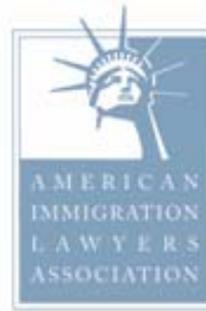




AMERICAN IMMIGRATION COUNCIL



June 14, 2011

The Honorable Alejandro Mayorkas
Director, U.S. Citizenship and Immigration Services
Department of Homeland Security
Washington, DC

Dear Director Mayorkas:

Thank you for your May 11, 2011 letter following our meeting regarding the role of counsel in immigration proceedings before USCIS. We appreciate your willingness to discuss problems we have identified through outreach and discussions with immigration attorneys throughout the country.

In your letter, you indicated that USCIS sent guidance to its Field Operations Directorate in spring 2010 emphasizing that attorneys and accredited representatives should have the option of sitting next to their clients whenever possible, and should not be relegated to the back of the interview room. You indicated further that a USCIS training module was modified to echo this guidance. As you requested, we will alert you if we learn of additional instances where USCIS officers are not complying with this guidance.

In our recent meeting you suggested that we recommend changes to the Adjudicator's Field Manual to clarify the scope of the attorney's role in USCIS interviews. Accordingly, we are forwarding a red-lined version of relevant sections of Chapter 12, *Attorneys and Other Representatives* (under revision as of June 16, 2006), and Chapter 15, *Interviewing Techniques*. In addition to these proposed revisions, we believe that USCIS should institute a publicly available complaint process for attorneys and accredited representatives who believe that USCIS adjudicating officers have improperly interfered with their ability to represent clients in USCIS interviews.

Among other issues, our proposed revisions to Chapter 12 address the role of counsel in an interview with the beneficiary of an I-130 petition. For the reasons discussed below, we believe that an I-130 beneficiary has a right to representation.

Under the Administrative Procedure Act (APA), the right to counsel applies to any person "compelled to appear" in immigration proceedings. 5 U.S.C. § 555(b). The immigration regulations provide that "[a]n applicant, a petitioner, a sponsor, a beneficiary, or other individual residing in the United States at the time of filing an application or petition may be *required* to appear for fingerprinting or for an interview." 8 C.F.R. § 103.2(b)(9) (emphasis added). *See also* USCIS, Adjudicator's Field Manual,

§ 15.1 (stating that a person may be “required” to appear for an interview). Serious consequences can result from a failure to appear. Specifically, “the application or petition shall be considered abandoned and denied” unless USCIS received a change of address or rescheduling request and the agency excuses the failure to appear. 8 C.F.R. § 103.2(b)(13)(ii).

Such a “required” appearance is a “compelled” appearance under 5 U.S.C. § 555(b) of the APA. *See* Dept. of Justice, Attorney General’s Manual on the Administrative Procedure Act, 61-62 (1947) (finding that the APA’s counsel provision applies where the appearance is “compelled or commanded” but does not apply to voluntary appearances or “mere requests” by an agency). This analysis applies whether the person “required” to appear is an applicant, petitioner or beneficiary.

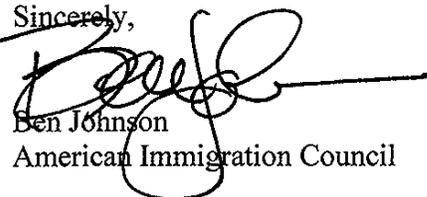
In addition, 8 C.F.R. § 292.5(b) provides a right to counsel for individuals involved in an examination related to an application for a benefit and does not distinguish between a petitioner and a beneficiary. *See* 8 C.F.R. § 292.5(b) (“[w]henver an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative . . .”).

Although 8 C.F.R. § 103.2(a)(3) indicates that a beneficiary is not a party to proceedings, this provision does not bar *representation* of beneficiaries. An interpretation of this provision to bar representation of beneficiaries in USCIS interviews would contradict the right to representation in 8 C.F.R. § 292.5(b), as well as the statutorily mandated right to counsel under the APA.

Furthermore, as we have previously emphasized, it is good policy to allow representation for noncitizens in interviews before USCIS. Access to counsel is not only vital for individuals attempting to navigate our complex immigration system, but also improves the quality and efficiency of immigration proceedings. Immigration attorneys, who customarily represent both petitioners and beneficiaries, can facilitate interviews by helping both categories of individuals better understand the proceedings, providing additional information to USCIS adjudicating officers, and answering legal questions.

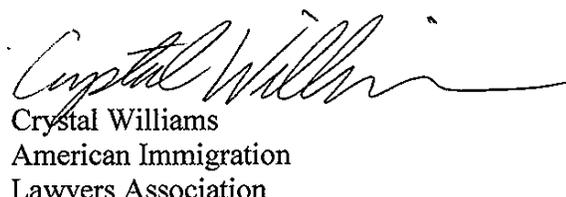
We look forward to continuing our dialogue regarding the right to counsel in USCIS proceedings.

Sincerely,



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Recommendations for Amending the Adjudicators Field Manual

Chapter 12.1 – Representation in Immigration Proceedings

An alien or petitioner has the right to be represented by an attorney or other representative who has properly filed a ~~notice of appearance~~ **Notice of Entry of Appearance as Attorney or Representative (Form G-28)**. Title 8 CFR 292 ~~sets out~~ **sets forth the right to representation and** the general rules ~~dealing with who may represent aliens for representation of individuals before USCIS or~~ in immigration proceedings ~~before USCIS~~.

In an immigration proceeding, ~~such as a~~ **including a removal hearing and any interview with USCIS**, an alien **subject to examination** has the right to be represented at no expense to the government **pursuant to 8 CFR § 292.5(b)**. ~~An alien does not have a right to representation during primary or secondary inspection when he or she is seeking admission to the United States. In all other matters, you should allow an alien to seek counsel to the extent that doing so does not hinder or unduly delay the adjudicative process.~~

Following the submission of an application for relief or benefits, the alien shall be advised of his or her right to representation by counsel or an accredited representative and shall be provided with a list of legal service providers. At the time of the alien's hearing or interview, s/he shall be required to sign a form acknowledging that s/he has been advised of such a right and, where applicable, has waived the right. The signed form shall be placed in the alien's file.

In all cases where an alien is represented, the representative must file a Form G-28. The notice should be signed by the alien before you recognize the representative. An important exception, however, arises when an alien is detained. When an alien is detained, the representative may be recognized without the alien's signature if it is the first time that representative appears on the alien's behalf.

You should be sure that the notice is signed by the alien being represented. ~~, especially in visa petition proceedings.~~ **In visa petition proceedings**, representatives who have obtained the consent **of the petitioner should be recognized in interviews with the petitioner. Representatives who have obtained the consent of the beneficiary should be recognized in interviews with the beneficiary.** You should not schedule separate interviews with the petitioner and the beneficiary at the same time if an attorney represents both the petitioner **and beneficiary.** ~~of the beneficiary only can not act on behalf of the petitioner. The opposite is also true. Representatives who have obtained the consent of only the petitioner, but not the consent of the beneficiary, should not be recognized in matters pertaining to the beneficiary. (Remember that in visa petition proceedings the moving party is the petitioner and while most communication is with the petitioner and his or her representative, certain actions are directed only to the beneficiary. For example, if during a spousal I-130 interview you decide to question the petitioner and beneficiary separately, if the attorney represents only the petitioner, he or she should not be allowed to be~~

~~present when you are interviewing only the beneficiary. Likewise, when sending out a notice of decision, do not send a copy to an attorney who represents only the beneficiary.)~~ When you decline to recognize a representative for **If a representative is unable to attend the interview for** any reason, you may still consider statements and submissions ~~made~~ by the ~~would be~~ representative. [See ~~8 CFR 292.4.~~]

You should be aware that “attorney” is a defined term in the regulations. Title 8 CFR 1.1 (f) defines an “attorney” as someone who is eligible to practice law in, and a member in good standing of the bar of, any state or the District of Columbia and is not under any order restricting his right to practice law. It is thus not necessary that an attorney be admitted to the bar in your particular state in order to represent clients there for immigration purposes. Also, one need not necessarily be an “attorney” in order to represent aliens before USCIS.

There are four situations in which a non-attorney may represent an alien:

- If an individual has a pre-existing relationship with the alien, appears on an individual case basis, and is not being paid for his representation, he or she may represent the alien if the USCIS official allows the representation. You will encounter family members, friends, and clergy who will assist the alien in appearances before USCIS, and you should allow them to do so. The requirement that a pre-existing relationship exist between the alien and the representative may be waived in the discretion of the USCIS official.
- The second situation in which a non-attorney may represent aliens involves law students and law school graduates not yet admitted to the bar. Law students must certify that they are not being paid for their services and that they are appearing under the direct supervision of a faculty member or attorney in a clinical program or legal aid program conducted by their school. Law school graduates must certify that they are appearing under the supervision of an attorney or accredited representative and that they are not being paid for their representation. Neither a law school student nor a graduate may represent an alien before USCIS if the officer ~~does not choose to allow the representation~~ **reasonably believes that such representation by a law school student or graduate will not adequately protect the rights of the individual or individuals to be represented, or if the representation by a law school student or graduate will impair the efficient conduct of the proceeding.** The officer may also require that the supervising attorney or faculty member appear.
- It is very common for ethnic, social, charitable or religious organizations to provide assistance and representation to aliens. These organizations must be approved by the Board of Immigration Appeals before their members can represent aliens before USCIS or in immigration proceedings. The standards for accreditation of these organizations are set forth in 8 CFR 292.2.

- Although it is rare, you should be aware that an official of the alien's home government may represent an alien if the official appears in his official capacity and with the alien's consent.

Chapter 15.2 – Interview Environment

It is essential that the person being interviewed appreciate the importance and seriousness of the proceedings. To ensure this, the setting in which the interview takes place must be orderly and official in appearance. Desk tops should be uncluttered and files should be housed in cabinets. Flags, USCIS and DHS seals and other official displays can enhance the official appearance. Excessive amounts of personal items should not be displayed in view of applicants as these may be distracting or detract from the serious nature of the proceedings.

Because Adjudications units in local USCIS offices are generally very busy with a high volume of applicants appearing for adjustment, naturalization, marriage fraud and conditional resident removal interviews, it is essential that adequate office space be provided for each district adjudications officer. Ideally, individual offices or high-walled, acoustically insulated, modular offices with doors should be provided to ensure a reasonable level of privacy. Offices should be equipped with video or audio taping devices. If the district lacks sufficient recording equipment, arrangements should be made to provide such equipment for, at least, the most difficult cases. Each work station should be provided with sufficient storage space for files, supplies, research materials and personal items, so that the office remains uncluttered. Sufficient seating for the officer and applicant, attorney and family members should be provided. **Seating directly next to the person being interviewed should be provided to an attorney or other representative to facilitate appropriate participation by the attorney or representative. The officer should not, under any circumstances, engage in conduct that could be perceived as or have the effect of undermining the integrity of the attorney-client relationship, or interfere with the right of the individual being interviewed to have his or her attorney or representative participate in the examination as provided in 8 CFR § 292.5(b).** Acoustical ceiling tiles or other sound dampening material should be installed to minimize noise from other interviews and protect the privacy of each applicant. Lighting and ventilation should be adequate for a pleasant, comfortable and efficient working environment. Handicapped access should be available in at least some work stations. A public waiting area should be reasonably proximate to the interview area to minimize lost time between interviews.

Chapter 15.4 – Interview Procedures

(a) Basic Interview Procedures and Techniques.

Conducting successful interviews and interrogations is a skill which requires knowledge and experience. Successful approaches will vary widely depending on the interviewer, the interviewee, and subject and purpose of the interview. Certain standards (such as

those relating to the rights of the individual and the need for professionalism) remain constant, others change according to the circumstances. The following observations apply to all interviews:

- The successful interview process begins when USCIS issues a call-in notice. In addition to accurately explaining the purpose of the interview, the notice should instruct the attorney (or in an unrepresented case, the interviewee(s) themselves) on what to bring to the interview. In all cases, the notice should at least instruct the attorney/interviewee(s) to bring the originals of all documents previously submitted as photocopies. (Whether the interviewing officer chooses to examine them during the interview or not, the original documents should be available.)

- Do not commence an interview, even though time may be limited, until you have reviewed the application or petition and related material. Depending upon the case, this may range from a rapid scanning of the file to an intensive study of all available material. However, it is essential that the review of the material be made before commencing the questioning in order that the adjudicator will have the requisite knowledge and understanding of all the facts and circumstances involved in the case. Otherwise, the questioning may not cover all pertinent points. The review should be sufficiently thorough to enable the adjudicator to cover all issues necessary for an adjudication, thereby avoiding any need for recalling the applicant, petitioner, or witness for further questioning on an issue which could have been covered during the initial interview. Review of the applicable provisions of the law and precedent decisions also should be made, if necessary, to ensure thorough familiarity with any legal issue involved which is to be developed by questioning. **In addition, the adjudicator should review submissions made by an attorney or other representative before or at the time of an interview which may assist in resolving legal issues.** The more complete the preliminary preparation of the case prior to beginning the interview, the better equipped you will be to conduct an efficient interview, without time-wasting repetition, needless questions, or illogical rambling.

- If complex issues are involved, prepare an outline of the logical sequence of questioning to be followed, the information to be developed, and the evidence to be utilized. Such outlines are most conducive to eliciting all essential facts. Additionally, it may be advisable to select certain material from the file or related files and arrange such material in the sequence of the plan of questioning. The extent of preliminary preparation necessary depends upon the issues involved in the individual case.

- In “marriage fraud” interviews or certain other types of cases where more than one individual is to be questioned, it is generally best to question each party separately, asking each party several of the same questions in order to identify discrepant answers. It may be necessary to recall the first party for further questioning after the second party provides discrepant answers. In other types of interviews, an entire family group may be interviewed collectively.

- Interview proceedings are not to be adversarial in nature. The purpose of the interview is to obtain the correct information in order to make the correct adjudication of the case, not to prove a particular point or to find a reason to deny the benefit sought. The purpose is to cover (and discover) all the pertinent information, both favorable and unfavorable to the applicant. **An applicant or the applicant's attorney or representative, as provided in 8 CFR § 292.5(b), should be permitted to present documents or other evidence that may help to clarify an issue of concern to the interviewer. Where relevant, such evidence should be reviewed and added to the applicant's file. The applicant's attorney or representative should also be permitted to communicate with the applicant where necessary to facilitate communication during the interview, including for the purpose of verifying that the applicant understands the interviewer's questions; objecting to inappropriate questions; and correcting errors of law. The attorney or representative should also be permitted to make a statement at the conclusion of the proceedings.**
- Greet the interviewee in a polite, dignified manner to put him or her at ease.
- Identify yourself, giving name and title.
- Begin the interview with an explanation in non-technical terms of the purpose of the interview.
- Obtain identification from all parties to the interview including interpreters and attorneys, unless identity has been previously established.
- **Confirm that the interviewee has been advised of his or her right to representation by counsel or an accredited representative, and ask him or her to sign a form acknowledging that s/he has been so advised. Place the signed form in the subject's file.**
- Administer the following oath: "Do you solemnly swear (or affirm) that the statements you are about to make will be the truth, the whole truth, and nothing but the truth?"

The oath or affirmation should always be administered in such a manner as to impress upon the person being interviewed the solemnity of the occasion and the importance of the testimony which s/he is about to give. The adjudicator and the person(s) to be sworn or affirmed should stand and raise their right hands during the administration of the oath or affirmation. The fact that the interview is being conducted under oath or affirmation should be noted in the transcript or in the file. If a verbatim question and answer statement is taken, the exact wording of the oath or affirmation should be included in the transcript. If such statement is not taken, the memorandum record of the interview should show that the person was under oath or affirmation.

- Inform the subject that willfully giving false testimony on a material matter under oath constitutes the crime of perjury, and that a person convicted of perjury is subject to a penalty of a fine, imprisonment or both.

- It should be kept in mind that all questions are either "closed-ended" or "open-ended". Closed-ended questions (such as "Have you ever been arrested?") call for specific, factual and usually brief responses. Open-ended questions ("Tell me about any arrest you have had.") solicit views, opinions, thoughts and feelings and generally call for longer, narrative-type responses. They are normally of much greater usefulness in assessing an individual's credibility and for eliciting statements which may later be supported and contradicted. Generally, leading questions (such as "You have never been arrested?") which assume a controversial fact or suggest the answer (usually "yes" or "no") should be avoided except to expedite obtaining preliminary identifying material.
- Persons being questioned should be permitted to give a full explanation of any issue involved in the case. Fairness requires consideration of all relevant evidence. In some instances, detailed questioning may be desirable in order to make it more difficult for the subject to disavow his statements at a later time or to fabricate a new story. In this connection, however, remember that an adjudicator is duty-bound to develop the facts, favorable as well as unfavorable, with equal fairness to the subject and to the interests of the Government.
- Should the interviewing officer be required to leave the office for any reason during the interview, the relating file(s) should be removed to avoid unauthorized review during the officer's absence.
- All USCIS proceedings shall be videotaped.
- An alien, or attorney or representative with a properly executed Form G-28, may request a personal review and/or copy of the record of proceedings, including any written record of an interview conducted before a USCIS officer. The requesting party may file a Freedom of Information/Privacy Act Request (Form G-639) with USCIS to gain access to other record material.

[See also Appendix 15-2, Techniques for Interviewing and Preparing Sworn Statements.]

(b) Rescheduling the Interview

For good cause, adjudicators should accommodate requests from attorneys, accredited representatives, applicants, petitioners, beneficiaries or other individuals, that an interview be rescheduled as instructed in 15.1(b)(2) of this Chapter. Adjudicators should consider such a request to be for good cause when the requestor has notified the adjudicator that he or she is unable to appear at the scheduled date and time because of circumstances beyond his or her control. With respect to requests by attorneys or accredited representatives, good cause shall include a scheduling conflict and any situation where two interviews of clients represented by the same attorney or representative are scheduled near in time and the earlier one lasts longer than anticipated.

~~In order to reschedule the interview, the adjudicator, in his or her discretion, must determine that the applicant, petitioner, beneficiary, or other individual is unable to appear at the scheduled date and time because of circumstances beyond the individual's control.~~

If the adjudicator determines that good cause exists, the adjudicator will reschedule the interview and mail a new interview notice. If the adjudicator determines that no good cause exists, the adjudicator will adjudicate the application or petition as instructed in AFM [Chapter 15.1\(d\)\(2\)](#).

~~(b)~~ (c) Terminating the Interview.

An adjudicator should not unnecessarily prolong an interview, but should terminate it when all necessary information has been elicited. The subject(s) should be thanked for cooperating and providing information.

On some occasions it may be necessary to terminate an interview even though all essential information has not been elicited; **however, termination should be avoided whenever possible.** ~~The most common reasons for such a Termination may be necessary in the following situations, which are not intended to be exclusive~~ **are:**

- The interviewee is unable to communicate without an interpreter, and one is not available.
- An interpreter clearly has difficulty in translating effectively.
- The officer has reasonable doubts about either the ability or impartiality of an interpreter supplied by the interviewee, and a USCIS or DHS interpreter is not immediately available.
- An attorney insists on responding to questions or coaching the person being interviewed. **However, an interview should not be terminated if the attorney is merely attempting to facilitate communication by clarifying the officer's questions or the applicant's answers, objecting to inappropriate questions, or correcting errors of law.**
- The subject refuses to respond to questions essential to the successful completion of the interview.
- **The interviewee initially waives the presence of counsel but later, during the course of the interview, requests that counsel be present.**

The interviewing officer should explain the reason(s) for the termination. ~~When appropriate, the~~ The interview should be rescheduled and (if needed) arrangements made for a competent interpreter. If the subject(s) or representative insists on continuing, a

supervisor should be informed of the reason for the termination. It is the responsibility of the supervisor to determine if termination is warranted and to deal with the subject(s) and/or representative if they refuse to accept an unfavorable determination.

Chapter 15.8 – Role of Attorney or Representative in the Interview Process

Frequently an attorney or other representative will be present to represent a subject. The following rules should be followed when the person being interviewed is accompanied by legal counsel:

- Interviewing officers should verify that a properly executed Notice of Entry of Appearance as Attorney or Representative (Form G-28) is part of the record.
- The attorney or representative's role at an interview is to ensure that the subject's legal rights are protected. An attorney or representative may advise his or her client(s) on points of law but s/he cannot respond to questions the interviewing officer has directed to the subject, **except to ask clarifying questions**. ~~The attorney or representative's role is even more restricted with regard to a sworn statement taken from an applicant for admission in conjunction with removal proceedings to determine admissibility, where the alien has not yet legally entered the United States.~~
- Officers should not engage in personal conversations with attorneys **or representatives** during the course of an interview.
- **Officers should never argue with attorneys or representatives during the course of an interview. If a conversation becomes argumentative, a supervisor should be called to help resolve the issue. Where necessary, disagreements between adjudicating officers and attorneys or other representatives regarding the appropriate role of representatives in USCIS interviews should be elevated to the Assistant District Director.**