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MORE ON H-1B ADMISSIONS AT NEWARK: EXPEDITED REMOVAL SHOULD BE USED WISELY

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Customs and Border Protection (CBP) has extraordinary power under Section 235 of the Immigration and Nationality Act to summarily remove a nonimmigrant from the U.S. at a port of entry if they find him or her inadmissible either for fraud or for failure to possess the proper visa. Generally, there is no further hearing or review of such an order, unless the applicant for admission claims to be a U.S. citizen, lawful permanent resident, refugee or asylee, or claims to fear harm in his or her home country. The individual facing such an order also does not have the right to have an attorney present at secondary inspection at the port of entry.

The recent incidents involving H-1B entrants who were subjected to expedited removal orders at Newark airport, especially Indian computer programmers in the IT consulting industry, has caused a stir in the H-1B community, http://cyrusmehta.blogspot.com/2010/01/new-uscis-memo-on-employer-employee.html. CBP Headquarters appears to be standing behind the actions of CBP in Newark. CBP HQ informed AILA's CBP Liaison Committee, according to a posting on the AILA InfoNet website on February 2, 2010, that "several of these cases involved companies under investigation by U.S. Immigration and Customs Enforcement (ICE) and/or U.S. Citizenship and Immigration Services (USCIS) for ongoing fraud. CBP HQ noted that they use as much advance information as possible to target specific individuals who warrant additional inspection. " The report goes onto state, "In the Newark enforcement actions, CBP Newark worked closely with USCIS - Fraud Detection and National Security (FDNS) and the Department of Labor - Office of Investigations. CBP HQ stated that CBP officers contacted the petitioner and/or current employer when clarification was needed. CBP HQ confirmed that they screen ALL employment-based visa holders to determine admissibility and ensure compliance with

entry requirements."

The AILA InfoNet posting also indicated that "on January 27, 2010, AILA members attending a CBP meeting in Newark, New Jersey area were informed that a new policy has been instituted at Newark Airport. This policy involves conducting random checks for returning H-1B, L-1, and other employment-based visa holders. Based upon the initial check, if the person's admissibility is questionable, then he or she will be sent to secondary inspection for further interview. In some cases, if CBP discovers discrepancies in previously filed petitions, then the applicant may be asked to withdraw his/her application for admission into the United States or be subject to expedited removal."

On the other hand, CBP HQ did not specifically discuss the facts of specific cases with AILA. If someone believes that he or she was improperly determined inadmissible or improperly treated, he or she can inquire through the normal inquiry process with CBP in Newark, http://www.cbp.gov/xp/cgov/toolbox/contacts/ports/cbp_psml.xml. Therefore, those who feel that they signed statements under duress or were properly maintaining H-1B status and wrongfully deported, should continue to pursue the matter with CBP Newark. Affected individuals should also ascertain whether CBP contacted their employer, as they claimed they did in their response to AILA, where clarification was needed. Even if an employer may have been investigated by the DOL or by CIS-FDNS, it still does not warrant the CBP to issue an expedited removal order unless the H-1B worker was not properly using the H-1B visa or was in collusion with the employer. The H-1B entrant could still have been in status despite an investigation of the employer.

It is also unfair, if the CBP is using the January 8, 2010 Nuefeld Memo on H-1B visas, http://tiny.cc/z3ZU8, to conclude that the H-1B entrant will not properly use the visa, or is engaging in fraud, solely because he or she is working at a client, whether direct or indirect, of the employer. While the Memo indicates that H-1B workers working at third party sites who report to managers there may no longer be eligible for an H-1B visa, it is a complex document, and may allow IT consulting companies to still demonstrate the right of control over their employees, even if working at client sites, See From Problem To Springboard: Tips On Using The Neufeld Memorandum in Support of H-1B Petitions, http://blog.cyrusmehta.com/news.aspx?SubIdx=ocyrus201012455838. All this cannot be demonstrated or rebutted during a secondary inspection interrogation of an H-1B employee, and despite the CBP HQ response, we

believe that the Newark actions were still arbitrary and unwarranted, See Why Is H-1B A Dirty Word? http://ailaleadership.blogspot.com/2010/02/why-is-h-1b-dirty-word.html. And assuming that there is a conclusive finding of fraud or improper prior approval of the H-1B petition, the DHS may issue a notice of intent to revoke the petition, and allow the employer to respond, rather than issue an ER at the airport to the H-1B employee after a cursory review of the situation. Assuming that the CBP believes that the employer perpetrated fraud, but the H-1B employee is innocent, it can still allow him or her to withdraw admission. A withdrawal of admission allows the individual to return to the U.S. upon applying for a new visa at a U.S. Consulate. Expedited removal, on the other hand, bars the H-1B employee for 5 years.

We acknowledge that the CBP has tremendous power over a nonimmigrant visa entrant under Section 235 at the POE, but we respectfully ask the CBP to use this power wisely and to reverse any erroneous decisions of its officers at Newark regarding H-1B visa entrants.