The removal part of the order will be signed by the asylum officer only after it is determined that the alien does not have a credible fear of persecution. Refer also to **Chapter 43.3** for documenting any potential fines issues.

(4) Advise the alien of the purpose of the referral and that the alien may consult with a person or persons of his or her choosing, at no expense to the government and without delaying the process, prior to the interview. The Form **M-444**, Information about Credible Fear Interview, must be given to the alien and explained in a language the alien understands. The alien should sign two

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copies, acknowledging receipt of the information. One copy should be placed in the A file, and the other retained by the alien. Give the alien a current list of organizations and programs prescribed in **8 CFR 292** which provides free legal services.

(5) Arrange for detention of the alien according to local procedures. Although it is normally the responsibility of the detention and removal personnel officer to notify the Asylum office, in some circumstances, you must advise the appropriate Asylum office that an alien being detained requires a credible fear interview. The Asylum office should also be advised whether the alien requires an interpreter and of any other special considerations. It may be helpful for the officer to provide the asylum officer with information on the alien's gender, the language(s) the alien speaks, whether the alien is traveling with a spouse or children, and any special medical needs or unusual behavior. Forward the A file to the location where the credible fear interview will take place. Prepare Form **I-259** and serve it on the affected carrier. Complete Form I-94 for NIIS entry notated "Detained at _____ pending credible fear interview pursuant to section **235(b)(1)(B)** of the Act. (Date), (Place), (Officer)".

An asylum officer will conduct an interview to determine if the alien has a credible fear of persecution, either at the detention facility or at a location arranged through the Asylum office having jurisdiction over the place of apprehension, depending on location. If the alien is determined to have a credible fear of persecution or torture, the asylum officer will refer the alien before an immigration judge for full consideration of the asylum and withholding of removal claim in proceedings under section **240** of the Act. If the alien is found not to have a credible fear of persecution or torture, following review by a supervisory asylum officer, the asylum officer will order the alien removed pursuant to section **235(b)(1)**, unless the alien requests that the determination of no credible fear be reviewed by an immigration judge. If the alien makes such a request, the asylum officer will use Form **I-863**, Notice of Referral to Immigration Judge, checking box #1, to refer the alien to the immigration judge for review of the credible fear determination. If the immigration judge determines that the alien does not have a credible fear of persecution, DHS will present the alien for removal to the carrier on which he or she arrived. There may be some situations where the actual carrier of arrival and port of embarkation cannot be ascertained. Such cases may require additional processing, including detention, in order to arrange for travel documents and transportation at government expense (User Fee).

If an alien claims a fear or concern about possible harm, and later asks to be sent home, the officer should review the sworn statement carefully with the alien to determine if there was a misunderstanding. If there was no misunderstanding, the officer should prepare a second Form **I-867A&B** and note that the alien has changed his or her mind. The officer must consult with an asylum supervisor before executing the decision. If the asylum supervisor concurs that it is appropriate to remove the applicant without a credible fear interview, the name of the supervisor, and the date and time of concurrence should be noted in the A file. Both the original and final Form I-867A&B must remain in the file.

If the alien maintains throughout the sworn statement that he or she has no fear of return and later claims a fear or a desire to apply for asylum, the applicant should be referred for a credible fear interview. The officer should reinterview the alien and complete an addendum to the statement, re-asking the fear questions. The officer should void the original Form **I-860** and complete an new Determination of Inadmissibility. The Form **I-296** should be voided if the verification of removal section has already been completed, and the officer should complete a memo to file, explaining the circumstances of the case.

(e) Claim to lawful permanent resident, asylee, or refugee status, or U.S. citizenship.

(1) An expedited removal case involving an alien who claims to be a U.S. citizen, to have been lawfully admitted for permanent residence, to have been admitted as a refugee under section **207**, or to have been granted asylum under section **208**, should be handled very cautiously to ensure that the rights of the individual are fully protected. The expedited removal authority provided by IIRIRA is a powerful tool and there are grave consequences involved in incorrectly processing a bona fide citizen, LPR, refugee or asylee for removal. You should be extremely aware of those consequences when you are using this tool. Although the statute and regulations provide certain procedural protections to minimize the risk of such consequences, you should never process a case for expedited removal which you would not feel satisfied processing for a hearing before an immigration judge.

If the alien falsely (or apparently falsely) claims to be a U.S. citizen, LPR, refugee, or asylee, and is not in possession of documents

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to prove the claim, make every effort to verify the alien's claim prior to proceeding with the case. This can be accomplished through a thorough check of the data systems, manual request to the Records Division, careful questioning of the alien, or prudent examination of documents presented. Use whatever means at your disposal to verify or refute a claim to U.S. citizenship, including verification of birth records with state authorities, etc.

(2) Verifiable claim. When inspecting an alien whose claim to LPR status has been verified, determine whether the alien is considered to be making an application for admission within the meaning of section **101(a)(13)(C)**. [See discussion in **Chapter 13.4**.] Although the LPR may not be considered to be seeking admission, he or she is nonetheless required to present proper documents to establish his or her status as an LPR. If the claim is verified and the alien appears to be admissible except for lack of the required documents, consider a waiver under section **211(b)** for an LPR. When inspecting an alien who had previously been admitted as a refugee or granted asylum status and who had departed the United States without having applied for a refugee travel document, consider accepting an application for a refugee travel document in accordance with **8 CFR 223.2(b)(2)(ii)** for a refugee or asylee. Refer to **Chapters 13.2** and **17.5** for a discussion of this and other options for admitting returning residents.

If the claim is verified, but a waiver is not available or is not clearly warranted, such as when fraud was committed in obtaining status or upon entry, or in cases where the alien appears to have abandoned his or her residence, you may initiate removal proceedings under section **240** of the Act. Procedures for preparing for removal hearings and processing inadmissible LPRs are discussed in **Chapters 17.6** and **17.10**. Although the charging document, Form **I-862**, Notice to Appear, is the same for both inadmissible and deportable aliens, immigration officers performing inspections at a POE are authorized to issue a Notice to Appear only to arriving aliens, as defined in **8 CFR 1.1(q)**. If an LPR is not considered to be seeking admission, he or she is not an arriving alien. If a Notice to Appear is to be issued charging the returning resident as a deportable alien, the Notice to Appear must be issued by one of the authorizing officers listed in **8 CFR 239.1**, including port directors.

(3) Unverifiable Claim. If no record of the alien's lawful admission for permanent residence, grant of refugee status, admission as an asylee, or citizenship can be found after a reasonably diligent search, advise the alien that you are placing him or her under oath, or take a declaration as permitted in 28 U.S.C. 1746, and warn the alien of the penalties for perjury. Section 1746 of the Title 28 U.S. Code reads as follows:

> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him as true under penalty of perjury, and dated, in substantially the following form:
>
> - If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)".
>
> - If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)".

The penalties for perjury contained in 18 U.S.C. 1621 (perjury generally) provide for fine and imprisonment of not more than 5 years, or both. The penalties for perjury contained in 18 U.S.C. 1546 (fraud and misuse of visas, permits, and other documents) provide for fine and imprisonment of not more than 10 years, or both.

If the alien declares under oath, pursuant to the advice above, that he or she is a citizen, LPR, refugee, or asylee, order the alien removed under section **235(b)(1)(A)** and refer to the immigration judge for review of the order. Complete Form **I-860** after completing all procedures in this chapter. Serve the Form I-860 on the alien. Serve Form **I-259** on the affected carrier, if

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appropriate. Use Form **I-863**, checking Box #4, to refer the removal order to the immigration judge for review. The alien should be detained pending review of the order by the immigration judge. In the event an alien who has made a verbal claim to citizenship or to LPR, refugee, or asylee status declines to make a sworn statement, conclude the expedited removal process in the same manner as any other nonimmigrant in the same situation.

If the immigration judge determines that the individual is not a citizen or is an alien who has never been admitted as an LPR, refugee, or asylee, the expedited removal order will be affirmed and the alien removed. There is no appeal from the decision of the immigration judge. If the judge determines that the individual is a citizen, the process is terminated and the citizen is released. If the judge determines that the alien was once admitted as an LPR, refugee, or asylee, and that status has not been terminated, the judge will vacate the expedited removal order and the government may initiate removal proceedings under section **240**.

(f) Special Treatment of Unaccompanied minors. When a minor (a person under the age of eighteen) who is unaccompanied and appears to be inadmissible under section **212(a)(6)(C)** or **(7)** of the Act, officers should first try to resolve the case under existing guidelines. Existing guidelines permit granting a waiver, deferring the inspection, or employing other discretionary means, if applicable, including withdrawal of an application for admission.

(1) Withdrawal of application for admission by minors. Whenever appropriate, officers should permit unaccompanied minors to withdraw their application for admission rather than placing them in formal removal proceedings. In deciding whether to permit an unaccompanied minor to withdraw his or her application for admission, every precaution should be taken to ensure the minor's safety and well-being. Factors to be considered include the seriousness of the offense in seeking admission, previous findings of inadmissibility against the minor, and any intent by the minor to knowingly violate the law.

Before permitting a minor to withdraw his or her application for admission, the officer must be satisfied either that the minor is capable of understanding the withdrawal process, or that a responsible adult (relative, guardian, or in cases where a relative or guardian is not available, a consular officer) is aware of the actions taken and the minor's impending return. Officers must attempt to contact a relative or guardian either in the United States or in another country regarding the minor's inadmissibility whenever possible. A minor brought to the United States by a smuggler is to be considered an unaccompanied minor, unless the smuggler is an adult relative (parent, brother, sister, aunt, uncle, or grandparent) or legal guardian. If the smuggler is not a relative or guardian, he or she should not be consulted concerning the disposition of the minor's case.

The true nationality of the minor must be ascertained before permitting the minor to withdraw. Another factor to consider is whether the port of embarkation to which the minor will be returned is the country of citizenship of the minor. A minor may not be returned to or be required to transit through a country which may not be willing or obligated to accept him or her. If the minor is being returned to a third country through a transit point, officers must ensure that an immediate and continuous transit will be permitted.

When deciding whether to permit the minor to withdraw his or her application for admission, officers must also make every effort to determine whether the minor has a fear of persecution or return to his or her country. If the minor indicates a fear of persecution or intention to apply for asylum, or if there is any doubt, especially in the case of countries with known human rights abuses or where turmoil exists, the minor should be placed in removal proceedings under section **240** of the Act. If there is no possibility of a fear of persecution or return and the INS permits the minor to withdraw his or her application for admission, the consular or diplomatic officials of the country to which the minor is being returned must be notified. Safe passage can then be arranged, and after all notifications to family members and government officials have been made, the minor may be permitted to withdraw.

(2) Minors referred for section **240** proceedings. Except as noted below, if a decision is made to pursue formal removal charges against the unaccompanied minor, the minor will normally be placed in removal proceedings under section **240** of the Act rather than expedited removal. The unaccompanied minor will be charged under both section **212(a)(7)(A)(i)(I)** of the Act as an alien not in possession of proper entry documents and section **212(a)(4)** of the Act as an alien likely to become a public charge. This additional charge renders the minor subject to removal proceedings under section **240** of the Act. Other charges may also be lodged, as appropriate. As a general rule, minors should not be charged with section **212(a)(6)(C)** of the Act, unless circumstances indicate that the alien clearly understood that he or she was committing fraud or that the minor is knowingly involved in criminal activity

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relating to fraud.

Minors who are placed in section **240** proceedings and who are not in expedited removal may either be released in accordance with the parole provisions, or placed in a DHS-approved juvenile facility, shelter, or foster care in accordance with existing juvenile detention policies and the Flores v. Reno settlement. At all stages of the inspections and removal process, officers should take every precaution to ensure that the minor's rights are protected and that he or she is treated with respect and concern. [See **Appendix 17-4**, policy memorandum discussing the Flores settlement.]

(3) Expedited removal of minors. Under limited circumstances, an unaccompanied minor may be placed in expedited removal proceedings. The minor may be removed under the expedited removal provisions only if the minor:

- has, in the presence of a DHS officer, engaged in criminal activity that would qualify as an aggravated felony if committed by an adult; or
- has been convicted or adjudicated delinquent of an aggravated felony within the United States or another country, and the inspecting officer has confirmation of that order; or
- has previously been formally removed, excluded, or deported from the United States.

If an unaccompanied minor is placed in expedited removal proceedings, the removal order must be reviewed and approved by the director of field operations, or person officially acting in that capacity, before the minor is removed from the United States. This is in addition to the normal supervisory approval required of all expedited removal cases.

(4) Treatment of Minors during Processing. Officers should treat all minors with dignity and sensitivity to their age and vulnerability. Processing of minors should be accomplished as quickly as possible. Like all persons being detained at POEs, officers must provide the minors access to toilets, sinks, drinking water, food, and medical assistance if needed. Minors may not be placed in short-term hold rooms, nor may they be restrained, unless they have shown or threatened violent behavior, they have a history of criminal activity, or there is a likelihood the juvenile may attempt to escape. Unaccompanied minors should not be held with unrelated adults. Any detention following processing at the POE must be in accordance with the Flores v. Reno settlement.

(Paragraph (f) added 8/21/97; IN97-05)

(g) Minors accompanied by relatives or guardians. If formal proceedings are initiated against an accompanying adult relative or legal guardian, the minor should be placed in the same type of proceeding (i.e. expedited removal or **240** proceedings) as the adult. However, withdrawal of application for admission by the minor should be considered whenever appropriate, even though the relative or guardian may remain subject to formal removal proceedings.

(h) United Nations High Commissioner for Refugees monitoring guidelines. The United States has signed various international agreements accepting an obligation to protect refugees and asylum-seekers from return to persecution or torture, and to follow certain international standards in processing those needing protection. The organization that monitors compliance with these agreements and provides guidance on their implementation is the United Nations High Commissioner for Refugees (UNHCR). As such, the United States has a responsibility to cooperate with UNHCR's requests for access to processes involving those needing protection. Therefore, DHS believes it is appropriate for the UNHCR to observe, to the extent within the resources available to the UNHCR, the expedited removal process to make a fair and impartial assessment of the process.

For these reasons, full cooperation with visiting UNHCR delegations is essential. Below are general guidelines and procedures to follow regarding a visit from the UNHCR. While the guidelines concentrate on the limits of the UNHCR's access and potential problem areas, in our experience the UNHCR has approached site visits professionally and responsibly, providing us with positive comments and useful feedback, and problems are unlikely to arise during its site visits.

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(1) UNHCR requests. The UNHCR has agreed to make all requests to observe the expedited removal process at POEs or the credible fear interview at detention facilities in writing to the Office of Field Operations. If any field office receives a request for access to the expedited removal process from a representative of the UNHCR, the field office should advise the representative to make the request to the Office of Field Operations.

Written requests from UNHCR to conduct a site visit must be received a minimum of two weeks in advance. CBP will consider written requests submitted less than two weeks in advance for only exceptional circumstances. The request will include the purpose and site (s) of the visit, the duration of the visit, the complete list of names of the UNHCR staff on the delegation, the title and official responsibilities of everyone on the delegation, the information about the person leading the delegation, and any special needs or requests. The Office of Field Operations will evaluate the request in consultation with the field and make a decision as quickly as possible.

Should there be a need to clarify or confirm the identities of visiting team members, local CBP staff will call the Office of Field Operations.

(2) Scope of UNHCR's access to secondary inspection processing. The UNHCR has agreed to maintain the confidentiality of any information to which it has access such as training materials and procedures manuals. Therefore, it can be given full access to tour the primary and secondary inspection areas, holding cells, food storage facilities, and other areas related to processing of expedited removal cases. While at the port, UNHCR representatives should be accompanied by a CBP officer, unless CBP has arranged for the representatives to talk confidentially with an alien. For safety reasons, the representatives will not be allowed to participate or be used as witnesses in baggage and personal effects search or body-pat-down search. Viewing of the baggage search may be allowed if there is no safety concern or threat to the representatives. The representatives should not be given access to computer databases or programs containing sensitive law enforcement information, but may be given a demonstration of certain programs in relation to the expedited removal process. The representatives may ask questions about the process, so long as their movements and the timing of their questions do not impede the processing of cases.

The port will designate a supervisor on the shift to whom the UNHCR team may direct questions about the processing. As time permits, the supervisor may arrange for the representatives to talk directly with line officers. During a secondary inspection, when possible, the representatives should be allowed to view the secondary inspection from an area (seated or standing) that would enable them to hear and see all participants.

The port will designate one or more secondary and primary officers on the shift to whom the UNHCR representatives may direct questions. Designation of these officers should be initially on a voluntary basis.

(3) Interactions between UNHCR and aliens in secondary inspection. If UNHCR representatives ask to sit in on interviews of either specific aliens or a random sample of aliens in secondary, the CBP officer should explain to the alien that the UNHCR representatives do not work for the U.S. Government, but work for the United Nations, and have asked to observe some interviews to understand the U.S. process. No more than two representatives may be present during the interview, and business cards will be provided to the alien after the interview is completed. The officer should explain that it is the alien's decision whether the UNHCR representatives are allowed to observe the interview or not, and that CBP will ask the same questions and follow the same procedures either way. If the alien does not want the UNHCR representatives to sit in on the interview, his or her wish should be respected. If the applicant requests to talk briefly and confidentially with the UNHCR representatives, he or she may do so after the officer finishes the secondary interview and process.

If the alien indicates that he or she does not want the presence of the representatives, and the representatives appear to be questioning that decision, a supervisor should be notified immediately and should support the alien's decision to be interviewed without UNHCR observers with no further discussion. The CBP supervisor will provide an explanation to the UNHCR delegation lead official that the interview will not continue with their participation. Additionally, the supervisor reserves the right to terminate the entire site visit, any part of an interview, or a particular portion of the site visit. A reason must be provided to the lead UNHCR official at the time of the termination. Prior to a decision to terminate the entire site visit, the supervisor must immediately advise the

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Headquarters Field Operations point-of-contact through appropriate channels. The alien's agreement or refusal to have a UNHCR presence at the interview should not be factored into the officer's decision to refer a case for a credible fear interview.

If an alien agrees to be interviewed with the UNHCR representatives present, the UNHCR representatives may observe the interview, and will be given a few minutes at the end of the interview to communicate directly with the applicant. In general, the UNHCR representatives should not ask questions or make comments during the interview. The CBP officer may, however, at his or her discretion, allow the representatives to make a comment or ask a question if the officer believes that it is facilitating the progress of the interview. Any interruptions of the interview will be recorded in the sworn statement.

CBP is not responsible for interpreting the interview verbatim or locating an interpreter to provide a verbatim interpretation in such circumstances. If the CBP officer and the alien are communicating in a language other than English without the assistance of an interpreter, and the representatives do not understand the language, the officer should explain what is being stated or asked.

When the interview is concluded, the UNHCR representatives should be invited to communicate briefly with the applicant. Any questions or statements asked by the representatives or the applicant, and any responses, will be recorded in the sworn statement.

If the UNHCR team or the alien requests a brief private discussion, the request should be accommodated within the constraints of the facility. Normally the issues aliens bring up with the UNHCR are the same like those they bring up during secondary inspections, e.g.: when can they call a relative, how long does the process take, and so forth. This request should be noted on the sworn statement. Generally, the meeting should take place out of hearing, but not out of sight, of CBP staff. If the UNHCR team requires translation and is not able to locate its own telephonic interpreter quickly, an interpreter should be provided when feasible. The local Asylum office will have been notified that the UNHCR is conducting a site visit and can cover the cost of interpretation using a commercial interpreter service if necessary. However, if an interpreter cannot be located quickly and there are time constraints (such as finishing in time to put an applicant on a scheduled plane), the officer should consult with his or her supervisor to decide whether there are compelling reasons for delaying the process to provide the representatives time to obtain an interpreter.

If the UNHCR team reports back to the CBP officer, after a private conference, that the alien alleged abusive treatment, either by CBP, an airline employee, or a smuggler, a supervisor should be notified immediately and the alien should be asked further questions in the representatives' presence. If the UNHCR team indicates that the alien has expressed a fear during the private conference which was not expressed during the interview with the CBP officer, the officer should ask the alien, in the representatives' presence, whether the alien is afraid of or concerned about return and would like to discuss his or her situation privately with an asylum officer. The alien's answer to the above questions should be recorded in the sworn statement or in a memo to file.

If the alien appears unwilling to discuss the alleged claim of fear with the CBP officer, states that the UNHCR representatives misunderstood, or does not want to be detained for a credible fear interview, the officer should call the local Asylum office for guidance on whether to refer the alien for a credible fear interview.

(4) Follow-up. If serious problems or misunderstandings arise during the UNHCR site visit, a CBP supervisor should immediately contact the Headquarters Field Operations representative who set up the meeting. After the UNHCR visit is completed, the field office will provide the Office of Field Operations feedback on how the visit went and alert it to any issues which the UNHCR representative (s) might raise.

(Added IN 00-22.)

(h) Non-governmental organizations secondary inspection access guidelines.
Since the implementation of expedited removal, many non-governmental organizations (NGOs) have requested access to observe and monitor this process at POEs. It is the DHS policy to promote a fair and open process by granting such requests for access to the extent that the visits do not compromise fundamental law enforcement interests and confidentiality as well as privacy rights. The aim of this policy is to achieve a reasonable balance between providing access to government information and protecting fundamental law

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enforcement obligations and the individual interests of arriving aliens. The following guidelines provide the procedures and practices to be followed by field offices and POEs receiving requests for visits or tours of CBP inspection facilities and operations by NGOs. An NGO may be generally defined as a group of individuals outside of the public and for-profit sectors, usually established to serve the interests of their communities, of a particular target group, or the common good. This definition should be interpreted broadly, and may include local and international organizations, business and professional associations, chambers of commerce, and policy development and research institutes. It is not intended to include the media or persons or organizations whose intent is to provide legal representation to individuals during secondary inspection processing at the time of their visit.

(1) Requests for visits.

- Any request to visit an inspection facility or observe secondary immigration inspection processing must be made in writing to the director of field operations having jurisdiction over the POE to be visited. The request must be made sufficiently in advance of the proposed visit, normally at least two weeks, to allow coordination with all affected parties, including facility operators and other agencies as appropriate. Special tours by visiting dignitaries or other special interest groups may be arranged at the discretion of the director of field operations, or at the request of headquarters offices.

- The request will include the proposed purpose and site(s) of the visit, the duration of the visit, the full names of the organization and the proposed visitors, whether they will have any special needs or requests, and point of contact. The field office receiving the request, in consultation with the site to be visited, will make a prompt decision and notify the interested party either in writing or telephonically of that decision. Whenever possible, visitors should be provided with a copy of these guidelines prior to their arrival at the POE.

- The size of the group and the number and duration of visits permitted are to be determined by the director of field operations, based on operational and resource considerations. If the director of field operations, port director, or other official determines that the visit will have an adverse effect on port operations, staffing resources, or the confidentiality or integrity of the inspection process, the request may be denied, the visit postponed, or the terms of the visit limited in a way appropriate to the potential adverse effects. If the director of field operations feels that an excessive number of requests would have an adverse impact on operations, he or she may ask the NGOs to consolidate their requests for visits. The director of field operations may also deny, limit, or terminate a visit based on particular law enforcement or security concerns, but should not deny such requests as a routine matter.

- If the director of field operations denies the request, the requesting party will be notified, in writing, of the specific reasons for the denial.

- The field office will retain a record of all POE visit requests. The record will include, at a minimum, the number of requests made, the disposition of each request, the name of the organization and the number of participants in each visit, and the date on which each visit occurred. Field offices may include comments on significant incidents, impact on operations, or other relevant information.

(2) Scope of access.

- Visitors will be escorted through the facility at all times. They may be present only in parts of the inspection area that are authorized by the official escorting them. For safety concerns, they will not be allowed to participate in baggage searches or be used as witnesses in baggage or body searches. They may be permitted to view a baggage search, with the consent of the alien, unless the officer determines there may be a safety concern or threat.

- Visitors may be permitted to observe the overall immigration inspections process, both primary and secondary, in such a way that it does not interfere with port operations. The port director may designate a supervisor or officer to whom the visitor may direct questions about the processing. As time and circumstances permit, the port official may arrange for visitors to talk directly

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to officers.

- Visitors may observe individual immigration secondary inspections of applicants for admission only with the consent of the applicant and the port officials. The port official will explain to the alien who the visitor is and what he or she wishes to observe. The alien's consent must be entirely voluntary, and should be noted in the sworn statement, if taken, or otherwise in the file. Visitors may not interfere with or interrupt the inspection or question applicants for admission. They may ask the inspector questions about the case being processed only when the alien is not present. Inspectors must not divulge any information about any secondary case that may compromise law enforcement confidentiality or the privacy of any alien. Visitors may not speak confidentially to an alien during the inspection process or while the alien is in CBP custody at the POE.

- CBP is not responsible for interpreting the interview verbatim for visitors or locating an interpreter to provide a verbatim interpretation in cases where the CBP officer and the alien are communicating without the assistance of an interpreter in a language other than English.

- Visitors may not have access to computer databases or programs containing sensitive law enforcement nature of the information, but may be given a demonstration of programs that are not law enforcement sensitive. They may not observe video display monitor outputs of systems data on screen or in print relating to specific applicants for admission.

- Visitors may not film, photograph, videotape, or audiotape POE operations, inspectors, or applicants for admission.

- CBP reserves the right to terminate the entire site visit, a particular portion of the site visit, or access to any part of an interview, if it determines that the visit has become disruptive to port operations or may in any way compromise the integrity of the inspection process. For safety reasons, port officials may remove visitors from the inspection area or terminate the visit if any visitor or applicant for admission becomes unruly or violent, or if any other safety hazard becomes apparent.

- Any violations of this policy by visitors to POEs will be documented in writing, and any significant incidents or interruptions will be reported to Headquarters Office of Field Operations through the chain of command.

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[redacted]

[redacted]

31.7 Responding to Inquiries Concerning Lookout Records.

CBP has implemented an agency-wide procedure to respond to inquiries from the public concerning the existence of lookout records in the National Automated Immigration Lookout System (NAILS) for certain individuals who may be inadmissible to the United States. The procedure is designed to standardize the manner and content of the CBP responses regarding this type of inquiry.

The criteria to create lookout records for individuals encompass two categories of persons. First, CBP creates lookout records for nonimmigrant aliens, or lawful permanent residents, who may be inadmissible to the United States under Section 212 of the INA, or other persons who may be violating the immigration laws of the United States. Second, CBP creates lookout records for persons who are of interest to another law enforcement agency.

Private individuals and attorneys occasionally request explanations or information related to the possible reasons for an individual having been questioned at the time of application for admission to the United States. If an individual was questioned as part of the normal inspectional process, the response should be drafted accordingly. However, in those cases when lookout information was the reason for the referral to secondary inspection, the director having jurisdiction over the port-of-entry where the event occurred shall evaluate and answer any subsequent inquiry using the guidance set forth below.

The lookout database is considered a law enforcement system of records of which CBP is not the sole proprietor. The records to which CBP officers have access during the inspection process include entries made by other law enforcement and government agencies.

CBP may not disclose lookout information that has been provided by another law enforcement agency or government agency. CBP will forward the inquiry to the agency that owns the record. Without making any reference to the agency when responding to the inquiring party, the CBP response to the inquiring party will be limited to stating that the inquiry is being taken under consideration. [redacted] A copy of the CBP response will be included with the inquiry that is forwarded to the appropriate agency.

Section 601(c) of the Immigration Act of 1990 states that the Attorney General and the Secretary of State shall develop protocols and guidelines for updating lookout systems and similar mechanisms for the screening of individuals applying for visas for admission, or for admission, to the United States. Such protocols and guidelines are to be developed to ensure that in the case of an individual whose name is in such a system, and who either applies for admission or requests a review, without seeking admission, for the continued inadmissibility under the INA, if the individual is no longer inadmissible, his/her lookout record shall be removed from the lookout system and the individual shall be informed of such removal. If the individual continues to be inadmissible, the individual shall be informed of such determination.

Section 601(c) of the Immigration Act of 1990 authorizes CBP to disclose information relating to an individual's inadmissibility when the pertinent content of the record indicates that grounds already exist to support removal proceedings against the individual. The disclosure of an individual's lookout record is limited to information that confirms specific removal grounds, such as prior or final deportation from the United States, conviction for crimes that render the individual inadmissible from the United States, prior withdrawal of an application for admission to the United States and prior refusal of entry to the United States.

Any inquiries generated by lookout records created by the Department of State (DOS) may be forwarded to DOS for appropriate action. The DOS intends to implement an analogous procedure to respond to inquiries posed at the time of application for admission where an individual has been entered into the DOS CLASS database. Appendix 31-2 contains copies of the DOS letter that may be given to any individual who asks for information or assistance if his/her name appears in CLASS.

The sample letters contained in Appendix 31-2 contain suggested language for a variety of situations.

- Letter 1- Letter from the Office of Chief Counsel, when no specific information may be provided to the requester
- Letter 2- Letter from the Office of Chief Counsel, when grounds for removal exist
- Letter 3- Letter when grounds for removal exist
- Letter 4- Letter when grounds for removal exist
- Letter 5- Letter when no specific information may be provided to the requester

Appendix 31-3 contains an information notice used by the Department of State concerning procedures for inquiring about their lookouts.

31.8 DFO Random Quality Review of CBP Permanent Lookout Records.

The development of a quality review function for NAILS is a key part of the continuing effort to restructure CBP lookout system procedures that began in Fiscal Year 1993. In March 1994, the Office of the Inspector General (OIG) issued a NAILS Inspection Report that listed as one of its

If the requested information or documentation is not available, the responding officer should provide a brief statement and/or explanation in the space provided on the NFO's memorandum and return the memorandum to the NFO within thirty (30) days of the date of the memorandum.

(8) Submission of Fine Recommendations to NFO. A recommendation for an administrative fine must include a completed Form I-849, reviewed and signed by a supervisor, and all supporting documentation related to the incident. The recommendation package should be submitted in duplicate, via regular mail, to the Director of the NFO as soon as possible following an alleged violation. The address of the NFO is:

National Fines Office
1525 Wilson Boulevard, Suite 425
Arlington, VA 22209.

Multiple recommendations may be included in a single mailing; however, each separate incident should include (in duplicate) a separate Form I-849 with supporting documentation relevant to that case.

(b) Special Requirements for Documenting Section 231 Fines.

43.4 Passengers Arriving from Contiguous Territory.

Regardless of documentary deficiencies, carriers are not liable for fines under Section 273 of the INA in instances where flights enter the United States directly from Canada or Mexico. However, contiguous territory is not a factor with violations occurring under sections of the INA other than Section 273. (Revised IN00-42)

43.5 Processing Administrative Fines at the National Fines Office.

(a) Initial Processing.

(1) File Creation, Coding, and Electronic Entry. Upon receipt at the NFO, a file is to be created for each fine recommendation. Where appropriate, a series of codes signifying the type of violation, passport and visa status, disposition of alien, etc., are to be assigned to the case in the course of an initial review. Case codes and data taken directly from the Form I-849 are to be entered into the NFO System [NFOS]. NFOS will assign a unique fine number to the case. (Revised IN00-42)

(2) Fines Officer Review. Once a fine number has been assigned, each new case is to be reviewed by a fines officer for legal and documentary sufficiency. The reviewing officer must make one of three possible determinations:

- that fine proceedings should be initiated;

- that fine proceedings should not be initiated; or

- that additional information and/or documentation is needed before fine proceedings can be initiated.

(A) Sufficient Circumstance/Evidence for Fine. If the reviewing fines officer determines that the case, as submitted, is sufficient to initiate fine proceedings, the reviewing officer must sign the appropriate area of Form I- 849, recommending that a Form I-79, Notice of Intent to Fine, be issued to the appropriate carrier. This recommendation is to be forwarded to the Director of the NFO for concurrence.

(B) Insufficient Circumstance for Fine. If the reviewing fines officer determines that fine proceedings are not warranted, the officer must note the reason(s) for his or her recommendation and forward the case to the Director of the NFO for concurrence. If the Director determines that fine proceedings are in fact warranted, the Director will order that a Notice of Intent to Fine be issued to the appropriate carrier; otherwise, the Director will approve the fines officer's recommendation for termination, the case shall be terminated in the NFO System, and no notice shall be sent to the carrier.

(C) Request for Additional Information. If the reviewing fines officer determines that additional information or evidence is needed in order to strengthen the Service's case against the carrier, the reviewing officer is to issue a memorandum to the port requesting additional information or documentation. This memorandum must reference the local tracking number assigned to the case by the originating port and provide the port with thirty (30) days to respond. The NFO will refrain from issuing a Notice of Intent to Fine until the 30 days have elapsed or a response to the memorandum is received at the NFO. If no response is received within the 30-day period, the reviewing officer and the Director of the NFO shall decide either to initiate fine proceedings on the basis of the evidence which is available, or to terminate the proceedings.

(b) Notice of Intent to Fine (Form I-79). When it is determined that fine proceedings should be initiated against a carrier, a Notice of Intent to Fine, Form I-79, is to be issued to the responsible carrier via certified mail. This notice informs the carrier of the Service's intention to impose a fine under a specified section of law and for a specified monetary amount. The carrier is provided with thirty (30) days to submit a written defense to the NFO stating the reasons why the proposed fine should not be imposed, or if imposed, why the fine should be mitigated or remitted. A copy of the Notice of Intent to Fine is to be filed with the appropriate case, pending further action.

(c) "Decision to Impose Administrative Fine" Notice. If, after thirty (30) days, a carrier does not respond to a Notice of Intent to Fine, the NFO will issue to the carrier a "Decision to Impose Administrative Fine" notice. This notice allows the carrier an additional thirty (30) days to file a written defense to the proposed fine. The carrier is advised that failure to provide a

written defense within this 30-day period will result in formal imposition of the fine and that all periods for filing a written defense will have expired. A copy of the Decision to Impose Administrative Fine is placed in the case file, pending further action.

(d) Form G-261 (Bill) and "Final Decision" Notice. If a carrier fails to respond to both the Notice of Intent to Fine and the Decision to Impose Administrative Fine, the Director of the NFO shall order that the fine be formally imposed. A bill, Form G-261, shall be created and sent to the responsible carrier along with a "Final Decision" notice explaining that the fine is imposed in full and all periods provided for the filing of a written defense have expired. The Final Decision notice shall further instruct the carrier that payment should be made within thirty (30) days to the Administrative Center Finance Office specified on the accompanying G-261.

(e) Receipt of Written Carrier Defense. A timely written defense submitted by a carrier (or on a carrier's behalf) to a Notice of Intent to Fine or a Decision to Impose Administrative Fine is to be placed in the appropriate case file, pending review and a decision by a fines officer. The NFO shall not issue a bill, Form G-261, to a carrier so long as a defense is pending.

(f) Attorney Representation. Correspondence received at the NFO which references a specific carrier or a specific violation must be submitted by the responsible carrier unless accompanied by a properly completed Form G-28, Notice of Entry of Appearance as Attorney or Representative. The NFO shall not discuss cases nor accept defense materials with any entity other than the responsible carrier unless a Form G-28 has been filed.

(g) Oral Interviews. If desired (and within the time frame allotted for filing a defense), a carrier representative may request an oral interview to defend a case with a fines officer. Oral interviews may be conducted telephonically or in person; if in person, the carrier representative must travel to the NFO. An oral interview is requested in conjunction with a written defense. Authority for conducting a personal interview is contained in 8 CFR 280.12. Procedures for conducting a personal appearance are contained in 8 CFR 280.13. [See Appendix 43-3 which contains the public notice concerning the oral interview requests.]

The NFO procedures for a request for a personal interview include the following:

- The request must be made in conjunction with the written defense and submitted within 30 days of service of the Notice of Intent to Fine, Form I-79. The immigration officer assigned to conduct the personal interview shall contact the representative of the carrier to set a date and time for the personal interview at the NFO, or a telephonic interview in lieu of a personal interview.

- If additional evidence is to be presented by the representative during a personal interview, the evidence must be submitted at the time of the personal interview. If a telephonic interview is to be conducted and additional will be presented, the representative must submit the documentation at least 24 hours before the start of the telephonic interview for consideration and inclusion in the file.

- Once a date and time for the personal or telephonic interview have been established, the representative is obliged to appear in person for the personal interview or telephonically contact the NFO for the telephonic interview on the scheduled date and time. If the representative cannot appear for the personal interview or cannot call for the telephonic interview on the scheduled date and time, the representative must call the NFO at least 24 hours in advance to reschedule the interview. The immigration officer will reschedule one additional date on which the personal or telephonic interview is to be held. The rescheduled interview date will be set within thirty (30) days of the original interview date and must be conducted and completed within that time frame. If the representative fails to appear or telephonically contact the NFO on the date and time that has been rescheduled by the immigration officer, the representative will have forfeited his or her opportunity to discuss or present information regarding those determined cases. The immigration officer will make a decision on the case based upon the existing record.

- The immigration officer assigned to conduct the personal interview may limit the discussion of a particular case to a reasonable time period at his or her discretion. The immigration officer may also limit the total time period allotted in a day for the scheduled personal or telephonic interview.

- In the discretion of the immigration officer assigned to conduct the personal interview, the representative may also discuss another case assigned for personal interview to the same officer, provided that the written defense and any additional evidence relevant to that other case has been filed. The representative may not discuss any case for which no request for a personal interview has been made, nor any case assigned to another immigration officer.

- The immigration officer will prepare a report of the personal or telephonic interview, summarizing the evidence and containing his or her findings and recommendation, and present it to the Director of the NFO.

(h) Decisions to Carrier Defenses. All aspects of a timely defense (oral or written) and any accompanying documentation shall be considered by a fines officer. The fines officer shall determine whether the proposed fine should be imposed in full, terminated, or mitigated (in cases where mitigation is permitted).

If the reviewing fines officer determines that imposition of the fine (in full or in part) is warranted, the reviewing officer shall compose a formal order stating the facts of the case, the arguments presented by the carrier representative, the reason(s) why the fine should be imposed, and the monetary amount recommended for the imposition. This recommendation shall be endorsed by the reviewing officer and forwarded to the Director of the NFO for approval or denial. If the Director concurs with the fines officer's recommendation, the Director shall endorse the formal order and order that the fine be imposed. The formal order shall be sent along with a bill, Form G-261, along with instructions to the carrier regarding the filing of an appeal to the Board of Immigration Appeals [BIA].

If the reviewing fines officer determines that imposition of the fine is not warranted, the reviewing officer shall note the reason(s) for his or her recommendation and forward the case to the Director of the NFO for approval or denial. If the Director concurs with the officer's recommendation for termination, the Director shall approve the fines officer's recommendation, the case will be canceled in the NFO System, and a notice shall be sent to the carrier stating that the fine has been terminated. The reviewing fines officer's recommendation, Director's concurrence, and a photocopy of the termination notice shall be placed in the appropriate case file.

(i) Appeals to Board of Immigration Appeals (BIA). Within eighteen (18) days of issuance of a formal order by mail, a carrier may appeal the NFO's decision to the Board of Immigration Appeals [BIA], by submitting Form EOIR-29, Notice of Appeal to the Board of Immigration Appeals, along with the required filing fee, to the NFO. The NFO shall deposit the filing fee into the Federal Reserve and forward the original file along with the appeal application to the Office of Appellate Review.

(j) Motions to Reopen / Motions to Reconsider. Within 90 days of the formal imposition of a fine, a carrier may file a motion to reopen with the NFO. Within 30 days of the formal imposition of a fine, a carrier may file a motion to reconsider with the NFO. Both types of motions require a non- refundable filing fee. The Director of the NFO shall consider a Motion to Reopen provided that additional evidence and/or information is presented which was not available prior to the fine's imposition.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision [See 8 CFR 103.5.].

A carrier may appeal the Director's decision to the BIA [See 8 CFR 3.1(b).].

43.6 Processing Liquidated Damages at Ports-of-Entry.

Under Section 233 of the INA, liquidated damages is the sum a carrier agrees to pay for a breach of the Immediate and Continuous Transit Agreement (Form I-426) when it appears that a transit-without-visa (TWOV) passenger failed to depart the United States or did not depart the United States by the scheduled departure date. Liquidated damages under Section 233 are always assessed against the carrier responsible for the passenger's arrival in the United States.

In instances where it is known at the port-of-entry that a TWOV passenger has absconded, the incident is to be reported to the NFO in the same manner as an administrative fine [See Chapter 15.6 and Chapter 43.3(a)(5)(E).]. In most instances, however, the process by which liquidated damages are initiated originates with the Service contractor and requires no special action on the part of the inspector. The inspector's primary role in the liquidated damages process is to ensure that all Forms I-94T are properly completed and forwarded to

- Seizure Form (I-620 or CATS)
- Damage Report
- Seized Property and Evidence Control (USMS-102)
- Conveyance Registration; and
- Photographs of the Conveyance

The conveyance should be transferred to the USMS as soon as possible after the seizure. There may be exceptions for conveyance which present special problems. In certain instances, the USMS will designate the Service as the substitute custodian in which case the same duties and obligations imposed on the USMS as custodian will be transferred to the Service.

Conveyances that remain in Service custody while awaiting transfer to the USMS should be kept secure. Precautions should be taken to prevent the theft of stored conveyances, vandalism or theft of property from the conveyances. Conveyances should also be protected against owners returning to unlawfully retrieve their conveyances. Seized conveyances should not be operated by Service employees.

The USMS guidelines require the seizing agency to remove all property not subject to seizure from the conveyance prior to the transfer of custody. Personal belongings must be removed before releasing the conveyance to the USMS.

44.8 Notification.

(a) Notice Requirements. Individuals or entities having a property interest in the conveyance must receive timely notice of their rights and remedies. Official notification to any person with an ownership interest in the seized conveyance should begin as soon as possible following seizure. In most cases, this should be done on the day of the seizure (Refer to M-397, Chapter 14).

DOJ Policy states that notification letters shall be sent to all interested parties (including owners and lienholders) known at the time of seizure not later than sixty (60) days from the date of seizure. Refer to M-397A, DOJ Policy, Sixty-Day Notice Period in All Administrative Forfeiture Cases.

The notification letter should be provided to the owner at the time of seizure if that person is present. By regulation, 8 CFR 274.8, this notification letter must describe:

- The procedure to obtain a personal interview pursuant to 8 CFR 274.5;

- The procedure to request judicial review of the seizure by filing a claim and posting a cost bond pursuant to 8 CFR 274.10; and
- The procedure for filing a petition for relief from forfeiture pursuant to 8 CFR 274.13-17.

In order to prepare the notification letter, the following information must be obtained:

- The appraised value of the conveyance;
- The case number from the automated system, and
- The name of the newspaper in which the Advertisement of Seized Conveyance will be published.

All notification letters to owners must be accompanied by copies of:

- 8 CFR Part 274, Seizure and Forfeiture of Conveyances;
- 8 CFR 103.7(c), Waiver of Fees;
- 28 CFR Part 9, Remission or Mitigation of Civil and Criminal Forfeitures;
- Section 274 of the INA, Bringing In and Harboring Certain Aliens, and
- The advertisement of seized conveyance.

(b) Related Notification Information. The amount of the cost bond is calculated based on ten percent (10%) of the appraised value, with a minimum amount of $250 and a maximum amount of $5,000. The advertisement must be published once a week for three (3) successive weeks in a newspaper of general circulation in the federal judicial district in which the seizure occurred. The advertising order and the notification letter should be prepared to ensure that owners are afforded a twenty (20) day period from receipt of notification in which to file a claim and cost bond.

If the notification letter is given to the owner at the time of seizure, the seizure file must so indicate. The owner should sign for the receipt of the letter, but if the owner is unwilling to sign, the seizure file should reflect the refusal. If the owner is not present, serve the notification letter on the operator. When someone else claims ownership of the conveyance, serve him/her with the notification letter.

If there is reason to believe that any other individual is a beneficial owner, as defined in 28 CFR 9.2(c) and 8 CFR 274.1(b), a notification letter should be provided to that person. If the conveyance is registered in the name of a company, notification should be sent to the company s address. Leasing companies (even companies are treated as lienholders and must be sent to the notification letter for lienholders.

If the owner is not present at the time of the seizure, or if a subsequent record check indicates another owner, or if there appears to be anyone else with an ownership interest, send these interested parties the notification letter by certified mail, return receipt requested.

Notification letters must be sent to any party with a property interest in the conveyance even if he/she has been arrested and incarcerated. In that instance, notification should be sent to the owner at the place of confinement as well as the last known address.

Particular care must be taken to ensure that notification is sent to the proper address. If the notice letter is returned as undeliverable or unclaimed, the returned letter should be kept in the seizure file to serve as proof of attempted service.

(c) Lienholders. There is a specific notification letter for lienholders (Refer to M-397, Chapter 14). Lienholders must also be sent copies of the regulations, the statute and the proposed advertisement. In addition, lienholders must be sent the Financial Statement (Refer to M-397, Chapter 14, Document 4) to complete and return with their petition.

Leasing companies are also sent the lienholder notification letter. Leasing companies are those businesses engaged in long-term contracts with lessees and the lessee has the actual use of the conveyance.

(d) Attorneys. Attorneys should file a Notice of Entry of Appearance as Attorney or Representative on Form G-28. Once the Notice of Entry of Appearance has been filed, the attorney must be sent copies of all notification letters, copies of previous correspondence from the client(s) and decision letters. The attorney is entitled to a copy of any sworn statement executed by his/her client. No other investigative material should be released. Attorneys may attend personal interviews with the clients but not in lieu of the clients.

(e) Publication of Notice of Seized Conveyance. Publication of notice of seizure and intent to forfeit a conveyance is mandated when the appraised value of the seized conveyance is $500,000 or less. The seizure of a conveyance whose appraised value is greater than $500,000 need not be advertised by the Service.

Notice of the seizure and the potential forfeiture of the conveyance is provided to the general public by publication in the legal classified section of a newspaper.

Please note that the Advertisement of Seized Conveyance must accompany the notification letters to the owners and the lienholders. The requirements for this advertisement are set forth in 8 CFR 274.9. The advertisement must include:

- A description of the conveyance including vehicle identification number;
- The time and place of seizure;
- That the conveyance is subject to forfeiture;

- That there are two exceptions from forfeiture, set forth at 8 CFR 274.5(b);
- That the Service is considering forfeiture and that the seized conveyance may be sold or disposed of otherwise if declared forfeited; and
- That any prospective petitioners for relief from forfeiture should submit petitions pursuant to 8 CFR 274.13 - 17 within thirty (30) days of the date of the first advertisement.

Although the regulations do not require that the Advertisement of Seized Conveyance inform the reader of the availability of judicial review, the policy of the Service is to include information on the filing of a claim and posting of a cost bond pursuant to 8 CFR 274.10.

44.9 Personal Interview.

The owner of a seized conveyance may request a personal interview in order to determine whether the Service will continue with the forfeiture proceedings. Any person or entity who appears to have an ownership interest in the conveyance should be provided notice of the opportunity for an interview. Beneficial owners and registered owners may request an interview. Note that lienholders (including companies who lease conveyances to customers in accordance with a long-term lease and the lessee has the actual use of the conveyance) are not generally afforded interviews. The Service may schedule personal interviews for more than one person or entity having an interest in the conveyance. The owner is advised of the opportunity for an interview in the notification letter. The interview should be held as promptly as possible after the date of seizure.

The interview should be conducted by an immigration officer. This officer should not necessarily be the seizing agent. The owner may request a personal interview with an immigration officer other than the officer who initially seized the conveyance pursuant to 8 CFR 274.5. Owners are entitled to representation by an attorney at the time of the interview. Attorneys may not attend the interview in lieu of the owner, but may accompany their clients. The owner may bring an interpreter to the interview.

If the person requesting an interview claims to be the owner of the conveyance even though he/she is not the registered owner, an interview should be scheduled. The claimant should produce proof of ownership interest in the conveyance at the interview.

The purpose of the interview is to provide the owner an opportunity to present evidence and arguments to support his/her position that the conveyance is not subject to seizure or forfeiture. The burden of proof is on the owner, not on the Service. There is no requirement that the interviewing officer justify the seizure, present evidence to establish the violation, or articulate the probable cause basis upon which the conveyance was seized. The owner is not required to answer questions posed by the interviewing officer.

The evidence and arguments presented by the owner may be oral or written. At the discretion of the interviewing officer, the interview itself may be held in person or via telephone. If an

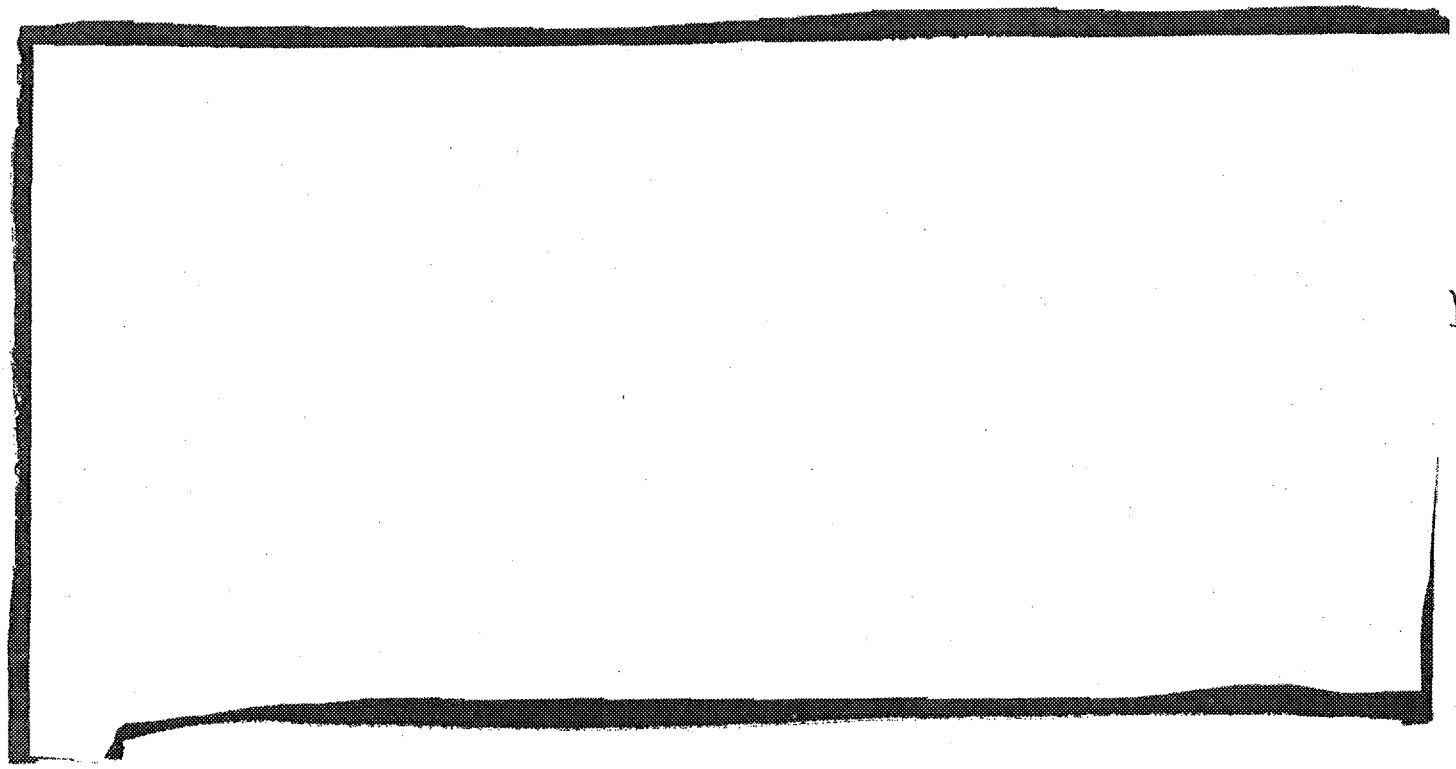
AMERICAN IMMIGRATION COUNCIL,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

Civil Action No. 11-1972 (JEB)

EXHIBIT E TO DECLARATION OF MELISSA CROW



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2.9 Dealing with Attorneys and Other Representatives.

No applicant for admission, either during primary or secondary inspection has a right to be represented by an attorney - unless the applicant has become the focus of a criminal investigation and has been taken into custody. An attorney who attempts to impede in any way your inspection should be courteously advised of this regulation. This does not preclude you, as an inspecting officer, to permit a relative, friend, or representative access to the inspectional area to provide assistance when the situation warrants such action. A more comprehensive treatment of this topic is contained in the *Adjudicator's Field Manual*, Chapter 12, and **8 CFR 292.5(b)**.

2.10 Land Border Integrity Program (Added 6/23/99; IN99-22)

Office of Inspections has st forth policy and guidance in establishing uniform national practices for integrity standards at all land POEs. Field managers are responsible for implementing the standards and guidelines outlined below. These guidelines are not intended to prevent tests of new and special processing techniques, nor are these guidelines intended to impose unrealistic operating requirements on POEs.

Each port must choose one or more of the options outlined below regarding vehicle and pedestrain lane scheduling options and implement at a minimum once per shift. Primary lane changes on INS staff with Customs staff are desirable. Schedules and frequencies should be negotiated with Customs counterparts locally.

Vehicle and Pedestrian Lane Scheduling Options:

(1) Agency pushes - Supervisory Immigration Inspector will randomly instruct officers to lane shift

(2) Compex/INTEX hits - Any time there is a hit, there is an automatic lane assignment shift

(3) Traffic manager will initiate random lane flip-flops - Primary lane changes of INS and Customs Staff

(4) Computer Generated random lane assignments and shift.

To further enhance the integrity of the inspectional process, an automatic lane push or flip-flop will occur when the inspecting officer encounters a relative. The term relative includes, but is not limited to: immediate family, and extended family such as in-laws, cousins,

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AMERICAN IMMIGRATION COUNCIL,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

Civil Action No. 11-1972 (JEB)

EXHIBIT F TO DECLARATION OF MELISSA CROW

5055 10 856

District Judge _____

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE, WASHINGTON

RAMON TORRES and LEONOR TORRES,

Plaintiffs,

v.

TOM RIDGE, Secretary of the Department of Homeland Security; and ARTHLYN SAMUEL, Branch Chief, United States Customs and Border Protection,

Defendants.

Case No. CV04-525P

COMPLAINT

04-CV-00525-CMP

1. Defendants have ordered Plaintiff Ramon Torres to appear for an examination regarding his immigration status on March 17, 2004, and have informed him and his counsel that no attorney may be present in the interview. Plaintiffs Ramon Torres and his partner, Leonor Torres, file this Complaint and seek a declaration from this Court they have a right, pursuant to Constitutional Due Process and statute, to be represented by their attorney when Mr. Torres is compelled to appear before an examining administrative officer. Plaintiffs

GIBBS HOUSTON PAUW
1000 Second Ave. Suite 1600
Seattle, WA 98104
(206) 682-1080

additionally request a temporary and permanent order enjoining Defendants from examining Mr. Torres without his attorney present.

PARTIES

2. Ramon Torres is a lawful permanent resident of the United States of America. He resides in Renton, Washington.

3. Leonor Torres is married to Ramon Torres. She was born in the United States and is a United States citizen. She resides with Mr. Torres in Renton, Washington, along with their two United States citizen children.

4. Tom Ridge is the Secretary of the Department of Homeland Security ("DHS"). As of March 1, 2003, DHS is the agency responsible for implementing the Immigration and Nationality Act. Within DHS, United States Customs and Border Protection ("CBP"), whose immigration functions were formerly part of the Immigration and Naturalization Service, is now responsible for implementing the provisions under which lawful permanent residents enter into the United States, in particular INA §§ 211, 212, 8 U.S.C. §§ 1181, 1182.[1] Respondent Ridge is sued in his official capacity.

5. Arthlyn Samuel is the Seattle District Branch Chief of CBP, and is sued here in his official capacity. Mr. Samuel has been delegated authority to control admissions of

[1] On March 1, 2003, the Immigration and Naturalization Service ("INS") ceased to exist and its functions were transferred to the newly formed Department of Homeland Security. *See* Homeland Security Act, 116 Stat. 2135, Pub. L. 107-296 (2002). The former INS was divided into three separate agencies, Citizenship and Immigration Services, Immigration and Customs Enforcement, and Customs and Border Protection. This complaint challenges a decision and policy of Customs and Border Protection, the component responsible for admission of lawful permanent residents.

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persons scheduled for deferred inspection within the Seattle District, including the authority to admit these persons or place them in removal proceedings.

JURISDICTION

6. This Court has jurisdiction over the present action pursuant to 28 U.S.C. § 1331, Federal Question Jurisdiction; 28 U.S.C. § 2201, the Declaratory Judgment Act; 5 U.S.C. § 702, the Administrative Procedures Act ("APA"); and 5 U.S.C. § 504, the Equal Access to Justice Act.

VENUE

7. Venue in the Western District of Washington is appropriate pursuant to 8 U.S.C. § 1421(c) because Plaintiffs reside within the district and the administrative officer denying Plaintiffs' right to counsel is the Seattle Branch Chief of the CBP, located within this district.

STATEMENT OF THE FACTS

8. Mr. Torres gained lawful status through his parents in or about 1987, and received his lawful permanent resident card in or about 1991. He graduated from Wapato High School, near Yakima, Washington. He works in construction plastering. He is the father of Adriana Torres, who is eight years old, and Ramon Torres Jr., who is three weeks old. Both of Mr. Torres' children are United States citizens. Mr. Torres is married to Plaintiff Leonor Torres, and the family lives together in Renton, Washington. Mrs. Torres is a teacher's assistant in the Renton School District, although she is currently on leave to care for her baby.

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9. After visiting his sick grandmother outside the United States for fourteen days, on January 1, 2004, Mr. Torres presented himself at the border to re-enter the United States. Defendants are in control of the documentation of the reason for deferred inspection. On information and belief, the inspecting immigration officer questioned whether Mr. Torres was admissible to the United States due to a 1996 criminal conviction for possession of a controlled substance. This 1996 conviction has since been expunged under Washington State law.

10. Defendants decided to parole Mr. Torres into the United States, and defer his inspection, on information and belief, to consider the immigration consequences of his conviction. Mr. Torres was ordered to appear in person for deferred inspection on March 3, 2004. He was warned in writing that at this interview a final determination would be made concerning whether and under what conditions he will be admitted to the United States. He was also warned in writing that failure to appear at the ordered interview could result in his being taken into custody.

11. Plaintiffs hired the office of undersigned counsel to represent Mr. Torres at the deferred inspection interview. Plaintiffs are very concerned that any immigration problems might force Mr. Torres to be separated from his wife and children, and they strongly desire to have an attorney present at any interviews which may determine whether or not Mr. Torres is admitted to the United States or taken into custody.

12. On February 24, 2004, undersigned counsel contacted CBP Branch Chief Arthlyn Samuel to request that Mr. Torres' deferred inspection be rescheduled. Mr. Samuel

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agreed to continue the deferred inspection to March 17, 2004. Mr. Samuel also volunteered the information that attorneys are not allowed to be present in deferred inspection interviews.

13. On March 1, 2004, undersigned counsel sent by federal express mail a letter to Mr. Samuel to confirm the rescheduled deferred inspection, and to protest as unlawful expressed CBP policy that attorneys are not permitted in deferred inspection interviews. This letter is attached as Exhibit 1 and incorporated by reference. Counsel requested that Mr. Samuel confirm in writing by March 10, 2004 that Mr. Torres would be allowed to have his attorney present during his examination. Counsel wrote that should there be a disagreement, Mr. Torres might seek a declaration regarding the issue from a Federal District Court.

14. Defendants did not contact counsel for Plaintiffs by March 10, 2004. On March 11, 2004, undersigned counsel contacted Mr. Samuel by telephone. Mr. Samuel confirmed that CBP contends that there is no right to counsel in deferred inspection, and does not allow attorneys to be present or represent persons in deferred inspection. Mr. Samuel did indicate, however, that at the discretion of the individual immigration officer, an attorney may be allowed to sit in the same room and observe the interview, though not to participate.

15. An actual controversy has arisen and now exists between the parties and a declaratory judgment is necessary in that Plaintiffs contend and Defendants deny the following: Plaintiffs have a Constitutional Due Process and statutory right to have Mr. Torres represented by counsel in a compulsory interview before an immigration officer.

STATEMENT OF THE LAW

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16. The Fifth Amendment of the United States Constitution grants Plaintiff Mr. Torres a Due Process right to counsel in a deferred inspection examination before an immigration officer.

17. The Fifth Amendment of the United States Constitution grants Plaintiff Mrs. Torres a Due Process right to have her husband represented by counsel in a deferred inspection examination before an immigration officer.

18. The right to counsel in a deferred inspection examination is guaranteed by the APA, 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.").

CLAIMS FOR RELIEF

19. Plaintiffs reallege paragraphs 1 through 19 herein as if fully set forth Plaintiffs are entitled to an order declaring that Plaintiffs have a Constitutional and statutory right to Mr. Torres' representation in a deferred inspection.

20. Plaintiffs are entitled to temporary and permanent injunctive relief prohibiting Defendants from denying Plaintiffs access to counsel in deferred inspection.

21. Plaintiffs are eligible for payment of attorney's fees, related expenses, and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests that this Court:

1. Assume jurisdiction over this matter;

2. Declare that Plaintiffs have a Constitutional Due Process and statutory right to Mr. Torres' representation in deferred inspection;

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3. Enjoin Defendants from compelling Mr. Torres to appear for deferred inspection without presence and assistance of counsel;

4. Award reasonable costs and attorney's fees pursuant to the Equal Access to Justice Act; and

5. Grant any and all further relief this Court deems just and proper.

Dated this 12th day of March, 2004.

By: _____

Christopher Strawn
WSBA No. 32243

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Heather Houston
Robert Pauw
Signe Dortch
Christopher Strawn

March 1, 2004

Arthlyn Samuel
United States Customs and Border Protection
1000 Second Ave., Suite 2100
Seattle, WA 98104

Re: Ramon Torres, A90-721-255
Deferred Inspection, Re-scheduled for March 17, 2004

Dear Mr. Samuel:

As you know, our office represents Ramon Torres. I talked with you on February 24, 2004, regarding rescheduling Ramon Torres's deferred inspection, which was set for March 3, 2004, at 3600 Port Tacoma Road, Suite 303, in Tacoma, Washington. First, I want to thank you for the courtesy of agreeing to reschedule Mr. Torres's interview for March 17, 2004, at my request. This should allow us to finish essential preparation to help Mr. Torres be prepared for his interview, which I hope will make the interview easier for everyone involved. I assume the interview will be in the same place, at the same time – that is, he may appear at any time between 8:00 a.m. to 12 p.m.

I'm writing this letter partially because Mr. Torres hasn't yet received a rescheduling notice, and I understand from our conversation that your office would send one to him. I'm also writing this letter because I am concerned about your statement that Mr. Torres is not allowed to have his attorney with him during the interview.

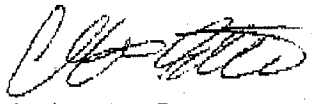
I have discussed the issue of the right to counsel in deferred inspection with the attorneys in our office, and I believe that Mr. Torres, who is a lawful permanent resident, and his U.S. citizen wife, have a right to counsel in deferred inspection. I believe the right to representation flows not only from Due Process, but also the Administrative Procedures Act, 5 U.S.C. § 555(b) ("a party is entitled to appear . . . with counsel . . . in an agency proceeding."), among other laws. Could you please confirm in writing by

Ex. 1

March 10, 2004, that you will allow Mr. Torres's counsel to be present in his interview and participate fully, not just as an observer?

If we disagree about Mr. Torres's right to counsel in deferred inspection, please let me know, and then Mr. Torres may seek a declaration from a Federal District Court regarding this legal question. Thanks again for your assistance, as well as your quick response to my request regarding a re-scheduling of Mr. Torres's interview. Please feel free to contact me at (206) 224-8778 if you have any questions or concerns.

Sincerely,



Christopher Strawn
Attorney

AMERICAN IMMIGRATION COUNCIL,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

Civil Action No. 11-1972 (JEB)

EXHIBIT G TO DECLARATION OF MELISSA CROW

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

LAURA NANCY CASTRO, YULIANA TRINIDAD CASTRO, and TRINIDAD MURAIRA DE CASTRO, PETITIONERS/PLAINTIFFS, In Their Own Name and On Behalf of All Others Similarly Situated, v. MICHAEL T. FREEMAN, PORT DIRECTOR, U.S. CUSTOMS AND BORDER PROTECTION, BROWNSVILLE, TEXAS PORT OF ENTRY; HILLARY CLINTON, U.S. SECRETARY OF STATE, JANET NAPOLITANO, SECRETARY, DEPARTMENT OF HOMELAND SECURITY, and THE UNITED STATES OF AMERICA.	)	CIVIL ACTION

PETITION FOR WRIT OF HABEAS CORPUS
CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
APPLICATION FOR TEMPORARY RESTRAINING ORDER AND
MOTION FOR PRELIMINARY INJUNCTION

Laura Nancy Castro ("Laura"), Yuliana Trinidad Castro ("Yuliana"), and Trinidad Muraira de Castro ("Trinidad"), by and through counsel, file the instant Petition for Writ of Habeas Corpus, and Class Action Complaint for Declaratory and Injunctive relief. Simultaneously, Laura and Yuliana seek a Temporary Restraining Order and Preliminary Injunction restraining and enjoining Respondents/Defendants ("Defendants"), from refusing them entry to the United States and from not returning the documents confiscated from them on August 24, 2009.

I. INTRODUCTION

The instant action challenges the procedures utilized by Customs and Border Protection, ("CBP"), in determining whether applicants for entry as United States citizens who claim to have been born with the aid of midwives in the State of Texas are entitled to enter, and, on reaching a negative conclusion, in confiscating

their documents, such as U.S. passports, Texas IDs, birth certificates, and receipts for U.S. passport applications, without providing for a hearing, either before or after said actions. Plaintiffs Laura and Yuliana Castro, in their own name and on behalf of all others similarly situated, seek both injunctive and declaratory relief, addressing the Due Process issues in the current procedures, or lack thereof. *See, Hernandez v. Cremer*, 913 F.2d 230 (5th Cir. 1990) (holding that applicant for admission with facially valid documents showing birth in the U.S. is entitled to "fair procedures" in determining whether he will be admitted, or placed in proceedings, and affirming, with minor modifications, injunction issued by the district court).

All three Plaintiffs, in their own names and on behalf of all others similarly situated, seek a declaratory judgment and corresponding injunctive relief, declaring unconstitutional and providing a remedy for the procedures by which Trinidad, and others similarly situated, are interrogated, intimidated, and threatened, without access to counsel, while on U.S. soil or at U.S. Consulates or Embassies, in order to obtain "confessions" that they falsely registered their children as born in Texas, on the basis of which "confessions" they are deemed inadmissible under 8 U.S.C. §1182(a)(6)(C)(i), and their children born in the United States are consequently deprived of their rights as U.S. citizenship.

Individually, Yuliana Castro also seeks APA review of Defendant Clinton's unreasonable delay in processing her application for a U.S. passport, which delay resulted in her not having said passport and was the precipitating factor for the events in question.

Plaintiffs Laura and Yuliana also seek declarations that they are United States citizens, and that Defendants acted illegally in confiscating their documents, including Yuliana's Texas birth certificate and ID, and Laura's valid U.S. passport. All three Plaintiffs seek a declaration that Trinidad did not commit fraud in

registering her daughters Laura and Yuliana as born in the State of Texas, when she obtained her laser visa, or in any other transaction relating to the subject matter of this action.

II. JURISDICTION AND VENUE

1. The jurisdiction of this Court is invoked under 28 U.S.C. §2241 (habeas corpus); 28 U.S.C. §§1331 (federal question), and 2201 et seq, (Declaratory Judgment Act), together with the Administrative Procedure Act, 5 U.S.C. §§702 et seq, ("APA"); and 8 U.S.C. §1503 (denial of rights and privileges as a U.S. citizen).

2. Jurisdiction and venue are proper in that, at the time the instant action is filed, all three Petitioners/Plaintiffs are at the B&M (Old) bridge in Brownsville, Texas, on U.S. soil, but Laura and Yuliana Castro are not allowed to enter the United States, and Trinidad Muraira de Castro is not being allowed to retract the "confession" she signed under extreme duress on August 24, 2009.

II. THE PARTIES

3. Petitioners Laura and Yuliana Castro are natives and citizens of the United States, who were born in Brownsville, Texas, in 1980 and 1984, respectively. *See*, Exhibit A, and sealed Exhibit B, incorporated herein by reference.

4. Michael T. Freeman is the Port Director of the Gateway Bridge, Brownsville, Texas. Hillary Clinton is the duly appointed and confirmed Secretary of State of the United States. Janet Napolitano is the duly appointed and confirmed Secretary of the Department of Homeland Security, ("DHS"). All are sued in their official capacities only. The United States is also a named Defendant.

III. THE FACTS

5. Laura Nancy Castro and Yuliana Trinidad Castro are natives and citizens of the United States, born in Brownsville, Texas in 1980 and 1984. Their births were attended by midwife Trinidad Saldivar,

who timely registered their births in Brownsville, Texas, within days of their births. [1] Their mother, Trinidad Muraira de Castro, is a Mexican citizen, who at all relevant times had documents with which to lawfully enter the United States. Exhs. A and B.

6. Shortly after the births of Laura and Yuliana, their mother, Trinidad, returned with them to her home in Matamoros, Mexico, where she has resided at all pertinent times. *Id.*

7. When Laura was about four years old, Trinidad registered her birth in Mexico, as born in Matamoros, so that she could attend school there. The same day, and for the same reasons, Trinidad also registered the birth of Yuliana, (who was then four and a half months old), in Matamoros, Mexico, showing birth in Matamoros. *Id.*

8. Although improper under Mexican law, it was at that time common for Mexican nationals residing in Mexico who had children born in the United States to register their births in Mexico, particularly if they intended to raise the child in Mexico.

9. In the past, such dual registration rarely if ever caused problems, if the child was first registered in the United States, and/or had a baptismal certificate that showed birth in the United States, and predated the Mexican birth certificate.

10. In determining citizenship, it has long been the practice of the Department of Justice, (INS and Executive Office for Immigration Review), to seek out and rely upon the *oldest* "public" document, be it a birth or a baptismal certificate, as the most reliable evidence of the place and date of birth. This practice was so ingrained that it was reflected in pre-printed language in

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[1] The midwife who delivered Petitioners Laura and Yuliana, Trinidad Saldivar, is on the list of suspicious midwives maintained by Defendants. The CBP Officer, Eliseo Cabrera, represented to Trinidad Muraira de Castro that Ms. Saldivar had spent five years in prison for filing false birth certificates. However, a PACER search of her name turns up no entries.

INS requests for evidence where birth facts were at issue. [2]

11. In fact, baptismal certificates were previously considered by the Board of Immigration Appeals ("BIA") to carry almost the same degree of evidentiary weight as birth certificates. [3]

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[2] *See, e.g., In re Pagan*, 22 I&N Dec. 547,548 (BIA 1999):

> On September 14, 1996, the Service notified the petitioner that because his name was added to the beneficiary's birth certificate 17 years after her birth, the birth certificate would not be given much evidentiary weight in establishing the claimed relationship. The Service informed the petitioner that, in order to establish the claimed relationship, he should submit "the oldest available evidence," which could include, but was not limited to, a baptismal certificate or other religious documents, early school records, and medical records, such as hospital birth records, all of which had to contain the names of the petitioner and the beneficiary. The petitioner was advised to submit affidavits as well.

See also, In re Bueno-Almonte, 21 I&N 1099, 1030 (BIA 1997):

> On July 29, 1996, the RSC director sent a notice to the petitioner requesting additional evidence. The RSC director noted that the beneficiary's birth was registered 7 years after the fact and asked the petitioner to submit "the oldest available evidence" which establishes that he is the father of the beneficiary. According to the notice, such evidence could include, but was not limited to a baptismal certificate or other religious document showing the date and place of birth or baptism, affidavits sworn to by two or more persons who have personal knowledge of the beneficiary's birth, early school records showing the beneficiary's date and place of birth and the names of his parents, or medical records which name the parents and the child.

[3] *See In re Matter of S.S. Florida*, 3 I&N Dec. 111, 116 (BIA 1948) (emphasis added):

> Obviously, prospective passengers making unsupported claims to citizenship in the United States to carriers should place the carrier upon notice that reasonable diligence requires such carrier or their agents to *obtain proof of citizenship in the United States either in the form of a birth certificate, baptismal certificate, or secondary evidence* if claim is made of nativity in the

12. Petitioner Laura Castro recently applied for, and received, a U.S. passport. Petitioner Yuliana Castro also applied for a U.S. passport in January, 2009. Defendant Clinton requested additional evidence of her birth in Texas, to which Yuliana last responded on July 30, 2009. Said application is still pending. Exhs. A and B.

13. On August 24, 2009, at about 9:40 a.m., the three Plaintiffs, with Yuliana's four week old daughter, Camila Abigail XXXXXXXX, applied for admission at the Old Bridge in Brownsville, Texas. Laura presented her U.S. passport. Yuliana presented her birth certificate, Texas ID, and the receipt for her U.S. passport, along with the Texas birth certificate of her infant daughter. Trinidad presented her laser visa. The agent on duty, CBP Officer Eliseo Cabrera, noted that Yuliana's birth certificate reflected a midwife birth, and for no other reason, took them to secondary inspection, where for approximately eleven hours he detained, interrogated, threatened, and otherwise abused the three Plaintiffs, and Yuliana's infant daughter. *See, id.*

14. At the time of the events in question, all four were in a delicate medical state. Trinidad suffers from high blood pressure. Laura is in the early months of pregnancy. Yuliana is recovering from complications of childbirth, and her daughter, Camila Abigail XXXXXXXX, at only four weeks of age, needed the type of care, and environmental conditions, which any newborn requires. *Id.*

15. All four were treated inhumanely. Eventually, based on threats, fear, and sheer exhaustion, complicated by the delicate medical condition of each, Officer Cabrera extracted a false "confession" from Trinidad Muraira de Castro, stating that Yuliana and Laura had in fact been born in Mexico. Officer Cabrera also extracted some form of statements from Laura and Yuliana, although

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United States or certificate of naturalization if claimed by the person to have been so naturalized.

the content of these statements is unknown. *Id.*

16. Plaintiffs' family was so concerned that they sent an attorney to the port of entry, who was not allowed to communicate with the Plaintiffs. The family also called the police, who came to the bridge, to make a report. *Id.*

17. After extracting false confessions from some or all of the Plaintiffs, Respondents confiscated their documents, and returned them to Mexico, without giving any of them a chance to contest said actions, either before or after they occurred. Laura and Yuliana were treated as having "withdrawn" their applications for admission, and Trinidad was found to be inadmissible under 8 U.S.C. §1182(a)(6)(C)(i), and subjected to "expedited removal." *Id.* [4]

18. This is a systemic problem. On information and belief, it is alleged that, rather than confront suspected cases of midwife fraud in the U.S., where the person would have access to an attorney, and other due process rights, Defendants concentrate on apprehending and detaining them at the ports of entry, where, according to Defendants, even the purported U.S. citizen has no Constitutional rights, unless criminal charges are to be placed. [5] Further, Officer Cabrera was overheard by Yuliana bragging to co-workers that the Castro family was his third such case of the day.

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[4] By forcing them to "withdraw" their applications for admission, rather than issuing orders of expedited removal, Defendants deprived Laura and Yuliana Castro of the statutory means of asserting U.S. citizenship by contesting the removal order. *See,* 8 U.S.C. §1252(e)(2). Similarly, by forcing Trinidad Muraira de Castro to "confess" to fraud, Defendants deprived her of the ability to contest the cancellation of her laser visa. 8 U.S.C. §1252(e)(1). Therefore, Trinidad Castro challenges the means by which the false confession was extracted, rather than the removal order itself, and seeks a declaration that it is, indeed, false.

[5] *See, e.g., Martinez v. Jimenez et al,* CA M-08-087 (S.D.Tx pending); and *L.A.E. v. Freeman,* CA B-09-191, member case in *Trevino v. Clinton et al,* CA B-07-218 (S.D.Tx pending).

19. Other than by requesting additional documentation in support of Laura's passport application, at no time prior to August 24, 2009, did any Respondent make any attempt to inform any of the Plaintiffs herein that there were questions as to whether Laura and Yuliana had in fact been born in Texas. Prior to that date, all three Plaintiffs crossed into the United States frequently, without problems or complications.

20. At the moment the instant action is being filed, all three Plaintiffs are in the waiting room of the Old Brownsville Bridge. At the time of filing, Plaintiffs are therefore within the United States, in Brownsville, Texas, within the jurisdiction of this Court. They are in custody within the meaning of 28 U.S.C. §2241.

21. Petitioners Laura and Yuliana Castro are in custody because they have been and are still being prevented from returning to the country of their birth with the full rights of U.S. citizens, and have been deprived of all evidence of their U.S. citizenship. This places significant restrictions on their liberty not shared by the populace at large.

22. Plaintiff Trinidad Muraira de Castro is in custody because the finding that she had committed fraud, derived from the false "confession" that Laura and Yuliana were actually born in Mexico, permanently bars her from the United States. Since she is not the spouse, son, or daughter or a U.S. citizen or lawful permanent resident, she is ineligible for a waiver under 8 U.S.C. §1182(i). She has close relatives born on both sides of the border, and will be deprived of the opportunity to participate fully in the lives of her U.S. citizen children and grandchildren.

23. Petitioners Laura and Yuliana also have ties on both sides of the Rio Grande, and need to be able to travel back and forth. Laura Castro's husband is in the U.S., and she is pregnant with their second child. Similarly, Yuliana needs to be able to take her infant U.S. citizen daughter for regular medical treatment in the

U.S. Without U.S. passports, they will be unable to do so. Even if they receive their passports, absent an injunction from this Court, there is no assurance that Defendants would not again detain them, confiscate their passports and other documents, and return them to Mexico, with no hearing or other legal procedure to challenge said actions. *See, e.g., Martinez v. Jimenez et al,* CA M-08-087 (S.D.Tx pending).

IV. CLASS ALLEGATIONS

24. The instant case is not an isolated instance, but a window into the cases of dozens, if not hundreds, of similarly situated persons. Plaintiffs' experience reflects and is the product of a policy, pattern and practice adopted and overseen by Defendants.

25. Plaintiffs seek to represent two related national classes:
I. Laura and Yuliana Castro seek to represent all persons: (a) who are Mexican-American and/or have Latino surnames, (b) who have Texas birth certificates indicating that their births were attended not by licensed physicians, but by midwives or other non-physicians in the State of Texas, (c) who have traveled or will in the future travel abroad, and who will seek re-entry to the United States at a port of entry within the Southern District of Texas, or whose applications for re-entry to the United States at a port of entry within the Southern District of Texas were denied on or after September 7, 2004, and who were not afforded a hearing or other opportunity to contest said denial, and (d) whose claims of U.S. citizenship have not been adjudicated by a federal court, and
II. All three Plaintiffs seek to represent all persons: [6] (a) (1)

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[6] In the event the Court determines that Trinidad Castro cannot assert her own rights, and therefore, the rights of others similarly situated, Laura and Yuliana seek to do so on her behalf, and on behalf of all others similarly situated. *See, Miller v. Albright,* 523 U.S. 420, 422 (1998) (emphasis added):

who have a son or daughter who is Mexican-American and/or has Latino surnames, and (2) which son or daughter has a Texas birth certificate indicating that his/her birth was attended not by a licensed physician, but by a midwife or other non-physician in the State of Texas, and (3) whose claim of U.S. citizenship has not been adjudicated by a federal court, and (b) (1) who, on or after September 7, 2004, have signed or will sign a "confession" allegedly admitting that they falsely registered a child as having been born in the State of Texas, which "confession" they claim or will claim was false, and was the product of coercion, threats, duress, or similar harsh interrogation tactics by agents of the United States Departments of State or Homeland Security, or (2) who have or will apply for laser or other non-immigrant documents allowing them to visit the United States.

26. On information and belief, Plaintiffs allege that the classes as so defined number at least in the hundreds, if not the thousands, not counting future members.

27. The classes are so numerous that joinder of all members would be impracticable. Joinder is particularly impracticable since the

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Justice O'CONNOR, joined by Justice KENNEDY, concluded that petitioner should not be accorded standing to raise her father's gender discrimination claim. This Court applies a presumption against third-party standing as a prudential limitation on the exercise of federal jurisdiction, see, *e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 113, 96 S.Ct. 2868, 2873-2874, 49 L.Ed.2d 826, and that presumption may only be rebutted in particular circumstances: where a litigant has suffered injury in fact and has a close relation to a third party, and where some hindrance to the third party's ability to protect his or her own interests exists, see *Powers v. Ohio*, 499 U.S. 400, 411, 111 S.Ct. 1364, 1370-1371, 113 L.Ed.2d 411. *Petitioner has not demonstrated a genuine obstacle to her father's ability to assert his own rights that rises to the level of a hindrance.* Accordingly, she is precluded from raising his equal protection claims in this case.

classes include future members.

28. The claims of the representative parties are typical of the claims of the classes.

29. The representative parties, and their counsel, can and will fairly and adequately protect the interests of the classes. Class counsel are experienced in class action litigation and in litigation of the type of claims raised here.

30. There are questions of law and fact that are common to the classes which predominate over any individual questions. Further, Defendants have acted, or refused to act, on grounds generally applicable to the class, making appropriate final injunctive and declaratory relief, with respect to the class as a whole.

V. THE CAUSES OF ACTION

A. HABEAS CORPUS

1. LAURA AND YULIANA CASTRO

31. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 30.

32. Plaintiffs Laura and Yuliana Castro seek APA review in habeas corpus of the actions of Customs and Border Protection of August 24, 2009, in refusing them entry, and in confiscating their documents indicating U.S. citizenship, without affording them an opportunity for a hearing or other legal process to determine their entitlement to enter, or to possess said documents, either before or after the challenged actions. Plaintiffs have both liberty and property interests in being able to enter the United States, and in the possession of said documents, which were lawfully issued to them by the State of Texas, and United States Department of State.

33. Yuliana Castro seeks APA review of the actions of the Department of State in unreasonably delaying the adjudication of her application for, and the issuance of, a United States Passport.

34. Both Plaintiffs have suffered legal wrong because of said agency actions, and have been adversely affected and aggrieved thereby. *See,* 8 U.S.C. §706:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall — (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be — (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

35. The action of CBP in refusing Plaintiffs entry to the United States, and in confiscating their documents, without providing for a hearing, may be challenged in habeas corpus. 5 U.S.C. §703.

2. TRINIDAD CASTRO, OR ALTERNATIVELY LAURA AND YULIANA CASTRO

36. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 35 above.

37. Plaintiff Trinidad Castro seeks APA review of Defendants' actions in cancelling her laser visa, ("DSP-150"), on the grounds that she allegedly obtained said visa "by fraud or by misrepresenting a material fact," to wit, that she misrepresented that her daughters Laura and Yuliana had been born in Texas, and of their refusal to allow her to retract the false "confession" extracted by Officer Eliseo Cabrera on August 24, 2009. (Exh. B at pp.).

38. The cancellation of Plaintiff's laser visa was based on an involuntary and untrue "confession" extracted from Plaintiff in a

manner contrary to her constitutional and statutory rights to be free from interrogation based, *inter alia,* on isolation, threats, and mistreatment of close relatives, in a manner designed to obtain a "confession," without regard to its veracity or voluntariness, let alone treatment by federal officials that was arguably cruel, inhuman and degrading within the meaning of 42 U.S.C. §2000dd-0:

> (1) No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.
>
> (2) Cruel, inhuman, or degrading treatment or punishment defined:
>
> In this subsection, the term "cruel, inhuman, or degrading treatment or punishment" means cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

39. Even in the context of suspected terrorists, it is becoming increasingly clear that information gained from "enhanced" interrogation techniques is unreliable. *See, e.g.,* New York Times, September 6, 2009, "What Torture Never Told Us," Op-Ed by Ali H. Soufan, an F.B.I. special agent from 1997 to 2005. Plaintiffs' Exhibit C, incorporated herein. Harsh interrogation tactics of the type used on Trinidad Castro, when applied to ordinary civilians, are even less likely to produce reliable information.

40. The cancellation of Plaintiff's laser visa was therefore arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. It was also in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, and was accomplished without observance of the procedures required by law.

41. Once the facts of the incident had been brought to their

attention, Defendants' refusal to allow Plaintiff to retract said involuntary and false "confession" is also arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

42. Plaintiff has been injured by said actions, in that they render her ineligible to enter the United States in the future, thus limiting her the ability to participate in the family life of her daughters and grandchildren in the United States.

43. Alternatively, her daughters Laura and Yuliana seek to raise these claims on her behalf, since they are also injured thereby, in that they were denied entry to the United States, had their documents confiscated, and, once they are successful in rectifying these wrongs, they will nonetheless be deprived of their mother's companionship, guidance, and assistance, for their own comfort and benefit, and in the rearing and education of their own children.

B. DECLARATORY AND INJUNCTIVE RELIEF

1. LAURA AND YULIANA CASTRO, ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

a. PROCEDURES FOR PURPORTED U.S. CITIZENS SEEKING ENTRY

44. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 43.

45. On their own behalf, and on behalf of all those similarly situated, Plaintiffs Laura and Yuliana Castro seek declaratory, and corresponding injunctive relief, with respect to the procedures utilized on August 24, 2009, leading up to Defendants' refusal to allow them entry as U.S. citizens, the confiscation of their lawfully issued documents, and expulsion from the United States, with no opportunity for a hearing, either before or after said actions were taken.

46. They urge the Court to declare that said procedures violated their Constitutional rights, and *Hernandez v. Cremer*, 913 F.2d 230 (5th Cir. 1990) (holding that an applicant for admission with

facially valid documents showing birth in the U.S. is entitled to "fair procedures" in determining whether he will be admitted, or placed in proceedings, and affirming, with minor modifications, injunction issued by the district court).

47. Plaintiffs also urge the Court to issue an injunction, similar to that approved by the Court in *Hernandez v. Cremer, supra*, enjoining Defendants from not implementing procedures ensuring that applicants for entry as U.S. citizens with facially valid documents showing U.S. citizenship receive due process in determining whether they will be allowed to enter, or placed in proceedings, and in determining whether any facially valid documents they possess will be confiscated, or returned to them.

b. TREATMENT OF PARENTS OF PURPORTED U.S. CITIZENS CLAIMING BIRTH BY MIDWIVES

48. Plaintiffs incorporate herein the allegations of paragraphs 1 through 47 above.

49. An alleged "confession" of midwife fraud by the parent or parents of a purported U.S. citizen affects the rights of the purported U.S. citizen, and may make it difficult, if not impossible, for the U.S. citizen to carry his or her burden of proving U.S. citizenship for purposes of, *inter alia*, obtaining United States passports, and immigrating close relatives.

50. The August 24, 2009 treatment by CBP officials of Trinidad Castro, her daughters Laura and Yuliana, and infant granddaughter, Camila Abigail XXXXXXXX, as described in Exhibit A, was designed to break their will or ability to resist, and was therefore likely to, and in fact did, produce false "confessions."

51. Any person on U.S. soil or under U.S. jurisdiction at a Consulate abroad is entitled to be free from being treated by U.S. officials in a cruel, inhuman or degrading manner. *See*, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or

Punishment, Art. 3, S. Treaty Doc. No. 100-20, p.20, 1465 U.N.T.S. 85; 42 U.S.C. §2000dd-0.

52. The August 24, 2009 treatment by CBP officials of Trinidad Castro, her daughters Laura and Yuliana, and infant granddaughter, Camila Abigail XXXXXXXX, constituted cruel, inhuman or degrading treatment, in violation of 42 U.S.C. §2000dd-0.

53. When applied to ordinary civilians, who are suspected of nothing more serious than having falsely registered a Mexican born child as having been born in the U.S., even harsh interrogation tactics by agents of the U.S. Government which fall short of the definition of 42 U.S.C. §2000dd-0, but which are designed to break the person's will or ability to resist, and therefore are likely to produce false "confessions," violate Due Process.

54. On information and belief, Plaintiffs allege that it is common for agents of the United States Government to use the type of harsh interrogation tactics employed herein, at ports of entry, during interviews with Citizenship and Immigration Services, ("CIS"), and at U.S. Consulates abroad, in order to obtain "confessions" (false or otherwise) that children born in Mexico were falsely registered as having been born in Texas.

55. Therefore, Plaintiffs also urge that the Court issue a declaration that it violates the rights of a purported U.S. citizen for Defendants to question his/her parent on U.S. soil or while under U.S. jurisdiction at a Consulate abroad about his/her birth in a cruel, inhumane or degrading manner, or by use of other techniques designed to break the parent's will or ability to resist, and without affording the parent the right to counsel prior to giving any statement which would call into question the citizenship of the said purported U.S. citizen.

56. Plaintiffs also seek an injunction, enjoining Defendants from questioning the parent of a purported U.S. citizen on U.S. soil or

while under U.S. jurisdiction at a Consulate abroad about his/her birth in a cruel, inhumane or degrading manner, or by use of other techniques designed to break the parent's will or ability to resist, and without affording the parent the right to counsel prior to giving any statement which would call into question the citizenship of the said purported U.S. citizen.

2. TRINIDAD MURAIRA DE CASTRO, ON HER OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED: CANCELLATION OF VISA PRIOR TO JUDICIAL DETERMINATION OF CHILD'S CITIZENSHIP IN DISPUTED MIDWIFE CASES

57. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 56 above.

58. For a parent of a child born in the United States who is neither a U.S. citizen or a lawful permanent resident, having or being able to obtain a laser or other non-immigrant visa can be important to their ability to participate fully in the lives of their children (and grandchildren).

59. Once someone who is neither a U.S. citizen or a lawful permanent resident has "confessed" to having registered a child born in Mexico as having been born in Texas, (whether of not the confession is true), Defendants cancel any non-immigrant visa possessed by that person, and, unless a waiver has been granted under 8 U.S.C. §1182(i), deny any future visa applications (immigrant or non-immigrant) by him or her.

60. In circumstances such as described in Paragraph 59, the person is not entitled to any form of hearing or other process to challenge either the manner in which the alleged "confession" was obtained, or its veracity.

61. Therefore, Plaintiffs urge the Court to issue a declaration that where a person has "confessed" while on U.S. soil or at a U.S. Consulate abroad, to having registered a child born in Mexico as having been born in Texas, it violates the rights of that person to

cancel a non-immigrant visa possessed by him or her, or to deny a visa application, (immigrant or non-immigrant), by him or her, without providing a hearing or other process by which said person, with the aid of counsel, may challenge the veracity of the "confession," and the process by which it was obtained.

62. Plaintiffs further urge the Court to issue an injunction, enjoining Defendants from canceling the non-immigrant visa, or denying the visa application, based on that person having "confessed," while on U.S. soil or under U.S. jurisdiction at a Consulate abroad, to having registered a child born in Mexico as having been born in Texas, by any person, without providing a hearing or other process by which said person, with the aid of counsel, may challenge the veracity of the "confession," and the process by which it was obtained.

C. DECLARATORY RELIEF UNDER 8 U.S.C. §1503(a)

63. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 62.

64. Plaintiffs Laura and Yuliana Castro further request that this Court declare that they are United States citizens, under 8 U.S.C. §1503(a). They were denied the right of entry to the U.S., and the right to possess their documents demonstrating U.S. citizenship, on the grounds that they are allegedly not United States citizens.

D. TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

WHEREFORE, it is respectfully urged that this Court issue a Temporary Restraining Order and Preliminary Injunction, restraining and enjoining Defendants from 1) not admitting Petitioners Laura Nancy Castro and Yuliana Trinidad Castro to the United States in a status which does not require that Defendants acknowledge their U.S. citizenship, or that Laura or Yuliana state that they are not U.S. citizens, with documents which are valid for multiple entries,

and can be renewed until such time as the instant litigation is finally concluded, and from not returning to them any and all documents confiscated from them on August 24, 2009, other than the United States passport of Laura Castro, which passport Defendants shall surrender to the Court for safekeeping until such time has her citizenship has been finally adjudicated, and 2) not returning to Trinidad Muraira de Castro her laser visa, or, alternatively, providing her with other documents allowing her admission to the United States under the same terms and conditions as a laser visa, which document can be renewed for so long as she complies with those conditions, and until such time as the instant litigation is finally concluded.

VI. CONCLUSION

It is therefore urged that this Court find that:

1) This Court has jurisdiction over the instant action;

2) Plaintiffs Laura and Yuliana Castro are United States citizens;

3) When Plaintiffs Laura and Yuliana Castro, and Laura's daughter Camila Abigail XXXXXXXX sought entry as United States citizens, and Trinidad Muraira de Castro sought admission as a visitor for pleasure at the Brownsville B&M Old Bridge on August 24, 2009, all four were treated in a cruel, inhumane or degrading manner, and in a manner designed to break the will to resist of Plaintiff Trinidad Muraira de Castro, and to extract from her a "confession" that she had falsely registered Laura and Yuliana as having been born in Texas, without regard to the veracity of that "confession,"

4) The procedures utilized by Defendants in extracting a "confession" from Muraira de Castro, and cancelling her laser visa; in forcing Laura and Yuliana Castro to "withdraw" their applications for entry, and in confiscating the documents of all three, violate Due Process, as determined, *inter alia*, by the Fifth Circuit in *Hernandez v. Cremer, supra*; and

5) Absent injunctive relief by this Court Plaintiffs, and the classes they represent, run the risk of having similar problems in

the future. *See also, Martinez v. Jimenez, supra.*

And on the basis of these findings, it is urged that the Court:

1) Assume jurisdiction over the instant case;

2) Issue a declaratory judgments, as requested above;

3) Issue preliminary and permanent injunctions, as requested above,

5) Issue a declaratory judgment, declaring and adjudging Petitioners Laura Nancy Castro and Yuliana Trinidad Castro to be United States citizens, and

6) Issue an award of attorneys fees, and such other and further relief as the Court may deem just and appropriate.

Respectfully Submitted,
s/

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CERTIFICATE OF CONSULTATION

Counsel has spoken with Victor Rodriguez, AUSA, who stated that he was tied up on September 9 and 10, but would be available for a hearing on Petitioners' application for a temporary restraining order on September 8 and 11, 2009.

S/ Lisa S. Brodyaga

VERIFICATION OF PETITIONER LAURA NANCY CASTRO

I, LAURA NANCY CASTRO, certify that I am a Petitioner herein, and that the facts as stated above, including the fact that I am presently at the Port of Entry at the Old Bridge in Brownsville, Texas, and intend to wait here until my attorney informs me that the petition has been filed, are true and correct to the best of my knowledge and belief. I further certify that I understand my obligations as a named plaintiff in a class action, and that I undertake to represent all others similarly situated to the best of my ability.

LAURA NANCY CASTRO

VERIFICATION OF PETITIONER YULIANA TRINIDAD CASTRO

I, YULIANA TRINIDAD CASTRO, certify that I am a Petitioner herein, and that the facts as stated above, including the fact that I am presently at the Port of Entry at the Old Bridge in Brownsville, Texas, and intend to wait here until my attorney informs me that the petition has been filed, are true and correct to the best of my knowledge and belief. I further certify that I understand my obligations as a named plaintiff in a class action, and that I undertake to represent all others similarly situated to the best of my ability.

YULIANA TRINIDAD CASTRO

VERIFICATION OF PETITIONER TRINIDAD MURAIRA DE CASTRO

I, TRINIDAD MURAIRA DE CASTRO, certify that I am a Petitioner herein, and that the facts as stated above, including the fact that I am presently at the Port of Entry at the Old Bridge in Brownsville, Texas, and intend to wait here until my attorney informs me that the petition has been filed, are true and correct to the best of my knowledge and belief. I further certify that I understand my obligations as a named plaintiff in a class action, and that I undertake to represent all others similarly situated to the best of my ability.

TRINIDAD MURAIRA DE CASTRO

VERIFICATION OF COUNSEL

I, Lisa S. Brodyaga, hereby certify that I am familiar with the Plaintiffs' cases, and that the facts as stated above are true and correct to the best of my knowledge and belief.

s/ Lisa S. Brodyaga

CERTIFICATE OF SERVICE

I certify that copies of the above, with Exhibit A and sealed Exhibit B, were served electronically on Victor Rodriguez, AUSA, on September 7, 2009.

s/ Lisa S. Brodyaga

AMERICAN IMMIGRATION COUNCIL,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

Civil Action No. 11-1972 (JEB)

EXHIBIT H TO DECLARATION OF MELISSA CROW

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

LAURA NANCY CASTRO, ET AL, IN THEIR OWN NAMES AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,	)	
v.	)	
MICHAEL T. FREEMAN, PORT DIRECTOR, U.S. CUSTOMS AND BORDER PROTECTION, BROWNSVILLE, TEXAS PORT OF ENTRY; ET AL.	)	CA B-09-208

PETITIONERS/PLAINTIFFS' EXHIBIT "S"

Exhibit "S" consists of Defendants' Amended Responses to Plaintiffs' First Set of Requests for Admission. These responses differ only in form from the prior version, and illustrate the depth of the problem, as follows:

1) Defendants do not consider that issuing a U.S. passport "settles" the question of whether one is or is not a U.S. citizen. (RFA Nos. 1 and 2). In other words, having a valid U.S. passport is no protection against being stopped at a port of entry, ("poe"), and subjected to treatment such as was received by Laura Castro, Ricardo Martinez, (CA M-08-087), [1] and doubtless many others.

2) No matter what evidence of U.S. citizenship is presented by an applicant for entry at a poe, unless and until a Notice to Appear is issued, "individuals applying for entry at a port of entry who are not facing criminal prosecution are not entitled to consult with an attorney or have an attorney present when interviewed by officers of the Department of Homeland Security." (RFA No. 45).

Therefore, by the simple expedient of continuing to interrogate a person with prima facie evidence of U.S. citizenship, (including a

---

[1] Mr. Martinez not only had a valid U.S. passport, but he was born in a hospital in McAllen, Texas. He was stopped at a port of entry in Laredo, handcuffed to a chair, threatened, isolated from his traveling companions, who were allowed to enter, and sent on their way, etc., until he "admitted" birth in Mexico. He was then stripped of all of his documents, (passport, Ids), and returned to Mexico. It took him almost two years to get back into the U.S.

facially valid U.S. passport), until the person succumbs, and signs a document withdrawing his/her application for admission, that person is not entitled to consult an attorney, even if one arrives, presents a notice of appearance, and demands to see his/her client, as occurred with the Castros, and Rodrigo Sampayo.

3) Defendants refuse to admit or deny that it is still their position that in determining U.S. citizenship in an action under 8 U.S.C. §1503, all doubts must be resolved in favor of the Government, (RFA Nos. 46,47,48), on the grounds that it calls for a legal conclusion. For the same reason, they also refuse to admit or deny, (RFA No.49), that:

> [I]t is the position of the Department of State that where an application for a U.S. passport is based on a facially valid Texas birth certificate showing birth with the aid of a midwife, the adjudicator may consider the fact that the midwife's name appears on a Department of State list of suspicious or convicted midwives in deciding whether or not to grant the application.

However, their responses to other RFAs show that Defendants *always* resolve all doubts in their favor. For example, to RFA No. 9:

> Admit that if Laura Nancy Castro and Yuliana Trinidad Castro were born in Texas, there is no reason to believe that their mother, Trinidad Castro, committed fraud when she applied for a laser visa.

Defendants responded:

> Defendants deny the request for admission.

Similarly, to RFA No. 10:

> Admit that if Jessica Garcia was born in Texas, there is no reason to believe that her mother, Ana Alanis, committed fraud when she applied for a laser visa.

Defendants responded:

> Defendants deny the request for admission.

4) Defendants also refused to admit RFAs No. 41 and 42, to the effect that the only "evidence" they had that Plaintiffs Ruiz and Reyes were not born in Texas was their Mexican documents. Further discovery is required to pin them down as to what other "evidence"

they considered, but all indications are that they consider a delayed Texas birth certificate to constitute evidence both of birth in Texas, and (because it is delayed) lack of birth in Texas.

Respectfully Submitted,
s/

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CERTIFICATE OF SERVICE

I certify that copies of the above, with attachment, were served electronically on Elizabeth Stevens, Attorney, OIL Julie Saltman, Attorney, OIL, and Victor Rodriguez, AUSA, on January 25, 2011.

s/ Lisa S. Brodyaga

REQUEST FOR ADMISSION NO. 43:

Admit that when adjudicating the passport application of Jennifer Gonzalez, the only evidence the Defendant Department of State had that indicated that she was not born in Texas was her Mexican birth certificate.

RESPONSE TO REQUEST FOR ADMISSION NO. 43:

Defendants deny the request for admission.

REQUEST FOR ADMISSION NO. 44:

Admit that it is the position of the Department of Homeland Security that an applicant for entry with facially valid documents indicating birth in the United States, but whose U.S. citizenship is questioned by the examining officer, has no right to counsel while detained at a port of entry unless criminal charges are contemplated.

RESPONSE TO REQUEST FOR ADMISSION NO. 44:

Defendants object to this request on the grounds that it requests an admission to a pure legal conclusion, and such a request is not permitted by Fed. R. Civ. P. 36. *See Warnecke v. Scott*, 79 Fed. Appx. 5, 2003 WL 22391051, at *1 (5th Cir. Oct.21, 2003), *citing* Wright, Miller & Cane, FEDERAL PRACTICE & PROCEDURE § 2255 & n.8 (2010) (collecting cases) ("requests for admissions are properly used for facts or facts as applied to law, not pure legal conclusions ..."); *see also In re Carney*, 258 F.3d 415, 419 (5th Cir.2001). Defendants also object to this request on the grounds it is vague, ambiguous, compound, and overbroad. Further, this request exceeds the scope of permissible discovery, and is irrelevant and not calculated to lead to the discovery of admissible evidence. Subject to, and without waiving these objections, Defendants admit that prior to the issuance of a Notice to Appear, individuals applying for entry at a port of entry who are not facing criminal prosecution are not entitled to consult with an attorney or have an

attorney present when interviewed by officers of the Department of Homeland Security.

REQUEST FOR ADMISSION NO. 45:

Admit that where the U.S. citizenship of an applicant for entry with facially valid documents indicating birth in the United States, is questioned by the examining officer, it is the position of the Department of Homeland Security that even if an attorney arrives during the questioning of said applicant, and represents that s/he is the applicant's attorney, the examining officer need not allow the attorney to speak with the applicant, or inform the applicant that an attorney has arrived who claims to represent him/her.

RESPONSE TO REQUEST FOR ADMISSION NO. 45:

Defendants object to this request on the grounds that it requests an admission to a pure legal conclusion, and such a request is not permitted by Fed. R. Civ. P. 36. *See Warnecke v. Scott*, 79 Fed. Appx. 5, 2003 WL 22391051, at *1 (5th Cir. Oct.21, 2003), *citing* Wright, Miller & Cane, FEDERAL PRACTICE & PROCEDURE § 2255 & n.8 (2010) (collecting cases) ("requests for admissions are properly used for facts or facts as applied to law, not pure legal conclusions...."); *see also In re Carney*, 258 F.3d 415, 419 (5th Cir.2001). Defendants also object to this request on the grounds it is vague, ambiguous, compound, and overbroad. Further, this request exceeds the scope of permissible discovery, and is irrelevant and not calculated to lead to the discovery of admissible evidence. Subject to, and without waiving these objections, Defendants admit that prior to the issuance of a Notice to Appear, individuals applying for entry at a port of entry who are not facing criminal prosecution are not entitled to consult with an attorney or have an attorney present when interviewed by officers of the Department of Homeland Security.

REQUEST FOR ADMISSION NO. 46:

Admit that it is the position of the Department of State that in an action under 8 U.S.C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL

Plaintiff,

Case No. 1:11-cv-01972 (JEB)

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

DECLARATION OF BENJAMIN JOHNSON IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, Benjamin Johnson, declare as follows:

1. I am the Executive Director of the American Immigration Council. I submit this Declaration in support of Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment in the above-captioned case.

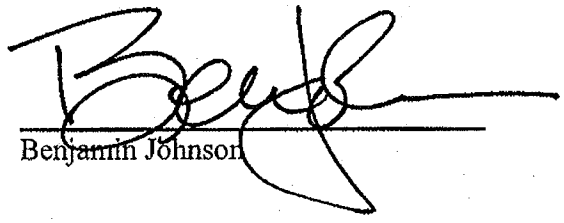
2. For many years, the American Immigration Council (AIC) and the American Immigration Lawyers Association (AILA) have received widespread reports of unwarranted restrictions on access to counsel by U.S. Customs and Border Protection (CBP) officers.

3. Attached as **Exhibit A** is a true and correct copy of a May 11, 2011 letter from AILA Executive Director Crystal Williams and me to CBP Commissioner Alan Bersin to highlight our concerns regarding CBP's conduct. The e-mail transmitting our joint letter is attached as **Exhibit B**.

4. On July 13, 2011, Ms. Williams and I each received a response from CBP acknowledging our May 11, 2011 letter.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Dated: March 23, 2012



Benjamin Johnson

AMERICAN IMMIGRATION COUNCIL,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

Civil Action No. 11-1972 (JEB)

EXHIBIT A TO DECLARATION OF BENJAMIN JOHNSON

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AMERICAN IMMIGRATION COUNCIL

May 11, 2011

The Honorable Alan Bersin
Commissioner, U.S. Customs and Border Protection
Department of Homeland Security
Washington, DC

Dear Commissioner Bersin:

The American Immigration Council (AIC) and the American Immigration Lawyers Association (AILA) have received widespread reports of unwarranted restrictions on access to counsel by CBP officers. We believe that these limitations reflect overly restrictive interpretations of existing regulations and may violate applicable due process guarantees. We are writing today to highlight our concerns in the hope of beginning a dialogue about these issues.

AIC and AILA recently conducted a nationwide survey to gather information about access to counsel during interactions with CBP, USCIS, and ICE. We collaborated with Penn State Law School's Center for Immigrants' Rights to analyze more than 250 survey responses submitted by immigration attorneys practicing throughout the country. The responses regarding interactions with CBP depict a system characterized by pervasive restrictions on representation. These problems have continued despite liaison efforts between AILA and CBP. Selected examples describing limitations on representation imposed by CBP are attached as an appendix to this letter.

Interviews and other interactions with immigration officers often can be intimidating and confusing, and noncitizens seek assistance from attorneys to help navigate this challenging process. CBP officers who prevent or limit attorneys' access to their clients in secondary and deferred inspection do not recognize this important role of counsel. Frequently, officers fail to exercise any discretion to permit attorneys to accompany their clients, although CBP's own guidance authorizes such discretion.

In instances where attorneys are permitted to appear with their clients, including deferred inspections, CBP officers often limit the scope of representation. One CBP officer at the Washington-Dulles International Airport warned an attorney that her appearance in deferred inspection "was entirely at the discretion of the CBP." In another case, an attorney accompanied her client to the San Ysidro, California Port of Entry to assist him in obtaining a new Arrival-Departure Record (I-94 Form) with an extended validity date. The officer and the officer's supervisor refused to listen to the attorney when she attempted to explain the legal basis for her request. The officer told the attorney that her client had no right to representation and that they were doing the attorney and her client "a favor" by allowing the attorney to be present.

CBP officers also prevent attorneys from providing relevant documentation. For example, during secondary inspection at Boston's Logan International Airport, a CBP officer refused to allow an attorney to submit documentation that would have resolved a critical legal question. As a result, the client was unnecessarily detained for over two months. In another case, a CBP officer who refused to allow an attorney to accompany her client to deferred inspection also refused to accept a legal memorandum that the attorney had prepared on behalf of the client. The officer said the memorandum "wasn't necessary" and handed it back to the attorney before taking the client into a back room for questioning.

In some cases, CBP officers adopt an adversarial approach. One attorney repeated a conversation she overheard between a senior CBP officer and a more junior CBP officer. The senior officer told the junior officer that she should not engage with attorneys because lawyers say "whatever their clients want them to say." In another instance, an attorney who had been barred from deferred inspection advised her client not to answer certain questions unless she was present. A CBP officer later told the client's wife that her husband had been detained for his refusal to respond. The CBP officer also informed the wife that the "family had retained a very bad lawyer who had given advice that seriously hurt her client's case" and advised the wife to fire her. An attorney in Miami reported that a CBP officer told her client that "she wasted her time by hiring an attorney" because attorneys are a "waste of time and money."

The important role of counsel in interactions with CBP officers is recognized in the governing law, both statutory and regulatory. Notably, the Administrative Procedure Act (APA) grants a right to counsel for individuals who are compelled to appear before an agency or agency representative. 5 U.S.C. § 555(b). Regulations governing DHS also provide a right to counsel. For instance, 8 C.F.R. § 292.5(b) states that "[w]henever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative . . . ." 8 C.F.R. § 292.5(b). This provision contains a proviso that the right to counsel does not apply to "any applicant for admission in either primary or secondary inspection . . ., unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody." While individuals may not have a "right" to counsel in certain contexts, CBP officers retain discretion to allow an attorney to accompany a client in primary or secondary inspection.

Moreover, the government has adopted and applied the restrictions on counsel in secondary inspection to deferred inspection. *See* CBP Inspector's Field Manual, Section 17.1(e) (citing 8 C.F.R. § 292.5(b) to support the position that an applicant for admission in deferred inspection "is not entitled to representation"). This expansion of the restrictions imposed by 8 C.F.R. § 292.5(b) is improper. Deferred inspection is not mentioned in 8 C.F.R. § 292.5(b). Although the deferred inspection regulation, 8 C.F.R. § 235.2, was added after § 292.5(b) was promulgated, the agency did not thereafter amend § 292.5(b) to encompass deferred inspection; nor did it identify deferred inspection as secondary inspection in § 235.2. *See* Inspection and Expedited Removal of Aliens, Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10312 (Apr. 1, 1997).

The circumstances warranting deferred inspection and secondary inspection are also distinct. Secondary inspection takes place "[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 10318. In contrast, deferred inspection is characterized as "further examination" that occurs after a person is paroled. 8 C.F.R. § 235.2. Unlike secondary inspection, it is 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(b)(3); *see also* CBP Inspector's Field Manual, Section 17.1(a). Therefore, although secondary and deferred inspections both provide an opportunity for an individual to provide additional evidence of admissibility, these procedures serve different purposes.

The CBP Inspector's Field Manual supports greater access to counsel than CBP officers typically allow. Chapter 2.9 states that an inspecting officer may allow counsel to be present during secondary inspection, specifying that "an inspecting officer" is not precluded from permitting "a relative, friend *or representative* access to the inspectional area to provide assistance when the situation warrants such action." (Emphasis added.) Chapter 17.1(e) addresses the role of an attorney in deferred inspection, stating that "an attorney may be allowed to be present upon request if the supervisory CBP Officer on duty deems it appropriate," and that the attorney may serve as an "observer and consultant to the applicant."

Beyond the Inspector's Field Manual, CBP policies affecting access to counsel during deferred inspection are difficult to ascertain and arbitrarily applied. One attorney reported that he used to regularly accompany his clients to deferred inspection at the Philadelphia International Airport. Recently, however, when he appeared with his client, a CBP officer told him that a new policy dictated that attorneys could no longer accompany clients to deferred inspection. Another attorney who asked to accompany his client to deferred inspection at the Indianapolis CBP office reported being told that the supervisor of that office refuses attorney presence as a matter of course.

These restrictive policies should not continue. Access to counsel is not only vital for noncitizens attempting to navigate our complex immigration system, but also improves the quality and efficiency of immigration decision making. As several attorneys noted in response to survey questions, counsel can help CBP officers maximize efficiency by providing helpful documentation and other case-related information regarding, for example, a client's criminal convictions or travel outside the United States. In addition, several attorneys reported that their clients feel more at ease and are more willing to communicate with CBP officers when their attorney is present.

We hope this letter is the first step in opening a dialogue with CBP. We seek to better understand CBP policies with respect to counsel and to provide input on the need for additional guidance that would better reflect existing statutory and regulatory protections. This dialogue will also help inform a White Paper we are drafting with Penn State Law School's Center for Immigrants' Rights on access to counsel before DHS. Our efforts are premised on the idea that noncitizens and CBP officials have a mutual stake in a functional, transparent and just legal system of which access to counsel is an essential part. We look forward to future opportunities to discuss these concerns with you.

Sincerely,

Ben Johnson
American Immigration Council
bjohnson@immcouncil.org

Crystal Williams
American Immigration
Lawyers Association
cwilliams@aila.org

cc:
Noah Kroloff, Chief of Staff, DHS
John Sandweg, Counselor to the Secretary and Deputy Secretary, DHS
Esther Olavarria, Counsel to the Secretary, DHS
Ivan Fong, General Counsel, DHS
Seth Grossman, Chief of Staff, Office of the General Counsel, DHS
Kelly Ryan, Acting Deputy Assistant Secretary, Office of Policy, DHS
Margo Schlanger, Officer for Civil Rights and Civil Liberties, DHS
Marco Lopez, Chief of Staff, CBP
Brett Laduzinsky, Special Assistant to the Chief of Staff, CBP
Bill McKenney, NGO Liaison, Office of the Commissioner, CBP
Alfonso Robles, Chief Counsel, CBP

APPENDIX – ATTORNEY ANECDOTES SUBMITTED IN RESPONSE TO AIC/AILA COUNSEL SURVEY

ATTORNEY #1

The following reflects one attorney's impressions of CBP officers at the Highgate Springs and Derby Line ports of entry (Vermont/Canada border) and her experience with restrictions on counsel in a deferred inspection interview.

Within the last few years, it has become official policy to bar counsel from L[1] and TN[2] adjudications at Highgate and Derby Line ports of entry. I understand from our CBP liaison that it is the new official policy of the region. Prior to this policy change, free trade officers, who were knowledgeable about L and TN visas, were cordial to and worked well with counsel. Now, because officers are less knowledgeable about L and TN visas, adjudications are inconsistent. In addition, CBP officers are very antagonistic toward and disrespectful of counsel. They don't recognize G-28s, and since the implementation of the new policy, I have been directed not to approach "the counter" and not to attempt to help clarify any aspects of the L or TN application.

In one particular case, I represented a long-time permanent resident who had lived in the U.S. for over 50 years. He was married, had two U.S. citizen children and three grandchildren and had worked for the same employer for thirty years. As a resident of a border community, he was a frequent traveler to and from Canada throughout his lifetime and had never previously been questioned in any significant way. When he entered the U.S. from Canada at Highgate Springs, the CBP officer asked him if he had ever been arrested. My client responded that he had been arrested when he was 17 years old, but that he had been told that he would not have a criminal record. The CBP officer asked him to return for a deferred inspection interview and to bring documentation about his arrest and the related court proceedings. Upon investigation, it was clear to me that the record did not make my client inadmissible, despite circumstances that might raise questions. I drafted a brief memorandum explaining this and requested that I be present during the deferred inspection interview, at the request of the client who was shocked and extremely nervous about this encounter. I called the port of entry days before the interview and the officer who answered the phone declined to help me confirm whether I could attend the interview. I then accompanied my client to the interview and again requested to accompany my client during the interview. The officer said "I don't think

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[1] L nonimmigrant status is available to intracompany transferees who are executives, managers, or employees with specialized knowledge working for multinational companies. 8 C.F.R. § 214.2(l). Canadian applicants may have their petitions adjudicated at the port of entry. 8 C.F.R. § 214.2(l)(17).

[2] TN nonimmigrant status is available to Mexican and Canadian citizens seeking temporary entry to work in certain professional occupations pursuant to the North American Free Trade Agreement (NAFTA); these applications are adjudicated at the port of entry. 8 C.F.R. § 214.6.

that I have to let you." I stated that I would appreciate the officer extending my client, a long-time permanent resident, the courtesy of allowing counsel to be present. The officer stated that he would check with his supervisor and that if the supervisor said he didn't "have to" allow counsel to be present, he would bar me from the interview. After checking with his supervisor, the officer stated that I could not accompany my client. I requested to speak with the supervisor. The officer declined my request, stating that he had already spoken to the supervisor. I then requested that the CBP officer review the memorandum I had prepared and take it with them to the interview. The officer said this wasn't necessary and handed the memorandum, which my client had paid me to prepare and should have been able to take with him, back to me before taking my client into a back room for the interview.

Just this year, two CBP officers at Highgate Springs publicly discussed immigration attorneys at the counter while they were conducting an inspection of my client. The senior officer told the more junior officer that she shouldn't engage with the lawyer, because lawyers say "whatever their clients want them to say." This is a complete shift from the culture that previously existed when free trade officers acknowledged and often solicited the participation of attorneys in interviews, particularly in marginal or complex cases. One senior free trade officer told me not infrequently that he learned something regularly from our presentations of law. On occasion, he acknowledged using our legal arguments as training tools for newer officers. There were numerous times when I would bring a regulation or interpretation of the law to his attention after he had initially denied a case, or been inclined to deny a case, and he would agree after further examination that I was correct. He was open to that because it made him better at his job.

Although our relationship with free trade officers in previous years was mutually respectful, it was definitely not (ever) deferential to attorneys – in fact, it was always extremely clear that an inspection was of the applicant personally and that we would participate substantively only upon request. We could approach the counter, present the paperwork, indicate that we were available to answer any questions that might arise, and trust that the legal presentation would be reviewed and that we would have an opportunity to present our position on any questions that might arise during the inspector's review.

ATTORNEY #2

The following is an excerpt from an e-mail submitted by an attorney regarding her experience at a secondary inspection interview at Boston's Logan International Airport:

During a Boston Secondary Inspection, I was not only prohibited from the room where my client was interviewed, but the CBP officer literally and forcefully pushed me aside when I was walking in with my client and told me I could not come in. I thought about bringing assault and battery charges against the officer but it is someone I have to deal with at times so I was reluctant to do so. CBP took my client into custody, charged him as

an arriving alien for a crime they said was a CIMT but was not. They moved him from prison to prison, first Boston then York, PA then Lumpkin, GA. I finally got a hearing for him in the Atlanta Immigration Court and he was released from custody and admitted into the US, but the whole thing took 2.5 months and many filings. The whole waste of prison, court, legal and transportation resources could have been avoided if only I were able to sit in on the interview with my carefully prepared memo explaining why his crime was not a CIMT.

ATTORNEY #3

The following is an excerpt from a letter submitted to CBP regarding the actions of CBP officers in relation to a deferred inspection interview at the Indianapolis CBP office:

. . . I attempted to accompany a lawful permanent resident client to a deferred inspection interview in the Indianapolis office. I called in advance and expressed my client's desire that I be in attendance. I was informed that, despite a general CBP policy that instructs supervisors to exercise discretion in determining whether or not to permit attorneys in individual interviews, the Indianapolis supervisor refuses attorney presence as a matter of course.

Nonetheless, I accompanied my client to Indianapolis and to the general offices, although I understood I would not be permitted (based on the supervisor's blanket decision) to attend the interview. I anticipated I would wait outside and be available should the situation change and the client require my assistance or the officer wish to speak with me. I was informed that I was not permitted on the premises and instructed to wait in my car.

During his interview, my client declined to answer specific questions outside my presence . . . His chosen course of conduct, it seems, seriously upset the officer conducting the hearing . . .

. . . Officer [redacted] *. . . spoke directly to the wife of the now-detained alien. She told the wife that in all of her years conducting interviews, no one had refused to answer her questions and that is why her husband was detained. She went on to say that the family had retained a very bad lawyer (me) who had given advice that had seriously hurt her husband's case . . . She told the wife of my client that the family should fire me as attorney.*

In the days since this incident, I have shared my experience with a number of other attorneys who practice in this area and have themselves had similarly disappointing contact with CBP officers in this office. . . Relationships between attorneys and Department officials need not be acrimonious. In theory, we share a purpose—to ensure that the law is carried out correctly and completely, although we protect the rights and interests of different parties in furtherance of that purpose. A general disdain for

representation does not facilitate the work of CBP or DHS; rather, it impedes it, as was evident in this case.

ATTORNEY #4

The following is a summary of a phone conversation with an attorney regarding her client's experience at a secondary inspection interview at the Washington-Dulles International Airport:

There are a lot of problems with CBP's treatment of individuals in the Washington-Dulles airport. In one particular incident, my client—an H-1B visa holder who had a pending adjustment of status application—was stopped for secondary inspection. He was detained for four hours during which time he was questioned and unable to call me. He was harassed, insulted, and told that he should get a different attorney because I had improperly filed things on his behalf. Four hours later, the CBP officer relented and let my client enter on his valid H-1B visa, but told my client he was "doing him a favor." It seems that CBP officers are engaged in a power struggle with attorneys and individuals entering the country.

ATTORNEY #5

The following is an excerpt from an e-mail submitted by an attorney regarding his experience with CBP at the San Ysidro, California Port of Entry:

My client was coming in on an H-1B visa, but had changed employers. Instead of applying for a new visa, he followed a process (approved by DHS) that allowed him to use the same visa stamp and obtain a new I-94 card with an expiration date beyond the expiration of the visa stamp based on a new H-1B approval notice. My client was admitted until the expiration date of his H-1B visa stamp so I accompanied him to the port of entry to assist him in obtaining a new I-94 with the extended validity date. I brought a policy memorandum that had been issued in 2001 by Legacy INS addressing this specific issue. The officer refused to listen to me when I attempted to explain the legal basis for my request or to look at the policy memorandum. I asked to speak with the supervisor, who also refused to listen. The officers told me that my client had no right to representation and that they were doing me and my client a favor by allowing me to be there. Ultimately, the CBP officers called USCIS to ask them what to do. USCIS told them that they should let the client in, and that he could be admitted beyond the validity of the visa stamp since he had a new approval notice with a longer validity . . . In addition to this particular example, I have sent clients to interviews with legal documents and officers simply refuse to read them.

ATTORNEY #6

The following is an excerpt from an e-mail submitted by an attorney regarding her experience at secondary inspection at the Office of Deferred Inspections in Miami:

Specifically, I have a lawful permanent resident client named [redacted]. Mr. [redacted] had four (4) misdemeanor non-drug convictions. They were all for petty theft. The last conviction was in 1992. He was issued a notice to appear at the airport and, subsequently, provided an appointment to attend an interview at deferred inspection to provide his judgment and conviction. In November of 2009, I attended his deferred inspection interview with him. Office [redacted] told me to wait outside. I asked why. I told the client not to respond to questions except name, date of birth and address. I asked to speak to a supervisor. The supervisor, [redacted], told me that I could not be present when my client was interviewed. A couple months later, I had to go back to deferred to obtain temporary proof of my client's residence, which he is legally entitled to in removal proceedings. In fact, he is mandated to carry proof of his residence with him. Officer [redacted] took my client and me into the deferred room. I filled out the I-94 form with my client. Officer [redacted] sees me and brings a male officer into the hallway and tells him to "get that fucking bitch out of here." The male officer than escorted me out of the inner office. On the way out I eyeballed Officer [redacted] and advised her that her conduct was inappropriate and uncalled for. She did not respond. I waited for the client in the lobby. The client came out to the lobby about 20 minutes later. He advised that Officer [redacted] told him that, "he should not waste his time nor money with me as he was going to get deported anyway." [redacted] also asked him how much he had paid for my services. He refused to answer. My client was granted cancellation of removal in proceedings and is now scheduled for naturalization.

AMERICAN IMMIGRATION COUNCIL,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

Civil Action No. 11-1972 (JEB)

EXHIBIT B TO DECLARATION OF BENJAMIN JOHNSON

Melissa Crow

From: Ben Johnson

Sent: Wednesday, May 11, 2011 6:08 PM

To: alan.bersin@dhs.gov

Cc: noah.kroloff@hq.dhs.gov; john.sandweg@hq.dhs.gov; esther.olavarria@hq.dhs.gov; ivan.fong@hq.dhs.gov; seth.grossman@hq.dhs.gov; kelly.ryan@hq.dhs.gov; margo.schlanger@hq.dhs.gov; marco.lopez@dhs.gov; brett.laduzinsky@dhs.gov; William.P.McKenney@dhs.gov; alfonso.robles@dhs.gov; Crystal Williams

Subject: Restrictions on Access to Counsel

Attachments: AIC Letter to Commissioner Bersin on Counsel Issues.5-11-11.pdf

Commissioner Bersin:

On behalf of the American Immigration Council and the American Immigration Lawyers Association, I am attaching a letter that we have put together addressing the issue of restrictions on access to counsel by CBP officers. We believe that these limitations reflect overly restrictive interpretations of existing regulations and may violate applicable due process guarantees. The purpose of the letter is to highlight our concerns and to pursue the opportunity for a dialogue about these issues.

We look forward to the chance to discuss these matters in greater detail.

Sincerely,

Benjamin Johnson
Executive Director
American Immigration Council
Direct: 202-507-7510
email: bjohnson@immcouncil.org
website: www.americanimmigrationcouncil.org

AMERICAN IMMIGRATION COUNCIL,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

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website: www.americanimmigrationcouncil.org

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL

Plaintiff,

Case No. 1:11-cv-01972 (JEB)

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

DECLARATION OF CATHY J. POTTER IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, Cathy J. Potter, declare as follows:

1. I practice immigration law in Harlingen, Texas. I submit this Declaration in support of Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment in the above-captioned case.

2. I represented the plaintiff in *Esquivel v. Freeman, et al.*, No. 1:11-cv-00028 (S.D. Tex. *filed* Feb. 11, 2011). Ms. Esquivel sought review of DHS' determination that she did not have a right to have an attorney present when she applied for parole into the United States. Attached as **Exhibit A** hereto is a true and correct copy of the Petition for Writ of Habeas Corpus, Complaint for Declaratory and Injunctive Relief, and Motion for Preliminary Injunction with Incorporated Points and Authorities in Ms. Esquivel's case. Exhibit "A" to this Petition, which was filed under seal, consisted of an e-mail string among counsel in Ms. Esquivel's case indicating CBP's position regarding her right to counsel. This e-mail string, which was filed as Exhibit "P" in a different case and is thus a matter of public record, is attached hereto as **Exhibit B.**

3. At Ms. Esquivel's request, her case was dismissed without prejudice in March 2011.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Dated: March 26, 2012

Cathy J. Potter

AMERICAN IMMIGRATION COUNCIL,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

Civil Action No. 11-1972 (JEB)

EXHIBIT A TO DECLARATION OF CATHY J. POTTER

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

ROSALINDA ESQUIVEL	)
	)
v.	)
	)
MICHAEL T. FREEMAN, PORT DIRECTOR, U.S. CUSTOMS AND BORDER PROTECTION, BROWNSVILLE, TEXAS PORT OF ENTRY;	)
JANET NAPOLITANO, SECRETARY, DEPARTMENT OF HOMELAND SECURITY,	)
ERIC HOLDER, Jr, UNITED STATES ATTORNEY GENERAL, and	)
THE UNITED STATES OF AMERICA.	)

PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND MOTION FOR PRELIMINARY INJUNCTION, WITH INCORPORATED POINTS AND AUTHORITIES

Rosalinda Esquivel, ("Ms. Esquivel"), through the undersigned, files the instant First Amended Petition for Writ of Habeas Corpus, and Complaint for Declaratory and Injunctive relief. She also seeks a preliminary injunction, granting the relief requested.

I. JURISDICTION AND VENUE

1. The jurisdiction of this Court is invoked under 28 U.S.C. §2241 (habeas corpus); 28 U.S.C. §§ 1331 (federal question), and 2201 et seq, (the Declaratory Judgment Act). Venue is proper in that, at the time of filing the instant action, Petitioner is physically present within this judicial district, *i.e.*, at the International Bridge in Brownsville, Texas, and her home, to which she is being prevented from returning, is in Brownsville, Texas.

II. THE PARTIES

2. Petitioner Esquivel is a native and citizen of Mexico, who, at the moment the instant action was filed, was physically present in the United States, at the port of entry at Brownsville, Texas, within the jurisdiction of this Court.

3. Michael T. Freman is the Port Director of the Brownsville, Texas Port of Entry. Eric Holder, Jr. is the duly appointed and confirmed Attorney General of the United States. Janet Napolitano is the duly appointed and confirmed Secretary of the Department of Homeland Security. All are sued in their official capacities only. The United States of America is also a named Defendant.

III. THE FACTS

4. Petitioner Rosalinda Esquivel ("Ms. Esquivel"), is a native and citizen of Mexico, and has been a lawful permanent resident of the United States since December, 1990.

5. Ms. Esquivel had worked as a nurse in Mexico prior to coming to the U.S., and had learned the art of midwivery from family. In the United States, she took classes to become a certified midwife, and was diligent in her record-keeping, and in maintaining a clean establishment. As a result, she had a thriving business. However, she succumbed to temptation to also register a few babies as born in Texas who had in fact been born in Mexico.

6. In June, 1995, pursuant to a plea bargain, Ms. Esquivel was convicted in U.S. District Court for the Southern District of Texas, on two counts of unlawfully procuring evidence of citizenship, and sentenced to probation. She was at that time told by her attorney, Albert Pullen, that in exchange for her plea, the Government would not attempt to deport her.

7. After her guilty plea, and before she was sentenced, Ms. Esquivel was instructed to inform the Government of all the children that she had fraudulently registered as born in the United States. She was at that time told that if she missed any, she would be imprisoned. Therefore, she turned over all her birth record files, (except for those that had previously disappeared or been stolen), to immigration. From her files, immigration prepared

a list of all the files, and instructed her to sign it. She crossed out one child (her grandchild), and signed the list.

8. Although she had in fact falsely registered on the order of magnitude of ten or twenty children, and had in fact delivered on the order of magnitude of 500, she signed the list saying that they were all falsely registered, in order to be sure that she did not miss any, and go to prison as a result.

9. Until September, 2010, Ms. Esquivel was allowed to continue her life. She lived in Brownsville, Texas, and crossed into Matamoros, Mexico frequently, to visit family, usually returning the same day.

10. Recently, Ms. Esquivel's father, who lives in Matamoros, has been seriously ill, and he is now receiving dialysis three times a week. Given her nursing background, Ms. Esquivel has been a primary caretaker, such that in September, 2010, she was crossing back and forth almost on a daily basis.

11. On the evening of September 20, 2010, as she was returning from Matamoros to her home in Brownsville, Texas, Ms. Esquivel was detained by CBP, for what she considered to be no reason at all. See, Petitioner's Exhibit A, incorporated by reference.

12. Over the next three days, Ms. Esquivel was alternately released and re-detained, every time she attempted to cross. She was held under unsupportable conditions, interrogated by various officers, given various documents, and forced to sign a statement that was invented by her interrogators. The last time she was released, she was told that she could no longer go to Mexico, and that if she did, she would never be able to return to the U.S. Given her need to attend to her father, Ms. Esquivel returned to Matamoros, and made no further attempts to cross into the United States. However, she wants to retain her LPR status, and return to the situation as it existed prior to September 20, 2010, where she was able to cross freely between her home in Brownsville, Texas,

and her family in Matamoros, Mexico. *Id.*

13. On or about January 14, 2011, Ms. Esquivel received word that some attorneys had visited her rental house in Matamoros, looking for her. She recognized the name on one of the business cards that they left, Jaime Diez, and called him the next day. They later met, and discussed the reasons that both the Department of State, and Mr. Diez, wanted her testimony in an ongoing case. He also offered to help her find pro bono counsel to represent her, both in that context, and in her removal hearing, which is currently scheduled for March 30, 2011, at 9:30 a.m., in Harlingen, Texas.

14. Ms. Esquivel has been informed that, in the context of attempting to arrange her deposition, in *Alvarez v. Freeman*, et al, CA B-09-191, the Government has authorized what they call a "multiple application" parole, which is valid for a year, or until an Immigration Judge orders her removal. Because she is eligible for relief under 8 U.S.C. §1182(h), and need only show that she has been rehabilitated, and is not a danger to society, she believes that she will win her case, if she is able to attend her hearings.

15. In order to be able to prepare for and attend her removal hearing, she needs to be able to take advantage of that grant of parole. However, because of her prior experiences, she is afraid to encounter the CBP agents at the bridge, without her attorney present. Because she is in removal proceedings, she believes that she has the right to have counsel present in all encounters with the Department of Homeland Security. However, DHS has refused to afford her the right to counsel when she applies for parole. [1] and that, absent counsel, there are no guarantees that she will not be interrogated, outside of the presence of counsel, and forced to sign an untrue declaration, much as occurred in September, 2010. She also fears that she may simply be detained, in retaliation for

[1] *See*, Exhibit A, incorporated herein.

her refusal to submit to a deposition, if that requires her to face government agents outside of the presence of counsel, and for bringing the instant lawsuit, to enforce her right to counsel.

16. Under 5 U.S.C. §555(b), Ms. Esquivel is also entitled to have counsel present in any mandatory appearance. As stated therein:

> 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.

17. Ms. Esquivel is presently on the U.S. side of the Brownsville International Bridge. Counsel obtained her verification on the instant petition while she was in U.S. territory, and she has been instructed to wait there until she returns. At the time of its filing, Ms. Esquivel is therefore within the United States, in Brownsville, Texas, within the jurisdiction of this Court. She is in custody within the meaning of 28 U.S.C. §2241 because she is not allowed to have counsel present when she applies for parole. This interferes with her ability to defend her LPR status in removal proceedings. *See, Koetting v. Thompson*, 995 F.2d 37 (5th Cir. 1993) (Although a "detainer" issued in connection with a parole violation does not constitute custody for habeas purposes where no liberty interest in impinged, custody does exist where the detainer implicates such an interest by interfering with the petitioner's ability to defend against the parole revocation proceedings).

IV. THE CAUSES OF ACTION

A. HABEAS CORPUS

Petitioner seeks review of an adverse action of the Department of Homeland Security, to wit: DHS' determination of February 9, 2011, "that CBP advises that she does not have a right to have an attorney present when she applies for parole and that CBP is not going to employ a different procedure just for her," Exhibit A. She has suffered legal wrong because of this action, and has been

adversely affected and aggrieved by said agency action. She is therefore entitled to judicial review thereof. Under 5 U.S.C. §703, she may challenge this action in habeas corpus, insofar as there is no other statutory means of review available:

> ... The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer.

Here, Ms. Esquivel asserts that the February 9, 2011 determination was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" within the meaning of 5 U.S.C. §706.

Under 8 U.S.C. §1229a(b)(4), Ms. Esquivel has the right to counsel in removal proceedings. This right is meaningless if counsel cannot provide meaningful assistance in all substantive encounters with the Department of Homeland Security, which is prosecuting said proceedings. *See, e.g., Singh v. Waters*, 87 F.3d 346, 349 (9th Cir. 1996):

> [B]y having the file of Singh and failing to inform his counsel, Bennett, that it had the file prior to the handcuffing and arrest on December 2, 1993, the Service effectively scuttled the right to counsel guaranteed to Singh by statute. 8 U.S.C. §§ 1252(b); *see also Mendez v. INS*, 563 F.2d 956, 958 n. 1, 959 (9th Cir.1977). The consequence was that Bennett was prevented from seeking a stay of deportation in an orderly way that would have prevented the physical removal of Singh from the United States. As the immigration judge ruled, this conduct also rendered the deportation unlawful.

See also, *Castaneda-Delgado v. INS*, 525 F.2d 1295,1302 (7th Cir. 1975) (Statute clearly and unambiguously grants aliens the right to counsel of their choice in deportation proceedings. Such provisions are an integral part of the procedural due process to which the

alien is entitled. These provisions would be eviscerated by the application of the harmless error doctrine, and we see no justification for such evisceration.)

B. DECLARATORY AND INJUNCTIVE RELIEF

Ms. Esquivel further asks this Court to declare that Defendants' refusal to allow her to be represented by counsel when she applies for parole is inconsistent with 8 U.S.C. §1229a(b)(4), and 5 U.S.C. §555(b), in that it renders null her right to counsel.

VI. CONCLUSION

It is therefore urged that this Court find that:

1) Ms. Esquivel is a lawful permanent resident who is under removal proceedings, and as such, she has the right to the assistance of counsel in all encounters with agents of Defendants.
2) Defendants' refusal to allow Ms. Esquivel to be accompanied by counsel when she applies for parole into the United States, to attend her removal proceedings, or for other lawful purpose, implicates a liberty interest by interfering with the petitioner's ability to defend against the removal proceedings, and therefore constitutes "custody" under *Koetting v. Thompson*, 995 F.2d 37 (5th Cir. 1993);
3) Defendants' refusal to allow Ms. Esquivel to be accompanied by counsel when she applies for parole into the United States, to attend her removal proceedings, or for other lawful purpose, is therefore arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" within the meaning of 5 U.S.C. §706.

And on the basis of these findings, it is urged that the Court:

1) hold unlawful and set aside the finding of Defendants that she is not entitled to counsel when she applies for the pre-authorized grant of parole at the port of entry,

2) enjoin Defendants from not allowing her to be accompanied by counsel when she applies for such pre-authorized parole,
3) absent any indication that she has committed a new offense, has been ordered removed by an Immigration Judge, or is a danger to the United States, enjoin Defendants from retaliating against her by taking her into custody when she applies for parole pursuant to the pre-authorized grant,
4) award attorneys fees, and such other and further relief as the Court may deem just and appropriate.

Respectfully Submitted,

s/
Cathy J. Potter, Attorney
P. O. Box 3919
Brownsville, Texas 78523
(956) 525-4151
Federal I.D. 1060322
Pennsylvania Bar 210071

VERIFICATION OF COUNSEL

I, Cathy Potter, hereby certify that I am familiar with the Petitioner's case, and that the facts as stated above are true and correct to the best of my knowledge and belief.

s/ Cathy Potter

CERTIFICATE OF SERVICE

I certify that a copy of the above, with Exhibit A, was served electronically on Victor Rodriguez, AUSA, on February 11, 2011.

s/ Cathy Potter

VERIFICATION OF PETITIONER

I, Rosalinda Esquivel, hereby certify that I am the Petitioner herein, that the facts as stated above were translated and explained to me in Spanish, and are true and correct to the best of my knowledge and belief, that I am currently within the United States, at the port of entry in Brownsville, Texas, and intend to remain here until my attorney informs me that the instant petition has been filed.

_____

VERIFICATION OF PETITIONER

I, Rosalinda Esquivel, hereby certify that I am the Petitioner herein, that the facts as stated above were translated and explained to me in Spanish, and are true and correct to the best of my knowledge and belief, that I am currently within the United States, at the port of entry in Brownsville, Texas, and intend to remain here until my attorney informs me that the instant petition has been filed.

AMERICAN IMMIGRATION COUNCIL,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

Civil Action No. 11-1972 (JEB)

EXHIBIT B TO DECLARATION OF CATHY J. POTTER

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

L.A.E., THROUGH HIS MOTHER, MARIA ALVAREZ,	
v.	CA B-09-191
MICHAEL T. FREEMAN, ET AL.	

PLAINTIFF'S EXHIBIT "P"

Exhibit "P" consists of the e-mail string among counsel attempting to ensure that the "multiple authorization" parole offered to Ms. Esquivel allows her to be accompanied by her attorney, Cathy Potter, at all times during the parole process. Since Ms. Esquivel is already in removal proceedings, it was thought that Defendants' response to Request For Admission #44 in *Castro et al v. Freeman et al*, CA B-09-208 [122:28], ensured that she had this right. Although Defendants have not explained their position in light of this RFA, they have made clear that Ms. Esquivel cannot be accompanied by counsel during the parole process. As Ms. Potter will explain at the February 14, 2011, hearing, it was agreed in *Vargas v. Freeman et al*, CA B-11-001, that Ms. Vargas would be paroled into the U.S. in exchange for dismissing and re-filing the suit, and that during the parole process, she would not be asked about her encounter with CBP Officer Cabrera in June, 2009. However, during that process, and outside of the presence of counsel, Ms. Vargas was detained for over six hours, and questioned about those events. The Declaration of Adriana Gonzalez, [68.1], does not ensure that during the parole process, and outside of the presence of counsel, Ms. Esquivel would not be questioned about her version of the September, 2010, events.

Respectfully Submitted,

s/ Lisa S. Brodyaga, Attorney
17891 Landrum Park Road Federal ID: 1178
San Benito, TX 78586 Texas Bar 03052800
(956) 421-3226

CERTIFICATE OF SERVICE

I certify that copies of the above, with attachment, were served electronically on Elizabeth Stevens, Esq., Aaron Goldsmith, Esq., and Victor Rodriguez, AUSA, on February 10, 2011.

s/ Lisa S. Brodyaga

Subj: **RE: LAE**
Date: 2/9/2011 5:04:47 P.M. Central Standard Time
From: Aaron.Goldsmith@usdoj.gov
To: LisaBrodyaga@aol.com
CC: Victor.Rodriguez1@usdoj.gov, cathypotter@aya.yale.edu
Lisa:

You are correct that CBP advises that she does not have a right to have an attorney present when she applies for parole and that CBP is not going to employ a different procedure just for her. As to any concerns she may have, I have attempted to address them through the sworn declaration from CBP that I filed with the Court yesterday.

I am certainly open to other suggestions as to how to proceed. Thank you.

From: LisaBrodyaga@aol.com [mailto:LisaBrodyaga@aol.com]
Sent: Wednesday, February 09, 2011 5:49 PM
To: Goldsmith, Aaron (CIV)
Cc: Rodriguez, Victor(USATXS)1; cathypotter@aya.yale.edu; LisaBrodyaga@aol.com
Subject: Re: LAE

Counsel:

This will summarize our conversation of earlier this afternoon, insofar as it related to the ability of Ms. Esquivel to obtain a new parole document, pursuant to your "multiple authorization" decision, without running the risk of being detained and questioned outside of the presence of her counsel. According to what I understood from our conversation, the Government takes the position that this is not possible.

As I understood our conversation, it is the position of the Defendants that it is not possible for Ms. Esquivel to go through the process of being paroled into the US while she is in the company of her attorney. And there are no guarantees that during the time she is not allowed to have her attorney present, she will not be detained and questioned. Particularly given that each and every time she came to the port of entry in September, 2010, she was subjected to a lengthy, and unpleasant, detention and interrogation, this does not seem to be to be much of an "inducement" to get her to submit to a deposition.

You did offer to conduct a deposition at the port of entry. Although I am not Ms. Esquivel's attorney, and cannot speak for her, I seriously doubt that she will agree to such a deposition. As I mentioned, this would not enable her to attend her removal hearing, without going through what she views as the lion's den, unaccompanied by her attorney. Therefore, there would be no benefit to her of agreeing to such a deposition. Moreover, she would still have to be accompanied to the room where the deposition is to be conducted, without her attorney. Given her prior experience, I hope you can understand her reluctance to do anything at the port of entry that would require her separation from her attorney.

Even more importantly, as I mentioned to you, it does not make sense to me that Ms. Esquivel can be deposed, with her attorney present, within the inner reaches of the port of entry, but that there is no way that it can be arranged for her to be given a new parole document at the port of entry, in a manner which allows her attorney to be present at all times. There is no reason that the document cannot be prepared, and any questions which need to be asked of her cannot be asked at the window in the waiting room, where her attorney can be present. Alternatively, she and her attorney could be escorted to a "secure" room in the interior of the port of entry. The Government claims that they want her deposition, but they are not willing to make even trivial concessions to make this possible. Particularly given that the Government appears to have taken the position that a person at the port of entry is entitled to counsel after a Notice to Appear has been issued, this makes no sense to me. A notice to appear has been issued, and filed, in her case. As I read the Government's response to our requests for admission, she is, therefore, entitled to be represented by counsel at all times.

If I misunderstood you in any way, or if anything stated above is not a correct statement of your position, please let me know immediately.

Sincerely,

Lisa Brodyaga

In a message dated 2/9/2011 8:33:46 A.M. Central Standard Time, LisaBrodyaga@aol.com writes:

> Counsel:
>
> As a prelude to our discussion this afternoon, I want to formalize our discussions regarding the ability of a person claiming to be a U.S. citizen, with facially valid documents showing that status, or a lawful permanent resident, against whom a Notice to Appear has been issued, to have counsel present at all times during any encounters at a port of entry. In response to our requests for admission in Castro et al v. Freeman et al, CA B-09-208, Defendants stated as follows, [122:28]:
>
> REQUEST FOR ADMISSION NO. 44:
> Admit that it is the position of the Department of Homeland Security that an applicant for entry with facially valid documents indicating birth in the United States, but whose U.S. citizenship is questioned by the examining officer, has no right to counsel while detained at a port of entry unless criminal charges are contemplated.
> RESPONSE TO REQUEST FOR ADMISSION NO. 44:
> Defendants object to this request on the grounds that it requests an admission to a pure legal conclusion, and such a request is not permitted by Fed. R. Civ. P. 36. See Warnecke v. Scott, 79 Fed. Appx. 5, 2003 WL 22391051, at *1 (5th Cir. Oct.21, 2003), citing Wright, Miller & Cane, FEDERAL PRACTICE & PROCEDURE § 2255 & n.8 (2010) (collecting cases) ("requests for admissions are properly used for facts or facts as applied to law, not pure legal conclusions ..."); see also In re Carney, 258 F.3d 415, 419 (5th Cir.2001). Defendants also object to this request on the grounds it is vague, ambiguous, compound, and overbroad. Further, this request exceeds the scope of permissible discovery, and is irrelevant and not calculated to lead to the discovery of admissible evidence. Subject to, and without waiving these objections, Defendants admit that prior to the issuance of a Notice to Appear, individuals applying for entry at a port of entry who are not facing criminal prosecution are not entitled to consult with an attorney or have an attorney present when interviewed by officers of the Department of Homeland Security.
>
> While this RFA was formulated in terms of US citizens, I believe that it has equal force with respect to lawful permanent residents. My understanding from Ms. Potter, who is now representing Rosalinda Esquivel, is that Ms. Esquivel will come to the U.S. for a deposition, if she is allowed to have an attorney present at all times during the process of reapplying for a parole document. It is also my understanding that Defendants are resisting this request, stating that she can have an attorney in primary, but not in secondary, inspection.
>
> This will be a key issue at the hearing before Judge Tagle on Monday, February 14, 2011, at 10:00 a.m. I have informed Ms. Potter of the hearing, and she will be present as Ms. Esquivel's attorney.
>
> I believe that if we can persuade Ms. Esquivel to come to the U.S. for a deposition, most, if not all, of the disputed discovery requests will be mooted. I would therefore appreciate a formal response to this inquiry as soon as possible, so that I can forewarn Judge Tagle of the status of the problem prior to the hearing on Monday.
>
> Thank you for your prompt consideration.
>
> Lisa Brodyaga
>
> In a message dated 2/8/2011 3:44:28 P.M. Central Standard Time, LisaBrodyaga@aol.com writes:
>
> > Aaron:
> >
> > The best time for me would be late tomorrow. Would 4:30 Eastern (3:30 Central) work for you?
> >
> > Lisa
> >
> > In a message dated 2/8/2011 2:59:09 P.M. Central Standard Time, Aaron.Goldsmith@usdoj.gov writes:
> >
> > > Lisa:

I would like to confer by telephone with you tomorrow regarding the Rule 30(b)(6) Notices, per the Court's order. Are you available tomorrow and, if so, what time works best for you?

Thank you.

Aaron S. Goldsmith
Trial Attorney
Office of Immigration Litigation
Department of Justice, Civil Division
Liberty Square Building
450 5th Street, NW
Washington, DC 20530-0001
Tel: (202) 532-4107
Fax: (202) 532-4393
aaron.goldsmith@usdoj.gov

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL

Plaintiff,

v. **Case No. 1:11-cv-01972 (JEB)**

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

DECLARATION OF JOHN P. PRATT IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, John P. Pratt, declare as follows:

1. I am the immediate former President of the South Florida Chapter of the American Immigration Lawyers Association ("S. Fla. AILA"). I have served on the Board of Directors of S. Fla. AILA for the past eight years. I submit this Declaration in support of Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment in the above-captioned case.

2. Pursuant to reports by a number of members of S. Fla. AILA that they and their clients had been mistreated by U.S. Customs and Border Protection (CBP) agents during deferred inspections, the Board of S. Fla. AILA decided to request that the DHS Office of Inspector General investigate CBP's deferred inspection practices in Miami.

3. Attached as **Exhibit A** is a true and correct copy of a December 2, 2010 letter that S. Fla. AILA sent DHS regarding the pattern and practice of abuse committed by CBP officers who conduct deferred inspections in Miami. In particular, the letter discussed complaints that CBP deferred inspectors in Miami have repeatedly denied certain individuals the right to be represented by counsel during CBP interrogations, threatened attorneys with arrest for seeking to

represent their clients, and disparaged lawyers who appeared at deferred inspections with their clients.

4. On December 21, 2010, I received an e-mail from the DHS Office of Inspector General acknowledging receipt of my letter and informing me that it had been referred to the U.S. Immigration and Customs Enforcement/U.S. Customs and Border Protection Joint Intake Center ("Joint Intake Center"). A true and correct copy of DHS's acknowledgement e-mail is attached as **Exhibit B**.

5. On January 6, 2011, S. Fla. AILA sent a follow up letter to the Joint Intake Center inquiring about the status of our request for an investigation by the DHS Office of Inspector General. A copy of my December 2, 2010 letter was attached. This correspondence was sent by e-mail and overnight mail. A true and correct copy of my follow up letter is attached as **Exhibit C**.

6. On or about April 29, 2011, CBP responded via letter. CBP indicated that Deferred Inspection Supervisory Officers have discretion to determine whether a noncitizen's attorney may be present during the deferred inspection process. CBP's response also indicated that the issues raised in AILA's letter "are being addressed promptly and professionally." A true and correct copy of CBP's response letter is attached as **Exhibit D**.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Dated: March 22ND, 2012

John P. Pratt

AMERICAN IMMIGRATION COUNCIL,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

Civil Action No. 11-1972 (JEB)

EXHIBIT A TO DECLARATION OF JOHN P. PRATT

AILA Southern Florida Chapter

Southern Florida Chapter
AMERICAN IMMIGRATION LAWYERS ASSOCIATION

December 2, 2010

DHS Office of Inspector General/MAIL STOP 2600
Attention: Office of Investigations – Hotline
245 Murray Drive, SW, Building 410
Washington, DC 20528

DHSOIGHOTLINE@dhs.gov.

Re: Miami CBP

Dear Sir or Madam:

The South Florida American Immigration Lawyers Association (S. Fla. AILA) is comprised of over 600 member attorneys and law professors who practice and teach immigration law. S. Fla. AILA Member attorneys represent U.S. lawful permanent residents, U.S. families seeking permanent residence for close family members, as well as U.S. businesses seeking talent from the global marketplace. S. Fla. AILA Members also represent foreign students, entertainers, athletes, and asylum seekers, often on a pro bono basis. At this time, we are requesting Office of Inspector General (OIG) to investigate a pattern and practice of abuse committed by Customs and Border Protection (CBP) officers employed at deferred inspections in Miami.

Immigration law is a complex field, however, it is clear that non-arriving aliens (those who are not seeking admission) and aliens who are being questioned regarding criminal matters or matters that may lead to criminal charges, are entitled to counsel during the inspection process. [1] Despite this, CBP deferred inspectors in Miami have repeatedly denied non-criminal

[1] * USC 1101(a)(13)(C) provides :An alien lawfully admitted for permanent residence shall not be regarded as seeking an admission into the U.S. unless the alien has (i)has abandoned or relinquished that status, (ii) has been absent from the United States for a continuous period in excess of 180 days, (iii) has engaged in illegal activity after having departed the United States, (iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings and extradition proceedings (v) has committed an offense identified in section 212(a)(2), unless since such offense the alien has been granted relief under section 212(h)of 240A(a), or (vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

lawful permanent residents and other foreign nationals, non-arriving aliens, and United States citizens, the right to be represented by counsel at CBP interrogations. Additionally, CBP officers in deferred inspections in Miami have threatened attorneys with arrest for seeking to represent clients who in fact are entitled to representation, and perhaps worse, have engaged in a pattern and practice of disparaging lawyers who appear at CBP deferred inspections in Miami with their client. The client is taken in a back room and outside the presence of the attorney is repeatedly told that "you don't need an attorney, and your attorney is ripping you off and stealing your money."

Below are some examples of what has been occurring at deferred inspections in Miami:

Examples of CBP Inspection Cases

Javier Montano Esq., 2100 Coral Way #703, Miami, Florida 33145, 305-854-9591

I requested rescheduling of an interview due to a scheduling conflict (an individual court hearing). I was advised that their schedule does not need to accommodate attorney's needs. In the alternative, I asked if they would have the courtesy to expedite our interview and this request was denied as well. I was told that said practice is not fair to the general public and if I wanted to get out of their quickly I had to be there early. Note, I was the first person to get there (7:15 a.m.) and I had to wait 2 (two) hours to see an officer. I honestly believe that they did this on purpose.

Also note that my client was told that she wasted her time by hiring an attorney and that she should have gone without an attorney, because it was a waste of time/money.

David Silk, Esq. 1110 Brickell Ave. #210 Miami, Florida 33131, 305-371-2777

I went to Deferred Inspection with a client this morning (November 23, 2010). The purpose was to pick up an NTA for a client. As usual, the CBP supervisor, Frances Borus, refused to permit me to enter when they questioned the client. They claimed that all they needed was to confirm his address and phone number. I responded that he didn't need to go in back to do that, that the decision to issue an NTA had already been made, and that Arturo had a right to counsel present if they were going to interrogate him further. He is not an arriving alien. The supervisor berated me for "embarrassing" her staff, and refused to permit me entry until after the NTA was physically served (they did let me in just before, however). **When Arturo went back, another officer, officer Rivera, told him that she hates attorneys, and that it was his attorneys' fault (ours) that his case has been delayed so much. Meanwhile, they kept him in back for a long period of time.**

Karina Acevedo, Esq., Acevedo, Lammers & Associates, 2828 Coral Way, Suite 410, Miami, Florida 33145, 305-854-3939

AILA Southern Florida Chapter

Southern Florida Chapter
AMERICAN IMMIGRATION LAWYERS ASSOCIATION

I had a deferred inspection with a client who at the time was pregnant. She was ill and asked the officer if he could process her case expeditiously. She was advised that being pregnant is not an excuse to skip the line. During the interview (by herself of course, as I was not permitted to represent her), **she was told that she wasted her time paying an attorney because the case was very easy, and my being there would not make any difference.**

Hector Galeano, Bernstein, Osberg Braun and De Moraes, 11900 Biscayne Blvd #700 Miami, Florida, 33181, 305-895-0300

On June 28, 2010, I went to deferred inspections with my client, who is a derivative U.S. citizen. At the interview at deferred inspections, I informed officer Reyes that my client was a U.S. citizen by derivation. She refused to allow me to speak on his behalf or attend his interrogation, in violation of the law. I waited 30-45 minutes for the client outside. The officer would not talk to me at all afterwards, and re-scheduled the client for another date. This new appointment hasn't come yet but based on the failure of CBP to allow my client to have my representation in the past, I assume they will once again deny him counsel. **This officer deprived a U.S. citizen of the right to counsel!**

Regina de Moraes, Bernstein, Osberg Braun and De Moraes, 11900 Biscayne Blvd #700 Miami, Florida, 33181, 305-895-0300

Specifically, I have a Lawful permanent resident client named Eladio Alfonso . Mr. Alfonso had four (4) misdemeanor non-drug convictions. They were all for petty theft. The last conviction was in 1992. He was issued a notice to appear at the airport and, subsequently, provided an appointment to attend an interview at deferred inspection to provide his judgment and conviction. In November of 2009, I attended his deferred inspection interview with him. Office Serranor told me to wait outside. I asked why. I told the client not to respond to questions except name, date of birth and address. I asked to speak to a supervisor. The supervisor, Borus, told me that I could not be present when my client was interviewed. A couple months later, I had to go back to deferred to obtain temporary proof of my client's residence, which he is legally entitled to in removal proceedings. In fact, he is mandated to carry proof of his residence with him. Officer Mello took my client and me into the deferred room. If filled out the I-94 form with my client. **Officer Borus sees me and brings a male officer into the hallway and tells him to "get that fucking bitch out of here."** The male officer than escorted me out of the inner office. On the way out I eyeballed Officer Borus and advised her that her conduct was inappropriate and uncalled for. She did not respond. I waited for the client in the lobby. The client came out to the lobby about 20 minutes later. **He advised that Officer Borus told him that, "he should not waste his time nor money with me as he was going to get deported anyway." Borus also asked him how much he had paid for my services. He refused to answer.** My client was granted cancellation of removal in proceedings and is now scheduled for naturalization.

Jessica Meldon, Esq., Bernstein, Osberg Braun and De Moraes, 11900 Biscayne Blvd #700 Miami, Florida, 33181, 305-895-0300

AILA Southern Florida Chapter

Southern Florida Chapter
AMERICAN IMMIGRATION LAWYERS ASSOCIATION

I took a client to deferred inspections in Miami on January 5, 2010. He is a lawful permanent resident who was attending scheduled interviews at deferred inspections in Miami though he lived in New York. He had already flown down to Miami on a prior occasion from New York. I was insistent that I go into his interview with him as I wanted his situation resolved. It was clear that when he obtained residence he had applied for a waiver of grounds of inadmissibility and that he was granted the waiver. He was not an arriving alien and thus he was entitled to counsel. I tried to show that he had applied for the waiver and that it had been granted (thus his having lawful permanent residence) as I had the document and fee receipt; but, CBP would not take it from me. Had CBP taken the document from me the case would have been resolved in five minutes. All of his misdeeds had been disclosed and waived at his residence interview and I had proof of this. Nevertheless, they made the client travel to Miami from New York at least twice, needlessly. I was not permitted to attend the interview with my client though he was not an arriving alien and entitled by law to legal counsel. CBP illegally deprived my client of counsel.

Request for OIG Investigation of CBP Deferred Inspection Practices & S. Florida AILA respectfully requests OIG to investigate the pattern of misconduct and abuse committed by CBP officers in deferred inspections in Miami. Not only has the right to counsel been abridged, especially in the case of United States citizens, and non-arriving aliens, the pattern and practice of disparaging and threatening attorneys is inappropriate and action must be taken against those who regularly engage in this type of misconduct.

We thank you in advance for your serious inquiry into this misconduct. S. Florida AILA respectfully requests that OIG follow-up with me, John Pratt, the current Chapter Chair. We are happy to provide any additional information you need.

Sincerely yours,

John P. Pratt, Esq.
President, AILA South Florida Chapter

AMERICAN IMMIGRATION COUNCIL,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

Civil Action No. 11-1972 (JEB)

EXHIBIT B TO DECLARATION OF JOHN P. PRATT

John Pratt

From: DHSOIGHOTLINE [dhsoighotline@dhs.gov]
Sent: Tuesday, December 21, 2010 9:43 AM
To: John Pratt
Subject: RE: Complaint from the American Immigration Lawyers Association (AILA), South Florida Chapter - Miami Customs & Border Protection (CBP)

Office of Inspector General

U.S. Department of Homeland Security

Homeland Security

This is to acknowledge receipt of the information you e-mailed to the U.S. Department of Homeland Security (DHS), Office of Inspector General (OIG).

It is our policy to thoroughly review all complaints and determine the appropriate course of action. In many instances, we refer information or complaints to a bureau, agency or office that will more appropriately respond to it.

The information or complaint you provided was reviewed and referred to the address below. As it has been referred, the OIG will take no action regarding the matter and information regarding the status of your complaint will not be maintained by the DHS OIG. Any additional information that you wish to send regarding the matter should be sent to the address below. Also, any information you might wish to obtain regarding the status of the referred matter should be obtained from:

U.S. Immigration and Customs Enforcement
U.S. Customs and Border Protection
Joint Intake Center
PO Box 14475
1200 Pennsylvania Avenue NW
Washington, DC 20044
Telephone: 1-877-2INTAKE (1-877-246-8253)
Email: Joint.Intake@dhs.gov

Fax: (202) 344-3390

From: John Pratt [mailto:jpratt@kkwtlaw.com]
Sent: Friday, December 10, 2010 3:06 PM
To: DHSOIGHOTLINE@dhs.gov
Cc: Tammy Fox-Isicoff
Subject: Complaint from the American Immigration Lawyers Association (AILA), South Florida Chapter - Miami Customs & Border Protection (CBP)

To Whom It May Concern,

My name is John P. Pratt, and I am the current President on the American Immigration Lawyers Association, South Florida Chapter. This email follows a letter previously sent to the Department of Homeland Security (DHS), Office of the Inspector General (OIG), relating to issues and matters with Customs & Border Protection (CBP) in Miami, Florida, and their official policies and/or conduct. For your convenience, attached please find the referenced letter.

It is respectfully requested that any correspondence pursuant to that letter be sent directly to my attention in my capacity as the President of the association. If you have any questions, please do not hesitate to contact me at 305-444-0060 or jpratt@kkwtlaw.com.

Sincerely,

John P. Pratt, Esq.

****
John P. Pratt, Esq.
Florida Bar Board Certified in Immigration & Nationality Law
Kurzban, Kurzban, Weinger, Tetzeli, & Pratt P.A.
2650 SW 27th Avenue
Suite 200
Miami, Florida 33133
Tel: (305) 444-0060
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JPRATT@KKWTLAW.COM
WWW.KKWTLAW.COM

Jacksonville Office
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AMERICAN IMMIGRATION COUNCIL,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

Civil Action No. 11-1972 (JEB)

EXHIBIT C TO DECLARATION OF JOHN P. PRATT

AILA
Southern Florida Chapter

Southern Florida Chapter
AMERICAN IMMIGRATION LAWYERS ASSOCIATION

VIA EMAIL & OVERNIGHT MAIL

January 6, 2011

U.S. Immigration and Customs Enforcement
U.S. Customs and Border Protection

Joint Intake Center
PO Box 14475
1200 Pennsylvania Avenue NW
Washington, DC 20044

To Whom It May Concern,

My name is John P. Pratt and I am the current President of the South Florida Chapter of the American Immigration Lawyers Association (AILA). We were advised that the attached complaint that was filed with the Department of Homeland Security, office of Inspector General, by our organization was forwarded to your office for investigation and action.

At this time it is respectfully requested that we are provided with any information regarding the status of this request. In addition, if you have any questions or require additional information and/or documentation, please do not hesitate to contact me at 305-444-0060 Extension 232 or jpratt@kkwtlaw.com

Sincerely yours,

John P. Pratt, Esq.
President, AILA South Florida Chapter

k:\pratt, john\ailn\president term - may 2010 to april 2011\aila s.fla letters - 2010-2011\letters\cbp-oig letter - 01-05-2011.doc 1/6/2011 2:42 PM

AILA Southern Florida Chapter

Southern Florida Chapter
AMERICAN IMMIGRATION LAWYERS ASSOCIATION

December 2, 2010

DHS Office of Inspector General/MAIL STOP 2600
Attention: Office of Investigations – Hotline
245 Murray Drive, SW, Building 410
Washington, DC 20528

DHSOIGHOTLINE@dhs.gov.

Re: Miami CBP

Dear Sir or Madam:

The South Florida American Immigration Lawyers Association (S. Fla. AILA) is comprised of over 600 member attorneys and law professors who practice and teach immigration law. S. Fla. AILA Member attorneys represent U.S. lawful permanent residents, U.S. families seeking permanent residence for close family members, as well as U.S. businesses seeking talent from the global marketplace. S. Fla. AILA Members also represent foreign students, entertainers, athletes, and asylum seekers, often on a pro bono basis. At this time, we are requesting Office of Inspector General (OIG) to investigate a pattern and practice of abuse committed by Customs and Border Protection (CBP) officers employed at deferred inspections in Miami.

Immigration law is a complex field, however, it is clear that non-arriving aliens (those who are not seeking admission) and aliens who are being questioned regarding criminal matters or matters that may lead to criminal charges, are entitled to counsel during the inspection process. [1] Despite this, CBP deferred inspectors in Miami have repeatedly denied non-criminal

[1] * USC 1101(a)(13)(C) provides :An alien lawfully admitted for permanent residence shall not be regarded as seeking an admission into the U.S. unless the alien has (i)has abandoned or relinquished that status, (ii) has been absent from the United States for a continuous period in excess of 180 days, (iii) has engaged in illegal activity after having departed the United States, (iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings and extradition proceedings (v) has committed an offense identified in section 212(a)(2), unless since such offense the alien has been granted relief under section 212(h)of 240A(a), or (vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

lawful permanent residents and other foreign nationals, non-arriving aliens, and United States citizens, the right to be represented by counsel at CBP interrogations. Additionally, CBP officers in deferred inspections in Miami have threatened attorneys with arrest for seeking to represent clients who in fact are entitled to representation, and perhaps worse, have engaged in a pattern and practice of disparaging lawyers who appear at CBP deferred inspections in Miami with their client. The client is taken in a back room and outside the presence of the attorney is repeatedly told that "you don't need an attorney, and your attorney is ripping you off and stealing your money."

Below are some examples of what has been occurring at deferred inspections in Miami:

Examples of CBP Inspection Cases

Javier Montano Esq., 2100 Coral Way #703, Miami, Florida 33145, 305-854-9591

I requested rescheduling of an interview due to a scheduling conflict (an individual court hearing). I was advised that their schedule does not need to accommodate attorney's needs. In the alternative, I asked if they would have the courtesy to expedite our interview and this request was denied as well. I was told that said practice is not fair to the general public and if I wanted to get out of their quickly I had to be there early. Note, I was the first person to get there (7:15 a.m.) and I had to wait 2 (two) hours to see an officer. I honestly believe that they did this on purpose.

Also note that my client was told that she wasted her time by hiring an attorney and that she should have gone without an attorney, because it was a waste of time/money.

David Silk, Esq. 1110 Brickell Ave. #210 Miami, Florida 33131, 305-371-2777

I went to Deferred Inspection with a client this morning (November 23, 2010). The purpose was to pick up an NTA for a client. As usual, the CBP supervisor, Frances Borus, refused to permit me to enter when they questioned the client. They claimed that all they needed was to confirm his address and phone number. I responded that he didn't need to go in back to do that, that the decision to issue an NTA had already been made, and that Arturo had a right to counsel present if they were going to interrogate him further. He is not an arriving alien. The supervisor berated me for "embarrassing" her staff, and refused to permit me entry until after the NTA was physically served (they did let me in just before, however). **When Arturo went back, another officer, officer Rivera, told him that she hates attorneys, and that it was his attorneys' fault (ours) that his case has been delayed so much. Meanwhile, they kept him in back for a long period of time.**

Karina Acevedo, Esq., Acevedo, Lammers & Associates, 2828 Coral Way, Suite 410, Miami, Florida 33145, 305-854-3939

I had a deferred inspection with a client who at the time was pregnant. She was ill and asked the officer if he could process her case expeditiously. She was advised that being pregnant is not an excuse to skip the line. During the interview (by herself of course, as I was not permitted to represent her), **she was told that she wasted her time paying an attorney because the case was very easy, and my being there would not make any difference.**

Hector Galeano, Bernstein, Osberg Braun and De Moraes, 11900 Biscayne Blvd #700 Miami, Florida, 33181, 305-895-0300

On June 28, 2010, I went to deferred inspections with my client, who is a derivative U.S. citizen. At the interview at deferred inspections, I informed officer Reyes that my client was a U.S. citizen by derivation. She refused to allow me to speak on his behalf or attend his interrogation, in violation of the law. I waited 30-45 minutes for the client outside. The officer would not talk to me at all afterwards, and re-scheduled the client for another date. This new appointment hasn't come yet but based on the failure of CBP to allow my client to have my representation in the past, I assume they will once again deny him counsel. **This officer deprived a U.S. citizen of the right to counsel!**

Regina de Moraes, Bernstein, Osberg Braun and De Moraes, 11900 Biscayne Blvd #700 Miami, Florida, 33181, 305-895-0300

Specifically, I have a Lawful permanent resident client named Eladio Alfonso . Mr. Alfonso had four (4) misdemeanor non-drug convictions. They were all for petty theft. The last conviction was in 1992. He was issued a notice to appear at the airport and, subsequently, provided an appointment to attend an interview at deferred inspection to provide his judgment and conviction. In November of 2009, I attended his deferred inspection interview with him. Office Serranor told me to wait outside. I asked why. I told the client not to respond to questions except name, date of birth and address. I asked to speak to a supervisor. The supervisor, Borus, told me that I could not be present when my client was interviewed. A couple months later, I had to go back to deferred to obtain temporary proof of my client's residence, which he is legally entitled to in removal proceedings. In fact, he is mandated to carry proof of his residence with him. Officer Mello took my client and me into the deferred room. Il filled out the I-94 form with my client. **Officer Borus sees me and brings a male officer into the hallway and tells him to "get that fucking bitch out of here."** The male officer than escorted me out of the inner office. On the way out I eyeballed Officer Borus and advised her that her conduct was inappropriate and uncalled for. She did not respond. I waited for the client in the lobby. The client came out to the lobby about 20 minutes later. **He advised that Officer Borus told him that, "he should not waste his time nor money with me as he was going to get deported anyway." Borus also asked him how much he had paid for my services. He refused to answer.** My client was granted cancellation of removal in proceedings and is now scheduled for naturalization.

Jessica Meldon, Esq., Bernstein, Osberg Braun and De Moraes, 11900 Biscayne Blvd #700 Miami, Florida, 33181, 305-895-0300

AILA Southern Florida Chapter

Southern Florida Chapter
AMERICAN IMMIGRATION LAWYERS ASSOCIATION

I took a client to deferred inspections in Miami on January 5, 2010. He is a lawful permanent resident who was attending scheduled interviews at deferred inspections in Miami though he lived in New York. He had already flown down to Miami on a prior occasion from New York. I was insistent that I go into his interview with him as I wanted his situation resolved. It was clear that when he obtained residence he had applied for a waiver of grounds of inadmissibility and that he was granted the waiver. He was not an arriving alien and thus he was entitled to counsel. I tried to show that he had applied for the waiver and that it had been granted (thus his having lawful permanent residence) as I had the document and fee receipt; but, CBP would not take it from me. Had CBP taken the document from me the case would have been resolved in five minutes. All of his misdeeds had been disclosed and waived at his residence interview and I had proof of this. Nevertheless, they made the client travel to Miami from New York at least twice, needlessly. I was not permitted to attend the interview with my client though he was not an arriving alien and entitled by law to legal counsel. CBP illegally deprived my client of counsel.

Request for OIG Investigation of CBP Deferred Inspection Practices & S. Florida AILA respectfully requests OIG to investigate the pattern of misconduct and abuse committed by CBP officers in deferred inspections in Miami. Not only has the right to counsel been abridged, especially in the case of United States citizens, and non-arriving aliens, the pattern and practice of disparaging and threatening attorneys is inappropriate and action must be taken against those who regularly engage in this type of misconduct.

We thank you in advance for your serious inquiry into this misconduct. S. Florida AILA respectfully requests that OIG follow-up with me, John Pratt, the current Chapter Chair. We are happy to provide any additional information you need.

Sincerely yours,

John P. Pratt, Esq.
President, AILA South Florida Chapter

AMERICAN IMMIGRATION COUNCIL,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

Civil Action No. 11-1972 (JEB)

EXHIBIT D TO DECLARATION OF JOHN P. PRATT

PO Box 997930
Miami, FL 33299-7930

U.S. Customs and Border Protection

APR 29 2011

John P. Pratt, Esq.
President, AILA South Florida Chapter
2650 SW 27th Avenue, Suite 200
Miami, Florida 33133

Dear Mr. Pratt:

Thank you for your inquiry regarding recent interactions between AILA attorneys and U.S. Customs and Border Protection (CBP) staff at the Office of Deferred Inspection in Miami, Florida. In your inquiry, you express concern about the right to counsel clients at this office. You and other attorneys in your organization are also concerned about the perceived unprofessional behavior of CBP personnel. Please allow me to address the situation.

Deferred Inspection is a continuation of the port of entry inspection, therefore there is no right to counsel, unless the applicant has become the focus of a criminal investigation and has been taken into custody. It is at the discretion of the Deferred Inspection Supervisory Officer as to whether the alien's attorney may be present during the deferred inspection process.

CBP takes allegations of employee misconduct very seriously and has instituted policies pertaining to abuses of authority. Complaints of unprofessional conduct are recorded, investigated, and appropriate action is taken against CBP officers who are found to have violated policy. However, the Privacy Act prohibits any disclosure of discipline towards CBP personnel.

Let me assure you that the issues raised in your letter are being addressed promptly and professionally. In the future, as provided by the Director of Field Operations to all AILA representatives, if you are dissatisfied with the decision of the duty Supervisor at the Office of Deferred Inspection, please request to speak with a Station Chief regarding your concerns. A Station Chief is always on duty and can be reached at 786-369-3500. Thank you for bringing this information to our attention.

Sincerely,

Diane J. Sabatino
Assistant Port Director
Passenger Operations
Miami International Airport

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL

Plaintiff,

Case No. 1:11-cv-01972 (JEB)

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

DECLARATION OF KAREN TUMLIN IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, Karen Tumlin, declare as follows:

1. I am the Managing Attorney at the National Immigration Law Center (NILC). I submit this Declaration in support of Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment in the above-captioned case.

2. In November 2008 NILC and the Stanford Law School Immigrants' Rights Clinic, on behalf of clients NILC, National Lawyers Guild-San Francisco, and the American Civil Liberties Union Foundation of Southern California, sued the U.S. Department of Homeland Security (DHS), the U.S. Department of Justice (DOJ), and various subcomponents of these agencies, including Immigration and Customs Enforcement, Customs and Border Protection (CBP), Citizenship and Immigration Services, the Office of the Inspector General, and the Executive Office for Immigration Review (EOIR) under the Freedom of Information Act to get more information about the government's use of a program known as "stipulated removal." Following extensive negotiations, DHS and DOJ produced thousands of pages of documents from 2008 through 2010.

3. Attached as **Exhibit A** are true and correct copies of three pages (Bates Nos. CBP-2008F2653(2)-000100 and CBP-2008F2653(2)-000101) produced by CBP, a component of

DHS, in response to our lawsuit. These documents appear to indicate that U.S. Border Patrol officers must notify individuals of their right to consult counsel and have counsel present during questioning regarding stipulated removal.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Dated: March 23, 2012

Karen Tumlin

AMERICAN IMMIGRATION COUNCIL,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

Civil Action No. 11-1972 (JEB)

EXHIBIT A TO DECLARATION OF KAREN TUMLIN

UNITED STATES DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION - BORDER PATROL

RECORD OF SWORN STATEMENT

Office: US DHS CBP OBP | 7201 South Airport Road | Pembroke Pines, FL. 33024

Statement by: LAST NAME test **File Number:** [redacted] b2

In the Case of: LAST NAME test

Conducted at: Border Patrol Station - Pembroke Pines **Date:** _____

Before Agent: BPA

In the **English** language **Interpreter:** ____ used

I am an officer of the United States Border Patrol, authorized by law to administer oaths and take testimony in connection with the enforcement of the Immigration and Nationality laws of the United States. I desire to take your sworn statement regarding: **Your true identity, date and place of birth, date and place and manner of entry into the United States and Immigration documents (if any).**

(Yo soy un oficial del Servicio de Patrulla Fronteriza autorizado por la ley a administrar juramentos y tomar testimonios en lo que se refiere a hacer cumplir las leyes de inmigracion de los Estados Unidos. Yo quiero tomar su declaracion jurada referente a su entrada a los Estados Unidos).

STATEMENT OF RIGHTS

Before we ask you any questions, you must understand your rights.
(Antes de que le hagamos cualquier pregunta, usted debe de comprender sus derechos.)

You have the right to remain silent.
(Usted tiene el derecho de guardar silencio.)
Anything you say can be used against you in court, or in any immigration or administrative proceedings.
(Cualquier cosa que usted diga puede ser usada en su contra en un juzgado de leyes, o en cualquier procedimiento administrativo de inmigracion.)
You have the right to talk to a lawyer for advise before we ask you any questions and to have him with you during questioning.
(Usted tiene el derecho de hablar con un abogado para que el lo aconseje antes de que le hagamos alguna pregunta, y de tenerlo presente con usted durante las preguntas.)
If you cannot afford a lawyer, we will supply you with a list of legal organizations that may represent you for free or for a small fee.
(Si usted no puede pagar a un abogado, nosotros le vamos a suplir con una lista de organizaciones legales que podrian representarlo gratuitamente o a un bajo costo.)
If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time.
(Si usted decide contestar nuestras preguntas ahora, sin tener un abogado presente, siempre tendra usted el derecho de dejar de contestar cuando guste.)

Initials:_____

UNITED STATES DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION - BORDER PATROL

RECORD OF SWORN STATEMENT

Office: US DHS CBP OBP | 7201 South Airport Road | Pembroke Pines, FL. 33024

Statement by: LAST NAME test **File Number:** A111 111 111

In the Case of: LAST NAME test

Conducted at: Border Patrol Station - Pembroke Pines **Date:** _____

Before Agent: BPA

In the **English** language **Interpreter:** ____ used

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If you cannot afford a lawyer, we will supply you with a list of legal organizations that may represent you for free or for a small fee.
(Si usted no puede pagar a un abogado, nosotros le vamos a suplir con una lista de organizaciones legales que podrian representarlo gratuitamente o a un bajo costo.)
If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time.
(Si usted decide contestar nuestras preguntas ahora, sin tener un abogado presente, siempre tendra usted el derecho de dejar de contestar cuando guste.)

Initials: _____

WAIVER

b2 b7E

RECORD OF SWORN STATEMENT

b2
b7E

Initials: _____