

CBP – AILA/LACBA Liaison Meeting Questions

I-94 Collection

1. Members are reporting a situation that is becoming more common in light of increased flight cancellations. When checking in for their outbound international flight, foreign nationals follow proper procedure and turn in their I-94 cards. If, however, their flights are cancelled, they are not given their I-94 cards back by the airline. In most instances, this is not a problem, as the foreign nationals are scheduled for the next flight out and do not leave the airport before the next flight. Sometimes though, flights are not available for quite some time and the individuals leave the airport. In addition, a common occurrence for business travelers (usually on H, L and E visas) is to cancel the trip altogether and schedule it for a different time (sometimes weeks or months later). At that point, these individuals are in the U.S. without proof of their status. Moreover, the CBP database reflects that they have left the U.S. already. What can foreign nationals do to obtain a new I-94 when airline officials cannot (or, in most instances, will not) locate their original I-94 to return to them? What should these individuals do to update the CBP record to reflect the correct information about their date of departure?

Response: In cases of delayed or canceled flights, carriers retain the responsibility of returning collected I-94 forms to non-immigrant visitors in order to permit the traveler to maintain evidence of authorized entry into the U.S. until he or she is able to depart. Passengers who are concerned about the proper recording of their departure may provide departure information to CBP in writing, and should include some evidence of their departure such as a copy of ticketing information, or passport entry stamps into another country.

2. Over the past six months, CBP has solicited comments from the public regarding information collection on I-94 forms. Among the requested topics for comment were whether the I-94 had “practical utility,” and the possible use of “automated, electronic... or other technological collection techniques.” Is CBP working on a plan to change data collection to a digital form or otherwise? If so, can you provide more details regarding goals for this program, a timeline for implementation, and how it will affect U.S. admission procedures?

Response: CBP is currently reviewing conversion options for automated data collection. The Electronic System Travel Authorization (ESTA) initiative, which will largely capture the same information collected on I-94 forms, offers a potential avenue for the eliminate of hand-written arrival and departure documents.

WHTI Documentation Requirements and CBP Communication with Airlines

3. Members have received reports of some problems that LPRs have experienced with airlines in Canadian airports. Some airlines have insisted that LPRs may not travel with their I-551 alone and must possess a valid passport to travel to the United States. CBP pre-flight inspection units at the airport reportedly stated that they do not work with the

airlines, and that they cannot provide guidance or instruction to airlines despite the close proximity of their offices in the airport. To what extent, if at all, does CBP provide information and training to airlines regarding WHTI documentation requirements for entry to the United States? Is CBP able to issue clarification to airlines regarding LPR documentation requirements?

Response: Headquarters took proactive measures with all ports of entry to ensure the trade was informed of WHTI requirements. Airlines needing further clarification on WHTI requirements should submit such requests to their local CBP port management. WHTI requirements can be found at http://www.cbp.gov/xp/cgov/travel/vacation/ready_set_go/air_travel/faq_requirements/whti_faqs.xml and http://www.cbp.gov/linkhandler/cgov/travel/vacation/ready_set_go/land_travel/reference_material/whti_ls_faq.ctt/whti_ls_faq.pdf.

Expedited Removal

4. If an applicant for admission presents a valid, unexpired visa to a CBP officer, and the CBP officer suspects that the applicant has *immigrant intent* or otherwise *intends to violate* U.S. laws, may that officer:
 - a. cancel the applicant's visa; and
 - b. properly subject the applicant to expedited removal based on INA § 212(a) (7) (A)(i)(I) for lack of a valid visa or entry document pursuant to the visa cancellation that just occurred?

Response: The cancellation of a nonimmigrant visa occurs after an alien has been found inadmissible. The only exceptions to this would be if:

(a) The visa has been revoked by the Department of State (DOS) under section 221(i), INA; or,

(b) The visa has become void by operation of section 222(g), INA.

If an inadmissible alien is allowed to withdraw his/her application for admission or is ordered removed, a CBP officer will cancel the visa.

An alien who presents a facially valid nonimmigrant visa but who fails to prove that s/he fits the definition of, and will meet the conditions of admission for, the claimed nonimmigrant classification is inadmissible as an immigrant without a valid immigrant visa. Such an alien is properly subject to expedited removal and visa cancellation.

5. Similarly, would visa cancellation and expedited removal based on INA § 212(a) (7) (A) (i) (I) be justified if based on the CBP officer's allegation of an *actual* violation in the applicant's past instead of a *prospective* violation or intent to commit a violation in the future?

Response: Evidence of prior violations of nonimmigrant status is considered in deciding if an arriving alien is able to prove that s/he will abide by the conditions of admission as a nonimmigrant. This is done on a case-by-case basis. Factors to be taken into consideration include: the nature of the violation (e.g., working or studying on a B-2 admission), the frequency of violation (was it a single event or was it repeated?), the duration of the violation (was it for a week or for six months?) and the time elapsed since the violation occurred (did it occur ten years ago or last year?).

An applicant for admission as a nonimmigrant who fails to prove that s/he will meet the conditions of nonimmigrant admission is an immigrant without a valid immigrant visa. S/he is inadmissible as such and is subject to expedited removal.

6. What is the standard for CBP discretion in invoking expedited removal instead of allowing the applicant to withdraw his or her application for admission in these cases, given that the applicant's visa was valid at the time of applying for admission and that the sole basis for expedited removal (lack of a valid visa) is rooted in the CBP officer's action in cancelling the visa?

Response: As stated in question 4, a visa cancellation can be the sole basis of a finding of inadmissibility and expedited removal only if the visa has been revoked by DOS under section 221(i), INA or has become void by operation of section 222(g), INA. The decision to allow any inadmissible alien to withdraw in lieu of expedited removal would be depend upon a careful balancing of relevant favorable and unfavorable factors in each case. For a discussion of the factors considered by CBP when deciding to allow an alien to withdraw his/her application, please see Kurzban's Immigration Law Sourcebook, chapter 3, IV, I, Withdrawal of Application, page 105, 10th Edition.

7. If an applicant disputes facts that are alleged by the examining CBP officer as a basis for visa cancellation and/or expedited removal, is there any redress or opportunity for re-examination available? If not, is the applicant's only remedy to apply for an I-212 before applying for admission to the United States at any time during the next 5 years?

Response: A traveler subject to expedited removal is questioned under oath concerning the facts relevant to his/her application for admission. The CBP officer will inform the traveler that this questioning is his/her opportunity to present information to be used to make a decision on the traveler's application for admission. The officer will record the questions and the traveler's responses on a Form I-867A/B, Record of Sworn Statement in Proceedings under Section 235(b) (1) of the Act. The officer will present the alien's sworn statement and all other

evidence to the first-line supervisor for review and concurrence. The first-line supervisor will then present these materials to the second-line supervisor for review and approval. The examining officer and both reviewing supervisors will weigh all evidence presented by the traveler along with all other relevant information in making a determination on the traveler's admissibility or inadmissibility. There is no re-examination process for an order of expedited removal. A review of applicable law and regulation shows no procedures to overcome an expedited removal beyond those contained in section 212(a)((9)(A)(iii), INA and 8 CFR 212.2 (i.e., Submission of Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal.)

8. Does CBP ever allow persons crossing the Mexican border without inspection to withdraw their application for admission (or is withdrawal of entry, as a matter of policy, allowed only to applicants with visa at airports)? If not, does CBP automatically perform expedited removal on all undocumented border crossers?

Do: (a) the recency of the person's entry, (b) the proximity to the border at the time of apprehension, or (c) any other factors, affect this decision or procedure?

Response: These questions should be referred to the Border Patrol – San Diego Sector.

9. Are there any policies to protect EWI entrants near the Mexican border against expedited removal or other return to Mexico that may have a legitimate right to relief from removal before an Immigration Judge? In at least one case, one entrant appears to have been coerced to sign off on expedited removal despite being eligible to adjust status pursuant to INA 245(i) and prospectively eligible for cancellation of removal. Assuming the person does not affirmatively assert these facts to a CBP officer, are there any screening questions they are asked to identify eligibility for relief from removal?

Response: These questions should be referred to the Border Patrol – San Diego Sector.

FOIA

10. Can the public access records regarding CBP apprehensions of EWI entrants through a FOIA with CBP? Alternatively, can these records also be obtained through a fingerprint record check to the FBI?

Response: The public can request access to these types of records by submitting a FOIA request to CBP. The CBP FOIA reference guide can be found at http://www.cbp.gov/xp/cgov/admin/fl/foia/making_a_request/reference_guide.xml.

Questions regarding obtaining records through fingerprint records checks to the FBI should be forwarded to the FBI.

11. What is the average time for FOIA responses through CBP's revised FOIA collection system (filings after October 1, 2007)?

Response: Per H.R. 3802, the "Electronic Freedom of Information Act Amendments of 1996", CBP has twenty (20) working days to respond to a FOIA request.

Property Seizures

12. What kind of training do CBP officers receive regarding investigations to uncover or detect evidence of unlawful activity on travelers' personal computers? What training do officers receive regarding analysis of evidence to determine whether or not it implicates unlawful activity?

Response: CBP Officers are provided with HQ guidance and other training pertaining to the inspection of merchandise that may come across the border, including personal computers. "Merchandise" is defined under 19 U.S.C. 1401(c) to include goods and wares of any description. The determination of potential violations of law depends, as always, on the specific facts and circumstances before the officer and can involve any of the laws enforced by CBP. If warranted, an investigation may be done by other agencies such as ICE.

13. If a traveler believes that their personal computer or other property has been wrongly seized by CBP due to incorrect or unfounded allegations of unlawful activity, is there any redress other than through a written appeal of property forfeiture?

Response: If a traveler believes any property has been wrongfully seized by CBP, then participation in the administrative forfeiture process is the primary means of challenging property seized for forfeiture. To the extent there may be other avenues to challenge the possession by CBP of a traveler's property would depend on the facts and circumstances of that detention. Information on the redress process for seized property can be found in the CBP Informed Compliance Publication entitled "What Every Member of the Trade Community Should Know About: Customs Administrative Enforcement Process: Fines, Penalties, Forfeitures and Liquidated Damages" dated February 2004. This publication can be accessed at http://www.cbp.gov/linkhandler/cgov/trade/legal/informed_compliance_pubs/icp052.ctt/icp052.pdf