



Behind Closed Doors

AN OVERVIEW OF
DHS RESTRICTIONS ON
ACCESS TO COUNSEL

BEHIND CLOSED DOORS:

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ABOUT THE LEGAL ACTION CENTER

The Legal Action Center (LAC) of the American Immigration Council advocates for fundamental fairness in U.S. immigration law. To this end, the LAC engages in impact litigation and appears as amicus curiae (friend of the court) before administrative tribunals and federal courts in significant immigration cases on targeted legal issues. The LAC also provides resources to lawyers litigating immigration cases and serves as a point of contact for lawyers conducting or contemplating immigration litigation. In addition, the LAC works with other immigrants' rights organizations and immigration attorneys across the United States to promote the just and fair administration of the immigration laws. More information is available on the LAC's website at www.legalactioncenter.org.

ABOUT PENN STATE LAW'S CENTER FOR IMMIGRANTS' RIGHTS

The Center for Immigrants' Rights is the immigration clinic at Penn State's Dickinson School of Law. At the Center, students produce policy reports, white papers, and primers of national impact on behalf of client organizations. Under the supervision of the Center's director, Shoba Sivaprasad Wadhia, and on behalf of the Legal Action Center, the following law students contributed to the production of this report: Elizabeth Boul ('12), Stephen Coccorese ('12), Sarah Hart ('12) and Heather Hoechst ('12). More information is available on the Center's website at <http://law.psu.edu/immigrants>.

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Executive Summary

While many people have heard of immigration courts, few understand that immigration judges make only a small percentage of the decisions about immigration status. Most determinations are made by U.S. Citizenship and Immigration Services (USCIS) adjudicators, U.S. Customs and Border Protection (CBP) inspectors, U.S. Immigration and Customs Enforcement (ICE) officers, and other government officials empowered to decide an individual's fate. These decisions might result in lengthy imprisonment and expulsion from the country and often are made without affording the affected individuals access to legal counsel at their own expense.

The right to competent legal representation is a constitutional mandate in criminal law. It is also a well-recognized right in immigration court, although—by contrast with criminal proceedings—the government does not appoint lawyers for indigent noncitizens. Individuals in many types of administrative proceedings before the immigration agencies similarly have a right to legal representation. However, in this obscure world of decision-making outside the courtroom, the right is often unrecognized or denied. Even when officials provide some access to counsel, the Department of Homeland Security (DHS), particularly ICE and CBP, have discouraged or prevented counsel from meaningfully participating in their clients' cases.

The American Immigration Council (Immigration Council), the American Immigration Lawyers Association (AILA), and the Center for Immigrants' Rights at Pennsylvania State University's Dickinson School of Law began a project over two years ago to uncover the scope of these limitations on access to counsel. Using a variety of tools—including surveys and in-depth interviews, Freedom of Information Act (FOIA) requests, and extensive policy and legal analysis—we discovered that limitations on access to counsel were prevalent throughout DHS.

Prior to issuing this report, the Immigration Council sought to bring these problems to the attention of the individual agencies. Only USCIS was responsive. In fact, USCIS has made significant revisions to its policies regarding access to counsel in response, at least in part, to the concerns we identified. With respect to ICE and CBP, however, the urgent need for reform remains.

Three major findings are presented in this report:

1. CBP routinely bars access to counsel, relying on outdated regulations and overly restrictive interpretations of guidance to justify its limitations. CBP officers also discourage noncitizens from seeking counsel.
2. ICE fails to provide or facilitate access to counsel when questioning represented individuals, restricts attorney-client communications in detention facilities, and has also discouraged noncitizens from seeking legal counsel.
3. While USCIS offices have failed to allow appropriate access to counsel, recent changes to the Adjudicator's Field Manual appear to be expanding access to counsel.

These findings, especially with respect to CBP and ICE, are particularly disturbing because our legal analysis suggests that the denial of access to counsel is contrary to the Administrative Procedure Act (APA), regulations, and DHS guidance. While both the regulations and guidance could be significantly improved to ensure greater access, what is striking is the blatant disregard for policies that favor allowing more, rather than less, access to counsel. There is no excuse for the frequent blanket prohibition of counsel when noncitizen clients appear before CBP and ICE.

This report recommends specific improvements throughout DHS that could strengthen and reinforce access to counsel, regardless of the situation or agency. These recommendations include the creation of a unified approach within DHS for guaranteeing access to counsel, revisions to policy manuals and guidance, and a commitment to training and dialogue that ensures the right to representation is recognized and respected. Access to counsel is particularly critical given the record-breaking numbers of deportations and increased collaboration between DHS and local law enforcement agencies to enforce immigration law in recent years.

Introduction

In the United States, most decisions about the immigration status of noncitizens—a category that includes lawful permanent residents and many other individuals who are authorized to reside in the United States—are made by DHS officials outside the courtroom. While noncitizens in removal proceedings may retain lawyers at their own expense,¹ those in administrative proceedings before DHS are often denied access to counsel.

Proceedings before the three DHS immigration agencies—Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS)—are complex and can be daunting for noncitizens who are trying to navigate the process alone. Without the assistance of a representative well-versed in immigration law, noncitizens often lack the specialized knowledge needed to obtain a just outcome. The grave consequences that can flow from DHS proceedings underscore the importance of effective access to counsel. For example, a CBP official can quickly remove an individual from the United States without a hearing through “expedited removal”² based solely on information gathered during the initial inspection process at the border. Questioning by ICE can lead to arrest, detention, initiation of removal proceedings, and removal. USCIS officers have the power to decide whether an applicant is entitled to lawful permanent residence, asylum, or naturalization based on statements made in an interview. These decisions significantly impact the lives of noncitizens and their families. In this context, the need for meaningful legal representation cannot be overstated.

Access to counsel also improves the quality and efficiency of immigration decision-making. Counsel can help immigration officers by providing helpful documentation and other case-related information to clarify complicated legal issues. In addition, clients often are more at ease and more willing to communicate with immigration officers when their attorneys are present.

To better understand the nature and scope of existing restrictions on access to counsel, the American Immigration Council (Immigration Council), the American Immigration Lawyers Association (AILA), and the Center for Immigrants’ Rights at Pennsylvania State University’s Dickinson School of Law developed and distributed a nationwide survey to gather information from attorneys about their experiences representing clients before CBP, ICE, and USCIS.³ The survey findings revealed unnecessary and unjust restrictions on noncitizens’ access to counsel in administrative settings before all three agencies.

As discussed herein, federal law and agency guidance strongly support affording noncitizens meaningful access to counsel in DHS proceedings. The Administrative Procedure Act (APA) and the Code of Federal Regulations (CFR) provide a right to counsel in certain agency settings.

¹ 8 U.S.C. § 1362; INA § 292. Only 51% of noncitizens in immigration court proceedings were represented in fiscal year 2011; approximately 148,102 persons were forced to navigate the legal process alone. U.S. DEP’T OF JUSTICE, EXEC. OFFICE OF IMMIGRATION REVIEW, FY 2010 STATISTICAL YEAR BOOK G1 (2011), available at <http://www.justice.gov/eoir/statspub/fy11syb.pdf>.

² 8 U.S.C. § 1225(b)(1)(A)(i) (2011); INA § 235(b)(1)(A)(i); 8 C.F.R. § 235.3(b) (2011).

³ Between September and December 2010, the Immigration Council and AILA collected survey responses from 268 attorneys. The Immigration Council and students at Penn State Center for Immigrants’ Rights, on behalf of the Immigration Council, conducted follow up interviews with a significant number of these attorneys and collected additional anecdotes from attorneys through April 2011.

Moreover, DHS field manuals and other agency guidance allow, and even encourage, access to counsel before DHS.

Despite the existing legal authority and agency guidance supporting access to counsel, the serious risks faced by noncitizens in immigration proceedings before DHS, and the benefits to both noncitizens and DHS officers when counsel is present, DHS routinely interferes with attorneys' efforts to represent their clients. Depending on the context, immigration officers completely bar attorney participation, imposed unwarranted restrictions on access to counsel, and/or strongly discourage noncitizens from seeking legal representation. The recommendations provided at the end of the report are designed to combat these harmful practices and to improve access to counsel.

Significantly, shortly before the publication of this paper, USCIS took important steps to address some of its most egregious access to counsel problems. The agency issued guidance to USCIS officers nationwide regarding attorney participation in benefits interviews and solicited comments from the public. Although the guidance falls short in certain respects, USCIS' attempts to improve access to counsel should serve as an example to CBP and ICE.

DHS RESTRICTIONS ON ACCESS TO COUNSEL

U.S. Customs and Border Protection (CBP)

Access to counsel is severely limited, and often entirely prohibited, during primary inspection (the initial inspection at a port of entry), secondary inspection (a more detailed investigative interview off of the inspection line), and deferred inspection (an inspection postponed to a later date after the noncitizen is paroled into the country).⁴ As discussed below, these restrictions stem from CBP's mistaken view that 8 C.F.R. § 292.5(b) authorizes blanket prohibitions on access to counsel. Attorneys reported that CBP officers also strongly discourage the use of counsel.

CBP Officers Often Completely Bar Access to Counsel During Inspections

One attorney who asked to accompany his client to deferred inspection at the Indianapolis CBP office reported that his request was flatly refused:

. . . 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.

In another case, an attorney was barred from a CBP interview at the port of entry at Highgate Springs, Vermont:

The CBP officer asked my client to return for a deferred inspection interview and to bring documentation about an 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 confirm whether I could attend the interview. I then accompanied my client to the interview and again asked to accompany my client during the interview. The officer said "I don't think 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

⁴ Of the respondents to the Immigration Council-AILA-Penn State Law survey, 118 appeared before CBP in the year prior to the survey. Of those 118 attorneys, 75 (64%) claimed that CBP officials restricted their representation in some manner.

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 to the interview. The officer said this wasn't necessary and handed the memorandum . . . back to me before taking my client into a back room for the interview.

As one Boston attorney explained, blanket prohibitions on attorney presence in CBP interviews can have serious consequences:

During a Boston secondary inspection, I was not only prohibited from entering 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 . . . CBP took my client into custody, charged him as an arriving alien for a crime they said was a CIMT [Crime Involving Moral Turpitude] 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 United States, but the whole thing took 2.5 months and many filings. The entire 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.

Even where local CBP offices generally permit lawyers to accompany clients to CBP inspections, such policies sometimes change without notice. For example, one attorney indicated that he used to regularly accompany his clients to deferred inspection at the Philadelphia International Airport. However, when he appeared with his client at a later date, a CBP officer informed him of a new policy dictating that attorneys could no longer accompany clients to deferred inspection.

In cases where attorneys cannot be physically present, CBP officers often prevent them from contacting their clients by phone, and similarly prevent clients from calling their attorneys. One attorney reported that he spoke by phone with a CBP officer in Riviera Beach, Florida, who was sitting next to his client. The officer refused to allow the attorney to speak to his client or to provide any information about the case because the attorney had not yet submitted a signed Form G-28 (Notice of Entry of Appearance as Attorney or Representative).⁵ In fact, the attorney had faxed a completed Form G-28 to the officer, who stated at the time that he was "exercising his discretion" not to give the form to the client for his signature.

⁵ The Instructions accompanying Form G-28 state:

An attorney or accredited representative appearing before the Department of Homeland Security (DHS) must file Form G-28 in each case. Form G-28 must be properly completed and signed by the petitioner, applicant, or respondent to authorize representation for the appearance to be recognized by U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE).
USCIS Form G-28, available at <http://www.uscis.gov/files/form/g-28.pdf>.

Another attorney described her inability to contact a client in secondary inspection at the Washington-Dulles International 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.”

When Counsel Is Permitted, CBP Officers Restrict Access

Even when CBP officers permit attorneys to appear with their clients, the scope of representation is often very limited. For example, a CBP officer at the San Ysidro, California port of entry told an attorney that her client had no right to representation and that CBP was doing the attorney and her client “a favor” by allowing the attorney to be present. The officer prevented the attorney from providing relevant documentation that would have resolved a critical legal question:

My client had entered the United States on an H-1B visa, but had changed employers since his arrival. To extend the period of my client’s authorized stay, I accompanied him to the port of entry to assist him in obtaining a new I-94 with an extended validity date based on his new H-1B approval notice. 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 and did not even 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 his original H-1B visa stamp since he had a new approval notice with a longer validity period.

CBP Officers Discourage Legal Representation

Attorneys reported that some CBP officers actively discourage noncitizens from retaining counsel. One attorney described an experience at deferred inspection in Miami, where a CBP officer told the client that representation was unnecessary:

. . . My client and I went to deferred inspection to obtain temporary proof of my client’s residence, which he is legally entitled to in removal proceedings. . . I waited for the client in the lobby. The client came out to the lobby about 20 minutes later. He advised that Officer XXXX told him that “he should not waste his time or money with me as he was going to get deported anyway.” XXXX 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.

U.S. Immigration and Customs Enforcement (ICE)

ICE officers regularly fail to provide or facilitate access to counsel when questioning represented clients, restrict attorney-client communications in detention facilities, and discourage legal representation.⁶ As discussed below, ICE's guidance on access to counsel is very sparse.

ICE Officers Often Completely Bar Access to Counsel During Questioning at ICE Field Offices

In many cases, ICE officers do not allow attorneys to be present while their clients are being questioned at field offices. In these settings, clients and attorneys often are unable even to call each other. ICE officers also frequently tell attorneys that their clients are not entitled to representation. These restrictions were reported in a variety of contexts, including custodial interviews, as well as questioning related to orders of supervision, stays of removal, deferred action requests, and the National Security Entry and Exit Registration System (NSEERS).⁷

During interviews required by ICE in Newark, New Jersey, one attorney was repeatedly prohibited from being present while his clients were questioned:

Earlier this year, I represented numerous students . . . who were instructed to report for interviews at various ICE offices on the East Coast. During interviews that took place in Newark, New Jersey, I was repeatedly prohibited from being present while my clients were questioned. One officer . . . told me I could see my client when he was "good and ready," and threatened to deny bond if I persisted in my efforts By the time the interview had concluded, the officer had already issued an NTA [Notice to Appear]. According to my client, they joked about my efforts to be present during the interrogation.

The restrictive policy at the Newark office stands in contrast with the policy in place at the ICE offices in Philadelphia and Fairfax, Virginia, where I have been permitted to accompany my clients during questioning. By being present during the interviews, I not only gave my clients peace of mind, but made the process more efficient for the ICE officers themselves by encouraging the students to be more forthcoming.

⁶ Of the respondents to the Immigration Council-AILA-Penn State Law survey, 149 appeared before ICE in the year prior to the survey. Of those 149 attorneys, 87 (58%) claimed that ICE officials restricted their representation in some manner.

⁷ The National Security Entry-Exit Registration System (NSEERS) was implemented in 2002 to collect data through a special registration process from individuals from predominantly Muslim countries who were living in the United States. According to DHS, the program effectively "ended" upon the publication of a notice in the federal register removing a list of countries whose nationals had previously been subject to NSEERS Registration (April 2011). *DHS Removes Designated Countries from NSEERS*, <http://www.dhs.gov/files/publications/crcl-201105-nseers-registration-removal.shtm> (last visited May 4, 2012).

ICE officers in several offices have reportedly prevented attorneys from being present during questioning of their clients following arrest: According to one attorney in Las Vegas:

A client with no criminal record was picked up by ICE officers when his Form I-751, Petition to Remove the Conditions of Residence, was denied. My G-28 was already in the client's file as his attorney of record. The morning of his arrest, I called ICE's Las Vegas Field Office and asked to speak with my client. I was told I could not speak with him because he was still in processing. At 1 p.m., I went to the ERO office, presented a copy of my signed G-28, and asked again to speak with my client. I was told I could not speak with him because he was still in processing. I waited over one hour but never got the chance to speak with my client. I was told later by another individual detained at the same office that each time the window clerk came to the back office saying that my client's attorney was out front asking to speak with him, the officers laughed and said to tell the attorney (me) to keep waiting. The other detainee said they had been done with my client for a long time and he was just sitting in the back detention room with the other detainees. This other detainee saw and heard all of this because she was a female and was handcuffed to a desk because she could not be held in the detention room with the male detainees.

Similarly, an attorney from Des Moines, Iowa, reported:

When my clients have been brought to [the ERO Office in Des Moines, Iowa,] immediately following an arrest, I have not been able to call them and they have not been able to call me. In almost all cases, I have not been allowed to enter the room where the ICE officer was interviewing my client. In one instance when I insisted on being present during questioning of my client, I was told that I could observe the officer while he questioned my client but I could not speak. I was told that if I opened my mouth, I would be "kicked out."

I think it is vital that my clients understand their rights, and when I am not able to speak with them before or during questioning, I believe they are at a serious disadvantage. For example, they may not understand the consequences of decisions ICE officers encourage them to make. ICE officers have encouraged my clients to sign stipulated removal orders and have described these orders to my clients as "voluntary departure orders." They have said to my clients, in essence, "sign this and in two days, you'll be drinking a beer in Mexico," as though there are no legal consequences to the decision to sign the order.

ICE Restricts Access to Counsel in Detention Facilities

Many attorneys reported restrictions on their ability to communicate with or otherwise access clients held in detention facilities. One attorney reported that most client consultations at the Pinal County Jail in Arizona now take place via videoconference, a practice that raises issues of attorney-client confidentiality and makes it difficult for detainees to sign or meaningfully review documents.

Several attorneys reported that ICE refused to provide any information regarding their detained clients unless they had an original signed Form G-28 on file. This creates serious problems for individuals whom ICE has transported to detention facilities far from their families and attorneys, especially in cases where removal may be imminent. According to an attorney from

Michigan, many jails holding ICE detainees make it difficult, if not impossible, to submit a signed Form G-28 in time to provide meaningful legal assistance:

Many local jails holding detainees on ICE's behalf refuse to accept overnight deliveries, requiring all letters to be sent by regular mail. In addition, many jails refuse to fax or otherwise transmit signed copies of Form G-28 to the relevant ICE office, requiring detainees to mail signed forms back to their attorneys, who then must express or deliver them in person to ICE. On one occasion, I had to send a Form G-28 to three different facilities because my client kept being transferred before the form arrived.

A California attorney described her experience as follows:

A client was recently detained and subject to imminent deportation following the reinstatement of a prior removal order. I faxed ICE a Form G-28 to the detention center in Mira Loma, CA, which is about two hours from my office, but was told they would not speak with me unless they had the client's original signature on the G-28. I told ICE I could not get to the detention center to have the client sign the form, but the ICE officer [on the case] refused to speak with me. Eventually, I persuaded the officer's superiors to take the faxed form to the client to obtain an original signature. But this accommodation, which should have been provided as a matter of course, was only obtained after many phone calls and hours of frustration. I was told that the policy of Mira Loma detention center was not to accept Form G-28 unless it had an original signature.

Even where there is a signed Form G-28 on file, some attorneys face obstacles when attempting to visit detained clients. For example:

The Eloy Detention Center, CCA [Corrections Corporation of America]⁸ often prevents clients from meeting with attorneys who have travelled to the facility. Sometimes, the jail will go on "lockdown" for no apparent reason, or the client has meal period. On numerous occasions, I've waited most of the day for a 15-minute client meeting, and have even had to return to Phoenix without meeting with my client at all. When I've complained to ICE, I'm told there is nothing they can do because visitation policies are set by CCA. The obstacles are so frustrating that a lot of good attorneys don't do detention work anymore because it's simply not feasible.

ICE Officers Discourage Legal Representation

Numerous attorneys reported that ICE officers attempted to dissuade their clients from retaining an attorney or said they had no right to counsel in the first place. In one telling example, an attorney in Virginia said an ICE officer had told a woman who later retained her that there was "no point" in hiring a lawyer:

⁸ CCA is private prison company that contracts with ICE to detain immigrants. See *Partnering with CCA*, <http://www.cca.com/partnering-with-cca/cca-partners> (last visited April 9, 2012).

Earlier this year, I was contacted by a woman who was arrested in a home raid conducted by the Fairfax ICE office. The arresting officers told her they were going to deport her immediately and there was no point in calling a lawyer because a lawyer could not help her. In truth, after securing my services, the woman was released on her own recognizance, obtained a stay of removal, and is now scheduled for an adjustment of status hearing this fall based on her existing marriage to a U.S. citizen. Had the woman not contacted me, it is likely ICE would have summarily removed her and then she would have been subject to the ten-year bar on admissibility.

Similarly, an attorney from Des Moines reported that ICE officers have told his clients that hiring attorneys is unnecessary because they will only “steal” from the people they represent.

U.S. Citizenship and Immigration Services (USCIS)

On May 23, 2012, USCIS issued a policy memorandum amending sections of the Adjudicator’s Field Manual (AFM) relating to counsel.⁹ These amendments are an important first step toward providing more meaningful access to counsel before USCIS.

Prior to the issuance of the May 23 memorandum and the December 21, 2012 interim memorandum that preceded it,¹⁰ USCIS frequently imposed restrictions on access to counsel, which, although less severe than those imposed by CBP and ICE, were unwarranted.¹¹ With respect to benefits interviews, attorneys reported that USCIS officers often discouraged attorneys from freely communicating with their clients or the adjudicating officer, prevented attorneys from submitting documents, and/or limited attorney seating.

In particular, USCIS officers prevented attorneys from explaining the interview process to their clients and from clarifying interviewing officers’ questions. Several attorneys noted that USCIS officers imposed particularly harsh restrictions on communication in cases where the government scrutinized marriage petitions. A Florida attorney stated that she was repeatedly prohibited from speaking during marriage interviews. A Colorado attorney who spoke to his client during a marriage interview recounted that the USCIS officer “shouted” that the attorney was “interfering with the interview.” A Chicago attorney shared that a USCIS officer told her that if she spoke during a marriage interview, she would be “thrown out.”

Limitations on communication extended to an attorney’s ability to provide relevant documentation to interviewing officers. A Missouri attorney indicated that he was prohibited from submitting documents pertinent to his client’s case. A Connecticut attorney reported that

⁹ See REPRESENTATION AND APPEARANCES AND INTERVIEW TECHNIQUES; REVISIONS TO ADJUDICATOR’S FIELD MANUAL (AFM) CHAPTERS 12 AND 15; AFM UPDATE AD11-42 (May 23, 2012), available at http://www.legalactioncenter.org/sites/default/files/docs/lac/USCIS_Finalized_AFM_5-23-12.pdf.

¹⁰ See The Role of Private Attorneys and Other Representatives; Revisions to Adjudicator’s Field Manual (AFM) Chapters 12 and 15; AFM Update AD11-42 (Dec. 21, 2011), available at http://www.legalactioncenter.org/sites/default/files/docs/lac/Role_of_Private_Attorneys_PM_Approved_12-21-11.pdf. The changes took effect as of the date of the memorandum. USCIS opened a public comment period, which ended on February 14, 2012.

¹¹ Of the respondents to the Immigration Council-AILA-Penn State Law survey, 254 appeared before USCIS in the year prior to the survey. Of those 254, 148 attorneys (58%) claimed that USCIS officials restricted their representation in some manner.

some USCIS officers selectively accepted documents offered in support of an application. A Utah attorney stated that USCIS banned access to laptop computers in interview settings, making access to client-related documents particularly burdensome.

Attorneys also reported that some USCIS officers prevented them from sitting next to their clients during interviews. One attorney reported that he accompanied his client to a naturalization interview and was told to sit in the corner of the interview room, approximately six feet behind his client. In another instance, an attorney reported that she was told to sit behind her client during an interview and not to make eye contact.

Since USCIS issued its interim amendments to the AFM, attorneys have reported improvements in access to counsel before USCIS. For example, attorneys in St. Louis and Columbus, where USCIS formerly restricted attorney seating, have reported that USCIS officers now allow their clients to sit next to them during benefits interviews. The problems documented prior to the issuance of the interim policy memorandum underscore the importance of ensuring that the new guidance is fully implemented and that USCIS takes additional steps to protect access to counsel.¹²

¹² In comments submitted on February 14, 2012, the Immigration Council and AILA proposed additional amendments to the AFM intended to safeguard access to counsel. See COMMENTS ON USCIS INTERIM MEMO “THE ROLE OF PRIVATE ATTORNEYS AND OTHER REPRESENTATIVES; REVISIONS TO ADJUDICATOR’S FIELD MANUAL (AFM) CHAPTERS 12 AND 15; AFM UPDATE AD11-42”, available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/AIC-AILA%20Counsel%20Memo%20Comments%202-14-12%20FINAL.pdf>. Some of these changes were implemented in the final version of the memorandum on May 23, 2012, but the majority was not.

DHS RESTRICTIONS ON COUNSEL ARE NOT SUPPORTED BY GOVERNING LAW OR AGENCY GUIDANCE

The APA, governing regulations, and agency guidance provide strong support for the right to counsel in many types of DHS administrative proceedings, and—in contexts where the right to counsel is less clear—much greater access to counsel than DHS currently permits.

The APA Provides a Right to Counsel to Noncitizens Appearing before CBP, ICE, and USCIS

The Administrative Procedure Act (APA) provides a right to counsel for individuals who are “compelled” to appear before an agency or agency representative.¹³ This means that a person who is “compelled or commanded”¹⁴ to appear, or whose appearance is brought about by “overwhelming pressure,”¹⁵ has a statutory right to counsel. To the degree that virtually all interactions with DHS officers involve compulsion, the right to counsel seems clear. For instance, when CBP refers a person to secondary inspection, he is considered to be in “detention.”¹⁶ He may not unilaterally withdraw an application for admission and depart the United States.¹⁷ Given that the person is not free to leave or withdraw his application without permission, his appearance is “compelled” under the APA. A person subject to deferred inspection also is compelled by CBP to appear. If the person fails to appear, CBP guidance mandates the initiation of removal proceedings and authorizes CBP to seek a criminal warrant or pursue criminal penalties under 8 U.S.C. § 1325.¹⁸ The threat of such severe consequences “compels or commands” individuals to appear or brings about their appearance by “overwhelming pressure.”

Noncitizens appearing before ICE also have a right to counsel under the APA. Detained noncitizens who are questioned by ICE certainly are compelled to appear.¹⁹ Likewise, individuals

¹³ 5 U.S.C. § 555(b) (“A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative”).

¹⁴ See 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”).

¹⁵ BLACK’S LAW DICTIONARY 118 (2d pocket ed. 2001) (defining “compel” as “[t]o cause or bring about by force or overwhelming pressure.”).

¹⁶ The CBP Inspector’s Field Manual provides: “During an inspection at a port-of-entry, detention begins when the applicant is referred into secondary and waits for processing.” See U.S. CUSTOMS AND BORDER PROTECTION INSPECTOR’S FIELD MANUAL § 17.8.

¹⁷ See 8 C.F.R. § 235.4 (2011) (providing that “[t]he alien’s decision to withdraw his or her application for admission must be made voluntarily, but nothing in this section shall be construed as to give an alien the right to withdraw his or her application for admission.”).

¹⁸ U.S. CUSTOMS AND BORDER PROTECTION INSPECTOR’S FIELD MANUAL § 17.1(d) (2007).

¹⁹ Restricting access to representation while in detention may also implicate the statutory right to legal representation in removal proceedings. 8 U.S.C. § 1229a(b)(4)(A), INA § 240(b)(4)(A); 8 U.S.C. § 1362; INA § 292. The ability to consult with counsel cannot be limited to the removal hearing itself. Many forms of immigration relief require extensive consultation between attorneys and clients, and the outcome of a removal hearing may hinge on an attorney’s ability to meet with a detained client. It is therefore crucial that noncitizens in ICE custody not face undue obstacles in securing legal representation or conferring with counsel.

who are placed under “supervision” in lieu of detention are compelled to appear before ICE.²⁰ The applicable regulation states that Form I-220B, issued to individuals who are released subject to orders of supervision, shall include “[a] *requirement* that the alien report to a specified officer periodically and provide relevant information under oath as directed.”²¹ If an individual violates the conditions of an order of supervision, he or she “may be returned to custody.”²² As in the context of deferred inspection, the high stakes “compel or command” individuals to appear or bring about their appearance by “overwhelming pressure.”

Individuals who appear before USCIS also are “compelled to appear” and thus have a right to counsel under the APA. Relevant regulations and agency guidance make certain appearances before USCIS mandatory and set forth serious consequences for failing to appear. For example, by regulation, “[a]n applicant, petitioner, a sponsor, a beneficiary . . . may be *required* to appear for fingerprinting or for an interview.”²³ If a person does not appear for an interview, “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.”²⁴ As an example, USCIS’ standard interview notice (Form I-797C) for the completion of an Application to Register Permanent Resident or Adjust Status confirms the compulsory nature of interviews. It states: “You are hereby notified to appear for the interview appointment, as scheduled below . . . Failure to appear for this interview and/or failure to bring the below listed items will result in the denial of your application.” The bottom of the notice states: “**YOU MUST APPEAR FOR YOUR INTERVIEW.**”²⁵

The Regulations Provide for Greater Access to Counsel than CBP, ICE, and USCIS Currently Permit

Certain restrictions on counsel before DHS also conflict with noncitizens’ right to counsel under the governing regulations. The DHS regulation regarding “Representation and Appearances” provides a right to counsel in many interactions with CBP, ICE, and USCIS. It 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. . . .”²⁶ A second regulation reinforces this right, providing that any applicant or petitioner may be represented by an attorney.²⁷ Other

²⁰ 8 U.S.C. § 1231(a)(3), INA § 241(a)(3).

²¹ 8 C.F.R. § 241.5(a) (emphasis added).

²² 8 C.F.R. § 241.4(l)(1).

²³ 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).

²⁴ 8 C.F.R. § 103.2(b)(13)(ii) (emphasis added).

²⁵ Form I-797C, available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/l797C.pdf>.

²⁶ 8 C.F.R. § 292.5(b) states in its entirety:

Right to representation. Whenever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative who shall be permitted to examine or cross-examine such person and witnesses, to introduce evidence, to make objections which shall be stated succinctly and entered on the record, and to submit briefs. *Provided*, that nothing in this paragraph 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.

See also 60 Fed. Reg. 6647-48 (Feb. 3, 1995) (stating that attorneys may engage in “full representation” during examinations before immigration officers).

²⁷ 8 C.F.R. § 103.2(a)(3).

regulations identify the right to counsel in relation to specific types of applications, such as applications for asylum or temporary protected status.²⁸ These regulations clearly apply to USCIS examinations in connection with applications or petitions for immigration benefits. This well-recognized right to counsel in administrative proceedings before USCIS recently was reiterated by the agency in its amendments to the AFM.²⁹

The regulatory right to counsel also applies to noncitizens “examined” by ICE officers.³⁰ The Immigration and Nationality Act (INA) provides that a noncitizen who is “arrested shall be taken without unnecessary delay for *examination* before an officer of the Service. . . .”³¹ The regulations provide that a noncitizen arrested without a warrant under INA § 287(a)(2) will be *examined* by an officer other than the arresting officer.³² Accordingly, noncitizens have a right to counsel in both these contexts.

In addition, the regulatory right to counsel applies in at least some CBP inspections. The regulation states that the right to representation does not extend 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.”³³ Significantly, the exceptions do not include deferred inspection interviews. Unlike primary and secondary inspection, deferred inspection is a “further examination” that occurs after a person has been paroled into the United States.³⁴ Deferred inspection is permitted only when the examining officer “has reason to believe” that the person can overcome a finding of inadmissibility by presenting, among other things, “additional evidence of admissibility not available at the time and place of the initial examination.”³⁵ Such interactions could be greatly facilitated by an attorney well-versed in immigration law and familiar with the facts of a client’s case. Thus, a non-citizen’s right to counsel is not only reinforced by a plain reading of the regulation, but makes sense as a matter of policy.

The regulatory right to counsel similarly should apply to CBP inspections involving lawful permanent residents (LPRs). The regulation limits access to counsel only for those considered “applicant[s] for admission.”³⁶ If a person offers proof of LPR status, the INA dictates that he or she should generally be presumed not to be an applicant for admission.³⁷ At that point, CBP

²⁸ See 8 C.F.R. § 208.9 (stating that an asylum applicant interviewed by an asylum officer may have counsel or a representative present); 8 C.F.R. § 244.8 (stating that an applicant for Temporary Protected Status may have a representative who may “consult with and provide advice to the applicant”).

²⁹ See REPRESENTATION AND APPEARANCES AND INTERVIEW TECHNIQUES; REVISIONS TO ADJUDICATOR’S FIELD MANUAL (AFM) CHAPTERS 12 AND 15; AFM UPDATE AD11-42 AT 1-4 (May 23, 2012), available at <http://www.aila.org/content/default.aspx?docid=39818>.

³⁰ The Board of Immigration Appeals (BIA) recently issued a precedent decision holding that immigrants arrested without a warrant need not be informed of their right to counsel or warned that their statements can be used against them until after they have been placed in removal proceedings. *Matter of E-R-M-F- & A-S-M-*, 25 I&N Dec. 580 (BIA 2011). While the authors of this paper disagree with the holding of this decision, it does not eviscerate the *right* to counsel during an arrest, but rather the *right to receive advisals* of the right to counsel pursuant to 8 C.F.R. § 287.3(c).

³¹ 8 U.S.C. § 1357(a)(2), INA § 287(a)(2) (emphasis added).

³² 8 C.F.R. § 287.3(a) (emphasis added).

³³ 8 C.F.R. § 292.5(b).

³⁴ 8 C.F.R. § 235.2

³⁵ 8 C.F.R. § 235.2(b)(3); see also U.S. CUSTOMS AND BORDER PROTECTION INSPECTOR’S FIELD MANUAL § 17.1(a).

³⁶ 8 C.F.R. § 292.5(b) (“nothing in this paragraph shall be construed to provide an *applicant for admission* in either primary or secondary inspection the right to representation [].”) (emphasis added).

³⁷ 8 U.S.C. § 1101(a)(13)(C); see also *Tineo v. Ashcroft*, 350 F.3d 382, 386 (3d Cir. 2003) (explaining that, under § 1101(a)(13)(C), returning lawful permanent residents are presumptively entitled to retain LPR status upon reentry); *Richardson v. Reno*, 162

must show that the person falls into one of six statutory categories that constitute exceptions to the general rule.³⁸ Until CBP makes such a determination, the LPR should not be considered an applicant for admission and is entitled to counsel.

Moreover, even with respect to primary and secondary inspection of non-LPRs, the regulation does not bar lawyers from accompanying their clients. While it may not confer an affirmative right to representation, it does not preclude CBP from exercising its discretion to allow an attorney to represent a client under these circumstances.³⁹

F.3d 1338, 162 (11th Cir. 1998) (explaining the presumption as allowing the returning LPR to “be summarily admitted back into the United States, unless the alien falls under one of the six [exceptions]”); *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011) (holding that a returning lawful permanent resident is not to be treated as an applicant for admission unless DHS proves by clear and convincing evidence that one of the six exceptions to the general rule for lawful permanent residents set forth at 8 U.S.C. § 1101(a)(13)(C) applies).

³⁸ 8 U.S.C. § 1101(a)(13)(C) reads in full:

An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—

- (i) has abandoned or relinquished that status,
- (ii) has been absent from the United States for a continuous period in excess of 180 days,
- (iii) has engaged in illegal activity after having departed the United States,
- (iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this Act and extradition proceedings,
- (v) has committed an offense identified in section 212(a)(2), unless since such offense the alien has been granted relief under section 212(h) or 240A(a), or
- (vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

³⁹ The implementation of the expedited removal process under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) strongly supports revisiting the limitations on the right to counsel in primary and secondary inspection. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [hereinafter “IIRIRA”], Pub.L. No. 104-208, H.R. Conf. Rep. No. 104-828, at 209 (1996) (expedited removal process was intended to “expedite the removal from the United States of aliens who indisputably have no authorization to be admitted . . .”). The Immigration and Naturalization Service (Legacy INS) initially justified the regulatory limit on the right to counsel in primary and secondary inspection on the grounds that any individual subject to deportation or exclusion would have an administrative hearing to determine admissibility or excludability. An individual subject to such a hearing had an explicit “right to representation.” Representation and Appearances, Clarifying Right to Representation, 45 Fed. Reg. 81732, 81732-33 (Dec. 12, 1980). IIRIRA, however, removed the guarantee of an administrative hearing and established a system of expedited removal—or removal without a hearing—for certain individuals who arrive at the border and are deemed ineligible for admission. A person may be removed without a hearing pursuant to 8 U.S.C. § 1225, INA § 235(b)(1)(A), if an immigration officer determines the person is inadmissible because he or she possesses fraudulent documentation, 8 U.S.C. § 1182(a)(6)(C), INA § 212(a)(6)(c), or has no valid documentation, 8 U.S.C. § 1182(a)(7), INA § 212(a)(7). This development significantly undermined the rationale for restricting the right to counsel in primary and secondary inspection.

Some DHS Guidance Provides for Greater Access to Counsel than the Agencies Currently Provide

Like the governing law, the DHS agencies' internal guidance supports greater access to counsel than each of them currently provides. However, such guidance tends to be construed narrowly or ignored completely. In addition, the agencies have not been forthcoming with additional existing guidance that is not publicly available.⁴⁰

The CBP Inspector's Field Manual (IFM) states that an inspecting officer may allow counsel to be present during secondary inspection.⁴¹ Moreover, in deferred inspection, "an attorney may be allowed to be present upon request if the supervisory CBP Officer on duty deems it appropriate," and the attorney may serve as an "observer and consultant to the applicant."⁴² In addition, the IFM instructs CBP officers to consult with CBP Field Counsel regarding attorney presence during deferred inspection, thus allowing CBP officers to make particularized decisions on requests for access to counsel.⁴³

Despite this guidance permitting access to counsel in CBP settings, CBP stated in its response to a FOIA request filed by the Immigration Council to obtain agency guidance on the role of counsel, that its policies regarding counsel are rooted in the premise that "applicants for admission do not have the right to legal representation." CBP released only two pages of

⁴⁰ The Immigration Council filed three FOIA requests to ICE, CBP and USCIS requesting agency guidance regarding the role of counsel. After receiving inadequate responses from the agencies and pursuing administrative appeals, the Immigration Council filed two lawsuits in the U.S. District Court for the District of Columbia. *See American Immigration Council v. DHS and USCIS*, No. 11-1971 (D.D.C. filed Nov. 8, 2011); *American Immigration Council v. DHS and CBP*, No. 11-1972 (D.D.C. filed Nov. 8, 2011). After the Immigration Council filed suit against USCIS, the agency released over two thousand pages of documents, which—despite significant redactions—confirmed some of the restrictions on counsel discussed in this report. Both lawsuits remain pending. Information about the lawsuit and links to released documents are available on the Immigration Council's website, at <http://www.legalactioncenter.org/litigation/access-counsel-dhs>.

⁴¹ *See* U.S. CUSTOMS AND BORDER PROTECTION INSPECTOR'S FIELD MANUAL Chapter 2.9 (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).

⁴² *Id.* at Chapter 17.1(g). This section of the IFM, entitled, "Attorney Representation at Deferred Inspection," was included in CBP's response to the Immigration Council's FOIA request. *See American Immigration Council v. DHS and CBP*, Complaint, Exhibit G, available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/AIC%20v%20Customs%20-%20Issued%20summonses%20%20complaint%20w%20exhibits.pdf>. However, a section with the same title is included as section 17.1(e) in the version of the IFM posted on CBP's website. *See* <http://foia.cbp.gov/streamingWord.asp?i=237>. Section 17.1(g) includes all the language of Section 17.1(e), as well as the following additional language: "Any questions regarding attorney presence in the deferred inspection process may be referred to CBP Field Counsel. In general, applicants for admission in primary and secondary processing are not entitled to representation." *See American Immigration Council v. DHS and CBP*, Complaint, *supra* note 40, Exhibit G.

⁴³ *Id.* Other sections of the IFM also anticipate attorney interactions with CBP on behalf of their clients. *See, e.g.*, Ch. 15.1(d) (requiring CBP officers to advise a noncitizen or his representative to submit information to local port of entry or local CBP office to correct previously recorded, but allegedly erroneous, Form I-94 arrival and departure dates that result in confirmed overstay lookouts); Ch. 17.15(d) (requiring an officer to notify the port of entry if notified by an attorney, friend or relative that an individual in expedited removal proceedings is planning to apply for asylum or has a fear of return and noting that a Form G-28 Notice of Representation is not required in this instance); Ch. 31.7 (discussing inquiries from private individuals and attorneys regarding possible reasons for questioning an individual at the time of application for admission to the United States).

unredacted documents in response to the FOIA request.⁴⁴ In an apparent attempt to justify the small number of responsive documents, CBP explained:

Barring an individual being the focus of a criminal investigation, applicants for admission do not have the right to legal representation. Thus, it is logical that CBP does not have extensive responsive documents concerning the subject; comprehensive CBP guidance governing attorney representation and conduct, where in most instances applicants for admission have no such right, is unnecessary. That is, where there is no substantive right to representation in primary and secondary inspections, the agency need not provide detailed instructions or guidance regarding the subject—it is sufficient for CBP personnel to be informed that generally there is no right to counsel at the border.⁴⁵

At a minimum, as CBP noted, applicants for admission who are the focus of a criminal investigation do have the right to legal representation, as do those who have been taken into custody.⁴⁶ CBP has since conceded that its initial search was inadequate and agreed to conduct a nationwide search for responsive records that will include ports of entry, border patrol stations, border patrol sectors, CBP field operations offices, and various offices at CBP headquarters.

ICE's policies regarding access to counsel in non-detention settings are perhaps the least clear of the three DHS agencies, as the only publicly available guidance relates to detention settings. Prior to the creation of DHS, the Immigration and Naturalization Service (INS) issued an "Examinations Handbook" with extensive guidance addressing when noncitizens were entitled to be notified of their right to counsel,⁴⁷ when attorneys could be present during client interrogations by Service officers,⁴⁸ and under what circumstances attorneys should be notified before the Service initiated contact with their clients.⁴⁹ By contrast, ICE's Detention and Removal Operations Policy and Procedure Manual (DROPPM) contains scant guidance regarding noncitizens' right to counsel.⁵⁰ Other ICE guidance, such as a recently issued memorandum regarding ICE transfer policies,⁵¹ and the Performance Based National Detention Standards

⁴⁴ These documents were comprised of excerpts from the Inspector's Field Manual Chapters 2.9 (Dealing with Attorneys and Other Representatives), 17.1.g (Attorney Representation at Deferred Inspection), and 17.9.11.2 (Notification of Detainees in Baggage Control Secondary); the Officer's Handbook, M68 ("Solicitation of Services"); and The Law of Arrest: Search and Seizure Manual, M69 ("warnings Required Following Administrative Arrest"). See *American Immigration Council v. DHS and CBP*, Complaint, *supra* note 40, Exhibit G.

⁴⁵ See *id.*, Exhibit F, at 10-11.

⁴⁶ See 8 C.F.R. § 292.5(b).

⁴⁷ INS EXAMINATIONS HANDBOOK I-75 (1988) ("An alien arrested without warrant is entitled to representation and shall be similarly advised."), available at http://www.legalactioncenter.org/sites/default/files/docs/lac/INS_Examinations_Handbook_Interviews_and_Interrogations.pdf.

⁴⁸ *Id.* at I-76 ("If the person desires to consult counsel or have counsel present, interrogation must be suspended until such desires have been satisfied.").

⁴⁹ *Id.* at I-79 ("The general policy is that notice should be given to the attorney of an interview of the client.").

⁵⁰ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DETENTION AND REMOVAL OPERATIONS POLICY AND PROCEDURE MANUAL (2006), available at http://www.legalactioncenter.org/sites/default/files/docs/lac/3-27-06_Detention_and_Deportation_Officer%27s_Field_Manual.pdf.

⁵¹ The transfer policy, for example, states that it is intended to "minimize" detainee transfers outside the geographic area of responsibility (AOR) under the authority of a Field Office Director when a detainee has, among other requirements, an attorney of record within the AOR. See POLICY 11022.1: DETAINEE TRANSFERS (Jan. 4, 2012), available at <http://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf>. This policy does not, however, specifically address difficulties encountered by attorneys who attempt to submit a Form G-28 after a detainee has been transferred. In addition,

(PBNDS),⁵² set forth general guidelines regarding access to counsel in detention settings, but do not address continuing problems discussed in this report or clearly acknowledge the important role of counsel.

USCIS' recently amended AFM explicitly permits access to counsel and recognizes the important role of counsel. Specifically, the AFM provides that a person involved in an immigration proceeding "has the right to be represented, at no expense to the government, by an attorney or representative. . . ." and that "[t]he role of the representative at an interview is to ensure that the rights of the individuals he or she represents are protected."⁵³ The AFM also recognizes that "[a]ttorneys and other representatives have a duty to represent their clients zealously."⁵⁴

The recent amendments to the AFM also address certain contexts where USCIS officers previously had impermissibly restricted access to counsel. For example, the AFM now ensures a beneficiary's right to representation at an interview,⁵⁵ requires a written waiver of representation when a person chooses to appear without his or her attorney (which must be included in the record of proceedings),⁵⁶ provides that a representative should be permitted to sit next to the client during an interview,⁵⁷ and explicitly permits an attorney to ask the client additional questions at the conclusion of the interview.⁵⁸ In addition, the AFM clarifies how individuals can change representation during the course of a proceeding,⁵⁹ and mandates a more accommodating process for rescheduling interviews due to an attorney's scheduling conflict.⁶⁰ Importantly, the AFM now also provides that an interviewing officer "should still consider statements and submissions by the individual's attorney . . ." when an individual elects to conduct an interview without his or her attorney.⁶¹

As previously discussed, prior to the recently proposed amendments to the AFM, attorneys reported that USCIS officers failed to provide adequate seating for attorneys in interview rooms and prevented attorneys from successfully communicating with their clients during interviews.⁶² The increased focus on the role of counsel in the recent amendments to the AFM suggests a

attorneys have reported that ICE continues to transfer detainees out of the AOR during the initial "custody determination." Thus, if an attorney attempts to submit a G-28 on behalf of a noncitizen who is being processed by ICE, the individual may still be assigned to a facility in another state despite having representation in the vicinity of the arrest.

⁵² See generally PERFORMANCE BASED NATIONAL DETENTION STANDARDS (PBNDS), available at <http://www.ice.gov/detention-standards/2011> (setting forth general guidelines regarding access to counsel, but giving individual detention centers substantial leeway to establish specific policies in detainee handbooks).

⁵³ See May 23, 2012 USCIS ADJUDICATOR'S FIELD MANUAL AMENDMENTS 11.

⁵⁴ *Id.* at 12.

⁵⁵ *Id.* at 11.

⁵⁶ *Id.* at 18.

⁵⁷ *Id.* at 19.

⁵⁸ *Id.* at 11.

⁵⁹ *Id.* at 10.

⁶⁰ *Id.* at 18.

⁶¹ *Id.* at 18-19.

⁶² Documents produced in response to the Immigration Council's FOIA request to USCIS included a letter dated March 18, 2010 from Debra Rogers, Acting Associate Director of USCIS Field Operations, recognizing that officers in some USCIS offices commonly imposed restrictions on attorney seating. In the letter, Ms. Rogers stated that the "proximity of an attorney or accredited representative to his or her client is to be determined within that relationship, and not by [USCIS]" and that this practice should cease immediately. See Letter from Debra A. Rogers, Associate Director, Field Operations, USCIS, to Field Leadership, available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/FOIA%20Response%20Pages%202-4.pdf>. Despite this internal directive in March 2010, attorneys reported several months later that USCIS officers continued to impose limitations on seating during interviews.

commitment by USCIS to resolve these problems and to improve access to counsel for noncitizens.

More change is needed, however. The final amendments to the AFM did not adopt additional changes suggested by AILA and the Immigration Council in response to the December 21, 2012 interim memorandum.⁶³ Significant changes that were not adopted are captured in the recommendations to USCIS below.

⁶³ *See supra* n. 12.

RECOMMENDATIONS

It is clear that DHS' component agencies do not uniformly apply current regulations and guidance relating to access to counsel. In order to achieve meaningful access to counsel, DHS itself must play a leading role in the development of a uniform policy ensuring access to counsel. To create this uniform policy, DHS should:

- Explicitly recognize that the law allows noncitizens to have counsel present in proceedings before DHS.
- Clearly define for its officers the role of counsel in DHS proceedings, including the ability to object to inappropriate lines of questioning, ask clarifying questions, facilitate communication between the client and the DHS officer, and advise clients and DHS officers on points of law, orally or in writing.
- Devise a “code of conduct” that every DHS officer or contractor is required to follow pertaining to the treatment of attorneys. This “code of conduct” should encourage an atmosphere of mutual respect between government officials and attorneys.
- Update 8 C.F.R. § 292.5(b) to acknowledge changes and developments in the law since 1996, including expedited removal, the definition of admission, and the inspection of LPRs. The failure to amend the regulation in the last 16 years has allowed policies at CBP to develop which ignore the evolution of its adjudicatory role and the concomitant need for additional access to counsel protections.

Even as DHS affirms a commitment to access to counsel, the individual agencies must take the initiative to improve their own guidance and training. Where relevant, CBP and ICE should draw from USCIS' recent amendments to the AFM as they consider changes to their own guidance that better safeguard access to counsel in CBP and ICE settings. Suggestions for agency-specific guidance are set forth below:

Customs and Border Protection

- Given the introduction of expedited removal under IIRIRA,⁶⁴ which did away with the guarantee of an administrative hearing, CBP should cease interpreting 8 C.F.R. § 292.5(b) to prohibit access to counsel in primary and secondary inspection.
- CBP should be required to accept, consider, and include in a respondent's record all case-related documentation submitted by counsel.
- If an individual indicates that he or she is represented, CBP should require a written waiver of representation before questioning him or her outside the presence of counsel. The waiver should be signed by the individual and placed in the record. Further, to confirm that such individuals fully understand the implications of waiving

⁶⁴ See *supra* n. 39 (discussing the implementation of IIRIRA).

their right to counsel, the CBP officer should be required to ask specific questions before requesting that an individual sign the statement.

- CBP should develop a clear process for rescheduling deferred inspection interviews in the event of legitimate attorney conflict.

Immigration and Customs Enforcement

- ICE officers should permit counsel to be present during any ICE questioning, including but not limited to post-arrest interrogation and interviews at ICE field offices.
- Whenever an individual is taken into ICE custody, ICE should advise him or her of the right to obtain counsel at no expense to the government and provide a list of free legal services providers.
- ICE should be required to accept, consider, and include in a respondent's record all case-related documentation submitted by counsel.
- If an individual indicates that he or she is represented, ICE should require a written waiver of representation before questioning him or her outside of the presence of counsel. The waiver should be signed by the individual and placed in the record. Further, to confirm that such individuals fully understand the implications of waiving their right to counsel, the ICE officer should be required to ask specific questions before requesting that an individual sign the statement.
- ICE should take meaningful steps to improve attorneys' access to their detained clients, including developing more flexible visitation policies, providing private meeting rooms, and limiting the periods during which detainees are not available to meet with counsel.
- ICE should assist attorneys in obtaining signed G-28 forms from detained clients.

U.S. Citizenship and Immigration Services

- USCIS should allow an attorney to be seated next to an individual being interviewed in every case. If sufficient seating is not available, the officer should offer to reschedule the interview. If the office space at a particular field office generally does not permit appropriate seating, USCIS Headquarters should encourage the field office to make interior changes.
- USCIS must accept and consider an attorney's statements, both written and oral, and include in the record all case-related documentation submitted by counsel.
- USCIS officers should be required to advise unrepresented individuals of their right to obtain counsel at no expense to the government and to provide a list of free legal services providers.

- If an individual indicates that he or she is represented, USCIS should require a written waiver of representation before questioning him or her. The waiver should be signed by the individual and placed in the record. Further, to confirm that such individuals fully understand the implications of waiving their right to counsel, the USCIS officer should be required to ask specific questions before requesting that an individual sign the statement.
- USCIS should cease terminating interviews when an attorney is merely acting in a representative capacity. Specifically, an interview should not be terminated because the attorney is attempting to facilitate communication during the interview, objecting to inappropriate questions, or providing legal analysis to the individual being interviewed or to the USCIS officer.

Finally, DHS must take necessary steps to implement the foregoing recommendations through a commitment to training, feedback, and follow through. Perhaps most importantly, it must emphasize the expectation that its employees understand the role of counsel and work with counsel to ensure efficient proceedings. DHS must also provide a clear process for monitoring compliance with the new guidance, including a transparent complaint process, to ensure the integrity of the revised policies.

CONCLUSION

Access to counsel not only aids noncitizens in navigating a complex immigration system, but also improves the quality and efficiency of immigration proceedings. DHS' unwarranted restrictions on access to counsel undermine the integrity of the immigration system. Noncitizens and DHS officials have a mutual stake in a functional, transparent, and just legal system that ensures broad-based access to counsel.