



# HOW TO INTERVIEW CLIENTS ABOUT THEIR ENTRIES AND ATTEMPTED ENTRIES TO THE UNITED STATES (AND UNDERSTAND THEIR ANSWERS)

By ILRC Attorneys

A prospective client's complete entry and exit history to the United States is one of the most important pieces of information to gather so that you can properly evaluate their immigration case. However, sometimes it can be challenging to figure out what questions to ask to elicit the information you need, or what the answers mean. This practice advisory describes different types of entries to the United States—entries without inspection, entries with valid documents, entries with fraudulent documents, “wave throughs”—as well as different outcomes of unsuccessful attempted entries—voluntary returns or expedited removals—and the legal significance of these different entries and attempted entries. We also provide suggestions for questions to ask clients to identify what happened at each entry or attempted entry. This discussion applies to entries and attempted entries made by people who are not lawful permanent residents; it is primarily meant to help you assess a client's options for obtaining legal status, by understanding their entry and exit history to the United States. This advisory does not go into issues surrounding other legal “admissions”<sup>a</sup> that do not involve a physical entry into the United States, such as the effect of a grant of U nonimmigrant status or TPS.<sup>b</sup>

## I. Discerning Whether a Successful Entry Occurred and If Not, What Happened When the Client Was “Turned Around”

### A. Understanding Entries and Attempted Entries

If you simply ask your client or prospective client “How many times have you come to the United States?” you may get an answer that does not accurately reflect their history of entries (and attempted entries) to the United States. For example, someone might tell you that they had four separate entries to the United States through the southern border with Mexico. But with more specific questioning, it may become clear that they were apprehended and turned back at the border three times and they only actually entered the United States without being apprehended on their fourth attempt. A discrepancy like this can make a big difference. For instance, this person might be eligible for a provisional unlawful presence waiver if they only had one successful entry to the United States and have never left since that entry. But if you believed they had four entries instead of just one, you might miss this possible eligibility. For this reason, it is critical to delve into the

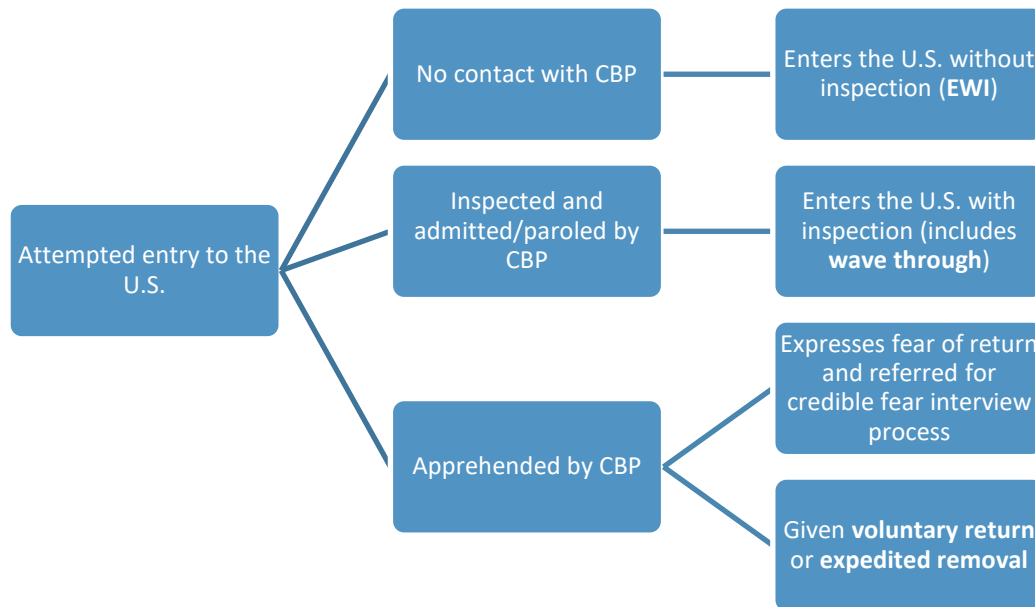
<sup>a</sup> Note that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) added the term “admission,” meaning a lawful entry to the United States after inspection and authorization by an immigration officer, replacing the former term “entry,” referring to crossing of a border with the United States. Further details on this change in terms is beyond the scope of this advisory and for purposes of this advisory, use of the word “entry” encompasses entries with or without inspection rather than focusing on the term “admission.”

<sup>b</sup> For more information on TPS grant as an “admission,” see ILRC, *Practice Alert on Ramirez v. Brown, November 2017 Update* (Nov. 15, 2017), <https://www.ilrc.org/practice-alert-ramirez-v-brown-november-2017-update-adjustment-opportunities-people-tps-and-people>.

details of a client’s entry and exit history, to determine which ones count as “entries” and which ones were only attempted entries.

**Practice Tip:** If it sounds like there may have been many entries and exits, the events occurred a long time ago, or the client is unsure of the details of what happened, do not just rely on their memory. Do OBIM and Customs and Border Protection (CBP) FOIA requests. For more information on how to file FOIA requests see ILRC, *A Step-by-Step Guide to Completing FOIA Requests with DHS* (Nov. 17, 2017).<sup>c</sup> Once you get the results, go over them with your client. Some practitioners request records in all cases, regardless of the number of entries or the client’s certainty regarding what happened. In cases where there is not an urgent deadline or reason for swift action, it is best practice to obtain agency records through a FOIA request any time there is a history of multiple entries or an exit.

When you are investigating what happened during a client’s entries or attempted entries, it is helpful to keep in mind there are generally four possible outcomes. One, they enter the country without inspection. Two, they make it into the country with inspection and admission or parole. Three, they are apprehended by CBP and returned. Four, they are apprehended by CBP and given expedited removal.<sup>d</sup> The first two result in an entry, and the second two usually do not. We will address further in this advisory the differences in the procedures and legal impact of each of these outcomes.



## B. Understanding Voluntary Return and Expedited Removal

From the point of view of many noncitizens, the difference between the third and fourth types of outcomes outlined above – voluntary return and expedited removal – is not readily apparent. In both scenarios the client may think of themselves as having been “caught” by CBP and sent back to their country of origin (or Mexico or Canada in certain situations). Nonetheless, these two different types of being “turned around” and “sent back” have very different legal consequences.

<sup>c</sup> Available at <https://www.ilrc.org/step-step-guide-completing-foia-requests-dhs>.

<sup>d</sup> A noncitizen who is subject to expedited removal, however, can express fear of return and if they pass a credible fear interview (CFI), they can be placed in withholding-only removal proceedings (while detained). A noncitizen can also appeal a negative CFI determination, but may still be removed if the immigration judge agrees there is no credible fear or they lose the withholding-only claim.

Generally speaking, a voluntary return has no effect, so it does not matter if someone has ten voluntary returns in their record; it most likely will not affect their ability to immigrate in the future. Voluntary return is not a legal procedure required by statute (note that voluntary return is different from voluntary departure, which is granted by an immigration judge). It is a choice by CBP officers to allow a person to “turn back” without facing expedited removal, if the person agrees to withdraw their “application for admission” by executing Form I-275, Withdrawal of Application for Admission. Oftentimes, voluntary returns occur informally, without the formal procedure of executing a form I-275.<sup>e</sup> An expedited removal, in contrast, is an administrative removal order, even though the individual did not appear before an immigration judge and did not have an opportunity to challenge the order; it has many of the same consequences as a removal order issued by a judge.

Expedited removal is a summary procedure for removing persons deemed inadmissible at the border for material misrepresentation or lack of immigration documents.<sup>f</sup> It applies to persons not admitted or paroled who are unable to prove they have been in the United States continuously for at least two years. In a January 2017 executive order, President Trump set forth a policy to expand expedited removal to people found anywhere within the United States who have not been residing in the United States for at least two years.<sup>g</sup> Although the statute technically provides for such non-border expedited removals, in reality, expedited removal has been limited to border apprehensions and also limited to more recent entrants. So far, the Trump Administration has not proceeded with the plan to expand expedited removal. Expedited removal continues to be generally applied to people encountered within 100 miles of the Canadian or Mexican border who cannot prove that they have been continuously present in the United States for at least fourteen days.

If someone has an expedited removal order and they have since returned to the United States unlawfully, they will be in danger of reinstatement of the removal order and will have no right to a hearing before an immigration judge unless they have an asylum-related claim. They may also be inadmissible under INA § 212(a)(9)(C), the so-called “permanent” bar, for returning unlawfully after a prior removal. Due to these severe consequences for someone who has been expeditiously removed, it is critical to identify whether someone has an expedited removal order or a voluntary return.

### **How to Determine if Someone Was Voluntarily Returned or Received Expedited Removal**

There are certain questions you can ask someone who is not sure whether they were sent back with a voluntary return or an expedited removal to help you figure out what happened. Based on their answers to these questions, if you suspect it may have been an expedited removal, you should do OBIM and CBP FOIA requests to confirm. You could also do an FBI background check, which may, but does not always, show an expedited removal. Nonetheless, results from an FBI background check come back much more quickly than results from a CBP FOIA so it can be a good place to start, even though the fact that there is no expedited removal in an FBI background check is not dispositive. If the FBI background check shows an expedited removal, you will have the answer more quickly. If not, you should still wait for the OBIM and CBP FOIA results before making any conclusions. Similarly, an executed I-275, Withdrawal of Application for Admission/Consular Notification in the FOIA results would indicate that the person was allowed to voluntarily return, but the lack of an I-275 doesn’t mean the person was not voluntarily returned informally instead.

<sup>e</sup> In some situations, a formal voluntary return might cut off an individual’s continuous physical presence required for cancellation of removal. See *Matter of Avilez*, 23 I&N Dec. 799, 800-801 (BIA 2003) (“an alien’s continuous physical presence continues to accrue for purposes of section 240A(b)(1)(A) of the Act following his or her departure of a duration less than that specified in section 240A(d)(2) unless, upon return to a land border port of entry, the alien was formally excluded or made subject to an order of expedited removal, was offered and accepted the opportunity to withdraw an application for admission, or was subjected to some other formal, documented process pursuant to which the alien was determined to be inadmissible to the United States.”).

<sup>f</sup> INA § 235(b)(1)(A).

<sup>g</sup> Border Security and Immigration Enforcement Improvements, Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017), available at <https://www.federalregister.gov/documents/2017/01/30/2017-02095/border-security-and-immigration-enforcement-improvements>.

Expedited removal orders are precipitated by a noncitizen's attempt to come into the United States without valid entry documents or through some type of misrepresentation. Asking the client what documentation, if any, they had with them when they were stopped by CBP, as well as what documentation they were given by CBP, would give you potentially useful information in figuring out what happened during the client's apprehensions. An expedited removal involves considerably more paperwork than a voluntary return. Also, an expedited removal order is usually accompanied by warnings that the individual cannot come back to the United States for five years. Many people with an expedited removal order remember this specific prohibition on returning for five years, even if they do not remember many of the other details. Lastly, expedited removal provisions did not take effect until April 1, 1997, so any border stop before then was most likely a voluntary return unless the client appeared before an immigration judge or was paroled in for the purpose of appearing before an immigration judge.

### Questions to ask:

- *When were you stopped by CBP trying to enter the United States?*
  - If before April 1, 1997 – before expedited removal provisions took effect – any border stop and turn around was likely a voluntary return.
- *Did you have any documents with you when you were stopped by CBP?*
  - If they were detained at or near the border with false documents of some kind, this may suggest an expedited removal.
  - If they were detained without documents, it may still be an expedited removal, but it is less likely than if they had false documents.
- (If yes) *What type of documents?*
  - You would want to pay special attention to the documents they were trying to use to come into the United States. If it was a green card or visa that was not validly issued to them (either fake or someone else's), this means that they may have been given an expedited removal order, and also that the basis for the expedited removal was inadmissibility under INA § 212(a)(6)(C)(i) for a material misrepresentation. If it was a U.S. passport or U.S. birth certificate that was not validly issued to them (fake or someone else's), this means that they may have been given an expedited removal order, and also that the basis for the expedited removal was probably inadmissibility under INA § 212(a)(6)(C)(ii), for a false claim to U.S. citizenship, which is a much more serious finding because of its long-term effects on future immigration relief options.
- *Do you remember having to sign anything or being given any paperwork?*
  - For a voluntary return, they oftentimes receive no paperwork. Sometimes, especially if they were attempting to enter with a nonimmigrant visa, they are given an I-275, Withdrawal of Application for Admission/Consular Notification and I-826 Notice of Rights.
  - For an expedited removal, a "Record of Proceedings" is created involving multiple forms, and the noncitizen is more likely to sign a sworn statement after initialing each page. An interpreter must be provided. The noncitizen is given a Notice and Order of Expedited Removal, Form I-860.
- (If yes) *Do you still have any of these documents?*
  - Someone who is expeditiously removed is given a form called a "Notice and Order of Expedited Removal." Sometimes people still have this document even many years later; other times you may need to do a FOIA in order to obtain it.
- *Do you remember being told that you couldn't come back for five years?*
  - If yes, this indicates an expedited removal.

## II. Legal Significance of Different Types of Entries

If you determine that your client did in fact make some type of entry into the United States, and was not immediately turned around with a voluntary return or expedited removal order, the next step is figuring out the type of entry and the legal consequences of that entry. Entries can be with or without inspection by an immigration officer. An entry with inspection is also known as an “admission.” In addition to entries during which an immigration officer officially admits someone based on a visa, entries with inspection also include “wave through” entries when a person is admitted into the country without being asked any questions or having any documentation with them. Courts have also found that when a person gains entry by misrepresenting their legal status or using false documents (other than a false claim to U.S. citizenship), that counts as an entry with inspection for purposes of determining whether they were “admitted.”

### A. Entry with a Visa or Other Document, Other Than a False Claim to U.S. Citizenship

An entry with a visa or other document is the most straightforward type of entry, made by someone who presents themselves at a port of entry with a valid visa such as a B-1/B-2 visitor visa, other visa, or border crossing card (BCC),<sup>h</sup> and who is allowed into the United States. In some cases, you can confirm this type of entry by reviewing their I-94 or stamp in their passport. Someone whose last entry is with a visa or other valid document like this has made a lawful entry (an “admission”) and may be eligible to adjust under INA § 245(a) if they meet the other requirements and do not fall under any of the bars to adjustment.

Someone who is permitted to enter the United States through use of a fraudulent visa or other document, other than a false claim to U.S. citizenship (see Section D below), has also been admitted to the United States, albeit by making a misrepresentation for which they would need a waiver for inadmissibility under INA § 212(a)(6)(C)(i).

Sometimes a noncitizen will tell you that they came to the United States “illegally,” which might lead an attorney to assume this means they entered without inspection, or “EWI” (see next section). However, it could also mean they came to the United States through some type of misrepresentation, as just described above, or were allowed into the country even though they lacked a lawful basis for admission and provided no documentation (see Section C below). This underscores why it is crucial to probe for details about all entries, as well as exits, to the United States, so that you do not misunderstand the type of entry or exit that occurred, and the corresponding legal consequence of that event.

### B. Entry Without Inspection

An entry without inspection (EWI) is similarly straightforward. This means that the noncitizen had no interaction with immigration officials and came into the United States undetected. If someone’s last entry was without inspection, they are typically ineligible to apply for permanent residency based on family petitions from within the United States because they have not been “inspected and admitted or paroled.”<sup>i</sup> However, there are a number of ways a person can potentially overcome this, such as if they have 245(i) as the beneficiary of a petition filed on or before April 30, 2001, they subsequently depart and reenter with advance parole, or they are granted U nonimmigrant status, asylum, or TPS in some jurisdictions.

### C. Entry After Inspection but Without Documents, Other Than a False Claim to U.S. Citizenship

As mentioned above, a client might tell you that they came to the United States unlawfully or “illegally,” because they had no lawful basis for coming to the United States. This may lead you to assume they entered without inspection. But, if they were allowed to enter the United States after presenting themselves to a border official for inspection, even though they

<sup>h</sup> A Border Crossing Card (BCC) is a document issued to Mexican citizens that allows them to visit U.S. border areas for a short period of time when entering by land or sea directly from Mexico, and can be used for unlimited trips for the duration of the card’s validity, usually ten years.

<sup>i</sup> INA § 245(a).

lacked any documentation, that is a lawful entry, or “admission,” for purposes of adjustment of status. The only exception is if the person falsely represented themselves as a U.S. citizen (see next section, Section D.).

Two seminal BIA cases, *Matter of Areguillini*<sup>j</sup> and *Matter of Quilantan*,<sup>k</sup> have established that “procedurally regular” inspections and admissions, also called “wave throughs,” are lawful entries, even though the person who was admitted may not have had a lawful basis for being admitted. “Wave throughs” most often occur when someone is traveling by land, such as in a car, to enter the United States. In the classic “wave through” scenario, a noncitizen is the passenger in a car stopping at a checkpoint to enter the United States. They present themselves for inspection at the port of entry, along with the driver of the car and other passengers, are not asked any direct questions, and are “waved through” with a hand gesture by the immigration officer.

In addition to adjustment of status eligibility, entry after inspection also means that if the individual is later placed in removal proceedings, they will be subject to the deportability grounds at INA § 237(a), which confer greater procedural rights, rather than the inadmissibility grounds at INA § 212(a) for individuals who have never been “admitted” to the United States. In the Fifth and Ninth Circuits, a “wave through” also constitutes an “admission” for purposes of establishing continuous residence for LPR cancellation of removal under INA § 240A(a)(2).<sup>l</sup>

#### D. Entry by Making a False Claim to U.S. Citizenship

A noncitizen who enters the United States under a false claim of U.S. citizenship – for instance, by showing someone else’s U.S. birth certificate – is treated as if they had made an entry without inspection.<sup>m</sup> The reasoning for this interpretation is that the process for inspecting U.S. citizens coming into the United States is much more perfunctory than that for inspecting noncitizens, so if someone manages to enter the United States by falsely claiming to be a U.S. citizen, this is more akin to someone who crosses the border undetected, without being inspected.

Therefore, it is important to find out what type of false documents someone may have used in order to enter the United States. Depending on the document, they may have been admitted, and have possible adjustment of status eligibility (with a fraud waiver), or instead they may not only lack a lawful admission, but also potentially be inadmissible under INA § 212(a)(6)(C)(ii).<sup>n</sup> There is no waiver to overcome this ground of inadmissibility.

#### How to Determine if Someone’s Entry Was With or Without Inspection

Screening for entries with documents, whether valid or fraudulent, is functionally very similar, with the exception that use of fraudulent documents will lead to inadmissibility under 212(a)(6)(C)(i), for a material misrepresentation. But as mentioned above, this similarity does not apply to documents used for false claims to U.S. citizenship.

#### Questions to ask about the type of entry:

- *Did you enter the United States through a checkpoint?*
  - If no, then no immigration official could have inspected and admitted the individual and this was an entry without inspection, as described in Part II, Section B.
  - If yes, then proceed to the next question.

<sup>j</sup> 17 I&N Dec. 308 (BIA 1980).

<sup>k</sup> 25 I&N Dec. 285 (BIA 2010).

<sup>l</sup> *Matter of Castillo Angulo*, 27 I&N Dec. 194 (BIA 2018).

<sup>m</sup> *Quilantan*, 25 I&N at 293. See also *Reid v. INS*, 95 S. Ct. 1164, 1168 (1975); *Matter of Pinzon*, 26 I&N Dec. 189 (BIA 2013).

<sup>n</sup> Note this ground of inadmissibility only applies to false claims made on or after September 30, 1996. Before this date, false claims fell under the general material misrepresentation ground, for which a waiver is available.

- *Did you present any documentation to the border official to gain entry?*
  - If no, then skip to the next set of questions to assess “wave through.”
  - If yes, then proceed to the next question.
- (If yes) *Was the documentation validly issued to you?*
  - If yes, then this was likely a standard entry with inspection and admission, as described in Part II., Section A.
  - If no, then proceed to the next question.
- *What type of documentation did you present to the border official? Do you remember if it was a fraudulent green card, visa, etc.?*
  - If a fraudulent green card or visa, this is an admission with a material misrepresentation, as described in Part II., Section A.
  - If a fraudulent U.S. passport or U.S. birth certificate, this is an entry without inspection, as described in Part II, Section D.
- *Do you still have the documentation you showed the immigration officer (if applicable)?*
  - If they still have the fraudulent document they used to enter the United States, this would help to prove the lawful entry.

The questions that follow focus on screening for “wave throughs,” and particularly on what is often the most challenging part of these types of cases: proving a “wave through.” These questions should help you assess whether you will be able to prove a “wave through” for purposes of adjustment of status, as the applicant for admission has the burden of proof to show a lawful admission. They are designed to help you identify whether someone made a lawful entry despite the lack of documentation. They will also help you determine whether the client is likely to be able to credibly prove their admission in the absence of an I-94 or an admission stamp.

**Questions to ask to determine if someone was “waved through,” and whether they are likely to be successful in proving it:**

- *Did you enter the United States through a checkpoint?* (Skip this question if you already asked it, as part of the previous set of questions.)
  - If no, then no immigration official could have inspected and admitted the individual and this was an entry without inspection, as described in Part II, Section B.
  - If yes, then proceed to the next question.
- *How were you traveling?*
  - If by air, it is less likely that the person was “waved through” if they presented no documents.<sup>o</sup>
  - If by foot or in a car, proceed with the rest of the questions. Because traveling by car is the most common scenario for a “wave through,” the rest of the questions are geared towards this type of situation. However, it is possible someone could have been traveling by foot and also been “waved through,” and you could adapt the following questions accordingly.

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<sup>o</sup> Heightened security and extensive customs checks at airports mean that someone is far less likely to be “waved through” the way they might be if traveling by car or on foot to the United States.

- (If in a car) *Do you remember any details about what the car looked like? Who was driving the car?*
  - The more details you can include in the client's statement about the "wave through" entry, the more likely it will be accepted as a credible account.
  - This can include the color of the car, type of car, and any other details they may remember.
- *Were you traveling with anyone else? If so, what details do you remember about the other people who were with you (if in a car, the other passengers in the car)?*
  - If they were traveling with someone with whom they are still in contact, who also has U.S. immigration status and would not be jeopardizing their own status, it could be helpful to include a statement from a corroborating witness regarding the "wave through" entry.
- *Did the immigration officer ask you any questions?*
  - This will provide details for the client's written statement regarding the "wave through."
- *Did you have any false or fraudulent immigration documentation with you? Did you show the documentation to the immigration officer?*
  - If no, then this entry was likely a "wave through."
  - If yes, then this is not actually a "wave through," but instead an admission with a misrepresentation and most likely the individual would be eligible for adjustment of status but require a waiver for the misrepresentation,<sup>p</sup> as described in Part II., Section A.
  - You will want to figure out whether someone had some type of fraudulent documentation with them, but did not end up having to provide it to the immigration officer. For example, if the officer did not ask them any questions or ask to see any documentation, there was no misrepresentation even if the person was prepared to show the false or fraudulent documents.
- *Do you remember approximately when this entry occurred? Any other details?*
  - Again, the more details the better, so if they can provide an approximate timeframe, which port of entry, what questions if any the immigration officer asked the group and to them individually, etc. and testify consistently if asked questions about this at an adjustment interview, the stronger the evidence will be.
- *What happened after you made it through the port of entry?*
  - If possible, see if the applicant can provide details about what happened after they were admitted, such as they were dropped off at a fast food restaurant just on the other side of the border, and their cousin picked them up and drove them to Los Angeles (or whatever the facts may be).
- *Are there any details that I'm missing?*
  - You want to make sure that you accurately describe everything they remember, especially regarding the complete interaction with immigration officers.

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<sup>p</sup> See INA § 212(i). Note, however, that there may be arguments against needing a waiver for material misrepresentation, including for instance if the individual was minor or otherwise lacked capacity to make a willful misrepresentation.





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