AMERICAN IMMIGRATION LAWYERS ASSOCIATION

September 25, 2023

**Submitted via** regulations.gov
**Docket ID No.** DOS–2023–0008
**RIN:** 1400-AF54

**Re: Third-Party Attendance at Appointments for Passport, Consular Report of Birth Abroad (CRBA), and Certain Other Services**

Dear Assistant Secretary Bitter

The American Immigration Lawyers Association (AILA) submits the following in response to the above-referenced request for comments from the Department of State (DOS) on Third-Party Attendance at Appointments for Passport, Consular Report of Birth Abroad (CRBA) and Other Services (88 FR 48143, 07/26/2023) (Public Notice:11999), which proposes to provide that private attorneys, interpreters and "other third parties" may attend certain appointments at passport agencies and centers and U.S. embassies and consulates abroad to assist the person requesting services (the applicant/requester).

Established in 1946, AILA is a voluntary bar association of more than 16,000 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 naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws, including on issues relating to attorney representation.

## I. Introduction

AILA appreciates the opportunity to comment on the proposed rule. As an association whose members routinely represent U.S. citizens with applications for passports, CRBAs, and other services, including renunciation of U.S. citizenship, we recognize the benefit of attorney representation at these appointments. We appreciate DOS's recognition that many U.S. citizens feel more comfortable having a representative available at their appointments to assist with the process and any issues that may arise.

While passport applications may, in most circumstances, be straightforward, applications for CRBAs and renunciation or relinquishment of U.S. citizenship can be far more complex, involve significant legal issues, and, in many cases, may be very stressful for the U.S. citizen. For example, determining whether a child acquired citizenship based on birth to one or more

U.S. citizen parent(s) requires the analysis and application of a multitude of statutes, many of which have been modified by case law. Additionally, renunciation of citizenship comes with long-lasting and impactful consequences, which the applicant may not fully understand without the support of legal counsel. DOS has previously acknowledged the importance of having an attorney present at an interview and that a consular officer could benefit from the attorney's experience in a February 1999 Cable (hereinafter "the 1999 Cable").[1]

## II. Comments

We agree with and appreciate the proposition that attorneys may accompany the U.S. citizen; however, we would ask DOS to define the requirements for an individual to be considered an attorney or interpreter and clarify who would be permitted to accompany the applicant as an "other third party" to protect against the unauthorized practice of law (UPL). Additionally, we would ask DOS to consider expanding the rule to include attorney participation at immigrant (IV) and nonimmigrant (NIV) visa interviews, especially in more complex cases such as those involving criminal issues or prior application of inadmissibility grounds under INA 212(a)(2).

### *A. Clarification on Who May Attend an Appointment*

The code of federal regulations addresses who may provide representation in immigration proceedings[2] and we ask that DOS apply these regulations to clarify who qualifies to represent an individual at consular appointment. Specifically, AILA requests that further clarification is provided, consistent with those regulations, as to who is an attorney. The Foreign Affairs Manual (FAM) provides a list of evidence that may be used to verify a valid attorney-client relationship, including Form G-28, Notice of Entry of Appearance as Attorney or Representative, letterhead showing membership in the legal profession or a letter from the applicant that identifies the attorney[3] and the 1999 Cable regarding working with attorneys advises consular officers to exercise caution in dealing with persons claiming to be attorneys who cannot establish that they are a member of the local or a U.S. bar association.[4] Failure by a consular officer to request satisfactory evidence that the individual representing the U.S. citizen is an attorney could lead to the unauthorized practice of law (UPL), which could harm the U.S. citizen seeking the in-person service at DOS and further undermine trust in the legal system ultimately causing harm to U.S. citizens in general.

Additionally, DOS must clarify who qualifies as "other third party" to ensure that UPL is not permitted. Significantly, the vague language of "other third party" leaves an open door for UPL. We acknowledge that some U.S. citizens who choose not to be represented by an attorney may be more comfortable being accompanied to an appointment by a non-attorney, such as a friend or family member. Some will choose to bring an attorney trained to identify issues with the application, such as the incorrect application of law, or assist with providing the required documentation for the application. However, U.S. citizens seeking genuine legal advice should be protected from the many non-legal consultants or notarios, who, under this rule, may be

[1] DOS Cable, Working Constructively with Immigration Attorneys, 99 STATE 21138 (Feb. 1999) *available at* AILA Doc. No. 03010241 (posted Jan 2, 2003) .
[2] 8 CFR 103.2(a)(3) states that for the submission or adjudication of immigration benefit requests, an applicant or petitioner may be represented by a U.S. attorney, a foreign attorney, or an accredited representative. Subject to the limitations in that regulation, 8 CFR 292.1 further defines who else may provide representation to individuals in front of DHS.
[3] 9 FAM 603.2-9
[4] 99 STATE 21138.

incentivized, for a fee, to accompany customers to an interview under the guise of providing legal advice when in fact, they do not have the training, expertise or license to do so.

This rule has no provision to stop such non-legal consultants from the lucrative unauthorized practice of law, resulting in fraud being perpetrated on U.S. citizens. An attorney can identify issues with the application, such as the incorrect application of law, or assist with providing the required documentation for the application. A non-legal representative cannot and should not be permitted to do this.

AILA requests that some clarification be made concerning who an appropriate third party is and their role in attending an appointment with an applicant. If such a clarification is not possible, AILA requests that the "other third party" language be removed entirely to eliminate the risk of UPL.

### *B. Expansion of Proposed Rule to Immigrant (IV) and Nonimmigrant Visa (NIV) Interviews*

AILA urges DOS to consider expanding the proposed rule to allow private attorneys to accompany their clients to IV and NIV interviews at U.S. embassies and consulates abroad, especially in cases involving criminal matters or where the Department has previously made an inadmissibility finding under INA 212(a). Such an expansion of the rule is squarely in line with DOS's1999 Cable to consular officers (COs) and is responsive to recent developments in federal case law as discussed below. Second, attorney presence at IV and NIV interviews would assist in the fair and efficient administration of our nation's immigration laws by diminishing the need for interagency communications regarding inadmissibility concerns and significantly reducing the time required for COs to process and adjudicate particularly complex cases. Finally, attorney representation at NIV and IV interviews will provide much-needed additional due process protections to noncitizens who, in many cases, are denied adequate review or consideration of their visa applications, resulting in tremendous and often permanent, hardship to the applicant, their U.S. citizen, and lawful permanent resident family members, and their employers.

U.S. Federal Courts have rightly noted that immigration laws are "second only to the Internal Revenue Code in complexity... A lawyer is often the only person who could thread the labyrinth."[5] Indeed, the inadmissibility grounds contain ten extremely broad and technical categories of inadmissible aliens, each with numerous complicated sub-categories, subject to seemingly indefinite interpretation and application of law to facts.[6] The implications of this level of complexity in immigration law cannot be understated, especially considering that COs must often render decisions on visa applications within a matter of minutes. COs are burdened by never-before-seen backlogs in visa adjudications, lack of sufficient personnel and resources, and a constantly changing landscape of evolving case law interpreting the inadmissibility grounds. The U.S. is a nation of laws, but asking already overburdened COs to navigate the minefield of federal immigration law under these conditions deprives COs and visa applicants of the rich benefit of our legal system. Allowing for attorney representation in consular interviews is one way to address this increasingly problematic reality.

[5] *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9t Cir. 1988)
[6] *See* INA 212(a)(1)-(10).

DOS has recognized the need for, and importance of, attorney representation at consular interviews. The 1999 Cable to all diplomatic and consular posts thoroughly addressed the mutually beneficial and often symbiotic relationship between COs and attorneys.[7] The 1999 Cable emphasizes that attorneys play a valuable role, from submission of correctly and thoroughly completed application forms and documentation to the resolution of INA 221(g) refusals to the interpretation of complex laws and regulations. The 1999 Cable states, "[t]he best immigration attorneys know the law very well. They know the Regulations...Let the attorney work for you on behalf of the Clients."[8] A November 1983 Cable further emphasizes the important role an attorney plays not just in helping to prepare a case or weeding out "bad" cases, but also by helping the consular officer "by organizing a case in a logical manner, by clarifying issues of concern, by avoiding duplication of effort and by providing the applicant with the necessary understanding of the visa process."[9] Attorney representation at all consular interviews, especially those with significant complexities and/or previous inadmissibility findings, is consistent with this directive.

Unfortunately, both the 1999 Cable, and the applicable guidance in the 9 FAM 603.2-9(a)(4), leave the availability of attorney representation to the discretion of each consular post.[10] This has overwhelmingly led to an "all or nothing approach" and the near "across the board" denial of attorney representation at U.S. embassies and consulates worldwide - a result likely not intended by DOS when drafting the comprehensive policies and language regarding the availability and benefits of attorney representation at interviews. The conditions are ripe for turning back the tide against attorney representation to what it once was, especially now that consular posts have resumed visa services and the restrictions imposed by the COVID-19 pandemic have abated.

Lack of attorney representation is a lost opportunity, both for the visa applicant and DOS. For example, in cases involving criminal inadmissibility or security issues, the classes of aliens potentially ineligible for visas are overwhelmingly broad, complex, subject to seemingly indefinite interpretation, and subject to a myriad of exceptions.[11] Recent developments in federal case law, especially those cases challenging DOS's authority to apply a broad inadmissibility ground to visa applicants,[12] require the DOS and its counterparts in other federal agencies to invest untold time and resources in funding and supporting litigation. In many cases, attorney representation might have avoided such a contentious outcome.

In *Munoz* and *Arias*, for example, the respective District Courts agreed with previous decisions that a U.S. citizen's constitutionally protected liberty interests are implicated in the denial of a

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[7] 99 STATE 21138 ("The relationship between Consular Officers and immigration attorneys can be productive. Consular Officers can often learn a great deal from a conscientious attorney, and vice versa").
[8] *Id.*
[9] DOS Cable, 83 State 323769 from C.D. Scully (Nov. 1983), III, Director, Office of Legislation, Regulations and Advisory Assistance, Visa Office, to U.S. Consulate Taipei, quoted in Jan M. Pederson & Michelle T. Kobler, The Fundamentals of Lawyering at Consular Posts, The Consular Practice Handbook 91, 113 (AILA 2012 ed.) & AILA/AIC Request Rulemaking on Access to Counsel (May 25, 2017), AILA Doc. No. 17052500.
[10] *Id. at para 7* "CA's policy on the presence of lawyers in the Consular section is that the head of the Consular section decides whether lawyers may be present at interviews;" 9 FAM 603.2-9(a)(4) "Each consular section has the discretion to establish its own policies regarding the extent to which attorneys and other representatives may have physical access to the Consulate or attend visa interviews, taking into consideration such factors as a consulate's physical layout and any space limitations or special security concerns."
[11] *See* INA 212(a)(2)
[12] Munoz v. US Dept of State, 50 F.4th 906 (9th Cir. 2022); Arias v. Garland et al., No.5:22-cv-05248 (W.D. Ark. 2023).

spouse's immigrant visa application.[13] The imposition of constitutional level considerations to visa applicants and their U.S. citizen family members in this context and others require already overburdened COs to provide a heightened and more exacting level of engagement with visa applicants. COs must provide applicants with a timely and bona fide factual basis to deny a visa.

These requirements may be satisfied in some cases by citation to a statutory provision that specifies a discrete factual predicate the consular officer must find to exist before denying a visa. Nevertheless, when the statutory provision is broad, such as under INA 212(a)(3)(A)(ii), which makes inadmissible any alien "who a consular officer... knows or has reasonable grounds to believe, seeks to enter the United States to engage, solely, principally, or incidentally in any other unlawful activity...", and a sufficient factual basis was not provided to the applicant; a due process claim can proceed. This finding, and others like it, result in significant additional scrutiny to the adjudicatory practices of COs, not to mention additional loss of time and resources to DOS due to ongoing litigation.

In many of these cases, attorney representation might have provided for essential and impactful communication with a CO, thereby ensuring a timely adjudication and a more specific one, consistent with Constitutional due process.[14]. An attorney may be able to better highlight relevant facts and their applicability to the applicant's eligibility. The attorney will be doing so to further their client's goals, and the CO will receive the information to comply with evolving case law. As a result, the symbiotic relationship envisioned by the 1999 Cable will come to fruition.

Attorney representation will also protect DOS's resources in numerous other ways. Currently, most legal inquiries, except those occurring under INA 214(b), may be submitted to LegalNet. LegalNet receives an untold number of these inquiries per year. A vast majority would be obviated by effective interaction between attorneys and COs during the visa interview process. Similarly, COs have reported to AILA members, especially during Embassy tours, conferences, and other speaking engagements, that attorney advocacy is particularly helpful in cases requiring analysis of the immigration consequences of criminal convictions. This is especially the case, when criminal convictions originate in foreign jurisdictions. An attorney who is local and steeped in the criminal law of a particular jurisdiction, can provide significant assistance to a CO reviewing the case. Similarly, attorney representation can provide clarity and efficiency in highly technical cases where the applicant faces a potential misrepresentation inadmissibility ground under INA 212(a)(6)(C), and why a waiver might apply in any particular case, among numerous other examples.

At a minimum, allowing for representation in the context of criminal inadmissibility and previous visa denials, would go far to protect the integrity of the visa application process as well as the rights of both citizens and noncitizens alike. DOS has in place fairly robust guidelines for attorney representation to U.S. embassies and consulates, in the guidance provided in the 1999 Cable and the FAM.[15] The time is ripe for expansion of attorney representation to both immigrant and nonimmigrant visa applicants.

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[13] *Id.*

[14] 99 STATE 21138 at para 11 clearly notes attorneys "are paid to represent their clients to the best of their ability and will be persistent in pursuing their cases... post that establish clear and consistent procedures for responding to attorney inquiries, may save time and resources in the long run."

[15] 9 FAM 601.7-2(c)(3) Correspondence with Representatives of Record, Attorneys; 9 FAM 603.2-9 Releasing Visa Records or Information to Attorney and other Representatives of Record.

## III. Conclusion

AILA appreciates the proposed rule and urges DOS to consider the recommendations to better define attorney and "other party" to protect applicants from the unauthorized practice of law, as well as to expand access to attorney representation during immigrant and nonimmigrant visa. Implementation of our recommendations will result in a more efficient and effective interview process. We appreciate the opportunity to provide feedback to DOS concerning the proposed rule and look forward to further opportunities to engage with DOS on the benefits of expanded access to attorney representation for these services for our members, their clients, and agency officials.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION