

## A FUNNY THING HAPPENED ON THE WAY TO ADMISSION: UNDERSTANDING LEGAL ISSUES AND COMMUNICATING WITH U.S. CUSTOMS AND BORDER PROTECTION

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### INTRODUCTION

Unraveling immigration problems that arise with U.S. Customs and Border Protection (CBP) can be frustrating. Your client will be unhappy and confused—to say the least—if they have been sequestered at the airport or the border for hours on end. If they live or work in the United States, the possibility of being unable to return home or report to work is an emergency of the highest degree. To make matters worse, your client may not have copies of CBP paperwork to help you decipher what happened and what the legal consequences may be. To help navigate these difficult situations, it is

important to understand how CBP works and how to effectively communicate with CBP.

Part of this is understanding and appreciating CBP's perspective on immigration matters. A CBP passport control officer's job at a port of entry (POE) is not easy or simple. CBP officers are expected to review the case of each applicant for admission to the United States in a matter of seconds. Referring a traveler for secondary inspection may have nothing to do with inspecting officer error, but instead may arise simply from a "hit" in a government database when the traveler's passport is swiped at primary. When problems arise, CBP protocol requires multiple levels of supervisory review before adverse action is taken against the traveler. However, in the aftermath of 9/11, CBP's dual mission of safeguarding the country from security threats and enforcing highly complex U.S. immigration laws is not always harmonious. CBP officers may have a natural tendency to err on the side of enforcement in complex cases where information is lacking. This may involve intense questioning, accusations of illegal activity and, in some cases, legal actions that bar travelers from re-entering the United States. Once an adverse action is taken, only an officer of high rank will have the authority to investigate and overturn it. Efforts taken by a traveler's attorney to question adverse decisions are often skeptically received, as attorneys may be perceived as biased actors instead of legal counselors.

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\* *Articles do not necessarily reflect the views of the American Immigration Lawyers Association.*

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From an immigration attorney's perspective, it is difficult to strike a comfortable balance in representing clients before immigration enforcement agencies like CBP. Ideally, you will be able to foresee admission issues with existing clients and you can prepare them to best present their case and supporting documents to CBP before they travel. But in other situations, you are forced to act after CBP has already taken adverse action. Professional ethics rules impose a duty to be a zealous advocate for your client, but any zeal may seem counterproductive when you try to present legal

arguments to CBP. Some officers consider questioning or requests for review of a CBP decision to be a personal affront. It is frustrating when you try to make your case, but an officer doesn't want to listen to you and may even say your client has no right to attorney representation. It is even more frustrating when there appear to be clear factual or legal errors, but meaningful communication with CBP is impossible to achieve. Submitting paper inquiries through administrative channels in Washington, D.C. is a bad solution for families who are separated or employees who are forced on indefinite leave. It seems like there should be some mechanism or protocol for direct communication with CBP officers at a POE, but there often is not.

So how can attorneys bridge this gap to work better with CBP? This article proposes a dual solution: first, know the laws regarding admission and CBP's procedural framework for enforcement. This article will focus on legal issues commonly encountered by applicants for admission, and will outline CBP's procedures and discretionary criteria for decision-making on these issues. Second, know how to best communicate and seek redress with CBP. This article will provide some basic guidelines on who to contact in your local CBP hierarchy and how to request CBP review of a decision you believe to be erroneous. Although these methods may not cure all your headaches, they may help ease the pain. Even better, they might even help you to make friends with a CBP officer along the way.

## COMMON LEGAL ISSUES

### Maintenance vs. Abandonment of Lawful Permanent Resident Status

One important legal issue that arises in CBP inspection is abandonment of lawful permanent resident (LPR) status. Despite a desire to live in the United States, it is common for LPRs to maintain family and other ties abroad. Given the great effort it often takes to obtain permanent resident status, a common question from many LPR clients is: "what do I have to do to keep it?"

In analyzing these cases, it is relatively easy to tell a client what *not* to do—in other words, how to avoid abandoning their LPR status as a matter of law. A legal presumption arises when an LPR is absent from the United States continuously for more than one year that they have abandoned their resi-

dent status.<sup>1</sup> An LPR who has been continuously absent for more than 180 days will be regarded "seeking admission" to the United States,<sup>2</sup> in these cases, maintenance of status may, but will not necessarily, undergo additional scrutiny. However, even if an LPR regularly returns to the United States, this alone may not be enough to avoid abandonment of resident status.

These issues arise in the context of CBP inspection when an LPR is returning to the United States after traveling abroad. If CBP believes that the traveler has legally abandoned their LPR status, the officer may refer the traveler to secondary inspection for investigation of any ties to the United States. After an investigation at secondary, CBP may schedule a deferred inspection appointment to allow the LPR to present further evidence of their maintenance of status. Alternatively, the officer may issue a notice to appear, placing the LPR in removal proceedings and divesting CBP of jurisdiction over the case.

As a practical matter, CBP's review of abandonment issues is automatically triggered *only* when an LPR has been absent from the United States for more than one year since their last entry, and they do not have special permission to re-enter, such as a re-entry permit, SB-1 visa or transportation letter. Scrutiny may also be triggered if a CBP officer sees a repeated pattern of travel outside the United States indicating that the LPR has spent much more time outside the United States than inside.

### *Who Has the Burden of Proof?* *"Seeking Admission" and Rights of LPRs*

A threshold issue is determining who has the burden to prove abandonment or maintenance of LPR status—Department of Homeland Security (DHS) or your client? Immigration & Nationality Act (INA) §101(a)(13)(C) of the Act states that an LPR shall not be regarded as "seeking admission" into the United States unless the alien "has been absent ... for a continuous period in excess of 180 days"<sup>3</sup> or "has abandoned or relinquished [LPR]

<sup>1</sup> See 8 Code of Federal Regulations (CFR) §211.1(a)(2). If gone for longer than one year, LPR status can be preserved by returning with a re-entry permit or a transportation letter issued by a U.S. embassy or consulate.

<sup>2</sup> Immigration & Nationality Act (INA) §101(a)(13)(C)(ii).

<sup>3</sup> *Id.*

status.”<sup>4</sup> Under normal circumstances, when DHS alleges inadmissibility, applicants for admission in removal proceedings have the burden of proving that they are “clearly and beyond doubt entitled to be admitted and [are] not inadmissible.”<sup>5</sup> However, LPRs who have been absent from the United States for long periods of time are not automatically inadmissible by law. Moreover, LPR status guarantees privileges and rights greater than those of nonimmigrants.<sup>6</sup> As such, courts have held repeatedly that DHS bears the burden of proving that LPRs have abandoned their resident status by “clear, unequivocal and convincing evidence.”<sup>7</sup>

But it is important to keep a realistic perspective on burden of proof issues in abandonment cases being considered by CBP. In fact, CBP *will* have affirmative evidence against your LPR client, inasmuch as the LPR’s prolonged or repeated travel outside the United States has likely triggered CBP’s investigation. Also, keep in mind that CBP is not the final DHS authority in determining abandonment of status and will simply refer cases to the immigration court if they believe abandonment has occurred. Therefore, instead of approaching CBP with the attitude that the government cannot *prove* your client’s abandonment of status, it makes more sense instead to prepare your client to *explain why* they have been outside the United States and why their presence abroad has not interrupted their U.S. resident status.

### ***Proving Maintenance of LPR Status: Actual Ties and Subjective Intent***

In thinking about how to prove to CBP how your LPR client has not abandoned their status, it is important to first consider CBP protocol to detect possible abandonment. The most obvious indicator of abandonment is a prolonged absence outside the United States exceeding one year without special authorization for re-entry. The CBP *Inspector’s Field Manual* (IFM)<sup>8</sup> lists several other “indicators

of possible abandonment of [LPR status],” including:

- Employment abroad;
- Immediate family members who are not permanent residents;
- Arrival on a charter flight where most passengers are non-residents with return passage;
- Lack of a fixed address in the United States; or
- Frequent prolonged absences from the United States.

Failing to file U.S. income tax returns while living outside the United States or self-declaring to be a “non-resident” on U.S. tax returns may also be red flags evidencing abandonment.<sup>9</sup>

To rebut CBP’s allegations of abandonment, the LPR can present countervailing evidence to prove maintenance of resident status. Generally, they must show actual ties to the United States<sup>10</sup> and prove their intent to return to the United States after a temporary absence. Evidence establishing ties to the United States can come in many commonsense forms: proof of filing U.S. tax returns, property ownership, close family members remaining in the United States during their absence, maintaining a home in the United States with personal belongings, bank accounts, U.S. cell phones or any other documentation showing a close connection to this country.

Proving an LPR’s subjective intent to return after a temporary absence can be more complicated. Whether an absence from the United States was “temporary” can vary depending upon the facts and circumstances of each case.<sup>11</sup> According to *Matter of Huang*,<sup>12</sup> temporariness is not defined in terms of elapsed time alone, and instead hinges on the intention of the alien. The BIA, in the seminal case *Mat-*

<sup>4</sup> INA §101(a)(13)(C)(i).

<sup>5</sup> INA §240(c)(2)(A).

<sup>6</sup> In fact, the BIA recognized that an applicant for admission who has a colorable claim to returning LPR status has just as much at stake as an alien in deportation proceedings. See *Matter of Huang*, 19 I&N Dec. 749 (BIA 1988).

<sup>7</sup> *Singh v. Reno*, 113 F.3d 1512, 1514 (9th Cir. 1997); *Landon v. Plascencia*, 459 U.S. 21 (1982); *Woodby v. INS*, 385 U.S. 276 (1966).

<sup>8</sup> The *Inspector’s Field Manual* (IFM) is self-described as a “comprehensive ‘how-to’ manual detailing official CBP

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policies and procedures for CBP’s immigration mission.” IFM §1. A redacted version of the IFM was publicly released by CBP in 2008 after a FOIA request and successful appeal by Charles Miller. AILA publishes a hardcopy of the IFM, available at [www.ailapubs.org](http://www.ailapubs.org).

<sup>9</sup> See “Maintaining Permanent Residence” under “Topics,” “Green Card (Permanent Residence),” “After a Green Card is Granted” at [www.uscis.gov](http://www.uscis.gov).

<sup>10</sup> *Matter of Quijencio*, 15 I&N Dec. 95 (BIA 1974).

<sup>11</sup> *Gamero v. INS*, 367 F.2d 123, 126 (9th Cir. 1966).

<sup>12</sup> 19 I&N Dec. 749 (BIA 1988).

*ter of Kane*,<sup>13</sup> stated that a returning LPR's intent should be determined from examining:

- *Purpose for Departing*—The traveler should normally have a definite reason for proceeding abroad temporarily.
- *Termination Date*—The visit abroad should be expected to terminate within a relatively short period, fixed by some early event. If unforeseen circumstances cause an unavoidable delay in returning, the trip would retain its temporary character, so long as the alien continued to intend to return as soon as his original purpose was completed.
- *Place of Employment or Actual Home*—The traveler must intend to return to the United States as a place of employment or business or as an actual home. He must possess the requisite intention to return at the time of departure, and must maintain it during the course of the visit.

The intent to return must be “continuous [and] uninterrupted ... during the entirety of [the LPR's] visit [abroad].”<sup>14</sup> If the LPR had no intention of returning at the time of departure, they cannot be considered temporarily absent. Likewise, the absence cannot be considered temporary if the intention to resume residence in the United States was abandoned during the period abroad.

In some cases, proving your client's subjective intent to return can be achieved through simple explanation. For example, if the LPR left for what was intended to be a brief trip, but an intervening emergency such as a serious health problem or a death in the family occurred, a delay in returning is easy to understand. The longer the absence, the more the difficult the case will be to prove. If your client had to assume unexpected personal or professional responsibilities while abroad that prolonged their absence, try to obtain objective proof of this. Get explanatory letters from family members, business colleagues or other individuals with knowledge of their situation. Be careful to emphasize and explain how the horizon for your client's return was always short-term, and if applicable, hinging on a particular event—recovery from an illness, completion of an unforeseeably complicated work project, or something similar.

If you have an LPR client who has spent long periods of time outside the United States, you should advise them to affirmatively prepare for questioning by CBP. Prepare your client to provide focused answers that tell the inspecting CBP officer why they were gone for so long, how they have maintained ties to the United States and how they have continuously intended to return home while abroad. Effective preparation may also include drafting an explanatory letter/brief and organizing other supporting evidence. If appropriate, the client should carry documents evidencing that they have maintained connections to the United States. Other documents, such as letters, a personal statement and evidence of the temporary activity they were engaged in abroad, may be useful in proving their subjective intent to return on a short timeline. You may choose to draft a legal brief applying the *Matter of Kane* factors to your client's circumstances for a complicated case. However, keep in mind that clarity and brevity of presentation is a virtue at a busy POE. If you do prepare a legal brief or an explanatory letter for your client, keep it focused and concise to ensure that the inspecting CBP officer can review it in its entirety in a timely manner.

### **CBP Refusals of Entry: Expedited Removal vs. Withdrawal of Application for Admission**

Another critical legal issue relating to CBP practices is the different classifications for refusing entry to an applicant for admission. Different types of refusals are distinct not just in procedure, but also in legal consequences to the traveler, and it is very important to know the difference between them and advise your clients accordingly.

#### ***Expedited Removal***

In 1996, Congress created a procedure called “expedited removal” to remove certain inadmissible aliens from the United States at the time of their inspection. CBP may issue expedited removal orders against travelers for lack of a proper entry document or because they have committed fraud or made a misrepresentation of material facts to attempt to gain an immigration benefit.<sup>15</sup> Under an expedited removal order, these persons may be removed from the United States without any judicial hearings or review, subject to a few narrow exceptions.<sup>16</sup> CBP

<sup>13</sup> 15 I&N Dec. 258 (BIA 1975).

<sup>14</sup> *Chavez-Ramirez v. INS*, 792 F.2d 932, 937 (9th Cir. 1986).

<sup>15</sup> 8 CFR §235.3(b)(1).

<sup>16</sup> Among individuals not subject to expedited removal are LPRs, persons fearing persecution or claiming asylum, and

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will document the facts underlying expedited removal inadmissibility on Forms I-867A and B and I-860 or I-213, and should provide a complete copy of these forms to the alien.<sup>17</sup>

The consequences of an expedited removal order are severe. Persons issued expedited removal orders cannot return to the United States for five years; following a second or subsequent removal, they will not be able to return for 20 years.<sup>18</sup> If the underlying ground of inadmissibility is fraud or misrepresentation, the result is a permanent bar from the United States.<sup>19</sup>

CBP protocol encourages officers to “be especially careful to exercise objectivity and professionalism when processing aliens [for expedited removal].”<sup>20</sup> The IFM adds that “DHS retains the discretion to permit withdrawal of application for admission in lieu of issuing an expedited removal order.... 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.”<sup>21</sup> Notwithstanding this cautionary language, CBP officers do not always conduct thorough investigations of foreign nationals’ cases before issuing an expedited removal order. After analyzing the forms underlying a client’s removal order, it is usually possible to determine if the order was warranted or whether it is legally deficient. If an expedited removal order was based on defective grounds—because your client was not inadmissible under INA §§212(a)(6)(C) or (a)(7)—then it should be challenged. If an order is issued for an arguably valid basis of inadmissibility, but appears to be an overly harsh exercise of discretion disfavoring the alien, it will be more difficult to question. Generally, the only persons with authority to overturn an expedited removal order are CBP supervisors at the POE that issued the order.<sup>22</sup>

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persons who have been continuously physically present in the United States for two years at the time the determination of inadmissibility is made. *See generally* 8 CFR §235.3(b).

<sup>17</sup> IFM §§17.15(b)(1)–(2).

<sup>18</sup> INA §212(a)(9)(A)(i).

<sup>19</sup> IFM §17.15(a)(2).

<sup>20</sup> IFM §17.15(b).

<sup>21</sup> IFM §§17.15(a)(2)–(3).

<sup>22</sup> The only formal procedure in law or regulations relating to ameliorative actions for removal orders is submission of Form I-212 to waive inadmissibility based on prior removal. *See* 8 CFR §212.2. Because there is no legal or regulatory

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### ***Withdrawal of Application for Admission***

In order to avoid expedited removal and the associated bar to re-entry, CBP may discretionarily allow an alien to withdraw his or her application for admission and depart immediately from the United States.<sup>23</sup> The IFM states: “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.”<sup>24</sup> The factors listed in the IFM include the seriousness of the immigration violation, previous findings of inadmissibility against the alien, the alien’s intent to violate the law, ability to easily overcome the ground of inadmissibility (*i.e.*, lack of documents), age or poor health of the alien, and other humanitarian or public interest considerations.<sup>25</sup> Proper balancing of these factors should be forgiving to innocent or innocuous violations, but will disfavor “obvious, deliberate fraud” and other egregious immigration violations.<sup>26</sup>

If CBP allows an alien to withdraw their application for admission, it is not considered a “removal” for future inadmissibility purposes and there is no consequent bar to re-entry. Similar to withdrawals, an applicant for admission under the Visa Waiver Program (VWP) who is refused entry by CBP is not considered “removed” and is not barred from re-entry.<sup>27</sup> However, such a refusal does render the applicant ineligible to use the VWP in the future, and they must be issued a visa before returning to the United States.<sup>28</sup>

### **Discretionary Admission: Waivers and Parole**

Another legal issue that is important to understand is when CBP may waive an applicant’s inadmissibility to the United States. There are many waivers of inadmissibility that are adjudicated before an applicant appears at a POE. However, CBP does have authority in some cases to exercise discretion and waive certain grounds of inadmissibility at the time of the applicant’s appearance at a POE requesting admission. Even if

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authority for CBP review or overturning of expedited removal orders, resistance to your requests to do so can be expected.

<sup>23</sup> INA §235(a)(4).

<sup>24</sup> IFM §17.2(a).

<sup>25</sup> *Id.*

<sup>26</sup> *See* 8 CFR §235.4; IFM §17.2.

<sup>27</sup> 8 CFR §217.4(a).

<sup>28</sup> *See* INA §217(a)(7).

CBP does not have authority to waive inadmissibility, an officer may be able to parole an applicant into the United States in very limited emergency circumstances.

***Waiving a Lack of Valid Visa or Travel Documents: Requesting an I-193 at the POE***

CBP has broad authority to waive an applicant's lack of proper travel documents in a number of situations.

INA §211(b) grants CBP discretionary authority to waive the travel documentation requirement for returning residents traveling without their green cards. CBP officers may instead complete Form I-193 on the applicant's behalf and grant a waiver.<sup>29</sup> Before approving this waiver, the inspecting officer will check government databases to verify the continued validity of the applicant's permanent resident status, and must also make a factual determination that the applicant has not abandoned such status and is not removable from the United States.<sup>30</sup> If for some reason your client absolutely must travel without their green card, instruct them to bring copies of their I-485 approval notice, copy of their green card (even if expired), or other documentation evidencing their LPR status to facilitate re-entry. Also, keep in mind that this—like other waiver decisions—is discretionary, so make sure your client has good cause for traveling without their green card and some evidence to back this up.<sup>31</sup> Even if CBP denies your client an INA §211(b) waiver, the waiver request can be renewed in removal proceedings.<sup>32</sup>

Similar to waivers for returning residents, newly arriving immigrants whose immigrant visas have technical defects may be waived into the United States through use of Form I-193. Also, children born abroad to LPRs may apply for a waiver of a travel document and CBP can order an I-551 for the

child upon entry, so long as the child enters with the parent within two years of birth and the parent has not abandoned LPR status.<sup>33</sup>

Finally, INA §212(d)(4)(A) also grants CBP authority to waive passport and visa requirements for nonimmigrant applicants for admission “on the basis of unforeseen emergency.” CBP has interpreted “unforeseen emergency” to mean:

- An alien arriving for a medical emergency;
- An emergency or rescue worker arriving in response to a community disaster or catastrophe in the United States;
- An alien accompanying or following to join a person arriving for a medical emergency;
- An alien arriving to visit a spouse, child, parent, or sibling who within the past five days has unexpectedly become critically ill or who within the past five days has died;
- An alien whose passport or visa was lost or stolen within 48 hours of departing the last port of embarkation for the United States;<sup>34</sup> or
- Other individual circumstances, on a case-by-case basis.<sup>35</sup>

Authority to grant such a waiver is reserved only to CBP port directors at the GS-13 level and above.<sup>36</sup> Like other discretionary waivers of documentary requirements, CBP must execute I-193 and may collect a fee.

***Waiving Inadmissibility for Nonimmigrant Canadians: Filing an I-192 with a U.S.-Canada Land Border POE***

INA §212(d)(3)(A) allows all grounds of inadmissibility except for certain terrorism and security grounds to be discretionarily waived by DHS for nonimmigrant applicants for admission. The U.S. Department of State (DOS) accepts these waiver requests concurrently with visa applications,<sup>37</sup> but CBP may accept waiver requests from visa-exempt nonimmigrants or in cases where nonimmigrants already possess a valid visa at the time they trigger inadmissibility. As a practical matter, most applicants for INA §212(d)(3) waivers of inadmissibility

<sup>29</sup> See 8 CFR §§211.1(b), 211.4 (waiver procedures) and 103.7(b) (fee information). A fee of \$545 may be charged, but can be waived by CBP at the discretion of the inspecting officer. Southern California AILA-LACBA CBP Liaison Minutes, Dec. 8, 2008. If extraordinary circumstances exist, such as recent approval of the I-485 during the applicant's travel abroad, an officer may be more likely to waive this fee.

<sup>30</sup> See 8 CFR §211.4; IFM §17.5(b).

<sup>31</sup> See 8 CFR §211.1(b)(3). If your client's green card was lost or stolen, they may file an I-90 (with the appropriate fee) to CBP *instead of* completing an I-193 at the POE. *Id.*

<sup>32</sup> 8 CFR §211.4(b).

<sup>33</sup> See 8 CFR §211.1(b)(1).

<sup>34</sup> IFM §17.5(d)(3)(A).

<sup>35</sup> IFM §17.5(d)(3)(C).

<sup>36</sup> IFM §17.5(d)(3)(A).

<sup>37</sup> See INA §212(d)(3)(A)(i); 9 FAM 40.301 notes.

with CBP are Canadians. For most other applicants, it makes more sense to request a waiver concurrently with a nonimmigrant visa application abroad.<sup>38</sup>

Applicants can file these waivers in person by presenting Form I-192 and supporting evidence at a U.S.-Canada land POE or pre-clearance location; some jurisdictions will also accept applications by mail. At the time of filing, CBP typically collects the applicant's fingerprints. CBP will not adjudicate the waiver request immediately at the time of application for admission and applicants are not automatically authorized to enter the United States pending adjudication. Processing times for these waivers have greatly reduced in recent years. CBP reports average processing times of 90 to 120 days for first-time I-192 applicants, and 60 to 75 days for applicants who are applying to renew a previously approved waiver.<sup>39</sup> These waivers involve review of each application by CBP locally and a final, nationally centralized review at the Admissibility Review Office (ARO) in Washington, D.C.

The general standard in adjudicating INA §212(d)(3) waivers comes from the BIA's decision *Matter of Hranka*.<sup>40</sup> Essentially, *Hranka* sets forth a balancing test, measuring the recency and seriousness of the offense triggering inadmissibility against the applicant's purpose in coming to the United States (and whether this serves a U.S. interest).<sup>41</sup> The *Foreign Affairs Manual* (FAM) states: "[t]he law does not require that [waiver approval] be limited to humanitarian or other exceptional cases. While the exercise of discretion and good judgment is essential, you may recommend waivers for any legitimate purpose such as family visits, medical treatment (whether or not available abroad), business conferences, tourism, etc."<sup>42</sup>

CBP's take on waivers is, predictably, stricter than DOS. The IFM emphasizes that CBP is not bound by the FAM.<sup>43</sup> The IFM further states:

The [CBP] inspector should consider [the FAM] and also consider that the Congress has deemed these aliens inadmissible to the United States. In considering the waiver weigh the benefit, if any, to the United States should the waiver be granted. In situations where the proposed visit is for the purpose of medical treatment, consider whether such treatment is available to the alien abroad. Granting of waivers of these grounds should not be routine and available just for the asking.<sup>44</sup>

Notwithstanding this language in the IFM, it is worth noting that the same office—the ARO in Washington, DC—plays a significant role in adjudicating waiver requests filed with both DOS and CBP.

Although all §212(d)(3) waivers are adjudicated on a case-by-case basis, the factors in the FAM, IFM and controlling case law are a good common-sense guide for which waiver cases may be viable. Applicants who can present documentation proving rehabilitation or a significant passage of time since the offense(s) triggering inadmissibility have a better chance of being granted a waiver. Likewise, applicants with a very compelling reason to travel to the United States or whose presence would measurably benefit the United States may also present viable waiver cases. Conversely, applicants who are found to have recently violated the law, have a repeated pattern of offenses or particularly serious offenses, and have no compelling reason to visit the United States may encounter difficulties in obtaining a waiver.

CBP's website provides a comprehensive list of the documents required for an INA §212(d)(3) waiver filing with CBP at a U.S.-Canada POE.<sup>45</sup> Following submission of the waiver application, e-mail inquiries may be made regarding case status to [attorneyinquiry.waiver.aro@dhs.gov](mailto:attorneyinquiry.waiver.aro@dhs.gov).

### **Port Parole**

Where your client has a compelling emergency reason for coming to the United States but is inadmissible, port parole might be considered as an option of last resort. INA §212(d)(5) gives CBP authority to "parole [applicants] into the United States

<sup>38</sup> Among other advantages, an INA §212(d)(3) waiver presented to DOS is usually referred to the ARO and adjudicated in four–six weeks, as opposed to one year or more.

<sup>39</sup> AILA National CBP Committee Liaison Teleconference Minutes, Sept. 29, 2009 (not yet published on AILA InfoNet as of the writing of this article).

<sup>40</sup> 16 I&N 491 (1976).

<sup>41</sup> *Id.*

<sup>42</sup> 9 FAM 40.301 n.3(a).

<sup>43</sup> IFM §17.5(e)(1).

<sup>44</sup> *Id.*

<sup>45</sup> CBP Form I-192, Application for Advance Permission to Enter as a Nonimmigrant and Inadmissible Canadian Information, at [www.cbp.gov/xp/cgov/travel/id\\_visa/indamisscan\\_info.xml](http://www.cbp.gov/xp/cgov/travel/id_visa/indamisscan_info.xml).

temporarily and under such conditions as [DHS] may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit...” Port parole is a wholly discretionary decision that is not pre-adjudicated by DHS<sup>46</sup>, but is instead decided based on the facts at the time of the applicant’s appearance before CBP.<sup>47</sup> There is no form (other than the I-94) used to execute an application for port parole, but there is a fee of \$65, which can be waived discretionarily.<sup>48</sup> The IFM lists some examples of applicants that may be granted port parole for humanitarian reasons, including someone with an urgent need for medical treatment, an emergency worker responding to a natural disaster and an unaccompanied minor placed in the custody of a social service agency.<sup>49</sup> The IFM also states that arriving aliens applying for parole for the “primary purpose of seeking adjustment of status” should not be granted port parole.<sup>50</sup> Because of the high level of discretion involved in port parole decisions, it is a very unpredictable immigration strategy and is not advisable in most cases. Furthermore, practitioners should be mindful that port parole may be an impossibility for some clients further abroad than Canada or Mexico; travelers who do not have visas will likely not be allowed to board aircraft to the United States (and thus will not be able to make their case for parole to CBP officers at the POE).

## COMMUNICATING WITH AND SEEKING REDRESS FROM CBP

### Redress Procedures with CBP: Communications to the POE and FO, PSMs, DHS-TRIP and PLOR

Seeking review of an incorrect CBP decision can be an exasperating experience for attorneys. Once your client has the opportunity to contact you, decisions have likely already been made and the damage is already done to their record. To make matters more difficult, there is no formal procedure

or protocol for challenging legally erroneous decisions made by CBP at the POE. In these frustrating situations, even if there is no quick fix, there are a number of things you can do on your client’s behalf to attempt to clarify or reverse CBP error. The best solution for each individual case will depend on the type of redress you are seeking. Different strategies will suit different cases, depending on the type of problem and the desired timeline for resolution.

To achieve redress for what you believe to be factual or legal errors, or improper exercises of discretion by CBP officers at a POE, you may wish to follow up directly with CBP at a local level. On the other hand, if the error appears to be systemic, stemming from a false “hit” in a government database, your only meaningful recourse may be a written redress request to an administrative office Washington, DC.

### *Directly Challenging Incorrect Decisions with CBP: Follow the Chain of Command*

To begin to discuss a legally questionable decision made by CBP at a POE, the most direct way is to contact the office that made the decision. The benefit of directly discussing the case with the POE is that this office is in the best position to overturn its own decision in a timely and efficient manner. The difficulty in directly challenging a CBP decision at the POE is that you can expect skepticism of your arguments, given that any adverse decision has already been reviewed and approved by several supervising officers before it is finalized. If the POE is not receptive to reviewing their decision, they may dismiss your arguments summarily.

When contacting the POE, you attempt to reach out to a section chief or supervising officer who oversees inspection and admission. If you cannot resolve the problem with a supervisor, you can try to work your way progressively up the chain of command. Above a POE supervisor, you can try contacting the head of Passenger Operations or, next, the port director. Before attempting to “cold call” the POE, contact the local AILA chapter’s CBP liaison for suggestions on whom, when and how to best contact the POE involved in your client’s case. The right contact is a CBP officer who has authority to review decisions, is used to working with attorneys and may be willing to investigate a particular case. However, if your only option is to call a general number, you can search for contact

<sup>46</sup> Port parole granted by CBP is distinct from “humanitarian” parole (which is granted by special application to USCIS) and “significant public benefit” parole (granted by DHS to government witnesses and informants). In these other cases, a parole document will be issued in advance, or the POE will have advance notice of the applicant’s arrival and parole approval.

<sup>47</sup> See IFM §16.1(c).

<sup>48</sup> IFM §16.1(c)(2) for fee waiver information.

<sup>49</sup> See *id.*

<sup>50</sup> IFM §16.1(c)(5).

information for a particular POE by state on CBP's website.<sup>51</sup> However, keep in mind that the person who answers the phone may have no authority to speak with an attorney about the legal merits of a decision already made by another officer.

If no one at the POE will seriously consider your inquiry, the next step in seeking review is to contact the CBP field office (FO) with jurisdiction over the POE. Some FOs may have a supervisory position in charge of review or quality control of inspection and admission issues, such as a "Security and Facilitation director." Alternatively, you can attempt to communicate with the field office Director. You can determine which FO has jurisdiction over the POE in your case by checking CBP's website; the webpage for each individual FO lists POEs it supervises, as well as the FO's phone number.<sup>52</sup> Again, it is a good idea to contact the local AILA CBP liaison for any tips about whom and how to contact the FO if you decide to do so.

If you exhaust all attempts to communicate with CBP at the POE and FO without success, your next logical step should be to contact your local AILA CBP liaison and/or AILA's CBP national committee. Summarize the facts of your case and your legal argument regarding CBP's alleged wrongdoing. The error involved in your case may represent a systemic problem or a novel issue that is best resolved by a higher authority in CBP. Beyond these efforts, the only remaining efforts would be to try to communicate with CBP Headquarters in Washington, D.C., or to sue CBP. At this point, it is important to keep a realistic perspective on whether further appeal to CBP is worthwhile and could achieve redress for your client.

Throughout your communications with the POE and the FO, you should be concise in your explanation of the case and the controlling law. Keep it simple—30 seconds or less to explain the essence of the case—with the goal of securing a chance to follow up in writing. If the CBP officer understands why its decision may have been incorrect and provides you with a follow-up opportunity to send documents or a legal brief, get a specific name, address, fax number and/or e-mail address to facilitate continued communication. If

your explanation is too complicated or lengthy, the CBP officer may be more inclined to back up the decision already made without investigating further or considering your arguments. Throughout your communications to CBP, also keep in mind that the officer may have adverse information regarding your client of which you are not aware. Be a good listener as well as a good advocate; if a CBP officer is willing to speak openly about the government's perspective on the case, you may learn new things about your client's record, previously undisclosed to you by either the government or your client.

Finally, be careful not to contact CBP at all unless you have bona fide arguments about why the decision made was incorrect. Likewise, attorney communications that threaten lawsuits or are otherwise aggressive or hostile toward CBP may not be productive. You will quickly develop a negative reputation with CBP, just like any other DHS agency, if you attempt to advance meritless cases or use bullying tactics.

### ***Passenger Service Managers and CBP Customer Service***

If the problem you wish to clarify or challenge arose at a POE at a major U.S. airport, you may also consider contacting a CBP Passenger Service Manager (PSM). In August 2008, CBP implemented its PSM program to strengthen customer service at certain high-traffic POEs. The PSM's mission is to be "highly visible and responsive to the traveling public, and [to] be the primary point of contact to address concerns or comments about the inspections process of international travelers."<sup>53</sup> Among PSM duties are to train CBP managers and supervisors on customer service issues, develop public service initiatives, and collect and analyze reports about CBP professionalism.<sup>54</sup>

There are two PSMs in California. Kris Rueda is the PSM at Los Angeles International Airport, and can be reached at (310) 665-4545. David Sanchez is the PSM at San Francisco International Airport; his phone number is (650) 821-8663. CBP has assigned PSMs to 18 other major international airports in the United States.<sup>55</sup> Notably, PSMs appear to *only* be

<sup>51</sup> See U.S. Customs and Border Protection, Contacts, Ports, at [www.cbp.gov/xp/cgov/toolbox/contacts/ports/](http://www.cbp.gov/xp/cgov/toolbox/contacts/ports/).

<sup>52</sup> See U.S. Customs and Border Protection, Contacts, Field Offices, at [www.cbp.gov/xp/cgov/toolbox/contacts/cmcs/](http://www.cbp.gov/xp/cgov/toolbox/contacts/cmcs/).

<sup>53</sup> CBP Press Release, "CBP Creates New Position to Strengthen Customer Service at Ports of Entry," (Aug. 13, 2008), located at [www.cbp.gov](http://www.cbp.gov).

<sup>54</sup> *Id.*

<sup>55</sup> CBP Passenger Service Manager Listing (Sept. 2, 2009) at [www.cbp.gov/xp/cgov/toolbox/contacts/ports/cbp\\_psml.xml](http://www.cbp.gov/xp/cgov/toolbox/contacts/ports/cbp_psml.xml).

prepared to assist with cases arising at their assigned POE, and will not receive inquiries about cases arising at a nearby, smaller airport or land/sea POE.

It remains to be seen how and to what extent PSMs will assist immigrants and immigration attorneys in legal redress inquiries with CBP. Certainly, PSMs appear to be equipped and ready to handle customer service issues, such as discriminatory or inappropriate behavior by CBP officers against travelers. But PSMs may have no authority to respond to legal questions. At least in Los Angeles, CBP supervisors have stated that legal inquiries made to the PSM will merely be forwarded to the same Section Chief that would normally review and respond to attorney inquiries.<sup>56</sup> Nevertheless, especially in CBP jurisdictions that do not have strong AILA liaison programs or CBP offices that are responsive to attorney inquiries, the PSM might be a good starting point of contact.

For non-legal issues, the PSMs appear to be the ideal CBP contact for aggrieved clients who have a problem at a major U.S. airport. Clients who have been subjected to an unnecessarily invasive search, a lengthy secondary inspection or believe they have been discriminated against should contact the PSM to report what occurred to them.

Beyond PSMs, CBP also has a customer service framework on a national level. Aggrieved parties can fill out a comment card regarding inappropriate officer behavior, call a national Customer Service Center, or file an online complaint.<sup>57</sup>

### ***DHS-TRIP: A Work-in-Progress for CBP and Interagency Redress***

Another option to seek redress for a client adversely affected by a questionable CBP decision is through DHS's Traveler Redress Inquiry Program (DHS-TRIP). This program was established in 2007, and was envisioned by DHS to be "a single point of contact for individuals who have inquiries or seek resolution regarding difficulties they experienced during their travel screening at transportation hubs," including denied or delayed airline boarding, denied or delayed entry into the United States at a POE, or

continuous referral to secondary inspection.<sup>58</sup> DHS-TRIP requests are received centrally, but review of each case may involve multiple government agencies, as necessary.

DHS-TRIP complaints are initiated by filing an inquiry on the program's website, [www.dhs.gov/trip](http://www.dhs.gov/trip). A case number is assigned, and documents explaining the redress request should be sent to a program address in Washington, D.C., within 30 days after filing the online complaint. Attorneys may initiate and complete a redress request on behalf of a client, so long as the client signs a program-specific release form.<sup>59</sup> DHS-TRIP's website provides an e-mail address to inquire regarding pending cases and advertises an online case tracking feature.<sup>60</sup>

In practice, DHS-TRIP leaves much to be desired by attorneys and aggrieved clients. First, case resolution may take an extremely long time and there are no reliable benchmarks for government processing times. In the author's experience, DHS-TRIP may take one to two years to complete review of a case. Second, DHS-TRIP is far from a transparent program and written responses following government review often do not confirm or deny whether any corrective action was taken. Even when a case is successfully resolved and negative notes against your client are removed from government databases, you may not be advised of this by the program at all. Effectively, you and your client may not realize your efforts have been successful until your client applies for admission to the United States, expecting trouble, and instead is admitted smoothly. Third, e-mails and case status inquiries to DHS-TRIP often go unanswered.

On September 11, 2009, DHS's Office of Inspector General (OIG) recognized these and other serious problems with DHS-TRIP in a report citing the ineffectiveness of the program and issuing 24 recommendations for suggested improvements.<sup>61</sup> Nota-

<sup>56</sup> Southern California AILA-LACBA CBP Liaison Minutes, Sept. 14, 2009.

<sup>57</sup> See generally "Practice Pointer: CBP Complaint Resolution Program," (Aug. 27, 2009), published on AILA InfoNet at Doc. 09090364 (posted Sept. 11, 2009).

<sup>58</sup> U.S. Department of Homeland Security, DHS-TRIP, at [www.dhs.gov/files/programs/gc\\_1169676919316.shtm](http://www.dhs.gov/files/programs/gc_1169676919316.shtm).

<sup>59</sup> The "Authorization to Release Information to Another Person" form is available online at [www.dhs.gov/xlibrary/assets/DHSTRIP\\_3rd\\_Party\\_Consent\\_form.pdf](http://www.dhs.gov/xlibrary/assets/DHSTRIP_3rd_Party_Consent_form.pdf).

<sup>60</sup> See DHS-TRIP, Step 3: After Your Inquiry, at [www.dhs.gov/files/programs/gc\\_1169827489374.shtm](http://www.dhs.gov/files/programs/gc_1169827489374.shtm).

<sup>61</sup> See DHS Office of Inspector General. "Effectiveness of the Department of Homeland Security Traveler Redress Inquiry Program," OIG-09-103 (Sept. 2009) at 1-2, published on AILA InfoNet at Doc. No. 09101665 (posted Oct. 16, 2009).

bly, the report also recommended that “redress resolutions to Port of Entry difficulties should be developed through a more independent process.”<sup>62</sup>

For certain cases—for example, clients who are repeatedly referred to secondary inspection but are always eventually admitted—DHS-TRIP may be a long-term solution to clearing up government error. For other cases—namely where clients have been erroneously refused admission or subjected to expedited removal—DHS-TRIP provides neither a timely nor a transparent avenue for reviewing and resolving U.S. government error. For now, we can only hope that the OIG’s recent recommendations to improve DHS-TRIP will be implemented and will result in meaningful changes making the system more effective and user-friendly.

### **Primary Lookout Override**

For clients who repeatedly are referred to secondary inspection due to false “hits” in government databases, CBP’s Primary Lookout Override (PLOR) system may be a solution. A CBP supervisor can use PLOR to suppress derogatory information on a particular individual’s record so that it will not appear during primary inspection. This can be specifically targeted to make sure that false positive hits do not trigger an automatic referral to secondary. PLOR is a feasible solution for individuals who undergo scrutiny for false identity matches (their name or date of birth is similar to that of a known criminal or terrorist). PLOR may also be used to remove false information from an applicant’s record. However, CBP has stated that PLOR will likely not be used if there is no identity mismatch and there is derogatory information about the applicant (for example, a criminal conviction on their record).<sup>63</sup> You should prepare your client to affirmatively request a PLOR while undergoing secondary inspection at a POE. The reviewing CBP officer may grant this request if they are convinced that the hit on your client’s record is a false positive.

<sup>62</sup> *Id.* at 60–62.

<sup>63</sup> See “Highlights from the CBP Open Forum at the Annual Conference 2009,” published on AILA InfoNet at Doc. No. 09061969 (posted June 19, 2009); AILA/CBP Advocacy & Liaison Committee Minutes (Mar. 14, 2007), published on AILA InfoNet at Doc. No. 07060776 (posted June 7, 2007).

### **Deferred Inspection: Correcting Admissions Errors and Proving Admissibility**

In some situations, CBP errors may be corrected by a Deferred Inspection Office before any adverse action is taken against your client. Attorney practice at CBP deferred inspection offices is for the most part limited to two scenarios: (1) to correct an admissions error committed by CBP at a POE and obtain a new, corrected I-94 card; or (2) to argue for an applicant’s admissibility to the United States after a case is referred by a POE for further review.

#### **Correcting Admissions Errors**

If CBP issued your client an I-94 that contains erroneous information, the deferred inspection office may correct this information in government databases and issue a new I-94 card. CBP errors may be simple and easy to fix, such as a mistaken class of admission or a short-changed expiration date listing the wrong month or year. Other errors may be slightly more complex, and will require more explanation as to officer error. For example, CBP may have listed the expiration of authorized stay as your client’s visa expiration date instead of the petition expiration date. In these cases, the deferred inspection officer will want to know which documents the applicant presented to the officer at the POE to determine whether any officer error was involved (*e.g.*, if your client had obtained an extension of status from USCIS, did they present the I-797 approval notice for the extension in addition to their valid, unexpired visa at the POE?). CBP may also ask the applicant to provide proof of maintenance of status since entry.

When doing intake on a case that may involve CBP error at the POE, ask your client for a comprehensive recollection of what happened during the inspection and admission process. What questions did the CBP officer ask? What documents did your client present for review? Did the client try to present documents that were refused or ignored by the officer? Did the client have questions that the officer refused to answer or acknowledge? Be very careful when requesting I-94 correction that officer error was indeed involved in the case, and be prepared to explain this at the deferred inspection office.

#### **Proving Admissibility**

In other cases, CBP may have referred an applicant for an appointment at a deferred inspection office when “an immediate decision concerning

admissibility cannot be made at a port-of-entry ... and the officer has reason to believe that doubts about the alien's admissibility can be overcome...."<sup>64</sup> For example, your LPR client may have remained outside the United States for an extended period of time, and not have any documentation to present at the POE regarding maintenance of their resident status. Alternatively, CBP may detect a criminal arrest or conviction on your client's record in government databases and request further information regarding that record at deferred inspection. In such cases where more detailed review of the case is needed, the applicant is photographed, fingerprinted and paroled into the United States for a specific period of time, generally not exceeding 30 days. CBP then sets an appointment at the deferred inspection office with jurisdiction over the place the applicant will be staying.<sup>65</sup>

A sworn statement should have been taken at the POE which clearly identifies CBP's concerns regarding your client's admissibility; your client should have been given a copy of that statement. Review this information carefully prior to preparing any written argument or evidence regarding admissibility to be sure that you focus on and address the inspecting officer's concerns about the case.

*Note Regarding Criminal Inadmissibility, NTAs and 10/1/09 CBP Policy Change.* On October 1, 2009, CBP implemented a nationwide policy targeted at increasing the rate of issuance of notices to appear (NTAs) in immigration court for applicants for admission with a record of criminal convictions.<sup>66</sup> As a result of this policy, it is expected that more NTAs will be issued at POEs and fewer applicants with criminal convictions will be paroled into the United States to attend deferred inspection appointments. It is also possible that incidents of detention of applicants for admission at POEs will increase. If you have a non-citizen client with criminal convictions, it is highly recommended to prepare the client to travel with a legal brief (*i.e.* explaining how the conviction does not trigger

inadmissibility, qualifies for the "petty offense" exception to inadmissibility, or otherwise argues admissibility). You should also prepare supporting evidence, such as copies of the criminal statute(s) underlying the offense and copies of the final disposition in the case.

You should also note in these cases that CBP may retain the NTA for some time following issuance at a POE. Often, the NTA is internally sent to a deferred inspection or other CBP office nearby the POE for additional research and gathering of criminal conviction documents to more concretely build the government's case for inadmissibility. In California, it can take weeks to months to obtain certified copies of court dispositions and until this time CBP may not transfer the NTA to Immigration and Customs Enforcement (ICE)'s Office of Chief Counsel. If the NTA issued by CBP is substantively deficient—in other words, your client's criminal record should not legally render them inadmissible or deportable—you should consider contacting your local CBP office or deferred inspection office to see if CBP still has the NTA and case file. Similar to expedited removal cases, you should make every attempt to speak with a supervising officer, as they may be the only officer with authority to consider rescinding the NTA. If CBP has already sent the NTA and supporting documents to ICE, you will need to contact ICE instead.

### **Office Locations in California**

CBP has four deferred inspection offices in California. The locations, contact information and hours of operation for those offices are as follows:

#### **Los Angeles**

300 N. Los Angeles Street, 2nd Floor, Rm. 2067  
Los Angeles, CA 90012  
Phone: (213) 830-5972 / Fax: (213) 830-5939  
Office Hours: M–W & F (8:00 am–4:30 pm)

#### **San Francisco**

630 Sansome Street, Rm. 1185  
San Francisco, CA 94111  
Phone: (415) 844-5227 / Fax: (415) 844-5235  
Office Hours: M–Th (9:00 am–5:00 pm)

#### **San Diego**

610 W. Ash Street, Suite 1018  
San Diego, CA 92101  
Phone: (619) 685-4336  
Office Hours: M–F (8:00 am–3:30 pm)

#### **Eureka**

317 Third Street, Suite 6

<sup>64</sup> IFM §17.1(a).

<sup>65</sup> *Id.*

<sup>66</sup> See "Change in CBP Policy on Deferred Inspection of Legal Permanent Residents with Criminal Convictions—October 1, 2009," published on AILA InfoNet at Doc. No. 09100122 (posted Oct. 1, 2009).

Eureka, CA 95501  
Phone: (707) 442-4822 / Fax: (707) 442-0152  
Office Hours: M–F (9:00 am–4:00 pm)

CBP deferred inspection offices may also engage in administrative tasks other than those listed above, such as renewal of a temporary I-551 card for a lawful permanent resident with removal proceedings pending whose NTA was issued by CBP. When in doubt whether the deferred inspection office can help with your client's situation, call to ask. Keep in mind, however, that any client who has overstayed their authorized period of admission may be subject to enforcement action, which may be instigated upon communication with CBP or any other DHS agency.

### ***The Role of the Attorney at Deferred Inspection***

CBP has interpreted federal regulations to conclude that an applicant for admission has no right to attorney representation during the deferred inspection process.<sup>67</sup> However, according to the IFM, “an attorney may be allowed to be present upon request [at a Deferred Inspection office] if the supervisory CBP officer deems it appropriate.”<sup>68</sup> Attorney representation is routinely allowed at CBP's deferred inspection offices in California, but the attorney may play only a limited role as “observer and consultant to the applicant.”<sup>69</sup> Generally, attorneys are permitted speak to CBP officers regarding their clients' admissibility and related legal issues, and may assist in presenting evidence on the client's behalf. However, attorneys may not be permitted to be present with their clients during all inspection and admission procedures. For example, in Los Angeles, attorneys are not allowed to be present when a CBP officer questions an applicant to execute a sworn Q&A statement, but the attorney may review the statement with their client prior to signing and can give advice and counsel at this time. It is important to be aware of these possible restrictions on representation when working

with deferred inspection offices. To ensure that the legal arguments in your client's case are effectively and substantively presented even if you are not allowed to be present, you may wish to draft a legal brief and prepare the client to discuss important facts of their case.

### **CONCLUSION**

In summary, both CBP officers and immigration attorneys have difficult jobs, but both play important roles in ensuring that immigration laws are enforced correctly and uniformly. Officers must vigilantly enforce U.S. immigration laws and protect against international travelers presenting security concerns. Attorneys must provide accurate and practical counsel to international travelers about how to comply with these laws as applied to the facts of their lives. With a solid understanding of the law and CBP procedures, both sides can successfully meet in the middle to resolve problems. AILA and CBP must continue to work together in this world of post-9/11 security and fast-moving technology to ensure our mutual understanding and cooperation.

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<sup>67</sup> See IFM, §17.1(e) (interpreting 8 CFR §292.5(d)). 8 CFR §292.5(d) sets forth a general right to attorney representation in immigration proceedings with U.S. government agencies, but includes a specific exception, stating that “nothing in this [section] shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody.”

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*