

# Rights of LPRs at Ports of Entry Upon Return to The United States From Travel Abroad

Lawful Permanent Residents (LPRs) have certain due process rights, including the right to a hearing before an immigration judge before they can be stripped of their permanent resident status. In addition, given the increasing reports of CBP inspection of traveler's electronic devices and/or social media accounts, it is important for members to advise LPR clients of the risks of refusing such a request. Due Process Rights of LPRs LPRs enjoy greater due process rights than nonimmigrants when returning to the United States after travel abroad. Like all international travelers, upon return, LPRs are subject to inspection by CBP. CBP may question and screen LPRs to determine whether they are a "returning resident" or whether they should be treated as an "arriving alien."

## Defining Who is Seeking "Admission"

An LPR who is deemed to be seeking admission may be charged as removable from the United States as an arriving alien. LPRs that are charged as removable, including those who are alleged to have abandoned their U.S. residence, have the right to a hearing before an immigration judge. See *Matter of Huang*, 19 I&N Dec. 749 (BIA 1988).

Under INA §101(a)(13)(C), a returning resident shall not be regarded as seeking "admission" to the United States, (i.e., shall not be treated as an arriving alien), unless he or she:

- Has abandoned or relinquished LPR status;
- Has been absent from the United States for a continuous period in excess of 180 days;
- Has engaged in illegal activity after having departed the United States;
- Has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under the INA and extradition proceedings;
- Has committed an offense under INA §212(a)(2) [criminal and related grounds of inadmissibility], unless since such offense the alien has been granted relief under INA §212(h) [waiver of inadmissibility] or §240A(a) [cancellation of removal for permanent residents]; or
- Is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

Despite the right to have an Immigration Judge adjudicate the issue, CBP may attempt to convince an LPR that their absence from the United States resulted in automatic abandonment of their U.S. residence, and urge them to sign a Form I-407, Record of Abandonment of Lawful Permanent Resident Status.

- **An individual does not lose LPR status merely because of time spent abroad. An LPR remains an LPR unless the government proves abandonment by clear, unequivocal, and convincing evidence and until an order of removal is issued and becomes final.**
- Form I-407 must be signed voluntarily and there are no negative consequences if an LPR refuses to sign the form.
- Neither failure to sign nor abandonment of LPR status by itself is grounds for detention by CBP.

## **A Determination of Abandonment of Permanent Residence**

If CBP makes a determination, by a preponderance of the evidence, that the LPR abandoned his or her residence in the U.S., and the LPR refuses to sign a Form I-407, CBP's only recourse is to issue a Notice to Appear (NTA) before an immigration judge.

- Even LPRs who have signed a Form I-407 retain the right to request a hearing before an immigration judge to determine whether LPR status was abandoned. See *Matter of Wood*, No. A24-653-925 (BIA 1992). Should CBP confiscate the LPR's permanent resident card, the LPR has the right to alternative evidence of LPR status, such as an I-94 card and/or passport stamp. AILA Doc. No. 17032261. (Posted 3/31/17)Page 2 of 4

## **CBP Search of Electronic Devices and Social Media Accounts**

- In 2009, CBP released to the public a copy of its current policy on searches of electronic devices. This policy states that all electronic devices, including those belonging to U.S. citizens, can be searched at a port of entry "without individualized suspicion."
- There appear to be only very narrow limitations to the scope of CBP's search authority. For example, section 5.2.1 indicates that privileged material, such as attorney/client communications, while not necessarily exempt from a search, may be subject to special handling procedures which require approval from CBP Associate/Assistant Chief Counsel.
- CBP's right to conduct suspicion-less searches of persons and conveyances has long been upheld by the Supreme Court as a "border search exception" to the 4th Amendment. While the 4th Amendment to the Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," the Supreme Court held in *Carroll v. United States*, 267 U.S. 132 (1925), that it is "reasonable" to conduct border searches without a warrant due to national security interests. CBP's policy of conducting suspicion-less searches of electronic devices has not yet been meaningfully challenged.
- Following the publication of the 2009 guidance, the Supreme Court held, in *Riley v. California*, 134 S. Ct. 2473 (2014), that the police may not search and seize the digital contents of a person's cell phone or electronic device, incident to an arrest, without first obtaining a search warrant. In arriving at this conclusion, the Court noted that cell phones have become "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley*, 134 S. Ct. at 2484.
- The ability of modern cell phones to contain the digital sum total of one's "papers and effects," the Court held, makes police searches of these devices unreasonable without a warrant. This ruling, however, only applies to arrests occurring in the interior of the United States and does not address arrests or searches at the border. Though this issue could be considered by a federal court, given the dire consequences to a foreign national who refuses to submit to such a search (including expedited removal), it is more likely that this issue will be pursued by a U.S. citizen who does not consent and is willing to litigate the matter.

- A subsidiary issue to warrantless searches of cell phones and electronic devices is whether CBP may access an individual's social media accounts. In 2016 CBP began collecting social media identifiers from Visa Waiver travelers through changes to the ESTA application. While the ESTA form makes this question optional, and only asks for social media "identifiers," (as opposed to "passwords") so that CBP can presumably view the traveler's public information, AILA has received several reports of CBP officers requesting log in information so that they can view private social media accounts and messages. While the CBP electronic device search policy has not been updated to address this specific situation, it appears that CBP may view this information as falling within the "border search exception" to the 4th Amendment. For more information, see CBP Inspection of Electronic Devices Tear Sheet.
- If a U.S. citizen refuses to consent to a search, CBP may do one of several things, including any of the following or a combination of the following:
  - Detain the person until he or she consents.
  - Have the person arrested for obstruction of justice.
  - Let the person go and seize the device in question.
- The CBP policy on search of electronic devices provides that CBP officers (with supervisory approval) make take physical possession of an electronic device either (a) when, upon a search of such a device, with or without suspicion of wrongdoing, a CBP officers discovers probable cause to seize it; or (b) when officers have "technical difficulties" in searching the device, such that technical assistance is required to continue the border search. In the latter case, inability to unlock the device due to non-consent could be deemed a "technical difficulty" justifying detention of the device.
- The policy provides that devices shall generally be returned within five days, but devices may be kept for up to 15 days and extensions beyond 15 days can be approved in 7-day increments thereafter.
- While CBP policy is to carefully record information about these detentions in its records, the policy sets no maximum period after which a device is required to be returned to its owner. If an LPR or nonimmigrant refuses to consent to a search, CBP could follow any of the courses of action outlined in the previous paragraph regarding U.S. Citizens and may, in addition, refuse a nonimmigrant admission to the United States and/or utilize the agency's expedited removal authority. See generally, INA §235 and 8 CFR Part 235.

## **Right to Counsel**

- CBP has long held that there is no "right to counsel" during the inspection and admission process, although attorneys are sometimes permitted, at the agency's discretion, to accompany clients who are detained in secondary inspection and/or are ordered to appear at a deferred inspection office. This interpretation is supported by 8 CFR §292.5(b) which applies generally to all immigration proceedings and states: (b) Right to representation.
- 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 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. (Emphasis added).

- In addition, the CBP Inspector's Field Manual, at chapter 2.9, states: Dealing with Attorneys and Other Representatives. "No applicant for admission, either during primary or secondary inspection has a right to be represented by an attorney – unless the applicant has become the focus of a criminal investigation and has been taken into custody. An attorney who attempts to impede in any way your inspection should be courteously advised of this regulation. This does not preclude you, as an inspecting officer, to permit a relative, friend, or representative access to the inspectional area to provide assistance when the situation warrants such action. ...1 (Emphasis added)."

### **Should CBP choose to issue an NTA and initiate removal proceedings**

- INA §101(a)(27) states that there must be at least ten days between service of the NTA and the first removal hearing. However, the issuance of an NTA does not impose upon CBP an obligation to allow the individual to speak with an attorney while being held in a CBP facility, "unless the applicant has become the focus of a criminal 1 The Inspector's Field Manual ("IFM") is no longer relied upon as an official source of agency guidance and has been at least partially replaced by the CBP Officer's Reference Tool (ORT). The ORT is the subject of FOIA litigation and has not yet been released.
- Nevertheless, the IFM guidance appears to comport with current agency practice. AILA Doc. No. 17032261. (Posted 3/31/17) Page 4 of 4 investigation and has been taken into custody."
- In addition, should CBP detain and hold the person until Immigration and Customs Enforcement (ICE) takes him or her into custody pending a bond hearing, the right to counsel would then attach, as the individual would no longer be an applicant for admission. AILA Doc. No. 17032261. (Posted 3/31/17)