



AMERICAN IMMIGRATION COUNCIL



March 24, 2011

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

Dear Director Mayorkas:

The American Immigration Council (AIC) and the American Immigration Lawyers Association (AILA) have received widespread reports of restrictions on access to counsel during USCIS interviews and other interactions with the agency. Both organizations are concerned that the scope of these restrictions may violate due process guarantees set forth in applicable statutes and regulations. We are writing today to highlight our concerns in the hope of beginning a dialogue about these issues.

AIC and AILA recently conducted a nationwide survey to gather information about access to counsel and attorney and client interactions with USCIS, CBP and ICE. We then collaborated with Penn State Law's Center for Immigrants' Rights to analyze more than 250 survey responses submitted by immigration attorneys practicing throughout the country. The data provided in these responses regarding interactions with USCIS depicts a system where restrictions on representation are recurrent and widespread. These problems have continued despite extensive liaison efforts between AILA and USCIS and promises from USCIS that new guidance would be forthcoming. Several survey responses describing limitations on representation are attached as an appendix to this letter.

Immigration attorneys report that USCIS officers frequently limit their ability to communicate with their clients. For example, some USCIS officers instruct attorneys to sit in a particular place in the room during client interviews. One Ohio 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. The USCIS officer explained that this seating requirement was a "new rule." In another instance, a Virginia attorney reported that she was told to sit behind her client during an interview and not to make eye contact with her client.

USCIS officers also limit attorneys' ability to speak during an interview. A Michigan attorney reported that, after attempting to clarify his client's statement in response to a USCIS interviewer's question, the officer stated, "This is not your interview; this is my interview," and refused to allow the attorney to speak further. An Arizona attorney reported that when she attempted to clarify an interview question for her client, the USCIS officer threatened to have her removed from the room or to terminate the interview. Several attorneys reported that USCIS officers have imposed particularly harsh restrictions in cases where the government is scrutinizing marriage petitions. A Connecticut attorney stated that some USCIS officers have taken the position that beneficiaries of I-130 petitions are not entitled to attorneys. A Florida attorney reported that she has been repeatedly prohibited from speaking in marriage interviews. A Colorado attorney who spoke to his client during a marriage interview reported that the USCIS officer "shouted" that the attorney was "interfering with the interview." A Chicago attorney reported that a USCIS officer told her that if she spoke during a marriage interview, she would be "thrown out." Her request to speak with a supervisor was denied.

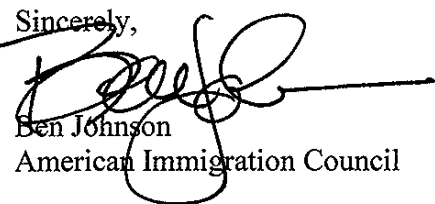
USCIS officers also limit an attorney's ability to provide relevant documentation to an interviewing officer. A Missouri attorney reported that he was prohibited from submitting documents pertinent to his client's case. A Connecticut attorney reported that some USCIS officers selectively accept documents offered in support of an application.

Interviews and other interactions with immigration officers can often be intimidating and confusing, and noncitizens seek assistance from attorneys to help them navigate this challenging process. The important role of counsel in interactions with USCIS officials is recognized in the governing law, both statutory and regulatory. Notably, the Administrative Procedure Act (APA) grants a right to counsel for individuals who are compelled to appear before an agency or agency representative. 5 U.S.C. § 555(b). Regulations governing DHS also provide a right to counsel. For instance, 8 C.F.R. § 292.5(b) states that "[w]hen an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative" 8 C.F.R. § 292.5(b); *see also* 8 C.F.R. § 103.2(a)(3) (any applicant or petitioner submitting a form to DHS prescribed by Chapter One of C.F.R. Title 8 may be represented by an attorney); 8 C.F.R. § 208.9 (an asylum applicant interviewed by an asylum officer may have counsel or a representative present); 8 C.F.R. § 244.8 (an applicant for Temporary Protected Status may have a representative who may "consult with and provide advice to the applicant").

Currently, USCIS policies affecting access to counsel are difficult to ascertain. To the extent agency guidance is available, attorneys report that it is unclear and inconsistently applied. Although USCIS officials have

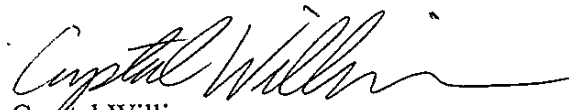
discussed forthcoming guidance on access to counsel, AIC and AILA are unaware of any definite timetable for its issuance. *See, e.g.*, Summary of 2010 USCIS Field Operations Directorate Quarterly Meeting (June 6, 2010) (“FO leaders agree that, barring safety or security concerns, attorneys and/or accredited representatives should be able to sit next to their clients during benefit interviews. We are working on guidance to address concerns expressed by stakeholders and will post it once available on the USCIS website”), available at <http://www.uscis.gov>.

The applicable law and regulations provide for access to counsel before DHS. Yet agency policies sometimes severely restrict counsel’s ability to participate in agency proceedings. These restrictive policies should not continue. Access to counsel is not only vital for immigrants attempting to navigate our complex immigration system, but also improves the quality and efficiency of immigration proceedings. Some attorneys who responded to our survey noted that certain USCIS officers openly recognize the benefit of attorney participation in interviews. By opening a dialogue with USCIS, we hope to better understand why some USCIS officers continue to impose restrictions on access to counsel and to provide input on new guidance that better reflects existing statutory and regulatory protections. This dialogue will also help inform a White Paper we are drafting with Penn State Law School’s Center for Immigrants’ Rights on access to counsel before DHS; publication is expected in the spring. These advocacy efforts are premised on the idea that immigrants and USCIS officials have a mutual stake in a functional, transparent and just legal system of which access to legal representation is an essential part. We look forward to future opportunities to discuss these concerns with you.

Sincerely,


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

ATTORNEY #1

The following is an excerpt from a complaint letter submitted by an immigration attorney regarding the behavior of a USCIS officer during an interview on an I-130 petition:

I am writing to make you aware of some deplorable conduct by Officer [REDACTED] during an interview with my clients. This was their second interview with USCIS, which was conducted on Monday, September 27, 2010. The file number is [REDACTED]. I am grateful that the interview was videotaped and respectfully, request you review it. Firstly, she refused to allow me [to] speak during the interview to clarify some of her questions for my clients. Further, she threatened to have me removed or the interview terminated whenever I attempted to speak. She is fully aware that as my clients' attorney of record, I have a right and purpose to be present. Officer [REDACTED] was actively and unlawfully preventing me from doing my job.

Secondly, Officer [REDACTED] intimidated my client, [REDACTED] to the point where she was reduced to tears. My client's mental state was further reflected by her statements to the Officer that Mr. [REDACTED] was the first man to support her emotionally. Additionally, my client explained on the videotape how she had been abused in prior relationships and jilted at the altar once before. None of this was placed in her written sworn statement even though she specifically requested that it be contained therein. Officer [REDACTED] then, attempted to ask my male client sexually inappropriate questions! My client's sexual relations are not material to [his] case and of a highly sensitive and intimate nature of which he has a recognized, fundamental right to privacy. I am not sure why she would try to attempt to ask such things other than to harass Mr. [REDACTED] and to satisfy her own perverted curiosity. Towards the end of the interview, Officer [REDACTED] grabbed my notepad, on which I was taking notes, and attempted to read them; thus, attempting to violate the Attorney/client privilege and become privy to my privileged and legally protected attorney work product.

Officer [REDACTED] further insisted that my clients sign affidavits that she misdrafted in her own words. Those affidavits were so poorly written that it reflected Officer [REDACTED] lack of basic command of the English language. Some of the sentences in the sworn statements were not coherent and some would have reflected falsity due to her inability to accurately type and write a sentence in English. Officer [REDACTED] additionally needs training in basic grammar, unless her writing was a deliberate attempt to viciously deny my client's

petition and harass my clients. I am requesting a careful and fair review of my clients' interview. Further, I ask that Officer [REDACTED] be required to perform her job duties in such a way that she complies with the law and USCIS policies and does not bring disgrace to the agency. Thank you for your time and attention to this matter.

ATTORNEY # 2

The following is paraphrased from a follow-up telephone conversation conducted with an attorney based on an initial written response regarding an adjustment of status interview:

I was helping friends with an adjustment of status interview for a fiancé visa. The interviewer asked the client about a time that he went out of the country. I attempted to clarify what happened by interjecting that he had actually been to that country many times (as this would help solidify the relationship). The officer interrupted and stated, "This is not your interview. This is my interview." She would not let me say anything else. I feel this is the policy of the officer - not to let attorneys speak during adjustment of status interviews. I did not attempt to argue with the officer and, luckily, the outcome was favorable to the client.

In another situation, I represented a client who had very little education, was of low income, and there were language barriers. The client was called back to the office early for the interview, before I arrived. When the client told the officer she had an attorney, the officer did not stop the interview. The officer told me later that it was up to the client to stop the interview. If the client did not protest her attorney not being present, the officer could continue. I think this is a problem because the client did not have the knowledge or language capacity to stop the interview.

ATTORNEY # 3

The following is an excerpt from an e-mail submitted by an attorney regarding I-130 interviews:

The [REDACTED] office is notorious for poorly trained examiners . . . We bring up issues over and over at our liaison meetings and the response is always "that it is an individual situation." The real problem is the deputy director who has been acting director twice, and who instructs his examiners in improper ways to look for denials. He came right out and admitted at one meeting that he tells examiners to trust their gut no matter what the documentation proves. He has his examiners write insulting notices of intent to deny using language like, "this is a poorly rehearsed attempt to circumvent the immigration

laws by presenting a fraudulent marriage.” . . . When the deputy director was asked at a meeting why [REDACTED] has such a high denial rate on marriage cases, he said "Well, look at the population we serve, we have a high number of West Africans." . . . Virtually every examiner he trained is a problem and needs retraining. There are those who are merely obnoxious in questioning and others who are scary, and who even try to intimidate clients who are represented into withdrawing their marriage applications. Example: "You look like a nice lady. We know you were trying to do Mr. XYZ a favor. Just withdraw this case and I will tell my supervisor that you were cooperative and did not mean to commit fraud. We will not tell your husband that you signed this."

. . .

Also, I have had clients denied the right to stop to use a rest room during a separated interview; [the] client was told "You are a big boy, surely you can hold your urine". . . I have also been denied the request for a rest room break between the two spouse interviews. I went anyway of course and the officer had another officer follow me into the rest room, I suppose to prevent me from talking to my client. It was humiliating.

ATTORNEY #4

The following is an excerpt from an e-mail submitted by an attorney regarding various USCIS interviews:

In the past year, there has been a lot of discussion in the [REDACTED] office regarding where an attorney can sit in the room. Officers have been told that it is completely up to them to decide where the attorney sits. In most cases, I am told that I have to sit behind my client and cannot make eye contact. The director has said that it is up to the discretion of the interviewing officer. It is also the position of some of the officers that attorneys disrupt interviews. I raised this issue with the director and thought it had been resolved, but I am still asked to sit in the back of the room. In another case at this office, I attempted to facilitate a document exchange between my client and the officer in response to a question that the officer asked. The officer stated that this was an interruption.

I also experienced a problem in an asylum interview in the [REDACTED] office. During the interview, I tried to assist the client in explaining situations. I felt the client was having a difficult time understanding what was going on, and wanted to help. The officer interrupted me and told me that I was not allowed to speak during the interview. Specifically, the officer said, "this is my interview, not yours." The officer only allowed me to summarize the interview at the end, after all questions had been asked.

ATTORNEY # 5

The following is an excerpt from an e-mail submitted by an attorney regarding various USCIS interactions:

USCIS [REDACTED] SISO [REDACTED] and ISOs under her jurisdiction in every case that I have appeared on in the last 6 years, when [REDACTED] became the supervisor, have: 1) told me to sit in a certain place in the room (behind the clients or in a corner with no immediate access to the clients); 2) questioned or officers have made faces when attempting to submit materials relevant to the case to the interview; 3) interrupted or cut off by the interviewing officer; 4) allowed me in the room, but was not allowed to participate, citing that as the attorney I could not comment on anything, except an issue of law and told that the issues that I was attempting to comment on were issues of facts, which the applicants could only answer; 5) acted in front of applicants that lawyers are not necessary and/or wanted/needed at interviews; 6) told the applicant that s/he was not entitled to representation . . . It is becoming increasingly difficult to assert your role as immigration counsel because of lack of access. Often interviewing officers cite that the AFM states that attorneys have limited or no role during interviews. I think the issue of access/role play by counsel is one of the most SIGNIFICANT ISSUES facing our practice when dealing with USCIS at the local level.

ATTORNEY # 6

The following is paraphrased from a follow-up telephone conversation conducted with an attorney based on an initial written response regarding VAWA self-petitions:

I have worked with the Legal Aid Society in Florida for 4 years. I mostly handle women who are married to US citizens and are applying for legal status through the Violence Against Women Act (VAWA). These self petitions are sent to Vermont's (VT) service center where the staff is trained to handle VAWA applications and all the sensitive issues surrounding it. However, once approved in VT, the applications are often re-adjudicated locally. They are supposed to send it back to VT if they find any problems, but instead they often disregard the findings from the Vermont center. They do this all the time. And they can be "extremely" abusive at the local office, too.

In general, the [REDACTED] office limits representation. They tell attorneys to sit in the corner or behind their client and just listen. Attorneys have a limited ability to speak up during the interview or object. If they do, the officer will often interrupt and silence them. One time my partner tried to say something from her chair in the corner and the officer raised her hand to stop her and continued with the questioning. . . I'm hesitant to argue with

their demands because they might just cancel the interview entirely. The field office director . . . is known for arguing with attorneys. One time I had a client who had been approved by the VT center and the local office tried to re-adjudicate it. [The Field Office Director] came in and screamed at my client to answer the questions, saying that she MUST answer or it was "over for her". The client got scared and thus started answering the questions despite my recommendation that she not. [The Field Office Director] denied a VT approved green card of another client, drafted a denial letter and sent it back to VT. She misrepresented the facts and ignored contemporaneous evidence, like the medical records of abuse . . . The VT center reaffirmed its position of approval despite [the Field Office Director's] insistence.

Mostly, by re-adjudicating the USCIS office re-victimizes the clients by making them recall and discuss the abuse they faced at the hands of their spouse. The VT center is trained to handle these sensitivities; the local office is not and is very blunt. There is even a USCIS memo instructing them to send it back to Vermont if they find any new evidence . . . the officers have a presumption that noncitizens will lie to get into the US permanently. One officer told him that officers loved "getting" people (catching them in lies) in marriage cases. They feel that, since the Vermont center never speaks to the client in person, it doesn't realize the lies the applicants spouse, and thus they (the local officers) have a better feel for the person as they speak with her face-to-face. One time the officer tried to deny a client's petition despite being statutorily eligible and I stepped in and corrected them. Thus, the [REDACTED] office always re-adjudicates the VAWA applications. But I'm very adamant that my clients not reply and very pushy with the officers, so with one exception, my clients have been successful.

It's gotten better after I filed complaints to USCIS and Congressional representatives and also because I refuse to back down. I worry about the fact that private attorneys might not be as adamant and unrepresented women with no knowledge of their rights might get trampled on.

ATTORNEY #7

The following is an excerpt from an e-mail submitted by an attorney regarding an I-130 interview:

The [REDACTED] USCIS office is horrible. I've had clients threatened with having their children taken away, being thrown in jail and their spouse being deported. I had one incident where one of the officers called the petitioner's parents while the petitioner was with me in the interviewing officer's room and threaten the petitioner's mother with jail. The interviewing officer, after excusing herself for a moment came back into the

interview room and explained (lied) that the mother would rather have the son not continue the interview but rather, come home so she could talk to him. The officer then left the room for a moment. (This was a "bluff" – my client's mother never said such a thing). My client became upset with his mother, wondering why she would do such a thing. I explained to him that his mother may not have actually said that but that the officers were just saying it to see what he would do, trying to determine whether he entered into a bona fide marriage.

After the interview, when my clients went home, the petitioner's mother told him what happened – that they threatened her over the phone with jail, and were yelling at her (things like, "what kind of mother are you? You're going to let your son do this?"). She said she never told him to stop the interview and come home.

This type of interviewing tactic (if you can call these interrogations, interviews) is normal for the [REDACTED] office. . . The problem is they treat everyone as if they assume they are in a sham marriage rather than treating people professionally and with respect. It'd be nice to see this type of abusive behavior at the [REDACTED] USCIS office stopped.