



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

March 17, 2014

OMB Desk Officer
U.S. Customs and Border Protection
Office of Information and Regulatory Affairs
Office of Management and Budget

Submitted via e-mail: oir_submission@omb.eop.gov

**Re: CBP 30-Day Notice and Request for Comments: Arrival and Departure Record (Form I-94W) and Electronic System for Travel Authorization
OMB Number: 1651-0111
79 Fed. Reg. 8984 (Feb. 14, 2014)**

Dear OMB Desk Officer:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced 30-Day Notice and request for comments on the information collection requirements associated with CBP Form I-94W and the Electronic System for Travel Authorization (ESTA).¹

AILA is a voluntary bar association of more than 13,000 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 nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on this 30-Day Notice and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views that will benefit the public and the government.

Description of the Federal Register Notice

In the 30-Day Notice, CBP seeks feedback on ways to enhance the quality, utility, and clarity of the information collected via Form I-94W and ESTA, and ways to minimize the burden associated with collecting such information, including the use of automated collection techniques and information technology. In addition, CBP proposes to revise some of the questions on Form I-94W and ESTA and to collect more detailed information about health and security issues. The proposed questions are:

¹ 79 Fed. Reg. 8984 (Feb. 14, 2014), 30-Day Notice and request for comments; Revision of an existing collection of information: 1651-0111, *published on* AILA InfoNet at Doc. No. 14021447 (*posted* 2/14/14).

ANSWER “YES” IF ANY OF THESE QUESTIONS APPLY TO YOU:

1. Do you currently have any of the following diseases:
 - Chancroid
 - Gonorrhea
 - Granuloma Inguinale
 - Leprosy, infectious
 - Lymphogranuloma venereum
 - Syphilis, infectious
 - Active Tuberculosis
2. Have you ever been arrested or convicted for a crime that resulted in serious damage to property, or serious harm to another person or government authority?
3. Have you ever violated any law related to possessing, using, or distributing illegal drugs?
4. Do you seek to engage in or have you ever engaged in terrorist activities?
5. Have you ever committed fraud or misrepresented yourself or others to obtain, or assist others to obtain, a visa or entry into the United States?
6. Are you currently seeking employment in the United States or [were] you were previously employed in the United States without prior permission from the U.S. government?
7. Have you ever been denied a U.S. visa you applied for with your current or previous passport, or have you ever been refused admission to the United States or withdrawn your application for admission at a U.S. port of entry? If yes,
When? _____ Where? _____
8. Have you ever overstayed a previous period of lawful admission to the United States, even by one day?

AILA strongly supports the enhancement of our national security through the efficient and effective control of the cross-border flow of goods and people, with appropriate allocation of resources. Toward this end, we commend CBP for seeking to improve the language used in Form I-94W and ESTA, though we are concerned with the clarity of some of the questions. We are also concerned about the omission of certain questions that are currently included on Form I-94W and ESTA.

Question #1: Physical or Mental Disorders

The first question on the current Form I-94W asks, “Do you have a communicable disease, physical or mental disorder, or are you a drug abuser or addict?” CBP proposes eliminating the language regarding “physical or mental disorder” and “drug abuser or addict” and including a list of specific communicable diseases. The inclusion of a list of diseases which may make the alien inadmissible increases the clarity of the question and we support this change. However, we are concerned that the removal of the language regarding a physical or mental disorder will result in

an increased rate of ESTA approvals and create a false sense of security for individuals who may later be found inadmissible at the port of entry, or who may be admitted and then subject to summary removal after having waived their right to a hearing before an immigration judge as a condition of admission through the visa waiver program. We suggest keeping this language in a question separate from the one on communicable diseases for greater clarity.

Questions #2 and #3: History of Arrests and/or Convictions

The current question on both the ESTA and Form I-94W asks travelers to indicate whether they have been “arrested or convicted of a crime involving moral turpitude.” This question presents challenges to almost anyone who has ever interacted with the criminal justice system. The determination as to whether a particular offense is a crime involving moral turpitude involves a complex legal analysis, which, even after completed, may not yield a clear answer.

In light of this difficulty, CBP proposes to replace this question with the more narrowly drawn, “Have you ever been arrested or convicted for a crime that resulted in serious damage to property, or serious harm to another person or government authority?” We are concerned that this question is too narrow. While it may elicit a “yes” response from some individuals who have been convicted of a crime involving moral turpitude, it may also elicit an accurate “no” response from such individuals. For example, someone who has been convicted of a theft offense that did not involve “serious damage to property” may answer “no” to this question, but may still be inadmissible to the United States. In addition to being too narrow, the question is also vague. For example, how would one determine what constitutes “serious harm to a government authority?”

Moreover, the question as drafted by CBP would result in ESTA approval and admission of many nonimmigrant aliens who may later be found inadmissible. While these individuals would not be subject to a finding of fraud for their responses to the ESTA/I-94W questions, they would nevertheless be subject to summary removal after having waived their right to a hearing before an immigration judge as a condition of admission through the visa waiver program.

Instead of narrowing the scope of the question, we propose clarifying the question in an effort to decrease the risk that an alien could misunderstand the question, answer it incorrectly, and be charged with immigration fraud. However, improving the clarity of the question is by no means an easy task. The terms “conviction” and “crime involving moral turpitude” are derived from INA §212(a)(2)(A)(i). In order for respondents to understand the significance of these terms, it appears that the question will either have to be long and cumbersome or short and overly broad. We examine these two options below.

Option #1: Ask Questions Supported by Clear Definitions

The first option involves providing definitions of the terms “crime involving moral turpitude” and “conviction.” For example, with regard to the definition of a “crime involving moral turpitude, the Board of Immigration Appeals has said:

A “crime involving moral turpitude” is generally defined as one that involves conduct that is inherently base, vile, or depraved, and is contrary to the accepted rules of morality and the duties owed between persons or to society in general.²

If the ESTA/I-94W questions are amended to include a definition such as this, the amendment should include the following note immediately after the definition:

NOTE: If you believe the offense for which you were arrested or convicted may fit within the definition of a “crime involving moral turpitude,” you must answer YES to this question.

Similarly, CBP should provide further information regarding the term “convicted,” citing INA §101(a)(48), as follows:

The term “conviction” means:

1. A formal judgment of guilt entered by a court, *or*, if adjudication of guilt has been withheld:
 - A judge or jury has found you guilty;
 - You entered a plea of guilty or “no contest;” or
 - You have admitted facts sufficient to warrant a finding of guilt;

AND

- 2) A judge ordered some form of punishment, penalty, or restraint on your liberty.

Persons who have received a deferred adjudication often do not understand that for purposes of U.S. immigration law, they have a conviction. In addition, individuals who have benefited from a judicial proceeding in which a record of conviction is suppressed are often instructed that they no longer need to report their conviction. Such persons might mistakenly believe that they do not need to disclose the conviction during the visa application process and inadvertently violate the U.S. immigration laws.

In the ESTA context, in order to ensure that applicants read the definitions, the software might be structured to require an affirmation of having read them before proceeding to the next page with the question asking if the individual has ever been arrested or convicted for a crime involving moral turpitude or other relevant offense.

² See e.g., *Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994); *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988); *Matter of Flores*, 17 I&N Dec. 225 (BIA 1980).

Option #2: Ask a Simple But Broad Question

Although the question “Have you ever been arrested?” is broad, and an affirmative answer will inevitably include many admissible persons, a similar question is used by U.S. Citizenship and Immigration Services on Form I-485, Application for Adjustment of Status. However, in the context of adjustment applications, applicants are afforded an opportunity to provide documents to clarify the nature of the offense and its disposition.

It should be noted that unless CBP is able to allocate sufficient resources to receive and review documentation demonstrating the disposition of each matter arising from an arrest, this option will likely result in a much larger number of ESTA denials. However, merely having been arrested for or convicted of a crime other than one involving moral turpitude or a controlled substance should not preclude participation in the visa waiver program. Moreover, an increase in ESTA denials will result in an increase in B-1/B-2 visas, which will place an additional burden on U.S. consular posts. Some individuals may prefer this option, rather than risk a finding of inadmissibility for immigration fraud for having misunderstood the definitions of the terms “conviction” and “crime involving moral turpitude.”

If this approach is taken, the following question (used by USCIS on Form I-485, Application for Adjustment of Status) should be included in place of proposed question #2:

Have you ever in or outside the United States been arrested, cited, charged, indicted, convicted, fined or imprisoned for breaking or violating any law or ordinance, excluding traffic violations?

If CBP was able to dedicate sufficient resources to review the legal merits of each arrest, citation and charge, the ESTA registration website would need to be updated to allow applicants to upload the record of arrest/conviction. CBP should then work to ensure that a review of the applicant’s admissibility occurs within a reasonably short timeframe (no greater than a few weeks), and if the applicant is deemed admissible, the ESTA application should be approved.

Without sufficient resources to ensure a timely review of admissibility, all applicants whose ESTA applications are denied based on a “yes” answer to the question would need to be referred to a U.S. Embassy or Consulate to apply for a visitor visa. The ESTA denial should clearly state that the applicant should “gather certified documents relating to [his/her] arrest, citation, charge, indictment, conviction, fine or sentence of imprisonment to present to the U.S. Embassy or Consulate at the time of [his/her] visa application.”

We also urge CBP to work with the Department of State to create a system whereby DOS can report to CBP regarding visitor visa applicants who are admissible notwithstanding a minor criminal history, with the express intent of facilitating ESTA registration in the future.

Question #6: Employment in the U.S.

CBP proposes changing the question on Form I-94W/ESTA which currently reads, “Are you seeking to work in the U.S. ...?” to “Are you currently seeking employment in the United States or were you previously employed in the United States without prior permission from the U.S. government?”

Though use of the word “employment” rather than “work” is an improvement, the proposed question may still result in denial of admission for an individual who is intending to enter the U.S. to meet with a prospective employer. While gainful employment of a visitor is prohibited, attending a job interview is not. Understandably, an employer may wish to meet with a prospective worker (and vice versa) before commencing the difficult and expensive process of relocating the worker and his or her family members. Therefore, we recommend that CBP provide greater clarity to differentiate between permissible B-1 activities and unauthorized employment in the U.S. with additional clarifying language as follows:

The term “employment” (or “employed”) means performing productive labor or services in exchange for a wage, salary or other remuneration from a U.S. source and/or the accrual of profits for labor or services rendered inside the U.S.

The term “employment” (or “employed”) does not include engaging in commercial or professional activities inside the U.S. on behalf of an employer outside the U.S. such as soliciting or completing commercial transactions, negotiating contracts, consulting with business associates, litigating; or attending meetings of the Board of Directors of a U.S. corporation; or participating in scientific, educational, professional, or business conventions, conferences, or seminars; or undertaking independent research.

Clarify That a Visa Refusal Is Equivalent to a Visa Application Denial

CBP has interpreted a visa refusal under INA §221(g) to constitute a visa denial that must be disclosed on Form I-94W or ESTA. This interpretation creates confusion for those persons whose visas were ultimately issued even though their visa applications were temporarily held in abeyance pending a security clearance or production of a required document. Such persons are expected to indicate that a visa was refused, but this is not at all clear based on the wording of the question. Therefore, we recommend modifying the language on Form I-94/ESTA to make CBP’s intent clear, as follows:

Have you ever been denied a U.S. visa or entry into the U.S. or had a U.S. visa canceled?

- If you have ever had a nonimmigrant visa application referred for “Administrative Processing” by a consular officer, answer “Yes” to the above question and explain.

- If, at the request of a consular officer, you have completed a new Form DS-160 to correct the visa category stated on a submitted Form DS-160, you should answer “Yes” to the above question and explain.
- If you have ever applied for a U.S. visa and the visa application was delayed *for any reason* even if you subsequently were issued a visa, you should answer “Yes” to the above question and explain.
- If you have ever applied for a U.S. visa and you did not receive the visa *for any reason*, you should answer “Yes” to the above question and explain.

Add a Traveler Redress Number to the ESTA Application and Form I-94W

Currently, a redress number, provided as part of DHS TRIP, can be inserted into the Advanced Passenger Information System that the airline submits to Secure Flight Passenger Data (SFPD). AILA respectfully requests that a field to capture a redress number, if any, be added to ESTA and Form I-94W. This will allow for centralization of the data and will further facilitate travel. We therefore recommend that the following language be added:

If you have ever applied under the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) to resolve difficulties you have experienced when traveling to the U.S., please provide your traveler redress number: _____

CONCLUSION

AILA appreciates the opportunity to comment on this Notice, and we look forward to a continuing dialogue with CBP on this issue.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION