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The Honorable Alan Bersin
Commissioner, U.S. Customs and Border Protection
Department of Homeland Security
Washington, DC

Dear Commissioner Bersin:

The American Immigration Council (AIC) and the American Immigration Lawyers Association (AILA) have received widespread reports of unwarranted restrictions on access to counsel by CBP officers. We believe that these limitations reflect overly restrictive interpretations of existing regulations and may violate applicable due process guarantees. We are writing today to highlight our concerns in the hope of beginning a dialogue about these issues.

AIC and AILA recently conducted a nationwide survey to gather information about access to counsel during interactions with CBP, USCIS, and ICE. We collaborated with Penn State Law School's Center for Immigrants' Rights to analyze more than 250 survey responses submitted by immigration attorneys practicing throughout the country. The responses regarding interactions with CBP depict a system characterized by pervasive restrictions on representation. These problems have continued despite liaison efforts between AILA and CBP. Selected examples describing limitations on representation imposed by CBP are attached as an appendix to this letter.

Interviews and other interactions with immigration officers often can be intimidating and confusing, and noncitizens seek assistance from attorneys to help navigate this challenging process. CBP officers who prevent or limit attorneys' access to their clients in secondary and deferred inspection do not recognize this important role of counsel. Frequently, officers fail to exercise any discretion to permit attorneys to accompany their clients, although CBP's own guidance authorizes such discretion.

In instances where attorneys are permitted to appear with their clients, including deferred inspections, CBP officers often limit the scope of representation. One CBP officer at the Washington-Dulles International Airport warned an attorney that her appearance in deferred inspection “was entirely at the discretion of the CBP.” In another case, an attorney accompanied her client to the San Ysidro, California Port of Entry to assist him in obtaining a new Arrival-Departure Record (I-94 Form) with an extended validity date. The officer and the officer’s supervisor refused to listen to the attorney when she attempted to explain the legal basis for her request. The officer told the attorney that her client had no right to representation and that they were doing the attorney and her client “a favor” by allowing the attorney to be present.

CBP officers also prevent attorneys from providing relevant documentation. For example, during secondary inspection at Boston’s Logan International Airport, a CBP officer refused to allow an attorney to submit documentation that would have resolved a critical legal question. As a result, the client was unnecessarily detained for over two months. In another case, a CBP officer who refused to allow an attorney to accompany her client to deferred inspection also refused to accept a legal memorandum that the attorney had prepared on behalf of the client. The officer said the memorandum “wasn’t necessary” and handed it back to the attorney before taking the client into a back room for questioning.

In some cases, CBP officers adopt an adversarial approach. One attorney repeated a conversation she overheard between a senior CBP officer and a more junior CBP officer. The senior officer told the junior officer that she should not engage with attorneys because lawyers say “whatever their clients want them to say.” In another instance, an attorney who had been barred from deferred inspection advised her client not to answer certain questions unless she was present. A CBP officer later told the client’s wife that her husband had been detained for his refusal to respond. The CBP officer also informed the wife that the “family had retained a very bad lawyer who had given advice that seriously hurt her client’s case” and advised the wife to fire her. An attorney in Miami reported that a CBP officer told her client that “she wasted her time by hiring an attorney” because attorneys are a “waste of time and money.”

The important role of counsel in interactions with CBP officers is recognized in the governing law, both statutory and regulatory. Notably, the Administrative Procedure Act (APA) grants a right to counsel for individuals who are compelled to appear before an agency or agency representative. 5 U.S.C. § 555(b). Regulations governing DHS also provide a right to counsel. For instance, 8 C.F.R. § 292.5(b) states that “[w]henever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative . . .” 8 C.F.R. § 292.5(b). This provision contains a proviso that the right to counsel does not apply to “any applicant for admission in either primary or secondary inspection . . ., unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody.” While individuals may not have a “right” to counsel in certain contexts, CBP officers retain discretion to allow an attorney to accompany a client in primary or secondary inspection.

Moreover, the government has adopted and applied the restrictions on counsel in secondary inspection to deferred inspection. *See* CBP Inspector's Field Manual, Section 17.1(e) (citing 8 C.F.R. § 292.5(b) to support the position that an applicant for admission in deferred inspection "is not entitled to representation"). This expansion of the restrictions imposed by 8 C.F.R. § 292.5(b) is improper. Deferred inspection is not mentioned in 8 C.F.R. § 292.5(b). Although the deferred inspection regulation, 8 C.F.R. § 235.2, was added after § 292.5(b) was promulgated, the agency did not thereafter amend § 292.5(b) to encompass deferred inspection; nor did it identify deferred inspection as secondary inspection in § 235.2. *See* Inspection and Expedited Removal of Aliens, Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10312 (Apr. 1, 1997).

The circumstances warranting deferred inspection and secondary inspection are also distinct. Secondary inspection takes place "[i]f there appear to be discrepancies in documents presented or answers given, or if there are any other problems, questions, or suspicions that cannot be resolved within the exceedingly brief period allowed for primary inspection." 62 Fed. Reg. at 10318. In contrast, deferred inspection is characterized as "further examination" that occurs after a person is paroled. 8 C.F.R. § 235.2. Unlike secondary inspection, it is permitted only when the examining officer "has reason to believe" that the person can overcome a finding of inadmissibility by presenting, *inter alia*, "additional evidence of admissibility not available at the time and place of the initial examination." 8 C.F.R. § 235.2(b)(3); *see also* CBP Inspector's Field Manual, Section 17.1(a). Therefore, although secondary and deferred inspections both provide an opportunity for an individual to provide additional evidence of admissibility, these procedures serve different purposes.

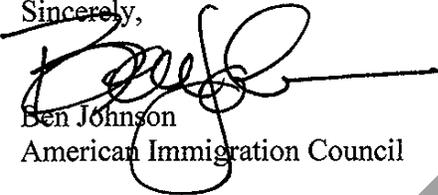
The CBP Inspector's Field Manual supports greater access to counsel than CBP officers typically allow. Chapter 2.9 states that an inspecting officer may allow counsel to be present during secondary inspection, specifying that "an inspecting officer" is not precluded from permitting "a relative, friend *or representative* access to the inspectional area to provide assistance when the situation warrants such action." (Emphasis added.) Chapter 17.1(e) addresses the role of an attorney in deferred inspection, stating that "an attorney may be allowed to be present upon request if the supervisory CBP Officer on duty deems it appropriate," and that the attorney may serve as an "observer and consultant to the applicant."

Beyond the Inspector's Field Manual, CBP policies affecting access to counsel during deferred inspection are difficult to ascertain and arbitrarily applied. One attorney reported that he used to regularly accompany his clients to deferred inspection at the Philadelphia International Airport. Recently, however, when he appeared with his client, a CBP officer told him that a new policy dictated that attorneys could no longer accompany clients to deferred inspection. Another attorney who asked to accompany his client to deferred inspection at the Indianapolis CBP office reported being told that the supervisor of that office refuses attorney presence as a matter of course.

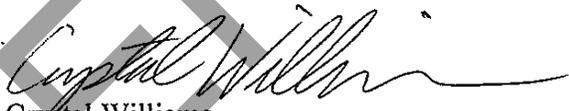
These restrictive policies should not continue. Access to counsel is not only vital for noncitizens attempting to navigate our complex immigration system, but also improves the quality and efficiency of immigration decision making. As several attorneys noted in response to survey questions, counsel can help CBP officers maximize efficiency by providing helpful documentation and other case-related information regarding, for example, a client's criminal convictions or travel outside the United States. In addition, several attorneys reported that their clients feel more at ease and are more willing to communicate with CBP officers when their attorney is present.

We hope this letter is the first step in opening a dialogue with CBP. We seek to better understand CBP policies with respect to counsel and to provide input on the need for additional guidance that would better reflect existing statutory and regulatory protections. This dialogue will also help inform a White Paper we are drafting with Penn State Law School's Center for Immigrants' Rights on access to counsel before DHS. Our efforts are premised on the idea that noncitizens and CBP officials have a mutual stake in a functional, transparent and just legal system of which access to counsel is an essential part. We look forward to future opportunities to discuss these concerns with you.

Sincerely,


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**APPENDIX – ATTORNEY ANECDOTES SUBMITTED IN RESPONSE TO
AIC/AILA COUNSEL SURVEY**

ATTORNEY #1

The following reflects one attorney’s impressions of CBP officers at the Highgate Springs and Derby Line ports of entry (Vermont/Canada border) and her experience with restrictions on counsel in a deferred inspection interview.

Within the last few years, it has become official policy to bar counsel from L¹ and TN² adjudications at Highgate and Derby Line ports of entry. I understand from our CBP liaison that it is the new official policy of the region. Prior to this policy change, free trade officers, who were knowledgeable about L and TN visas, were cordial to and worked well with counsel. Now, because officers are less knowledgeable about L and TN visas, adjudications are inconsistent. In addition, CBP officers are very antagonistic toward and disrespectful of counsel. They don’t recognize G-28s, and since the implementation of the new policy, I have been directed not to approach “the counter” and not to attempt to help clarify any aspects of the L or TN application.

In one particular case, I represented a long-time permanent resident who had lived in the U.S. for over 50 years. He was married, had two U.S. citizen children and three grandchildren and had worked for the same employer for thirty years. As a resident of a border community, he was a frequent traveler to and from Canada throughout his lifetime and had never previously been questioned in any significant way. When he entered the U.S. from Canada at Highgate Springs, the CBP officer asked him if he had ever been arrested. My client responded that he had been arrested when he was 17 years old, but that he had been told that he would not have a criminal record. The CBP officer asked him to return for a deferred inspection interview and to bring documentation about his arrest and the related court proceedings. Upon investigation, it was clear to me that the record did not make my client inadmissible, despite circumstances that might raise questions. I drafted a brief memorandum explaining this and requested that I be present during the deferred inspection interview, at the request of the client who was shocked and extremely nervous about this encounter. I called the port of entry days before the interview and the officer who answered the phone declined to help me confirm whether I could attend the interview. I then accompanied my client to the interview and again requested to accompany my client during the interview. The officer said “I don’t think

¹ L nonimmigrant status is available to intracompany transferees who are executives, managers, or employees with specialized knowledge working for multinational companies. 8 C.F.R. § 214.2(l). Canadian applicants may have their petitions adjudicated at the port of entry. 8 C.F.R. § 214.2(l)(17).

² TN nonimmigrant status is available to Mexican and Canadian citizens seeking temporary entry to work in certain professional occupations pursuant to the North American Free Trade Agreement (NAFTA); these applications are adjudicated at the port of entry. 8 C.F.R. § 214.6.

that I have to let you.” I stated that I would appreciate the officer extending my client, a long-time permanent resident, the courtesy of allowing counsel to be present. The officer stated that he would check with his supervisor and that if the supervisor said he didn’t “have to” allow counsel to be present, he would bar me from the interview. After checking with his supervisor, the officer stated that I could not accompany my client. I requested to speak with the supervisor. The officer declined my request, stating that he had already spoken to the supervisor. I then requested that the CBP officer review the memorandum I had prepared and take it with them to the interview. The officer said this wasn’t necessary and handed the memorandum, which my client had paid me to prepare and should have been able to take with him, back to me before taking my client into a back room for the interview.

Just this year, two CBP officers at Highgate Springs publicly discussed immigration attorneys at the counter while they were conducting an inspection of my client. The senior officer told the more junior officer that she shouldn’t engage with the lawyer, because lawyers say “whatever their clients want them to say.” This is a complete shift from the culture that previously existed when free trade officers acknowledged and often solicited the participation of attorneys in interviews, particularly in marginal or complex cases. One senior free trade officer told me not infrequently that he learned something regularly from our presentations of law. On occasion, he acknowledged using our legal arguments as training tools for newer officers. There were numerous times when I would bring a regulation or interpretation of the law to his attention after he had initially denied a case, or been inclined to deny a case, and he would agree after further examination that I was correct. He was open to that because it made him better at his job.

Although our relationship with free trade officers in previous years was mutually respectful, it was definitely not (ever) deferential to attorneys – in fact, it was always extremely clear that an inspection was of the applicant personally and that we would participate substantively only upon request. We could approach the counter, present the paperwork, indicate that we were available to answer any questions that might arise, and trust that the legal presentation would be reviewed and that we would have an opportunity to present our position on any questions that might arise during the inspector’s review.

ATTORNEY #2

The following is an excerpt from an e-mail submitted by an attorney regarding her experience at a secondary inspection interview at Boston’s Logan International Airport:

During a Boston Secondary Inspection, I was not only prohibited from the room where my client was interviewed, but the CBP officer literally and forcefully pushed me aside when I was walking in with my client and told me I could not come in. I thought about bringing assault and battery charges against the officer but it is someone I have to deal with at times so I was reluctant to do so. CBP took my client into custody, charged him as

an arriving alien for a crime they said was a CIMT but was not. They moved him from prison to prison, first Boston then York, PA then Lumpkin, GA. I finally got a hearing for him in the Atlanta Immigration Court and he was released from custody and admitted into the US, but the whole thing took 2.5 months and many filings. The whole waste of prison, court, legal and transportation resources could have been avoided if only I were able to sit in on the interview with my carefully prepared memo explaining why his crime was not a CIMT.

ATTORNEY #3

The following is an excerpt from a letter submitted to CBP regarding the actions of CBP officers in relation to a deferred inspection interview at the Indianapolis CBP office:

. . . I attempted to accompany a lawful permanent resident client to a deferred inspection interview in the Indianapolis office. I called in advance and expressed my client's desire that I be in attendance. I was informed that, despite a general CBP policy that instructs supervisors to exercise discretion in determining whether or not to permit attorneys in individual interviews, the Indianapolis supervisor refuses attorney presence as a matter of course.

Nonetheless, I accompanied my client to Indianapolis and to the general offices, although I understood I would not be permitted (based on the supervisor's blanket decision) to attend the interview. I anticipated I would wait outside and be available should the situation change and the client require my assistance or the officer wish to speak with me. I was informed that I was not permitted on the premises and instructed to wait in my car.

During his interview, my client declined to answer specific questions outside my presence . . . His chosen course of conduct, it seems, seriously upset the officer conducting the hearing . . .

. . . Officer [REDACTED] . . . spoke directly to the wife of the now-detained alien. She told the wife that in all of her years conducting interviews, no one had refused to answer her questions and that is why her husband was detained. She went on to say that the family had retained a very bad lawyer (me) who had given advice that had seriously hurt her husband's case . . . She told the wife of my client that the family should fire me as attorney.

In the days since this incident, I have shared my experience with a number of other attorneys who practice in this area and have themselves had similarly disappointing contact with CBP officers in this office. . . Relationships between attorneys and Department officials need not be acrimonious. In theory, we share a purpose—to ensure that the law is carried out correctly and completely, although we protect the rights and interests of different parties in furtherance of that purpose. A general disdain for

representation does not facilitate the work of CBP or DHS; rather, it impedes it, as was evident in this case.

ATTORNEY #4

The following is a summary of a phone conversation with an attorney regarding her client's experience at a secondary inspection interview at the Washington-Dulles International Airport:

There are a lot of problems with CBP's treatment of individuals in the Washington-Dulles airport. In one particular incident, my client—an H-1B visa holder who had a pending adjustment of status application—was stopped for secondary inspection. He was detained for four hours during which time he was questioned and unable to call me. He was harassed, insulted, and told that he should get a different attorney because I had improperly filed things on his behalf. Four hours later, the CBP officer relented and let my client enter on his valid H-1B visa, but told my client he was "doing him a favor." It seems that CBP officers are engaged in a power struggle with attorneys and individuals entering the country.

ATTORNEY #5

The following is an excerpt from an e-mail submitted by an attorney regarding his experience with CBP at the San Ysidro, California Port of Entry:

My client was coming in on an H-1B visa, but had changed employers. Instead of applying for a new visa, he followed a process (approved by DHS) that allowed him to use the same visa stamp and obtain a new I-94 card with an expiration date beyond the expiration of the visa stamp based on a new H-1B approval notice. My client was admitted until the expiration date of his H-1B visa stamp so I accompanied him to the port of entry to assist him in obtaining a new I-94 with the extended validity date. I brought a policy memorandum that had been issued in 2001 by Legacy INS addressing this specific issue. The officer refused to listen to me when I attempted to explain the legal basis for my request or to look at the policy memorandum. I asked to speak with the supervisor, who also refused to listen. The officers told me that my client had no right to representation and that they were doing me and my client a favor by allowing me to be there. Ultimately, the CBP officers called USCIS to ask them what to do. USCIS told them that they should let the client in, and that he could be admitted beyond the validity of the visa stamp since he had a new approval notice with a longer validity . . . In addition to this particular example, I have sent clients to interviews with legal documents and officers simply refuse to read them.

ATTORNEY #6

The following is an excerpt from an e-mail submitted by an attorney regarding her experience at secondary inspection at the Office of Deferred Inspections in Miami:

Specifically, I have a lawful permanent resident client named [REDACTED]. Mr. [REDACTED] had four (4) misdemeanor non-drug convictions. They were all for petty theft. The last conviction was in 1992. He was issued a notice to appear at the airport and, subsequently, provided an appointment to attend an interview at deferred inspection to provide his judgment and conviction. In November of 2009, I attended his deferred inspection interview with him. Office [REDACTED] told me to wait outside. I asked why. I told the client not to respond to questions except name, date of birth and address. I asked to speak to a supervisor. The supervisor, [REDACTED], told me that I could not be present when my client was interviewed. A couple months later, I had to go back to deferred to obtain temporary proof of my client's residence, which he is legally entitled to in removal proceedings. In fact, he is mandated to carry proof of his residence with him. Officer [REDACTED] took my client and me into the deferred room. I filled out the I-94 form with my client. Officer [REDACTED] sees me and brings a male officer into the hallway and tells him to "get that fucking bitch out of here." The male officer then escorted me out of the inner office. On the way out I eyeballed Officer [REDACTED] and advised her that her conduct was inappropriate and uncalled for. She did not respond. I waited for the client in the lobby. The client came out to the lobby about 20 minutes later. He advised that Officer [REDACTED] told him that, "he should not waste his time nor money with me as he was going to get deported anyway." [REDACTED] also asked him how much he had paid for my services. He refused to answer. My client was granted cancellation of removal in proceedings and is now scheduled for naturalization.