The Second Line: Handling Issues with CBP and DOS

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We have all experienced or at least heard of client horror stories at U.S. Customs and Border Protection (CBP) and U.S. Department of State (DOS). These instances are rare, but when they do happen, they occur without our presence at consulates, airports, or the border. How do we minimize risk for our clients? This article provides background and strategies to help effectively navigate and resolve common CBP and DOS issues.

How to be prepared for secondary inspections

If the CBP officer at the port of entry cannot verify the information of an applicant for admission, or if the applicant does not have all of the required documentation, he or she may be directed to an interview area known as secondary inspection. CBP officers have very limited time to inspect arriving passengers, so secondary allows officers to conduct additional investigation in order to verify information without causing delays for other arriving passengers. While secondary inspections are fairly common, with CBP conducting more than ten million per year, they can still be a source of great anxiety for many. Here are a few words to the wise to properly prepare your client and yourself for a secondary inspection.

1. Educate your client about the inspection process.

Give your client background about CBP's inspection process. With so many millions of individuals passing through CBP per year, primary inspection can only last for a very short time. Primary inspectors in airports have only 1-2 minutes to process an applicant. If they cannot do so, they must refer the applicant to secondary. This is no reflection on CBP's decision to permit the applicant's entry; rather, secondary inspection is a procedure designed to promote efficiency and flow, given the massive volume of entrants to the U.S.

It is important to explain that the inspection areas, especially in older airports, are not usually comfortable spaces. The same is true for land border ports where overall space is often extremely limited. Secondary inspection is conducted right after primary inspection, often while the client is weary from travel. Sometimes the secondary inspection happens right away. Other times, in busy airports during busy times, the client could be waiting hours. DHS maintains its position that an individual in primary or secondary inspection is not entitled to representation, except where the person has become the focus of a criminal investigation and has been taken into custody for that purpose.

2. Anticipate problems.

Attempt to spot issues that may cause delays or trouble during the inspection process. This may include recent criminal or other ineligibility problems, violations of status, travel of long duration, a passport that will be expiring soon, etc. This will allow you to resolve re-entry obstacles through I-192s, SB-1 visas, non-immigrant petitions to change employer, make amendments, etc. Have F-1 students and J-1 exchange visitors speak with the DSO or TPL prior to departure to ensure the SEVIS record is up-to-date.

As a side note, while it is not a problem per se, make your client aware that some individuals will regularly be put into secondary, such as those traveling on advance parole. Advance parole is always tied to another status or process, such as a pending I-485 application to adjust status. Therefore, secondary inspection is needed to verify the underlying status or process. Assure your clients who are traveling on advance parole that the trip to secondary is only to verify the authenticity of the parole document.

3. Make sure the client understands his or her immigration status, as well as the limitations of that status.

The client needs to be aware of his or her current immigration status, the limitations of that status, and representations made in his or her immigration paperwork. For example, if the client has H-1B status, he or she should know the full name of the employer, the work locations, the job title, the job duties, and the salary. The client should also understand that he or she cannot work for any other employer or encounter material changes to the employment without notifying you.

4. Make yourself available for the client during the inspection process, and have the client reach out to other key individuals prior to travel.

If possible, especially if there are potential obstacles to re-entry, make yourself available for the client during the inspection process. It helps to provide your client with a direct number to reach you and to obtain your client's return travel information to be ready for a call. Additionally, have your client notify the DSO, TPL, or employer about the travel plans to have them on standby as well. In this way, information can be verified and additional documentation provided in a timely manner. Finally, have your client get the name of the officer, in case you have to contact him or her later.

5. Help the client understand the difference between a visa, an I-797A, an I-797B, and an I-94, as well as the need to inform you every time the client travels.

Have you ever encountered the client who travels unbeknownst to you and returns with an I-94 of much shorter duration than his or her approved petition? This can be very frustrating, especially if you only discover this at the time of preparing an I-129, I-485, etc. The immigration attorney should clarify the rules of travel and instruct the client to always notify you of upcoming travel.

A visa is permission for the applicant to present himself or herself for inspection. It does not govern one's immigration status here in the U.S.; that would be the I-94. The I-94 takes the form of a physical card at land borders, and is otherwise available electronically on CBP's website for all entries. Another very important concept with respect to the I-94 is the "last action rule," that is, the principle that the last issued I-94 governs your client's status, and all prior I-94s have no further legal effect.

The I-797A is a petition/application approval notice for an individual who is physically present in the U.S. and intends to remain in the U.S. in the interim. An I-94 is included at the bottom of the approval notice. Finally, the I-797B is a petition/application approval notice for an individual who is not present in the U.S., is present in the U.S. but intends to travel very soon, or is present in the U.S. but is not eligible to change or extend status from within the U.S. The I-797B does not contain an I-94.

These distinctions matter greatly. For reference, note the following examples:

A. The person who has been in the U.S. for 8 years, because his B-1/B-2 visa is valid for 10 years even though the I-94 was only valid for 6 months.

B. The person with an approved H-1B petition valid through 2018 (per the I-797A) who travels and returns with an I-94 valid through early 2016, but believes the I-797A governs her status.

C. The person with the approved I-797B who never left the U.S. to obtain an I-94 upon entry, but mistakenly believes that the I-797B controls his status.

Apart from educating your client about these distinctions, make sure to instruct your client to always look at his or her arrival documents upon each entry to ensure that the correct category and expiration date are given. If necessary, he or she should ask to speak with a supervisor. Additionally, emphasize that the client must contact you prior to travel and after returning to the U.S., so that you can review the arrival documents and resolve any problems.

6. Use deferred inspection and other resources to resolve problems.

There are over 70 deferred inspection sites throughout the United States and the outlying territories. In certain cases, CBP will parole an applicant for admission into the U.S. and schedule him or her for deferred inspection to allow time for a complicated issue to be resolved or where the applicant for admission is missing certain documentation necessary to make a determination. The applicant will be given an I-546, Order to Appear-Deferred Inspection, or an I-515A for students, explaining what information and/or documentation is needed to resolve the issue. This can be a good result for your client, since immediate action is not required, and the applicant can consult his or her attorney and likely be represented at the deferred inspection. Moreover, and more importantly, approaching Deferred Inspection Site staff can be a

great idea to remedy errors recorded on arrival documents issued at the time of entry to the U.S.

For those applicants for admission who are always stopped for questioning and inspection when clearing CBP, the Department of Homeland Security's Travel Redress Inquiry Program (DHS TRIP) may be a helpful resource. Individuals who have encountered such problems can submit a request for redress to have erroneous information corrected in DHS systems. The Redress Control Number received can then be entered when making plane reservations. Along the same line, a FOIA with CBP or other immigration-related agencies may help determine why the individual is having difficulties upon entry.

Deferred inspection to correct issues with entry

As noted above, deferred inspection sites can be very helpful to resolve inaccuracies on arrival documentation. Such errors can include improper non-immigrant classification, inaccurate biographical information, an incorrect period of admission, etc. Where CBP has made the error, it will usually make the correction, even where much time has passed. It is certainly advisable to at least try, and here are a few tips for a thorough effort:

1. Choose an office to provide assistance. Any designated deferred inspection location or CBP office located within an international airport can assist, including the applicant's local office. Most corrections are made via in-person appearance. However, 12 of the 70 deferred inspection sites currently have e-mail addresses through which you can request I-94 corrections. There is a CBP deferred inspection site chart on the CBP website, which provides this information.

2. If a particular office does not have an e-mail address to make such corrections, call the CBP office to explain the situation. If necessary, ask to speak with the Port Director. Determine whether your client needs to set up an appointment or whether walk-ins are preferred.

3. If you cannot attend, give the option for the CBP officer to call you. Give your client a direct number to reach you as well, and make yourself available (if possible) during the appointment. For a more complicated issue, write a brief summary for the officer's review. Some will read it, some will not.

4. Have your client get the officer's name. In that way, you can call the officer if there was a problem and you were not contacted during the deferred inspection appointment.

5. Inquire with another office if no one will help, or contact the AILA Chapter local CBP liaison. As noted, on the CBP website you can find contact information for the various ports of entry, as well as the deferred inspection offices.

Avoiding B-1/B-2 issues

INA Section 214(b), which puts forth the presumption of immigrant intent with every visa application and entry into the U.S., is the provision most responsible for visa denial. The applicant is wholly subject to the officer's discretion, and the officer's findings of fact cannot be appealed. This discretionary decision should focus on the applicant's individual circumstances, but it seems unlikely that officers who work in countries with a high incidence of fraud and/or overstays would not be affected by such circumstances. Still, we must focus on what we can control, and a prepared client and strong documentation (in that order) can go a long way.

There are two important components to overcome 214(b), namely the applicant's concrete, temporary plans in the U.S. and the applicant's substantial proof of ties to the home country.

The applicant must intend to enter the U.S. for a temporary period with specific and realistic plans related to business or pleasure. When assisting a client who is attempting to enter the U.S. in B-1 or B-2 status, it is helpful to keep the following in mind with respect to concrete, temporary plans:

1. Use the Foreign Affairs Manual (FAM), the authoritative source for the U.S. Department of State's policies and procedures. It has a well-crafted section that enumerates the many acceptable B-1 and B-2 activities. Try to fit your client's plans into one of the enumerated activities, especially if the travel is not just to visit friends and family.

Acceptable B-1 activities include negotiation of contracts, participation in conferences or research, exploration of investment opportunities in the U.S. such as for a future E-2 visa, litigation, and even commercial transactions not involving gainful employment in the U.S. For example, a U.S. entity purchases technical equipment from a foreign entity. The transaction includes installation, maintenance, and training, so the foreign entity sends a few employees to the U.S. in B-1 status to conduct those activities. The employees' principal place of business is in the foreign country, and the accrual of profits are in the foreign country, so B-1 status makes sense in this case.

Acceptable B-2 activities include travel to receive medical treatment, travel to engage in a short course of study, and travel as the fiancé(e) of a U.S. citizen, LPR, or nonimmigrant. A good strategy to help show that the client fits within a specific B-1 or B-2 activity is to write a letter to CBP or the Embassy, explaining the situation.

2. Talk to the client about how he or she will fund the temporary visit to the U.S. Appropriate funding serves as good evidence that the client will not engage in unauthorized work. To this end, a description of the client's means of financial support while in the U.S. accompanied by proof of employment in the foreign country, the bank account statements of the client or a family member or friend who will provide support, proof of the assets of the client, etc. are helpful evidence to provide.

3. A letter of support from a friend or family member may be helpful in certain cases, particularly when proof of ties to the home country is weak or the client has inadequate funding for the trip. The letter can highlight the relationship, the definite plans associated with the trip, and the funding.

As noted, the applicant must also demonstrate substantial proof of ties to the home country. This concept is expressed in the FAM as a residence in a foreign country, which the applicant does not intend to abandon. To help your client meet this crucial component, consider the following:

1. Evaluate all evidence of ties to the home country. There are many points of attachment that can be documented, such as school attendance, employment, business, property, family, finances, and social/cultural ties. Evidence can be made available to the officer to establish the substantial ties. For example, evidence of employment can include current paystubs and a letter of employment. Additionally, if the applicant has been granted leave by the employer, it is a great idea to get documentation that leave was approved and that it is temporary.

2. Have an interview preparation session with the client. Some officers read the documentation, but all officers read the applicant's face, body language, and answers to direct questions. Consular officers and CBP officers have very little time to assess the applicant, so often the most important evidence for the visa application is your client's confident and thorough responses to the officer's questions. Spend some time with your client going through the application and evidence. Additionally, ask your client questions, especially on the weaker aspects of the application.

<u>Visa Application at a Consular Post</u>

Preparing your client for visa application at a consular post is a process that involves several steps. Best practices for preparing your client for visa application include:

1. Plan ahead to account for wait times for an appointment, which varies from 1-40+ days, depending on the consular post, season, and local events. Although it is possible to expedite a visa appointment for a reasonable cause, consular posts do not always exercise favorable discretion in that regard so it is best to know the wait times in advance to manage client and employer expectations.

2. Review instructions on the consular post website. Some consulates have limitations on the number of pages to be submitted in an evidence package, or require certain documentation for particular visa types.

3. Complete, save, & submit Form DS160. It is always a best practice to print the application and review it with the applicant prior to submission to ensure that all of the information is accurate; do not rely on the applicant to complete this step without attorney review. Statements made on visa applications can be used to

deny subsequently filed petitions or applications; they may also impact admissibility for an immigrant visa or adjustment of status applications.

4. Pay the MRV fee and schedule the appointment online or via phone.

5. Allow enough time for receipt of passport via courier service after approval and advise the client and employer of possibility for delay due to administrative processing or further review required by the post. Typically the delay is 1-2 weeks, but can be up to 6 months or longer.

What actually happens at a consular interview?

Consular officers generally spend between 1-4 minutes with your applicant during which time they must decide four things:

1. Why is the applicant applying for the visa?

2. Is the visa they are applying for the right visa for the intended purpose?

3. Has the applicant satisfied the requirements for the visa for which they are applying?

4. Is the applicant admissible? (Have they rebutted the presumption of immigrant intent? Are there any statutory reasons why they cannot be issued a visa?)

How do consular officers make those determinations?

- Purpose of travel

Consular officers will review Form DS160 and the supporting documentation. He may question the applicant to determine if the purpose of travel is permissible under the visa category for which they are applying.

- Eligibility and Appropriateness of Visa Type

Consular officers determine whether the applicant has met the requirements for the visa type by reviewing the supporting documentation (e.g., DS2019 for Js, I-129 for H and L, I-20 for F). He will review the applicant's work experience and credentials (e.g. specialized skilled knowledge for L1B; managerial/supervisory experience and role for L1A; university degree or equivalent for H). Finally, he will review the purpose of the travel to determine whether it is appropriate for the visa (e.g., determining that B applicants will not engage in employment and/or engage in a permissible level of training).

- Admissibility

Consular officers must also determine whether the applicant is admissible based on statutory grounds unrelated to the requirements of the visa. For example, has the applicant made any material misrepresentations? Has he violated US immigration laws? Does he trigger any health related grounds of inadmissibility (rare)? Has he triggered inadmissibility due to certain criminal arrests or convictions? Can the applicant rebut the presumption of immigrant intent with evidence (personal, economic, professional ties to a residence outside the US)?

Preparing for a Consular Interview

There are two important things that you can do to help ensure that the visa application process goes smoothly: 1) prep your applicant for the interview, and 2) provide the consular officer with comprehensive support documentation.

- Interview Prep

Never assume that a USCIS approved petition will automatically result in a visa. While it may not be common, consular officers can and do recommend revocation of a petition approval and send it back to USCIS. Ensuring that your client understands that visa issuance is never a guarantee is an important first step in preparing him for the interview.

Your client should have a copy of the documents that were filed with USCIS and be familiar with its contents. He must understand the position or role that he will be performing; he should know about the employer; he must know where he will be working – all of those facts should be the same as what was stated in the petition and supporting documentation.

While it may seem intuitive that your client will know what he will be doing, for whom, and where, the interview process can be a stressful event resulting in misstatements or misunderstanding. This is particularly true if the applicant is already of the anxious sort or does not have a strong command of the English language. Add those stresses to an intimidating interview environment, i.e. a consular adjudicator talking to (but typically not really looking at) your client through a bulletproof glass window, often a few inches above the applicant peering down, typing away at the computer as if a decision has already been rendered, and you have a recipe for a nervous wreck disaster. A mock interview with the client via Skype or other video conference method is a best practice; skipping this step is a disservice to the client. If video conferencing is not feasible, a mock telephone interview is a minimum step in preparing your client for the interview.

Your mock interview should start with softball questions to give your client an opportunity to practice explaining his life (i.e. reason for visa application) in about 1-2 minutes. A video conference will also give you the opportunity to assess your client's appearance since presentation does matter in many instances. Make sure that your

client dresses and acts the part for their interview; business visa applicants should be familiar with the company, understand the role they are to assume in the US, and demonstrate that they are experienced and/or qualified for that role; students should look like students – they should have English language skills, prove financial ability to support themselves without having to engage in employment while studying, and demonstrate sufficient home ties to rebut any presumption of immigrant intent; visitors should look like visitors – if they are applying for a tourist visa, they should know the places that they intend to visit.

It is also critical to identify potential problem areas before the interview and before the DS160 is submitted. In your interview prep, you should discuss the following with your client:

- The strength of the applicant's home ties abroad or the existence of family ties in the US to identify risk factors and likelihood of denial under section 214(b) for immigrant intent.
- Whether the applicant has previously applied for US visas, whether those visas were issued or denied, and the reasons for any denial.
- Whether the applicant may face other grounds of inadmissibility due to arrests, convictions, unlawful presence in the US, violation of US immigration laws, health or substance abuse concerns.

Managing your client's expectations is another best practice. While visa applications, particularly those with prior petition approval, are generally a smooth process for most there are various reasons that could result in delay. For example, administrative processing at a consular post is relatively common. While administrative processing delays are typically resolved in 1-2 weeks, it is possible to have delays that take much longer. Your applicant and the employer must understand that visa issuance is not guaranteed. This can be a very tough pill to swallow if your applicant is the Global CEO of a household name, international employer. Further, if your applicant has had criminal convictions or arrests for alcohol or drug related offenses, he may be subject to health screening by a panel physician, which will certainly result in visa issuance delay. Planning ahead for those delays and having a contingency plan for the employee if a delay occurs is a best practice. It is generally best to advise your client of worst case scenarios even if you anticipate and expect the interview to go perfectly. As long as the applicant and employer know that problems can arise, even if they are not expected, they will not feel blindsided if something does go awry.

Prepare your client with basic information to make them feel more comfortable. For first time visa applicants, for example, it will be beneficial to them to have the tips below. Knowing what to expect can help your client be less nervous.

Tips to relay to your client about what to expect at the consular interview:

- Advise your client to appear for their interview no earlier than 15 or 20 minutes. Applicants arriving earlier than 30 minutes for the interview will most likely be turned away.
- The interview will be brief, sometimes as brief as 1-2 minutes. The consular officer may not always make eye contact or engage in conversation. It may feel intimidating to be standing at the window counter, looking up at the consular officer. Your applicant may feel a lack of privacy during the interview process as the questions are asked through the window rather than in a separate, private office. Having this background information helps set the stage for the process so that your applicant will be prepared for what may seem like a short and sterile application process.
- Do not have your client show up with his briefcase and framed diplomas. He should have an organized copy of the documentation that will be needed for the interview, his identification and passport, and perhaps a book to read while he waits. This also helps facilitate easy transfer of the documents to the consular officer. Trying to locate what the consular officer needs in a stack of unorganized documents will only frustrate the officer and panic the applicant.
- When called to the counter window, your applicant should have his application and passport in hand to avoid having to rifle through documents –that only makes a nervous applicant more nervous.
- Instruct your applicant to present the supporting documents only when asked for them. Advise your client not to start shoving their folders or documents through the window prior to instruction. Often, consular officers rely on the verbal interview in making visa issuance determinations.
- If your applicant has been arrested or convicted, he should have copies of all relevant records to present to the officer upon request.
- Advise your client to be respectful to the consular officer. While this should go without saying, it is important to relay to your client that if they feel they have been wronged, insulted, or subjected to an improperly denied visa, they must remain calm and not get angry with the officer. Off the cuff negative remarks may result in that officer making notes in the system that a subsequent consular officer will review at a later visa application.

<u>Comprehensive support letter/documentation</u>

Most practitioners provide comprehensive support letters with petitions filed with USCIS. The same should be done for visa applications at the consulate. The support letter should address the issues of concern for the consular officer:

1. the purpose of the application;
2. evidence of qualification for the visa;
3. appropriateness of the visa type; and
4. Admissibility of the applicant.

These support letters should include all relevant information, detailed descriptions of the purpose (e.g. for L1A visa applicants, description of both the role abroad and in the US

to include percentage of time breakdowns, organizational structure of the role, etc.), information about the applicant and his qualification, education, and experience background. How you structure your support letter will depend on the particular visa type for which your client is applying.

In addition to the support letter, which has typically already been prepared and submitted to USCIS in a visa petition, it is also best practice to prepare a one page bulleted summary of the case to help the consular officer adjudicate quickly. Place that summary sheet on top of the support documentation presented to the officer. Take the opportunity in this one sheet summary to elucidate any issues that might arise. Often, your concise summary will help guide the officer to the decision you want.

Consular requests for information, 221(g), and Administrative Processing

Interview preparation with your client will most often reveal any issues that may arise during a consular interview. For example, if you determine that your client has weak home ties, you may suggest that he collect stronger evidence to present at the interview upon request such as bank records, employment records, evidence of residence, ability to pay the costs of the trip, etc. Accordingly, solid interview preparation should head off any request by the officer for additional information since your client will already be prepared to present it.

However, when attending an in-person consular interview, additional documentation may be requested to establish eligibility. Examples of additional requested documentation may include:

- Updated resumes, pay statements, or offer letters of employment;
- Evidence regarding the applicant's intent to depart the US;
- Evidence regarding your applicant's ability to pay the costs of the trip;

Administrative processing and 221(g)

Refusal under Section 221(g) means that essential information is missing from an application or that an application has been placed on administrative hold. The consular officer who interviews your applicant will tell him at the end of the interview if action on his case is being refused under 221(g) pending further information. As mentioned above, even if your client's petition is approved, the consular officer may still find new issues and deny the visa. Examples that would lead to a 221(g) refusal can include: the officer discovering that the degree certificate is not authentic or that the applicant does not have the experience claimed, or that the petition was approved through fraud or misrepresentation, or that there is missing documentation needed to approve the visa.

In these cases, the consulate can refuse the visa under 221(g) and return the case back to USCIS for reconsideration and/or revocation of the approved petition. If the consular officer requests documentation that your client does not have on hand, he will be issued

a request for that documentation in writing and the visa application will be held until the information is received.

If the 221(g) refusal was issued where there are simply documents missing or additional confirmation of petition approval or background checks are needed, the consulate may issue the visa once the missing documents are presented or the confirmation/security clearances have been obtained. In cases where there is a request for additional documentation, the consular officer will instruct the applicant how to submit the requested documentation. Always review your client's submission to the officer before it is sent to ensure that the response is complete. Once the officer has reviewed the submitted documents, your client will be contacted for follow up.

Revocation process

Consular officers do have the discretion to initiate the revocation process of an approved petition after visa interview. If you have never had a client go through this process, it can be extremely frustrating, time consuming, and costly for the employer and the applicant.

The revocation process seems to be used most frequently at Indian consulates and is quite burdensome, taking at least 3 months to complete but often as long as 1-2 years. The revocation process typically goes through the following steps:

- Consular officer issues a 221(g) refusal notice that indicates that the petition is being returned to USCIS. The negative findings or factors may not necessarily be disclosed on that notice; they may not even tell the applicant or attorney of record. Some consuls will discuss over email the negative findings of the case, but not all of them will be so generous.
- When the National Visa Center receives the returned petition, it reviews it and enters it into the fraud database by fraud management. This step could take 2-3 months.
- Once the data entry/review process is completed by NVC, the petition is returned to the USCIS service center that adjudicated it.
- The USCIS service center will issue a receipt notice to the petitioner indicating that it has received the petition back. This step can take 1-2 months.
- The USCIS service center reviews the returned petition, along with the consular officer's notes. However, this review process is not a high priority. This step can take several months.
- Once the service center completes its review, a Notice of Intent to Deny (NOID) or a Notice of Intent to Revoke (NOIR) will be sent to the petitioner requesting documentation or explanation relevant to the consular officer's objections. NOIRs and NOIDs generally will be issued with a 30-60 day response window.
- Assuming the service center receives a timely response from the petitioner it will either reaffirm the original petition or officially deny it.

- If the petition is reaffirmed, the service center will send the reaffirmed petition and the supporting documentation provided in the NOIR/NOID response back to the original consulate along with a recommendation to issue the visa.
- Once the consulate receives the package, it will notify the beneficiary of a new interview date and the applicant will return to the consulate and be interviewed again for the visa.
- After the consulate completes its second interview, the visa will be issued, or it will be placed in administrative processing or denied again under 221(g) and sent back to USCIS with a recommendation for revocation.

Many employers may not wish to wait 1-2 years for a potential employee to complete the revocation process at a consulate. Some may wish to start over and file another petition with additional support documentation (the applicant would ideally have gained additional experience as well), pursue other avenues to get the employee to the US (e.g. initiate a permanent residence case and seek IV status rather than NIV), or will simply give up and look for a different employee. Understanding how the revocation process works and how long it takes is essential to advising your client regarding strategy to resolve difficult issues such as this.