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Via e-mail: [public.engagement@dhs.gov](mailto:public.engagement@dhs.gov)

**RE: Comments on USCIS Interim Memo “The Role of Private Attorneys and Other Representatives; Revisions to Adjudicator’s Field Manual (AFM) Chapters 12 and 15; AFM Update AD11-42”**

Dear Sir or Madam:

The American Immigration Council (AIC) and the American Immigration Lawyers Association (AILA) commend USCIS for taking significant steps to improve access to counsel by issuing interim changes to the Adjudicators Field Manual (AFM). The changes to the AFM address some of the most egregious access-to-counsel problems that stakeholders have raised over the past few years. In particular, we welcome changes that ensure a beneficiary’s right to representation at an interview; require written waiver of representation when a person chooses to appear without his or her attorney; provide that a representative should be permitted to sit directly next to the client during an interview; clarify how individuals can change representation during the course of a proceeding; and mandate a more accommodating process for rescheduling interviews. We believe these steps will help improve both the quality and efficiency of adjudications.

Nonetheless, the new guidance falls short in several ways. The following comments address areas of continuing concern and recommend additional changes to the AFM to help safeguard meaningful access to counsel before USCIS.

#### **Clarify the Role of Attorneys and Representatives**

The amendments to the AFM recognize the important role of an attorney or representative appearing before USCIS and mention various ways in which he or she may participate in the adjudicatory process. For example, Chapter 12.4 provides that “[t]he role of the representative at an interview is to ensure that the rights of the individuals he or she represents are protected.” Chapter 12.5 states that an attorney may object to inappropriate lines of questioning and Chapter

12.4 states that an attorney may ask clarifying questions.

The guidance does not, however, clearly describe other steps that may be taken by an attorney when representing his or her client before USCIS. We recommend that the AFM expand the definition of the role of an attorney or representative during the adjudicatory process. In addition to recognizing that an attorney may object to inappropriate lines of questioning and ask clarifying questions, the AFM should explicitly recognize that an attorney may: 1) facilitate communication; and 2) advise USCIS officers and interviewees on points of law, orally or in writing.<sup>1</sup> This comprehensive definition should be provided in one section of the guidance so it may be easily referenced.

### **Clarify Officer's Treatment of Submissions**

We urge USCIS to clarify that adjudicating officers must consider a representative's statements and submissions and that *all* submissions must be included in the record. As currently drafted, the AFM suggests that the officer has broad discretion whether to consider a representative's submissions and whether to include them in the record. Specifically, Chapter 15.1(b)(2) states that an officer "*may* still consider statements and submissions" of a representative where the representative is unable to appear (emphasis added). Chapter 15.4(c) says that a representative "should be permitted to present documents or other evidence that may help to clarify an issue," but then goes on to say that such evidence, "when relevant, should be added to the applicant's file." In order to ensure a proper disposition and to preserve the record for any subsequent review, it is essential that the officer consider *all* submissions and that *all* submissions be included in the record, regardless of whether the officer believes they are relevant.

### **Narrow the Exception to Proximate Seating for Representatives**

Chapter 15.2(a) addresses a longstanding problem, namely that attorneys or representatives sometimes are not able to sit next to their clients during an interview. The new language provides that "[t]he attorney or other representative should be seated directly next to the person being interviewed to facilitate appropriate participation...." However, as currently drafted, the AFM creates a potentially significant exception to this rule where "the physical layout of the interview space cannot accommodate it." USCIS should replace the seating provision with mandatory language that requires the attorney or other representative to be seated directly next to the individual being interviewed in every case. If the room cannot accommodate this seating arrangement, the interviewing officer should determine if another room is available. If there is no room with sufficient seating available, the officer should ask the individual being interviewed if he or she would like to reschedule the interview for a future date when appropriate space will be available.<sup>2</sup>

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<sup>1</sup> The current guidance omits the following phrase formerly included in *Chapter 15.8 – Role of Attorney or Representative in the Interview Process*: "An attorney or representative may advise his or her client(s) on points of law." We urge USCIS to reinsert similar language suggested here to ensure an attorney's ability to provide legal authorities to both the client and the USCIS officer.

<sup>2</sup> If the office space at a particular field office generally does not permit appropriate seating, USCIS Headquarters should encourage the field office to make interior changes.

## **Expand Upon Waiver Requirement**

We are pleased that Chapter 12.2(B) now provides that individuals who choose to proceed without their attorney or representative must provide a written statement to USCIS confirming that they have voluntarily chosen to go forward without representation. In addition, prior to accepting the written waiver, the officer should be required to offer to reschedule the interview so that counsel may be present. In every circumstance where the individual decides to proceed without his or her representative, the written waiver should be signed by the individual and placed in the record. Further, to confirm that such individuals fully understand the implications of waiving their right to representation, the AFM should also require the officer to ask specific questions of the interviewee before he or she signs the statement.

## **Improve the Complaint Process**

The AFM now provides helpful guidance regarding the appropriate conduct of USCIS officers and supervisors, attorneys, and representatives. As with any new guidance, it is critical that it is implemented and followed. Therefore, USCIS must have a transparent and meaningful complaint mechanism for individuals to voice their concerns about compliance, misconduct, or abuse. It is particularly important for individuals to have a way to file a complaint at the local USCIS office,<sup>3</sup> especially in situations where an individual was unable to ask for a supervisor during the interview or where the complaint is not one that the DHS Office of the Inspector General would typically investigate.<sup>4</sup>

We urge USCIS to further amend the AFM to require USCIS officers to give petitioners, beneficiaries, attorneys, and other representatives, information at the beginning of each interview, both orally and in writing, on how to file a complaint with USCIS. The notice also should outline what happens to a complaint that is mailed to the USCIS field office after an interview, including who reviews the complaints and how individuals may follow up on complaints they have submitted. This information should be posted in the waiting room of every USCIS office, along with the already-posted OIG complaint process.

## **Provide Additional Protections to Termination Process**

We commend USCIS for including new language in Chapter 15.4(e) that “termination is to be avoided whenever possible.” However, we recommend that USCIS also include language that ensures interviews will not be terminated when an attorney or representative is merely acting in a representative capacity. Specifically, the AFM should state that an interview will not be terminated if the attorney is attempting to facilitate communication during the interview, object

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<sup>3</sup> It appears that there are four ways a person may file a complaint with USCIS: 1) raise concerns with the supervisor while at the field office; 2) mail a written complaint to the USCIS field office; 3) submit a complaint to the DHS Office of Inspector General (OIG); and 4) contact USCIS headquarters. We recommend that the complaint information provided at the interview include information on each of these procedures, as well as any other complaint mechanism that exists.

<sup>4</sup> USCIS directs those with knowledge or suspicion of criminal violations, misconduct, wasteful activities or allegations of civil rights or civil liberties abuse by a USCIS employee to report specific information to the OIG. These reports can be made by phone, fax, email, or regular mail.

to inappropriate questions, or provide legal analysis orally or in writing to the individual being interviewed or to the USCIS officer.

### **Require USCIS Officers to Advise Unrepresented Individuals of the Right to Counsel**

In addition to advising represented individuals of their right to counsel, the AFM should require USCIS officers to advise individuals who are not represented of their right to counsel. Individuals may not be aware that they have the right to an attorney when they appear before USCIS. Although USCIS proceedings take place outside of a courtroom, they can be complex and daunting for people trying to navigate the process alone. The grave consequences that can flow from USCIS adjudications underscore the importance of counsel in these proceedings. Parties should be informed of this right to counsel as early in the process as possible.

We recommend that officers inform unrepresented individuals of the right to counsel or an accredited representative at the outset of the interview. The officer should be required to ask questions to ensure that the individual understands that he or she has a right to counsel. Officers should also be required to offer to reschedule the interview so that the individual may seek representation.

If, after the officer has asked the required questions and offered to reschedule the interview, the individual chooses to proceed without representation, he or she should provide a written statement to USCIS as confirmation of this fact. This statement should be signed by the individual and placed in the individual's file.

### **Clarify the Role and Qualifications of Reputable Individuals**

As the AFM points out, reputable individuals are not lawyers. We are concerned, however, that the manual states that a reputable individual "appears" on behalf of a person. Using the term "appear" in reference to a reputable individual may be misinterpreted to convey authority to engage in legal support on behalf of an individual, similar to the authority given to attorneys and accredited representatives – the only groups authorized to submit notices to appear. Thus, we suggest that USCIS replace the term "appear" with "participate" every time it is used in Chapter 12.1(E) and its corresponding sample declaration. For example:

- Revising the first sentence of Chapter 12.1(E) to read: "A reputable individual is an individual of good moral character who participates in proceedings before USCIS on an individual case basis at the request of the person entitled to representation."
- Revising the title of the sample declaration at Appendix 12-1 to read: "SAMPLE DECLARATION OF A REPUTABLE INDIVIDUAL REQUESTING PERMISSION TO PARTICIPATE IN A PROCEEDING BEFORE A USCIS OFFICIAL."

Additionally, we commend USCIS for providing concrete examples of those who would qualify as reputable individuals and requiring USCIS officers to ask questions regarding an individual's eligibility to participate in proceedings. In order to provide adequate protections against the unauthorized practice of law, we recommend that USCIS provide a list of *required* questions that officers must ask when determining whether to grant the request of a person seeking to appear as a reputable individual. These questions should include, but need not be necessarily limited to:

- Are you being paid to participate in this interview?
- How do you know the applicant or petitioner?
- Have you previously participated in a proceeding before USCIS?
- If so, how many times and what was your relationship to the applicant(s) or petitioner(s)?

### **Clarify the Role of Law Students and Recent Law Graduates**

The AFM now provides needed clarification regarding the role of representatives before USCIS. With respect to the role of law students, however, the manual requires some additional explanation. Chapter 12.1(F) requires law students and law graduates to “seek permission to appear in proceedings before DHS officials.” However, the regulations already set forth the requirements for law students and law graduates who wish to represent individuals before DHS. 8 CFR §292.1. Although USCIS cites the regulation in a footnote, we urge USCIS to amend the AFM to clearly state that USCIS officials are required to permit a law student or law graduate to represent individuals according to the criteria set forth at 8 CFR §292.1.

In addition, Chapter 12.1(A) states that 8 CFR §1.1(k) defines “practice” or “preparation.” In fact, new definitions of “practice” and “preparation” were added by 8 CFR §1.2.<sup>5</sup> The AFM should be further amended to reflect this change.

### **Remove Reference to Counsel in Primary and Secondary Inspection**

We ask USCIS to remove the reference to primary and secondary inspection in Chapter 12.1(A). Guidance relating to inspections at ports of entry is outside the scope of the AFM. Individuals appearing at primary and secondary inspection are interviewed by U.S. Customs and Border Protection (CBP) officers, not USCIS adjudicators. In fact, the title of Chapter 12.1, “Representation before USCIS,” confirms that rules governing CBP inspections are not appropriately included in this section. We understand that the reference to primary and secondary inspection is a holdover from earlier versions of the AFM issued by Legacy INS – when INS employees conducted adjudications as well as inspections at the border – but given the division of responsibilities between USCIS and CBP, it is no longer appropriate to include this language in the AFM.

### **Remove Reference to Counsel in Refugee Classification Interview**

We ask USCIS to remove the language in Chapter 12.1(A) stating that there is no right to representation in an interview regarding a request for classification as a refugee. This language conflicts with 8 CFR §292.5(b), which provides for the right to representation in all DHS examinations. Section 292.5(b) makes no distinction between examinations performed by DHS within the U.S. and those performed overseas. Furthermore, §292.5(b) carves out an exception to the right to counsel at primary and secondary inspection. The fact that the regulation does not specify any additional exceptions confirms that no other exceptions are permitted.

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<sup>5</sup> Immigration Benefits Business Transformation, Increment I, 76 FR 53764, 53779 (Aug. 29, 2011).

## **Permit Other Attorneys from the Same Law Firm or Organization to Appear**

We wish to reiterate a suggestion we have made in the past regarding appearances by attorneys in the same law firm. The AFM should reflect that while the attorney listed in Part I of the G-28 is the primary attorney, other attorneys from the same law firm or organization may also appear before the agency on behalf of the individual and are permitted to sign petitions and applications on his or her behalf as appropriate.

## **Clarify Video Equipment Policies**

Although Chapter 15.2(b) notes that “[o]ffices should be equipped with video or audio taping devices,” there is a lack of clarity regarding the use of video equipment in USCIS interviews. We are unaware of guidance regarding videotaping interviews, the process for notifying individuals and their representatives about the use of video, and procedures for obtaining a copy of the videotape when an interview has been recorded. At a minimum, petitioners, beneficiaries, attorneys, and representatives should be notified when an interview is being recorded and should also receive information about how to obtain a copy of the videotape. We would welcome the opportunity to discuss this issue further and provide more detailed comments on the use of video equipment.

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Again, we thank USCIS for taking important steps to protect access to counsel and improve adjudications. We appreciate the opportunity to comment on these interim changes. Should you have any questions, please contact Emily Creighton at (202) 507-7505 or [ecreighton@immcouncil.org](mailto:ecreighton@immcouncil.org).

THE AMERICAN IMMIGRATION COUNCIL  
THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION