

U.S. doubling down on border filings scrutiny



By [Eileen M. Martin](#)

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Prove it. That is what U.S. Customs and Border Protection (CBP) officers say when a petition is filed at a port of entry to the U.S., and one of its law enforcement officers has to make a decision on whether an applicant or beneficiary qualifies for the U.S. status he seeks. This scrutiny only seems to be increasing year over year.

CBP adjudicates most first-time nonimmigrant NAFTA professional (TN) applications at its ports of entry. In past years, applicants would apply on a package of photocopies of all documents except their passports. Now, applicants must present original university degrees or transcripts and offer letters on letterhead with original signatures. This is a huge contrast to 25 years ago when an officer at a port of entry could be convinced that an applicant had attained the requisite university degree by a photograph in a yearbook.

L-1 Intracompany Transfer petitions, many of which are filed at ports of

entry for Canadian beneficiaries, have numerous requirements. They have also seen a tightening of the evidentiary requirements over time. As an example, unaudited financials used to be the standard to show that a company was active. Now CBP officers frequently will remain unconvinced of a company's activities without tax returns and payroll records.

In the past, a beneficiary could convince an officer that he worked for a Canadian company by a letter from that company. Now, any petition filed without a T-4 or equivalent documents is likely to face rejection.

As CBP officers have gained increased access to information through technology, accessing the U.S. for unlawful purposes has also become more difficult due to increased scrutiny.

Some foreign national coming to the U.S. for legitimate purposes have been caught up in the U.S. government's search for bad actors. The current state of affairs for legitimate status applicants is the side effect of this tightening of border security, particularly since 9/11. Unfortunately, once you're flagged, the news doesn't get better; while you might think that technology would make it easier for the government to correct an error or identify whether the person named in its database is actually, say, a criminal, or just someone else with the same name, the reality is the opposite. It can be challenging to be removed from a database of offenders once one's name has been listed.

Technology is also a double-edged sword, as CBP officers' decisions are also more heavily scrutinized by their immediate bosses, who are also under increased pressure from the Department of Homeland Security.

CBP knows which officer inspects which foreign national, and how much time that inspection takes on the primary line. While CBP officers work for national security, they are often at least as concerned about their job security. A bad decision that might have catastrophic results can be traced back to a single officer and threaten that officer's job security. Knowing this, many officers are inclined to exceed the legal standard of preponderance of the evidence and ratchet it up to "clear and convincing evidence" or even higher.

Border filings are a quick way to obtain an answer on an application or petition. However, lawyers should ensure that travellers understand and confirm all of the information in the documents they are filing. This goes a long way to protecting the traveller who is filing for a benefit when entering the U.S. — and preventing a denial in the record that can make future applications more complicated or challenging. These travellers should also understand the process and the fulsome authority of CBP officers. Learning of this information at the border is often an unhappy surprise.

When in doubt, it is recommended to consult with U.S. immigration counsel before filing documents at a port of entry. While no attorney can eliminate the scrutiny, a knowledgeable attorney can prepare the traveller for what is coming, manage expectations and make certain that the right paperwork to merit approval is submitted the first time around.

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