



NOT SURE WHETHER TO LAUGH OR CRY: HOW THE BORDER PATROL'S HARASSMENT OF AN OREGON COMEDIAN SHOWS WHY IT SHOULD NOT BE CHECKING DOCUMENTS WITHIN THE UNITED STATES

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In late January, Oregon comedian Mohanad Elshieky was briefly detained by the Border Patrol while traveling on a Greyhound bus in Spokane, Washington. He [recounted the incident on Twitter](#), and it was [also reported by a number of news organizations](#). In summary, the agents boarded the bus at the Spokane Intermodal Bus Station and began questioning passengers about their citizenship. When Mr. Elshieky admitted to the Border Patrol agents that he was not a U.S. citizen but informed the agents that he had been granted asylum in the United States, the agents rejected the Employment Authorization Document (EAD) and driver's license that he offered them, and asserted that he was "illegal". After questioning Mr. Elshieky for roughly 20 minutes outside the bus in freezing weather, and checking by phone with supervisors, the agents finally allowed Mr. Elshieky to reboard the bus and go on his way.

The Border Patrol, attempting to justify its action, appears to have sent the following statement to [several news organizations](#), [at least one of which reproduced it in full](#). I reproduce the statement below in full as well to avoid any suggestion that I am taking language out of context:

"Agents from the U.S. Border Patrol's Spokane Station encountered an individual on Sunday at the Spokane Intermodal Bus Station who was not in possession of the immigration documents required by law.

While performing transportation checks, agents made contact with Mohanad Elshieky. Mr. Elshieky stated he was from Libya and presented the agents with an Oregon driver's license and an Employment

Authorization Card (EAD). As with anyone who needs to have their immigration status verified, Mr. Elshieky was asked to exit the bus. After the approximately 20 minutes needed to verify his status, Mr. Elshieky was allowed to board the bus and continue his travels without delay.

According to 8 USC 1304(e), all immigrants 18 years and older are required to carry immigration documents showing they are in the United States legally. Neither an EAD nor a driver's license is considered a valid document to satisfy this law. A valid I-94, which is given to all immigrants when legally entering the United States, or paperwork showing a person is currently in the asylum process, which is given to the asylee by the U.S. Citizenship and Immigration Services, would have worked to resolve this inquiry quickly.

For decades, the U.S. Border Patrol has been performing enforcement actions away from the immediate border in direct support of border enforcement efforts and as a means of preventing trafficking, smuggling and other criminal organizations from exploiting our public and private transportation infrastructure to travel to the interior of the United States. These operations serve as a vital component of the U.S. Border Patrol's national security efforts.

Although most Border Patrol work is conducted in the immediate border area, agents have broad law enforcement authorities and are not limited to a specific geography within the United States. They have the authority to question individuals, make arrests, and take and consider evidence. The Immigration and Nationality Act 287(a)(3) and 8 USC 1357 state that Immigration Officers, without a warrant, may "within a reasonable distance from any external boundary of the United States...board and search for aliens in any vessel within the territorial waters of the United States and any railcar, aircraft, conveyance, or vehicle." A reasonable distance is defined by 8 CFR 287 (a)(1) as 100 air miles from the border."

The notion that there is a comprehensive registration scheme currently in operation, which registers all aliens and requires them to carry certain documents, has been contested in [an article by Professor Nancy Morawetz and Natasha Fernandez-Silber that is very much worth reading](#), but for present purposes we can take it as given. The more important point here is that the Border Patrol, even in its statements to the media, appears to be unaware of what that registration scheme actually says.

The provision of law cited by the Border Patrol for the proposition that “all immigrants 18 years and older are required to carry immigration documents showing they are in the United States legally”, [8 U.S.C. § 1304\(e\)](#), states that “Every alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him pursuant to subsection (d).” The referenced subsection (d), in turn, states that

Every alien in the United States who has been registered and fingerprinted under the provisions of the Alien Registration Act, 1940, or under the provisions of this chapter shall be issued a certificate of alien registration or an alien registration receipt card in such form and manner and at such time as shall be prescribed under regulations issued by the Attorney General.

[8 U.S.C. § 1304\(d\)](#). The statute makes clear that its structure will be fleshed out by regulations.

The regulation at [8 C.F.R. § 264.1](#) then sets out in detail what documents qualify as evidence of alien registration for purposes of the statute. It states:

The following forms constitute evidence of registration:

Form No. and Class

I-94, Arrival-Departure Record—Aliens admitted as nonimmigrants; aliens paroled into the United States under section 212(d)(5) of the Immigration and Nationality Act; aliens whose claimed entry prior to July 1, 1924, cannot be verified, they having satisfactorily established residence in the United States since prior to July 1, 1924; and aliens granted permission to depart without the institution of deportation proceedings.

I-95, Crewmen's Landing Permit—Crewmen arriving by vessel or aircraft.

I-184, Alien Crewman Landing Permit and Identification Card—Crewmen arriving by vessel.

I-185, Nonresident Alien Canadian Border Crossing Card—Citizens of Canada or British subjects residing in Canada.

I-186, Nonresident Alien Mexican Border Crossing Card—Citizens of Mexico residing in Mexico.

I-221, Order to Show Cause and Notice of Hearing—Aliens against whom deportation proceedings are being instituted.

I-221S, Order to Show Cause, Notice of Hearing, and Warrant for Arrest of Alien—Aliens against whom deportation proceedings are being instituted.

I-551, Permanent Resident Card—Lawful permanent resident of the United States.

I-766, Employment Authorization Document.

Form I-862, Notice to Appear—Aliens against whom removal proceedings are being instituted.

Form I-863, Notice of Referral to Immigration Judge—Aliens against whom removal proceedings are being instituted.

Note to paragraph (b):

In addition to the forms noted in this paragraph (b), a valid, unexpired nonimmigrant DHS admission or parole stamp in a foreign passport constitutes evidence of registration.

[8 C.F.R. § 264.1\(b\)](#). (Emphasis added.)

The regulation clearly lists an “I-766, Employment Authorization Document” as a form of “evidence of alien registration.” This is in stark contrast to the Border Patrol spokesperson’s assertion that “Neither an EAD nor a driver’s license is considered a valid document to satisfy this law.” In fact, an EAD is indeed considered a valid document to satisfy the law—although apparently not to satisfy the Border Patrol.

The Border Patrol spokesperson’s assertion that “A valid I-94, which is given to all immigrants when legally entering the United States, or paperwork showing a person is currently in the asylum process, which is given to the asylee by the U.S. Citizenship and Immigration Services, would have worked to resolve this inquiry quickly” fares little better on close examination. Many nonimmigrants can indeed print a Form I-94 from the [U.S. Customs and Border Protection \(CBP\) website](#), although paper Forms I-94 are no longer routinely issued upon entry into the United States, and one assumes that the Border Patrol did not expect Mr. Elshieky to have a printer with him. But Mr. Elshieky’s I-94 issued upon entry to the United States, if he had had it with him, would have revealed

only that he had once been a J-1 (exchange visitor) nonimmigrant, a status he no longer held—which would be of little use to the Border Patrol in their efforts to determine whether he was here legally now. And some asylees, who initially entered without inspection but were subsequently granted asylum, would not have such an I-94 from their time of entry anyway.

What the Border Patrol spokesman presumably meant was that Mr. Elshieky should have been carrying a Form I-94 indicating his current asylum status, as opposed to his former J-1 status. But while some asylees will indeed possess such a document, the regulations quoted above specify a Form I-94 as evidence of alien registration only for limited classes of people, and asylees are not among them:

I-94, Arrival-Departure Record—Aliens admitted as nonimmigrants; aliens paroled into the United States under section 212(d)(5) of the Immigration and Nationality Act; aliens whose claimed entry prior to July 1, 1924, cannot be verified, they having satisfactorily established residence in the United States since prior to July 1, 1924; and aliens granted permission to depart without the institution of deportation proceedings.

[8 C.F.R. § 264.1\(b\)](#). Moreover, not all asylees will have a Form I-94. It is supposed to be issued following a grant of asylum by an immigration court or by the Board of Immigration Appeals (BIA), but this is not done contemporaneously with the grant. The Form I-94 is issued by U.S. Citizenship and Immigration Services (USCIS) within the Department of Homeland Security, while the immigration courts and BIA are part of the Executive Office for Immigration Review (EOIR) located within the Department of Justice, and the government lawyers who will have the asylee's file at the moment of the grant are part of Immigration and Customs Enforcement (ICE). The issuance of an I-94 by USCIS following a grant of asylum by an immigration judge or the BIA has, from this author's personal experience, sometimes taken months, depending on how long it takes for the relevant file to be transferred.

As for the Border Patrol spokesman's suggestion that Mr. Elshieky ought to have presented "paperwork showing a person is currently in the asylum process, which is given to the asylee by the U.S. Citizenship and Immigration Services," this misses the mark on two levels. First, such paperwork is not listed in [8 C.F.R. § 264.1\(b\)](#) as evidence of alien registration. And second, Mr. Elshieky was not, and never claimed to be, "currently in the asylum process"; he correctly

informed the Border Patrol that he had already been granted asylum.

The bottom line, therefore, is that the Border Patrol got the law wrong. I would respectfully suggest that this misunderstanding by the Border Patrol, including not only the agents on the ground but the agency's own official spokesperson, is illustrative of a broader problem.

The Border Patrol, according to its spokesperson's statement, believes that "lthough most Border Patrol work is conducted in the immediate border area, agents have broad law enforcement authorities and are not limited to a specific geography within the United States. They have the authority to question individuals, make arrests, and take and consider evidence." Whether or not this is correct as a description of the Border Patrol's statutory and regulatory authority, it does not appear to be correct as a description of what they are qualified to do and should be doing.

Enforcement of U.S. immigration laws is, and historically has been, divided among multiple agency components. Enforcement of the laws within the interior of the United States is performed by what is now ICE and used to be a component of the Immigration and Naturalization Service (INS) within the Department of Justice. There has been recent debate about whether to abolish ICE and return that enforcement function to within the Department of Justice, an issue beyond the scope of this blog post, but the important point here is that there has always been a component of the government performing this function which was not the Border Patrol. Even within U.S. Customs and Border Protection (CBP), of which the Border Patrol is a component, it is the Office of Field Operations (OFO), the officers in black uniforms whom one encounters at airports and other ports of entry, who have the primary responsibility for determining whether people arriving at the borders of the United States are admissible under our complex immigration laws—not the green-uniformed Border Patrol. And when applicants seek immigration benefits from within the United States, or the government seeks to remove them from the United States, the relevant legal determinations are generally made either by USCIS, a descendant of the former INS, within the Department of Homeland Security, or by the immigration courts and BIA in EOIR within the Department of Justice. All of these agency components have specialized training in the nuances of immigration law, and must have it in order to perform their functions. The Border Patrol is not in the same position.

This author would respectfully suggest that the Border Patrol's place in the overall immigration-enforcement scheme should be limited to determining whether people who are trying to cross the border, or have very recently done so and are still very near the border, have passed (or will pass) through a port of entry for inspection, or have crossed elsewhere to avoid inspection. In the former case, when someone passes through a port of entry, CBP OFO can analyze the details of their situation. In the latter case, the Border Patrol can hand over recent entrants without inspection to ICE (or perhaps in the future a revamped INS) and the immigration courts, and in certain cases to USCIS asylum officers for an analysis of a claimed fear of persecution. But when someone is not a recent border-crosser in close proximity to the border, the Border Patrol is not the agency component qualified to determine whether they are properly maintaining some status in the United States or potentially ought to be processed for removal proceedings.

This is so whether or not someone in the interior of the United States is encountered less than 100 miles from the border, as was apparently the case here. (The Spokane bus station is evidently 90-something miles from the U.S.-Canada border in a straight line, although Google Maps suggests that [actually driving from there to the border would take roughly 108 miles](#).) As the American Civil Liberties Union has pointed out, [roughly two-thirds of the U.S. population lives within 100 miles of some U.S. border](#), if one includes the water boundaries of the United States. Operating within that 100-mile zone does not equate to only patrolling the actual border and only seeking out people who appear to have recently crossed it. Spokane, Washington, is not on the border with Canada, and I very much doubt that the Border Patrol agents who questioned Mohanad Elshieky really thought that he had just entered from Canada without inspection.

Checking documents within the United States to enforce the immigration laws in the interior of the United States is not the Border Patrol's job, or at least should not be. As the case of Mohanad Elshieky illustrates, forcing the square peg of the Border Patrol into the round hole of interior enforcement can produce deeply problematic results. The Border Patrol should stick to patrolling the border, and leave interior enforcement and legal interpretation to better-qualified agency components.