AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

January 27, 2014

U.S. Customs and Border Protection
Attn: Tracey Denning
Regulations and Rulings
Office of International Trade
90 K Street NE, 10th Floor
Washington, DC 20229-1177

Re: CBP 60-Day Notice and Request for Comments: Arrival and Departure Record (Forms I-94 and I-94W) and Electronic System for Travel Authorization
OMB Number: 1651-0111
78 Fed. Reg. 70570 (Nov. 26, 2013)

Dear Officer Denning:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced 60-Day Notice and request for comments on the information collection requirements associated with CBP Form I-94, Form I-94W, and the Electronic System for Travel Authorization (ESTA).[1]

AILA is a voluntary bar association of more than 13,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on this 60-Day Notice and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views that will benefit the public and the government.

Description of the Federal Register Notice

In the 60-Day Notice, CBP seeks feedback on ways to enhance the quality, utility, and clarity of the information collected via Forms I-94 and I-94W and ESTA, and ways to minimize the burden associated with collecting such information, including the use of automated collection techniques and information technology. In addition, CBP proposes to revise some of the questions on Form I-94W and ESTA and to collect more detailed information about health and security issues. The content of the proposed changes to the I-94W and ESTA is not included in

[1] 78 Fed. Reg. 70570 (Nov. 26, 2013), 60-Day Notice and request for comments; Revision of an existing collection of information: 1651-0111, *published on* AILA InfoNet at Doc. No. 13112741 (*posted* 11/27/13).

AILA National Office
1331 G Street NW, Suite 300, Washington, DC 20005
Phone: 202.507.7600 I Fax: 202.783.7853 I *www.aila.org*

the Notice. CBP also requests comments on information gathered in connection with Form I-94 in either an electronic or paper format.

CBP's PROPOSED CHANGES TO FORM I-94W and ESTA

AILA strongly supports the enhancement of our national security through the efficient and effective control of the cross-border flow of goods and people, with appropriate allocation of resources. Toward this end, we commend the initiative by CBP to improve the language used in Form I-94W and ESTA, though we are concerned with the clarity of some of the questions on these forms.

Clarify the Question Relating to Crimes Involving Moral Turpitude

First and foremost, we are concerned about the question on both the ESTA and Form I-94W, which asks travelers to indicate whether they have been "arrested or convicted of a crime involving moral turpitude." This question presents challenges to almost anyone who has ever interacted with the criminal justice system. The determination as to whether a particular offense is a crime involving moral turpitude involves a complex legal analysis, which, even after completed, may not yield a clear answer.

The terms "conviction" and "crime involving moral turpitude" are derived from INA §212(a)(2)(A)(i). Though the questions on the ESTA application and Form I-94W should be revised to provide greater clarity, a dilemma is presented which is not easily resolved. In order for respondents to understand the significance of these terms, it appears that the question will either have to be long and cumbersome or short and overly broad. We examine these two options below.

Option #1: Ask Questions Supported by Clear Definitions

The first option involves amending ESTA and Form I-94W to provide definitions of the terms "crime involving moral turpitude" and "conviction." For example, with regard to the definition of a "crime involving moral turpitude, the Board of Immigration Appeals has said:

> A "crime involving moral turpitude" is generally defined as one that involves conduct that is inherently base, vile, or depraved, and is contrary to the accepted rules of morality and the duties owed between persons or to society in general.[2]

If the form is amended to include a definition such as this, the amendment should include the following note immediately after the definition:

---

[2] *See e.g., Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994); *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988); *Matter of Flores*, 17 I&N Dec. 225 (BIA 1980).

NOTE: If you believe the offense for which you were arrested or convicted may fit within the definition of a "crime involving moral turpitude," you must answer YES to this question.

Similarly, CBP should provide further information regarding the term "convicted," citing INA §101(a)(48), as follows:

The term "conviction" means:

1. A formal judgment of guilt entered by a court, *or*, if adjudication of guilt has been withheld:

   - A judge or jury has found you guilty;
   - You entered a plea of guilty or "no contest;" or
   - You have admitted facts sufficient to warrant a finding of guilt;

AND

2) A judge ordered some form of punishment, penalty, or restraint on your liberty.

Persons who have received a deferred adjudication often do not understand that for purposes of U.S. immigration law, they have a conviction. In addition, individuals who have benefited from a judicial proceeding in which a record of conviction is suppressed are often instructed that they no longer need to report their conviction. Such persons might mistakenly believe that they do not need to disclose the conviction during the visa application process and inadvertently violate the U.S. immigration laws.

In the ESTA context, in order to ensure that applicants read the definitions, the software might be structured to require an affirmation of having read them before proceeding to the next page with the question asking if the individual has ever been arrested or convicted for a crime involving moral turpitude or other relevant offense.

Option #2: Ask a Simple But Broad Question

Although the question "Have you ever been arrested?" is broad, and an affirmative answer will inevitably include many admissible persons, a similar question is used by U.S. Citizenship and Immigration Services on Form I-485, Application for Adjustment of Status. However, in the context of adjustment applications, applicants are afforded an opportunity to provide documents to clarify the nature of the offense and its disposition.

It should be noted that unless CBP is able to allocate sufficient resources to receive and review documentation demonstrating the disposition of each matter arising from an arrest, this option will likely result in a much larger number of ESTA denials. However, merely having been arrested for or convicted of a crime other than one involving moral turpitude or a controlled substance should not preclude participation in the visa waiver program. Moreover, an increase in ESTA denials will result in an increase in B-1/B-2 visas, which will place an additional burden on U.S. consular posts. Some individuals may prefer this option, rather than risk a finding of inadmissibility for immigration fraud for having misunderstood the definitions of the terms "conviction" and "crime involving moral turpitude."

If this approach is taken, the following question should be stricken from the ESTA and I-94W Forms:

> Have you ever been arrested or convicted for an offense or crime involving moral turpitude or a violation related to a controlled substance; or have been arrested or convicted for two or more offenses for which the aggregate sentence to confinement was five years or more; or have been a controlled substance trafficker; or are you seeking entry to engage in criminal or immoral activities?

In its place, the following question (used by USCIS on Form I-485, Application for Adjustment of Status) should be substituted:

> Have you ever in or outside the United States been arrested, cited, charged, indicted, convicted, fined or imprisoned for breaking or violating any law or ordinance, excluding traffic violations?

If CBP was able to dedicate sufficient resources to review the legal merits of each arrest, citation and charge, the ESTA registration website would need to be updated to allow applicants to upload the record of arrest/conviction. CBP should then work to ensure that a review of the applicant's admissibility occurs within a reasonably short timeframe (no greater than a few weeks), and if the applicant is deemed admissible, the ESTA application should be approved.

Without sufficient resources to ensure a timely review of admissibility, all applicants whose ESTA applications are denied based on a "yes" answer to the question would need to be referred to a U.S. Embassy or Consulate to apply for a visitor visa. The ESTA denial should clearly state that the applicant should "gather certified documents relating to [his/her] arrest, citation, charge, indictment, conviction, fine or sentence of imprisonment to present to the U.S. Embassy or Consulate at the time of [his/her] visa application."

We also urge CBP to work with the Department of State to create a system whereby DOS can report to CBP regarding visitor visa applicants who are admissible notwithstanding a minor criminal history, with the express intent of facilitating ESTA registration in the future.

Differentiate Between the Words "Work" and "Employment"

AILA recommends that CBP provide greater clarity to the distinction between the terms "work" and "employment" as interpreted under the immigration laws. For example, Question "D" on ESTA and the I-94W currently states:

> Are you seeking to work in the U.S.?

This question is open to misinterpretation by legitimate visitors for business, who could easily answer "yes" based on the mistaken understanding that their intended business activities constitute "work." Clearer language should be used to differentiate between permissible B-1 activities and unauthorized employment in the U.S. We therefore recommend the following language:

> Will you be gainfully employed in the U.S.?
>
> "Gainfully employed in the U.S." means performing productive labor or services in exchange for a wage, salary or other remuneration from a U.S. source and/or the accrual of profits for labor or services rendered inside the U.S.
>
> The term "gainfully employed in the U.S." does not include engaging in commercial or professional activities inside the U.S. on behalf of an employer outside the U.S. such as soliciting or completing commercial transactions, negotiating contracts, consulting with business associates, litigating; or attending meetings of the Board of Directors of a U.S. corporation; or participating in scientific, educational, professional, or business conventions, conferences, or seminars; or undertaking independent research.

Clarify That a Visa Refusal Is Equivalent to a Visa Application Denial

CBP has interpreted a visa refusal under INA §221(g) to constitute a visa denial that must be disclosed on Form I-94W or ESTA. This interpretation creates confusion for those persons whose visas were ultimately issued even though their visa applications were temporarily held in abeyance pending a security clearance or production of a required document. Such persons are expected to indicate that a visa was refused, but this is not at all clear based on the wording of the question. Therefore, we recommend modifying the language on the ESTA and I-94W forms to make CBP's intent clear, as follows:

> Have you ever been denied a U.S. visa or entry into the U.S. or had a U.S. visa canceled?

- If you have ever had a nonimmigrant visa application referred for "Administrative Processing" by a consular officer, answer "Yes" to the above question and explain.
- If, at the request of a consular officer, you have completed a new Form DS-160 to correct the visa category stated on a submitted Form DS-160, you should answer "Yes" to the above question and explain.
- If you have ever applied for a U.S. visa and the visa application was delayed ***for any reason*** even if you subsequently were issued a visa, you should answer "Yes" to the above question and explain.
- If you have ever applied for a U.S. visa and you did not receive the visa ***for any reason***, you should answer "Yes" to the above question and explain.

Add a Traveler Redress Number to the ESTA Application and Form I-94W

Currently, a redress number, provided as part of DHS TRIP, can be inserted into the Advanced Passenger Information System that the airline submits to Secure Flight Passenger Data (SFPD). AILA respectfully requests that a field to capture a redress number, if any, be added to ESTA and Form I-94W. This will allow for centralization of the data and will further facilitate travel. We therefore recommend that the following language be added:

> If you have ever applied under the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) to resolve difficulties you have experienced when traveling to the U.S., please provide your traveler redress number: _____

AILA's PROPOSED CHANGES TO FORM I-94

The Federal Register Notice states that there are currently no proposed changes to Form I-94. However, AILA recommends the following additions to Form I-94:

Add an "Employment Authorized" Endorsement to the Electronic Form I-94 for E-2 and L-2 Spouses

AILA recommends that CBP resume its practice of adding an "Employment Authorized" endorsement to the Form I-94 for E-2 and L-2 spouses. Specifically, for those E-2 and L-2 spouses entering the U.S. by air or sea, we recommend that CBP adjust the admissions software to automatically include an "Employment Authorized" endorsement on the electronic I-94 record. For those entering at land border crossings, the endorsement should be made manually on the paper Form I-94.

The statute unequivocally mandates providing E-2 and L-2 spouses with an "employment authorized" endorsement or "other appropriate work permit" as evidence of their employment eligibility. *See* INA §214(e)(6) (pertaining to E-2 spouses) and INA §214(c)(2)(E) (pertaining to L-2 spouses). Moreover, CBP already gathers the data needed to verify that an individual is the spouse of an E-2 or L-1 worker and, upon admitting such persons, automatically creates an electronic record demonstrating their lawful status. The software should be able to identify the legal basis for an individual to qualify for E-2 or L-2 status as the spouse of a nonimmigrant worker. Adding an "employment authorized" endorsement as a field automatically generated in the electronic Form I-94 record for appropriate dependent spouses would create no additional administrative burden for CBP officers at air and sea ports. Manually adding such an endorsement would be a minimal additional burden to officers at land border crossings. Both the automatic electronic record and the manual endorsement process would allow DHS to efficiently comply with the statutory mandate to provide such an endorsement or permit.

Add a "Multiple Entry" Endorsement to the Electronic Form I-94 for TN Workers

AILA recommends that CBP adjust its admissions software to include a "multiple entry" endorsement on the electronic Form I-94 admission record of qualified TN nonimmigrant workers arriving at an air or sea port. Pursuant to 8 CFR §214.6(e), a citizen of Canada or Mexico admitted in TN status "*shall* be provided a confirming document" that "*shall* bear the legend 'multiple entry'" (emphasis added). Thus, CBP is required by regulation to generate an admission record that bears a multiple entry endorsement. CBP already gathers the data needed to verify an individual is a TN worker and, upon admitting such persons, automatically creates a document demonstrating their lawful status. The software used to create the electronic I-94 admission record clearly identifies the individual as a TN nonimmigrant. Adding a "multiple entry" endorsement as a field that is automatically generated in the electronic I-94 would create no additional administrative burden for CBP officers and would create a minimal additional burden for those officers manually completing the paper Form I-94 at land border crossings. Both the automatic electronic record and the manual endorsement process would allow DHS to efficiently comply with the regulatory mandate to provide such an endorsement.

CONCLUSION

AILA appreciates the opportunity to comment on this Notice, and we look forward to a continuing dialogue with CBP on this issue.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION