AMERICAN IMMIGRATION COUNCIL

January 29, 2015

U.S. Department of State
U.S. Department of Homeland Security

Submitted via www.regulations.gov

Re: Request for Information, USCIS-2014-0014
Modernizing and Streamlining the Visa System

To Whom It May Concern:

The American Immigration Council submits these comments in response to your request for input on streamlining and improving the U.S. immigrant and nonimmigrant visa systems. Our comments focus primarily on improving access to counsel at secondary inspection and deferred inspection and at consular interviews abroad.

I. Introduction

The American Immigration Council ("Council"), is a 501(c)(3) tax-exempt, not-for-profit educational and charitable organization whose mission is to educate the American public about the contributions of immigrants to American society, to promote sensible and humane immigration policy, and to advocate for the just and equitable enforcement of immigration laws. We employ a diverse set of strategies, including policy advocacy, litigation, research, communications, and education.

The Council has long advocated for access to counsel in various immigration settings. In our 2012 report, *Behind Closed Doors: An Overview of DHS Restrictions on Access to Counsel*, we describe restrictions on access to legal counsel before DHS, provide an overview of the applicable legal framework, and offer recommendations designed to improve the system. Attorneys can improve the quality and efficiency of immigration decision-making and protect the rights of their clients. Yet thousands of immigrants who are required to appear at immigration-related examinations face barriers to accessing counsel. As outlined below, we recommend that DHS and DOS amend their rules and guidance regarding access to counsel during secondary inspection and deferred inspection and during consular interviews abroad.

II. Overview of Current Policies and Practices

A. Admission and Parole of Individuals at Ports of Entry

In 8 C.F.R. § 292.5(b), the Department of Homeland Security (DHS) recognizes that individuals appearing before the agency have a right to counsel at no expense to the government in many immigration-related examinations:

> Whenever an examination is provided for in [Chapter 1 of CFR Title 8, DHS's immigration and naturalization regulations], the person involved shall have the right to be represented by an attorney or representative who shall be permitted to examine or cross-examine such person and witnesses, to introduce evidence, to make objections which shall be stated succinctly and entered on the record, and to submit briefs. *Provided,* that nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody.

The immigration regulations provide for examinations in a variety of contexts, including following warrantless arrests of noncitizens, when individuals apply to lawfully enter the United States at a port of entry and during deferred inspections.[1] Section 292.5(b) would provide for a right to counsel in all of these examinations, but an exception was added to the regulation in 1980 to explicitly exclude any examination occurring in primary or secondary inspection. The agency justified the limitation on the regulatory right to counsel because, if an inspecting officer believed that an individual seeking admission was not entitled to enter, the individual was entitled to a hearing to determine admissibility or excludability, at which point he or she would have the right to an attorney.[2] And prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208 (Sep. 30, 1996), this was true[3]—but it is no longer the case. Now, certain individuals found inadmissible during inspections may be immediately subject to expedited removal without further review.[4] Despite this change, the agency has not eliminated the exception to its regulatory right to counsel and, in fact, has attempted to expand its scope: even though deferred inspection is a distinct process which is not addressed in the text of § 292.5(b),[5] Customs and Border Protection (CBP) has interpreted the restriction on access to counsel to cover individuals in deferred inspections.[6]

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[1] *See*, *e.g.*, 8 C.F.R. §§ 235.1; 235.2; 287.3(a).
[2] *See* Representation and Appearances: Clarifying Right to Representation, 45 Fed. Reg. 81732, 81732 (Dec. 12, 1980).
[3] *See* 8 U.S.C. §§ 1225(b); 1226(a); 1362 (1994).
[4] *See* 8 U.S.C. § 1225(b)(1)(A); *see also* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004).
[5] Neither the deferred inspection regulation nor the Federal Register notice regarding that regulation identify deferred inspection as a form of secondary inspection. *See* 8 C.F.R. § 235.2; Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312 (Mar. 6, 1997). Further, deferred and secondary inspections serve different purposes. Individuals are referred to secondary

Although CBP does not recognize a *right* to counsel in these examinations, agency policy has allowed individuals in secondary and deferred inspection access to legal representatives where officers determine that it would be appropriate. In secondary inspection, CBP officers may allow "a relative, friend *or representative* access to the inspectional area to provide assistance when the situation warrants such action."[7] In deferred inspection, "an attorney may be allowed to be present upon request if the supervisory CBP Officer on duty deems it appropriate," to serve as an "observer and consultant to the applicant."[8]

CBP documents released pursuant to Freedom of Information Act (FOIA) litigation and problems reported by attorneys suggest that, in practice, individuals in secondary and deferred inspection face a patchwork of unpredictable access to counsel policies. Access may vary by location or officer on duty, and the details of the policies may be difficult for travelers and their attorneys to clearly and quickly understand. For example, several years ago, CBP at Logan Airport in Boston uniformly barred attorneys from secondary and deferred inspections. In 2011, the port changed its policy to generally permit attorney access during deferred inspections but apparently made no further clarification of its policy with regard to secondary inspections.[9] Other ports under the jurisdiction of the Boston Field Office also were directed to generally permit

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inspection "[i]f there appear to be discrepancies in documents presented or answers given, or if there are any other problems, questions, or suspicions that cannot be resolved within the exceedingly brief period allowed for primary inspection." 62 Fed. Reg. at 10318. In contrast, deferred inspection is "further examination" following parole, permitted only when the examining officer "has reason to believe" that the person can overcome a finding of inadmissibility by presenting, *inter alia*, "additional evidence of admissibility not available at the time and place of the initial examination." 8 C.F.R. § 235.2.

[6] *See* CBP's Inspector's Field Manual (IFM), Section 17.1(e) (citing § 292.5(b)). Regardless of any potential amendment to DHS's regulatory recognition of the right to counsel, we encourage the agency to abandon this unwarranted expansion of the §292.5(b) secondary inspection exception.

We acknowledge that the IFM has been replaced by the electronic Officer Reference Tool (ORT). Since the ORT is not publicly available, it is unclear what guidance is currently in use. However, as of 2014, CBP's Office of Field Operations recognized that CBP officers continued to use the IFM as a "reference." *See* AILA National Liaison Meeting with CBP, Agenda and Notes (Apr. 2014), AILA Doc. No. 14051241, at 9 (posted May 12, 2014).

[7] IFM, Section 2.9 (emphasis added); *see also* Jayson P. Ahern, Assistant Commissioner, Office of Field Operations, Attorney Representation During the Inspection Process (July 2003) at 1, *available at* http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_1.pdf, at 1-2 (allowing an "accompanying helper . . . in appropriate circumstances").

[8] IFM, Section 17.1(e); *see also* Ahern, Attorney Representation During the Inspection Process, at 1.

[9] Email from Assistant Director, Border Security, Boston Field Office (May 27, 2011) at 1-2, *available at* http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_3.pdf, at 87-88.

attorney access during deferred inspections in 2011,[10] while the Miami Field Office reported, in response to a complaint about lack of attorney access to deferred inspections, that its officers evaluate "the totality of circumstances . . . on a case-by-case basis[,] and discretionary authority permitting attorney presence during the inspection process is exercised when deemed appropriate."[11] Attorneys at a variety of ports reported inconsistent access to counsel during deferred and secondary inspections—a letter that we, along with the American Immigration Lawyers Association (AILA) submitted to CBP in 2011 highlighted incidents in which attorneys were barred from accompanying clients to inspections at ports across the country.[12]

B. Visa Applications at Consulates

While foreign nationals who apply for immigration benefits from within the United States have access to counsel in most situations, the reverse is true for visa applicants abroad. Under current DOS guidance, each consular section decides whether an attorney can be present during a visa interview: [13]

> **9 FAM 40.4 N12.3 Inquiries Concerning Attorney Representation**
>
> (CT:VISA-2164; 08-20-2014)
>
> Each post has the discretion to set 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 particular consulate's physical layout and any space limitations or special security concerns. Whatever policies are set must be consistent

[10] *See* Email from CBP Area Port Director (acting), Boston, MA (June 24, 2011); Email from Port Director, CBP Service Port of Providence (Jun. 24, 2011); Email from Assistant Port Director, Providence Service Port (Jun. 24, 2011); Email from Supervisor/FI, CBP Field Operations, Bradley International Airport (Jun. 24 2011), *available at* http://www.legalactioncenter.org/sites/default/files/Production%2010%20for%20website.pdf, at 18-19.

[11] Email from Chief, CBP Miami Field Office (May 20, 2011) at 1, *available at* http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_4.pdf, at 27-28.

[12] Letter from AILA and the Council to CBP Commissioner Alan Bersin (May 11, 2011) at 5-9, *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/AIC%20Letter%20to%20Commissioner%20Bersin%20on%20Counsel%20Issues.5-11-11-Confidential.pdf.

[13] There is a limited exception to this general rule for applicants under the Iraqi and Afghan special immigrant visa programs. Sections 1218 and 1219, respectively, of the National Defense Authorization Act for FY 2014, Pub. L. No. 113-66 (127 Stat. 672), authorized representation throughout the special immigrant visa process for applicants under the Refugee Crisis in Iraq Act of 2007, Special Immigrant Status for Certain Iraqis, § 1244 of Pub. L. No. 110-181, Defense Authorization Act 2008, *as amended*, and Afghan Allies Protection Act of 2009, § 602 of Pub. L. No. 111-8, Omnibus Appropriations Act 2009, *as amended*. DOS guidance to consular officers for attorney representation of these applicants is provided in 9 FAM 42.32(D)(11) N12.

and applied equally to all. For example, either all attorneys at a particular post must be permitted to attend consular interviews or all attorneys must be prohibited from attending interviews.

Anecdotally, we understand that different posts have adopted differing positions regarding access to counsel during consular interviews. In recent years, several posts, in response to questions from AILA, have stated that they bar attorneys from participating in consular interviews:

- U.S. Consulate, Ho Chi Minh City (around March 2013): "No, unfortunately, Post does not allow attorneys to accompany applicants to the interview." Q&A with AILA Bangkok District Chapter, AILA Doc. No. 13061745, at 3 (posted June 17, 2013).

- U.S. Embassy Paris (March 2013): Referring to space limitations and concerns about minimizing outside waiting lines and providing "efficient service," the Embassy "limit[s] access to the applicants." Q&A with Consular Liaison Committee, Rome District Chapter ("RDC"), AILA Doc. No. 13042248, at 7 (posted April 22, 2013).

- U.S. Embassy, Warsaw: "Due to security and space constraints, Embassy Warsaw does not allow third parties to attend visa interviews" except for "special cases" (such as a caretaker for an individual with disabilities). Q&A, RDC, AILA Doc. No. 13042246, at 10 (posted April 22, 2013).

- U.S. Embassy, London (Oct. 2012): "Due to security requirements and space restrictions post does not allow counsel to be present at the time of interview." Q&A, RDC, AILA Doc. No. 13042243, at 7 (posted April 22, 2013).

III. Reasons for Changing Current Policies

A. DHS Has Recognized the Importance of the Right to Counsel in Other Contexts

DHS already has recognized the significant contribution attorneys can make in ensuring the integrity of the immigration system. In fact, in 2012, the U.S. Citizenship and Immigration Services (USCIS) amended its Adjudicators Field Manual (AFM) to address some of the most egregious access to counsel problems.[14]

[14] For example, the changes ensure a beneficiary's right to representation at an interview (except for refugees not the focus of criminal investigation and in custody or during site visits conducted by the Fraud Detection and National Security Division), 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.

> [USCIS] is committed to ensuring the integrity of the immigration system. …. This policy memorandum provides guidance to adjudicators and balances the meaningful role of attorneys and other [BIA-accredited] representatives in the interview process with the important responsibility of adjudicators to conduct fair, orderly interviews.

USCIS Policy Memorandum, PM-602-0055.1, "Representation and Appearances and Interview Techniques; Revisions to Adjudicator's Field Manual (AFM), Chapters 12 and 15; AFM Update AD11-42," at 1 (May 23, 2012). That "meaningful role" is no less significant when the applicant is abroad or a client is seeking entry to the United States at secondary or deferred inspection.

DOS, going back at least 30 years, has expressed a similar view. A 1983 cable from the Visa Office detailed the contributions attorneys can make:

> In the sometimes-complex world of visas, a good attorney can prepare a case properly; weed out "bad" cases; and alert applicants to the risks of falsifying information. The attorney can help 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.

DOS Cable, 83 State 323769 (Nov. 1983) from C.D. Scully, 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.). In 1990, the Visa Office repeated these contributions, as recounted in minutes of a meeting with AILA's Visa Office Liaison Committee. *See* Minutes of the AILA/VO Liaison Meeting (May 10, 1990), reported and reproduced in 67 Interpreter Releases 950, 967, 969-70 (Aug. 27, 1990), *quoted in* Andrew T. Chan, *The Lawyer's Role in Consular Visa Refusals*, Consular Practice Handbook, 167, 169. Nearly a decade later, a February 1999 cable on the subject of "Working Constructively with Immigration Attorneys," included such points as:

- "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."

- "The INA and its underlying bureaucracy is often compared to the Internal Revenue Code as being one of the two most complicated statutes in the U.S. Code. The employment of a lawyer does not constitute a red flag or signal the existence of a problem in a case."

- "The best immigration attorneys know the law very well. They know the regulations."

IV Processing and Procedure, 99 STATE 21138—Working with Attorneys, at ¶¶ 1, 4, 12, AILA Doc. No. 03010241 (posted Jan. 2, 2003).

The cable also provides that even when consular section policy did not generally permit attorneys at interviews, individual consular officers could request that an attorney respond to questions in complicated cases. *Id*. at 7. The significant benefits that legal representation provide are not achieved by permitting representation only upon invitation by a consular officer.

B. Legal Representation During Secondary and Deferred Inspections and Visa Interviews at Consulates Would Improve Accuracy, Efficiency and the Protection of Rights

A more robust access to counsel policy could significantly impact the fairness of CBP and DOS adjudications. Attorneys could improve the quality and efficiency of immigration decision-making, helping immigration officers by providing relevant evidence and legal analysis or by encouraging their clients to be more open with immigration officers. Even more importantly, attorneys could protect the rights of their clients, who often lack the specialized knowledge needed to properly present their own claims. Absent this protection, individuals subject to inspection or visa interviews at consulates could be improperly refused admission to the United States, subjected to expedited removal, or denied a visa.[15]

The important benefits of providing access to counsel in inspections and visa interviews are not outweighed by potential interests of DOS and DHS in barring counsel. For example, with regard to access to counsel during secondary inspections, the interests that led the agency to carve out an exception to the regulatory right to counsel no longer apply. Though the agency justified limiting the right to counsel in inspections because individuals found inadmissible were entitled to further review of their cases, subsequent amendments to the immigration laws made many individuals seeking admission subject to expedited removal without a formal hearing.[16] As a result, inspections play an even more crucial role for individuals potentially subject to expedited remova,l and the need for counsel in these examinations has correspondingly increased.

We understand that consular posts and ports of entry are concerned about being able to conduct interviews and examinations expeditiously. But a lawyer's presence at a consular interview can enhance efficiency by promptly addressing questions that arise as to the classification requirements or admissibility. For example, at consular posts, treaty investor (E-2) visas frequently involve complex questions on such issues as the proportionate amount of funds invested or whether the investor has a direct and controlling interest. An attorney could answer the consular officer's inquiry about corporate records or a particular contract provision and direct the officer's attention to the documents containing information the officer needs.

Similarly, we have heard about situations in which lawyers who were not allowed to accompany clients to consular interviews later were forced to spend substantial time correcting errors by

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[15] DHS and DOS also must recognize that for many visa classifications, the applicant is not the only party in interest—and DOS already acknowledges, at 9 FAM 40.4 N.7.1, that a third party may have a sufficient interest warranting disclosure of information about a visa application. A petitioner, whether an employer or a family member, has a real, substantive interest in whether the visa application is approved. Access to counsel should be extended to all interested parties.

[16] *See* discussion *supra,* at 2.

consular officials that could have been resolved much more efficiently at the interview itself. A consular officer denied an application for a nonimmigrant specialty occupation visa (H-1B) on the erroneous ground that the applicant must apply for an L-1 visa (specialized knowledge intracompany transferee) because the U.S. petitioner/intended employer was a U.S. subsidiary of the foreign company where the applicant currently worked. With the attorney not present to address this error, it then took several months before the post responded to the attorney's attempts to inform the post of the error, rescheduled an appointment, and conducted another interview. In other instances, consular officers at different posts have denied dependent visas (such as H-4 or L-2) to visa applicants without counsel present, based on the flawed reasoning that the principal (H-1B or L-1), who received USCIS approval of an extension of that status and remained in the United States at work, did not have a current visa in his or her passport. The process was delayed by weeks, when an attorney could have pointed out at the interview the FAM provision that confirms there is no such requirement.

Similarly, attorneys can play an important role in ensuring the integrity of DHS examinations. In the Council and AILA's 2011 letter to Commissioner Bersin, we included examples of how CBP's refusal to allow counsel in the inspection process led to inefficient and inaccurate outcomes. In one example, an attorney attempted to accompany her client to secondary inspection to present a memo explaining why the client was admissible despite a prior criminal conviction. The attorney was not permitted into the inspection and, without the attorney's information and assistance, the officer decided not to admit the client, who was then detained at government expense. Two and one-half months later, the client was released from detention and properly found admissible, but only after the lawyer was able to present her information to an immigration court.[17]

Finally, we acknowledge that certain posts or ports may have space limitations which make ensuring access to counsel less convenient. Yet, such space limitations—though they may require creative solutions to overcome—must not determine access to counsel policies. Officers could, for example, schedule interviews or deferred inspections for which an attorney will be present on a certain day or portion of a day so that the post can accommodate an additional person at each of those interviews. The time that could be saved by the attorney's ability to answer questions should offset any reduction in the number of interviews or examinations attributable to having an additional person per interview.

C. Statutory Right to Counsel

Although DHS and DOS do not currently recognize a right to counsel during secondary inspection or consular processing in their regulations, such a right has a statutory basis. The Administrative Procedures Act (APA) provides a right to counsel to individuals who are "compelled to appear" before an agency or its representative in 5 U.S.C. § 555(b), and so, to the extent that an interaction with DHS and DOS officers involves compulsion, an individual appearing before the agency already has a statutory right to counsel. An individual referred to secondary inspection is clearly compelled to appear for his or her examination. The individual is

[17] Letter from AILA and the Council to CBP Commissioner Alan Bersin, at 6-7.

not free to leave or withdraw his or her application for admission without permission,[18] and pursuant to CBP's own interpretation, is considered to be in detention from the moment he or she is referred to secondary.[19] With limited exceptions, a visa applicant has to appear in person before a consular officer to receive a visa. Amendments to the DHS and DOS regulations would simply bring the agencies' policies in line with their obligations under the APA.

IV. Proposed Changes

A. CBP

We encourage DHS to remove the exception related to secondary inspections from 8 C.F.R. § 292.5(b) and to ensure that individuals required to appear in secondary and deferred inspections have the same access to counsel that is guaranteed in other examinations before the agency. We suggest amending the text of the regulation to read:

> Whenever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative who shall be permitted to examine or cross-examine such person and witnesses, to introduce evidence, to make objections which shall be stated succinctly and entered on the record, and to submit briefs. *Provided,* that nothing in this paragraph shall be construed to provide any applicant for admission in primary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody.

B. DOS

We also encourage DOS and/or DHS[20] to promulgate regulations in 22 C.F.R. Part 40 that would ensure meaningful access to counsel at consular posts. Counsel must be allowed to accompany,

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[18] *See* 8 C.F.R. § 235.4 ("The alien's decision to withdraw his or her application for admission must be made voluntarily, but nothing in this section shall be construed as to give an alien the right to withdraw his or her application for admission.").

[19] IFM, Section 17.8(a) ("During an inspection at a port-of-entry, detention begins when the applicant is referred into secondary and waits for processing.").

[20] The Secretary of State's authority to administer and enforce the provisions of the immigration and nationality laws relating to the powers, duties, and functions of U.S. diplomatic and consular officers contains a significant exception for "those powers and duties conferred upon the consular officers relating to the granting or refusal of visas." Immigration and Nationality Act of 1952 ("INA"), Pub. L. 82–414, § 104(a)(1) (66 Stat. 163 (June 27, 1952)), as amended, 8 U.S.C. § 1104(a)(1). Congress has vested this authority with the Secretary of Homeland Security. Homeland Security Act of 2002 ("HSA"), Pub. L. 107-296, § 428(b)(1)(116 Stat. 2135 (Nov. 25, 2002)), 6 U.S.C. § 236(b)(1). The Secretary of State continues to have the authority to direct a consular officer to refuse a visa to a foreign national if he or she deems such refusal necessary or advisable in the foreign policy or security interests of the United States. HSA § 428(c)(1), 6 U.S.C. § 236(c)(1). With the foregoing and certain other exceptions, Congress also delegated specific regulatory authority to the Secretary of Homeland Security relating to the

advise and represent their clients at the interview, which includes receiving information, communicating with consular officers, presenting and submitting evidence, and making concise legal arguments. When a party is represented by counsel, any notice or other written communication that DOS is required to serve the party shall also be simultaneously provided to the representative of record.

In addition, we propose the following revisions to the visa refusal procedures (22 C.F.R. Part 41 for nonimmigrant visas and Part 42 for immigrant visas) to complement access to counsel and help improve efficiency in consular processing. A visa refusal should identify in sufficient detail each ground of ineligibility and the facts corresponding to each ground (unless disclosure is barred by law) and include a readily-understandable explanation of whether there is a mechanism (by law or regulation) to apply for relief. Applicants for nonimmigrant visas also need a clearly articulated and meaningful process at all posts to request reconsideration and, if refused again, receive another sufficiently detailed statement of the ground(s) and the corresponding facts. While nonimmigrant visa applicants can reapply after refusal, post procedures, such as restricting available appointments,[21] can frustrate and discourage applicants. Immigrant visa applicants, who have the right to reapply within one year after refusal of the application under 8 U.S.C. §1201(g), should be timely granted another interview after reapplication, and receive a sufficiently detailed statement, if refused again, as previously described. The visa application process, particularly following a refusal, needs to be transparent.

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Thank you for your consideration of our suggestions. If you have questions, please contact Kristin Macleod-Ball at kmacleod-ball@immcouncil.org or 202-507-7520.

Sincerely,

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On behalf of the American Immigration Council

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functions of consular officers in connection with the granting or refusal of visas. *See* HSA §§ 428(b), (c)(1)-(2), (d), 6 U.S.C. § 236(b), (c)(1)-(2), (d).

[21] *See* 9 FAM 41.103 NN15-16.