

## EXERCISE OF DISCRETION VS. PROSECUTORIAL DISCRETION

CBP's policy is to use discretion where appropriate and in keeping with the CBP strategy of risk management; that is, focusing our resources on those cases that pose the greatest risk. Each traveler is evaluated on a case by case basis and the decision is based on the totality of the circumstances. Differences are outlined below:

### Exercise of Discretion – an affirmative act of approval – benefit decisions

1. Waiver (fee/ no fee)
2. Parole (fee/ no fee)
3. Deferred Inspection

#### **1. Waivers of Documentary Requirements:**

Generally, waivers approved at ports of entry will be for documentary deficiencies and will be documented using Form I-193, Application for Waiver of Passport and/or Visa.

#### Examples of situations in which a waiver may be appropriate:

- ~~Returning lawful permanent residents lacking evidence of alien registration.~~
- ~~Unforeseen emergency. An alien is not in possession of a proper visa due to governmental error (e.g., the consulate issued an L-2 instead of an L-1 non-immigrant visa).~~
- ~~An alien is not in possession of a proper visa, but has the requisite documentation for an employment-based non-immigrant visa (e.g., presents an I-797 confirming that a petition has been approved) however, the passport presented has expired.~~
- ~~An alien with a brief overstay that rendered his or her visa invalid pursuant to INA §222(g).~~
- ~~An alien issued a valid and appropriate visa, but who is unable to present the visa at the time of his or her application for admission. This often occurs when the visa is contained in a previously issued passport that is not in the alien's possession.~~
- ~~Representatives of foreign information media without appropriate visas.~~

#### **2. Paroles:**

Permits an otherwise inadmissible alien to physically be present in the U.S. for a temporary period of time due to compelling reasons: (not an admission)

- Ports of entry may grant paroles for:
  - Deferred inspection.
  - Referral for removal proceedings.
  - To facilitate an alien's departure.
  - Other situations deemed to be in the public interest.

#### The following situations are a few examples in which parole may be appropriate:

- Court Appearances
- Medical reasons
- Emergency workers responding to natural disasters
- When a document deficiency is not the only ground of inadmissibility
- Significant Public Benefit Parole

In situations involving minor or inadvertent violations and apparent bona fide travel with no other violations, such as a brief overstay of a Visa Waiver Program (VWP) admission, a parole may be granted to the alien if the alternative would result in detention or undue hardship.

The following are examples to parole a VWP applicant:

- On previous visit to U.S., traveler stayed beyond the 90 days due to hospitalization for illness while visiting family. Current trip is to attend a funeral.
- Pervious overstay in transit to another country the next day due to flight departure times.

### 3. Deferred Inspection

A deferred inspection may be used:

- When an immediate decision concerning admissibility cannot be made at a port of entry.
- When it appears likely that the issues surrounding admissibility can be resolved favorably at the onward port of entry.
- Deferred inspections may be necessary to:
  - Review an existing file.
  - Review other documentary evidence essential to clarifying admissibility.

The following situations are examples for deferred inspection

- Family of four, principal alien left their immigrant visa in their home country, family members can't be processed at this time. Parole entire family for deferred inspection.
- Beneficiary of an immediate relative petition, and who has an adjustment of status application pending with USCIS, if the only reason for inadmissibility is the alien's failure to have a valid advance parole, and there is a likelihood that USCIS will exercise discretion and allow the alien's adjustment of status application to continue to a final decision

### Prosecutorial Discretion Options – applies to enforcement decisions

#### 1. Withdrawal of Application for Admission

#### 2. Voluntary Return

#### 3. NTA release

#### 1. Withdrawal of Application for Admission

Under §235(a)(4) INA, the Attorney General may, in his or her discretion, permit an alien to withdraw his or her application for admission in lieu of removal proceedings under §240 of the Act, or expedited removal under §235(b)(1) of the Act. Factors might include, but are not limited to:

1. The seriousness of the immigration violation.
2. Previous findings of inadmissibility against the alien.
3. Intent on the part of the alien to violate the law.
4. Ability to easily overcome the ground of inadmissibility (i.e., lack of documents).
5. Age or poor health of the alien.
6. Other humanitarian or public interest considerations (relatives/other assets in U.S.).

Examples of Withdrawal of Application include:

- False claim under adjustment (7A1) vs (6C2)

- Preclearance airport, traveler left travel documentation at home, will travel on another flight once in possession of proper documents

## **2. Voluntary Return**

Voluntary return is used when CBP Officers encounter outbound illegal aliens.

Examples include:

- Encountered outbound after overstay of admission period.
- EWI outbound, no criminal record, traveling with minor children

## **3. NTA Release**

If the person is served a Section 240, Notice to Appear (NTA), and released, he/she must be paroled on a Form I-94 for removal proceedings (Port Authorized Parole). When an alien does not pose a potential risk to the US and transfer to a detention facility may cause undue hardship.

Examples of aliens placed into proceedings and not detained:

- Placed in proceedings for hardship reasons, family of four, encountered, overstays, detain father but not mother and children
- Traveler encountered as an overstay but due to age or health, release on own recognizance