September 10, 2019

MEMORANDUM FOR:            Mark A. Morgan  
                        Acting Commissioner  
                        U.S. Customs and Border Protection  

                        Scott K. Falk  
                        Chief Counsel  
                        U.S. Customs and Border Protection  

FROM:                  Peter E. Mina  
                        Deputy Officer for Programs and Compliance  
                        Office for Civil Rights and Civil Liberties  

                        Susan Mathias  
                        Assistant General Counsel (Legal Counsel)  
                        Office of General Counsel  

SUBJECT:         Ensuring Meaningful Access for Indigenous Language Speakers  
                   Complaint No. 18-11-DHS-0537  

Purpose

Pursuant to 6 U.S.C. § 345 and 42 U.S.C. § 2000ee-1, this memorandum provides policy recommendations in connection with the above referenced complaint, in which the complainant alleges that U.S. Customs and Border Protection (CBP) failed to provide him meaningful language access during the inspections process.

Background

A news article, published August 5, 2018, reported that CBP separated a Guatemalan man from his daughter on July 7, 2018, after CBP claimed that her birth certificate was a falsified document.¹ The article states that the man spoke an indigenous Guatemalan language that Border Patrol Agents did not understand when he was detained, which contributed to the separation of the man and his daughter. The article further reports that in response the Texas Civil Rights Project contacted the man’s family in Guatemala and the Guatemalan consulate, and was able to authenticate the minor’s birth certificate, and that after DNA testing, which verified that the man was the child’s father, the two were reunited on August 3, 2018.

¹ The personal identifying information (PII) for the complainant, his minor child, his counsel, and the CBP Officers and Agents allegedly involved in the incident is set out in the attached PII Memorandum so that this memorandum can be shared freely (without that attachment) with those who have no need to know this personally identifying information.
Following the publication of the article, in September 2018, attorneys at the Texas Civil Rights Project were in contact with CRCL and on February 28, 2019, formally filed allegations on his behalf regarding the same incident. In their recounting, the complainant alleged that CBP detained him and his two-year-old daughter on or about July 5, 2018, near McAllen, Texas. The complainant is a native Mam speaker who has a very limited understanding of Spanish and does not speak English. The complainant alleged that he presented a birth certificate demonstrating that he is his minor child’s father, but the officer who processed him, and spoke to him only in Spanish, was “leading him to recant his statement that he was the father.” The complainant alleged that “no Mam interpreter was provided for [him] during his communication . . . Due to this confusion and language barrier, the official accused [the complainant] of lying about his relationship to his daughter and used the confusion to justify separation between the father and daughter.”

The complainant’s attorneys wrote that they learned of the complainant’s situation and notified DHS and ORR of the “unlawful family separation” on July 13, 2018. The complainant’s attorney stated that “on or about July 20, CBP official [b](6) responded via letter to our notification stating that DHS was going to undertake DNA testing to confirm parentage.” According to the correspondence, Texas Civil Rights Project negotiated the testing and requested “that [the complainant] be provided a Mam interpreter to provide informed consent,” which he was. The results of the DNA test confirmed his paternity.

Investigation

CRCL opened a short form investigation into these allegations on September 11, 2018. On November 5, 2018, CBP subsequently provided CRCL a Report of Investigation (ROI) (JIC 201811239). CBP also provided CRCL with the Record of Sworn Statement in Proceedings (I-867A), which documents that a BPA, witnessed by another BPA, interviewed the complainant in Spanish without an interpreter. The complainant’s I-213 included the following statement: “NOTE: Subject initially claimed to be traveling with his juvenile daughter . . . and claimed to be a family unit. Subject admitted to BPA [ ] that the child was his niece and her birth certificate was a fake document obtained by a smuggler in Guatemala to help him reach his destination.” Similarly, the minor child’s I-213 states, “Note: UAC is was [sic] traveling with Adult claiming to be the father [ ], Adult later admitted to not being the father instead being the uncle due to the child just crying.” CBP stated that it did not attempt to verify or authenticate the minor child’s birth certificate because of the complainant’s alleged admission that it was “fake.”

The complainant’s I-213 contains an addendum dated July 23, 2018, which states:

United States Border Patrol Agent [ ] from the Weslaco Border Patrol Station in Weslaco, Texas, contacted Language Line Services via telephone to interpret from [complainant]. Bertilda Identification number 301741 translated questions for [complainant]. [Complainant] was asked if he gave consent on taking a DNA sample from [minor child]. [Complainant] freely stated yes and gave consent. [Complainant] was also asked if he agreed and consented to take a DNA test which he also stated yes.
EARM contains an entry dated August 6, 2018, that confirms that the complainant had limited proficiency in Spanish: “8/6/18- JFRMU UC- ORR has provided the DNA report that confirms paternity for this adult and minor [ ]. ORR determined that during questioning about his relationship with the child, he did not understand the questions because he does not speak Spanish. He is an indigenous speaker.”

Subsequently, CBP responded to several additional questions from CRCL. CBP confirmed in correspondence to CRCL that in “this particular case, since the language line services [were] used after the subject had already been processed, the use of a language interpreter was only included in the I-213 narrative as an addendum to the original processing narrative.” The interpreter translated into Mam; CBP stated that “ICE/HSI wanted the consent for DNA translated into MAM.”

CBP noted on records and stated in correspondence to CRCL that “the subject was initially processed using the Spanish language with no interpreter used.” According to CBP, the complainant responded to questions regarding biographics and medical screening in Spanish. The I-867A record of sworn statement memorializing these responses that CBP provided to CRCL is dated July 6, 2018; however, the I-867A contains the questions and answers regarding consent to a DNA test. Thus, CRCL cannot identify which information the complainant provided to CBP in Spanish, and which through a translator.

In correspondence to CRCL dated December 10, 2018, the complainant’s attorneys wrote to CRCL regarding the complainant’s linguistic ability:

Mam language. Our Spanish speaking attorneys, paralegal, and law student can verify that [the complainant’s] ability to communicate in Spanish is very limited. It may appear to a person that [the complainant] had limited cognitive ability, but once [Texas Civil Rights Project] TCRP hired a Mam translator to communicate, it became clear that he was able to communicate perfectly fine in his native tongue. In addition, TCRP requested that CBP use the assistance of a Mam interpreter when they sought consent to conduct the DNA testing on both him and his daughter. TCRP coordinated with HSI agent [ ] to request that prior to the DNA testing, that CBP secure an interpreter to get informed consent. It took approximately two days for an interpreter to be available to get consent in his native language.

Analysis

Pursuant to Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, Federal Agencies, including CBP, are required to take reasonable steps to provide meaningful access to limited English proficient (LEP) persons to their programs, services, and activities, consistent with and without unduly burdening their agencies’ missions.² Federal agencies

are required to “develop and implement a system by which LEP persons can meaningfully access their services . . . .” To comply with EO 13166, DHS developed a language access plan and adopted a language access policy. CBP incorporated language access requirements into National Standards on Transport, Escort, Detention and Search (TEDS). CBP, subsequently, promulgated a language access plan, which it issued in final form on November 18, 2016. The plan describes “CBP’s current language access activities, [and] includes steps to improve and increase language services for LEP individuals in operations, services, activities, and programs across CBP.” The plan confirms that the “obligations under Executive Order 13166 and this Plan apply to all LEP members of the public CBP encounters in its programs and activities, regardless of their immigration status.”

In the plan, CBP committed to developing agency-wide “procedures or protocols that staff should follow to provide language services to LEP persons encountered in their daily activities. The protocol will cover: recognizing the LEP status of an individual, identifying the language spoken, identifying situations requiring appropriate language assistance, accessing this language assistance, and recording the contact.” CBP stated in the Language Access Plan under Next Steps that as of March 2017, “USBP has a protocol for . . . the use of contract telephonic interpretation services . . . .”

On December 4, 2018, CBP issued Directive 2130-031, Roles and Responsibilities of U.S. Customs and Border Protection Offices and Personnel Regarding Provision of Language Access (the Directive). The Directive states, “It is the policy of CBP to take reasonable steps to provide LEP persons with meaningful access . . . to its operations. . . . This policy also applies to interactions with the public, including but not limited to, law enforcement encounters (e.g., questioning, processing, etc.).” The Directive, in 6.8.1, states:

> The Executive Assistant Commissioner, Office of Field Operations, and Chief, USBP, shall also establish and implement mission-specific written procedures for interacting with LEP persons; record in the appropriate electronic system language assistance services provided and language spoken by LEP persons to whom such services are provided consistent with CBP policy; and display the “I

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7 CBP Language Access Plan, id. at 2.
8 Id. at 2.
9 Id. at 14.
CBP does not require that an LEP self-identify his or her native language to be provided language services. To help CBP personnel identify the primary language of the alien, the Directive further specifies in 7. Identifying Primary Languages:

7.1. CBP personnel will attempt to identify the primary language of an LEP person through self-identification by the LEP person; identification by an individual accompanying the LEP person; asking a CBP employee able to provide language assistance services or a contract interpreter to verify an individual’s primary language; and/or through use of job aids, such as the “I Speak” poster, the “Habla?” poster for indigenous languages, the “I Speak” booklet, and the indigenous language identification tool.

Additionally, when CBP encounters an individual whose primary language is a language other than English or Spanish, USBP agents are required to use a telephonic interpretation service. CBP has reported that the USBP contract with Interpreters and Translators, Inc., provides consistent, quality language services including indigenous languages, and while interpreters may not always be immediately available, especially for some indigenous languages, they are consistently able to provide interpreters within 30 minutes or less.

CRCL recognizes that Border Patrol Agents and some CBP Officers are required to be proficient in conversational Spanish and typically conduct interviews on the Southwest border in Spanish. However, as noted above, there are numerous legal and procedural requirements that must be met when a non-English or Spanish-speaking LEP individual presents to CBP. If not followed, the results can have a significant impact on the health, safety, and rights of the individuals involved.

Findings

1. The complainant speaks Mam, an indigenous language, and has limited proficiency in both English and Spanish.

2. Border Patrol Agents who encountered, questioned, and processed the complainant and his minor daughter did not identify that his primary language is Mam and that he had limited proficiency in Spanish.

3. CBP did not provide or engage interpretation in Mam to facilitate meaningful communication with the complainant during processing of the complainant.

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12 Id. at 4.
13 Id.
14 CBP, Language Access Plan at 7. Under the Language Access Plan, BP’s language access protocol provides that “[i]n instances where in-house language capabilities are not sufficient” BP personnel will use “contract telephonic interpretation services.”
4. The lack of interpretation in Mam during the initial processing may have negatively impacted the complainant’s ability to accurately represent his parental interests.

5. CBP did not advise the complainant during processing that CBP provides free language assistance services. To CRCL’s knowledge, CBP has not fully implemented its Language Access Plan,15 with respect to part a) of Objective 13, which states: “Provide for notice of free language assistance services and points of contact for additional information, a) CBP will develop and implement a communication plan which shall include methods for providing notice to the public of language assistance services and points of contact for additional information; b) CBP will post the Civil Rights and Civil Liberties “I Speak” multi-lingual posters nationwide at operational locations to assist officers and agents in identifying languages spoken by LEP members of the public CBP encounters in its programs and activities.” Additionally, to CRCL’s knowledge, CBP has not developed mission-specific written procedures for interacting with LEP persons, as required by CBP Directive 2130-031.

6. There were important interests, including parental interests, at stake during CBP’s processing of the Complainant, for which effective language services were required.

Recommendations

CRCL recommends that CBP undertake the following measures:

1. CBP, in collaboration with CRCL, should immediately identify all existing protocols and review them to ensure that Border Patrol agents and Office of Field Operations officers can accurately and properly identify the primary language of the alien, especially with respect to indigenous language speakers.

2. CBP should take additional steps to widely disseminate these or improved protocols, develop musters, and integrate the protocols into training to ensure that agents and officers follow the protocols.

3. CBP should ensure that officers and agents document the use of language assistance, if used, in the electronic system of record.

4. CBP should ensure that as already required the “I Speak” poster, and the “Habla?”16 indigenous language posters are prominently displayed at operational locations (Port of Entry, Border Patrol Station, and Centralized Processing Center).

5. CBP should continue to work with CRCL to update its language access plan to include new protocols, musters, training, and other steps related to effective communication with indigenous language speakers who are not proficient in English or Spanish.

Please inform us within 60 days whether you concur or non-concur with these recommendations by emailing a response to (b)(6)

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15 CBP provided CRCL with a draft of a Supplementary Language Access Plan on March 27, 2019, which CRCL currently is reviewing.

If you concur, please include an action plan outlining how you plan to implement these recommendations.

It is CRCL’s statutory role to advise department leadership and personnel about civil rights and civil liberties issues, ensuring respect for civil rights and civil liberties in policy decisions and implementation of those decisions. These recommendations are pursuant to that role; we believe they can assist you in making CBP the best agency possible. We look forward to continuing to work with CBP on these important issues, especially by providing technical assistance, as requested, and reviewing any protocols, musters, and trainings regarding language access to LEP persons.

Copies to:

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September 10, 2019

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Scott K. Falk
Chief Counsel
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FROM: Peter E. Mina
Deputy Officer
Office for Civil Rights and Civil Liberties

Susan Mathias
Assistant Gene
Office of General Counsel

SUBJECT: Attachment to Recommendation Memorandum for Complaint No. 18-11-DHS-0537

The attached memorandum does not include the personally identifiable information (PII) of the complainant, his minor child, his counsel, or the CBP Officers and Agents allegedly involved in the incident so that the memorandum may be freely shared. CRCL provides this attachment to assist those reviewing CRCL’s recommendations who need to know that information:

Complainant:

Complainant’s Minor Child:

Complainant’s Counsel:

Protected by Attorney-Client and Deliberative Process Privileges
Border Patrol Agents:

BPA [REDACTED], witnessed by BPA [REDACTED] interviewed Mr. [REDACTED] in Spanish.

The I-213 states that Mr. [REDACTED] admitted to BPA [REDACTED] that Miss [REDACTED] was his niece.

An addendum to the I-213 states that BPA [REDACTED] from the Weslaco Border Patrol Station in Weslaco, Texas, contacted Language Line Services via telephone to interpret.

HSI Agent:

Victor Hugas

This attachment should be attached to the recommendation memorandum only for those who have a need to know this personally identifiable information.