

CBP RECENT ENFORCEMENT UPDATE

Laura Knoll
Alley, Maass, Rogers & Lindsay, P.A.

I. A Recent Change in the Foreign Affairs Manual Allows Yacht Crewmembers on U.S. Documented Vessels to Obtain B-1 Visas

A. Foreign Affairs Manual Change

Though U.S. Coast Guard regulations seemingly permitted U.S. recreational vessels to employ a noncitizen master or unlicensed crew, until recently, immigration regulations prohibiting the issuance of B-1/B-2 visas to foreign crew members serving on board U.S. vessels meant that in reality, the employment was prohibited. The reason was because customs previously interpreted immigration laws to authorize B-1 visas for masters and crew members of foreign-flagged yachts only. See U.S. Dep't of State, 9 Foreign Affairs Manual 41.31 N9.5 (2011) (limiting B-1s to foreign crew members on yachts that "sail out of a foreign home port"). Under this interpretation, a noncitizen would be unable to obtain a B-1 visa to serve as master or unlicensed seaman on any U.S.-documented recreational vessel because they have domestic, not foreign, homeports. A recent change appears to authorize B-1 visas for crew members on yachts documented under the laws of the United States. See U.S. Dep't of State, 9 Foreign Affairs Manual 402.2-5(C)(5) (Aug. 20, 2019) (removing the "sail out of a foreign home port" language and authorizing B-1 visas for yacht crew "regardless of the nationality of the yacht"). This change is currently being tested. We understand CBP agrees with this interpretation.

B. Citizenship Requirements for Recreational Vessels over 200 GT is a Three-Statute Analysis

There are two statutes that restrict the nationality of crewmembers onboard U.S. documented vessels:

46 USC § 8103(a)--Except as otherwise provided in this title, only a citizen of the United States may serve as *master, chief engineer, radio officer, or officer in charge of a deck watch or engineering watch* on a documented vessel

46 USC § 12131. Command of documented vessels.

(a) In general.--Except as provided in subsection (b), a documented vessel may be placed under the command only of a citizen of the United States.

(b) Exceptions.--Subsection (a) does not apply to

(1) a vessel with only a recreational endorsement . . .

The U.S. Coast Guard has recognized that 46 USC § 12131 supersedes 46 USC § 8103(a) with respect to the citizenship requirement for the captain of a private yacht.

However, there is also a third statute that is relevant for officers on U.S. flag vessels over 200 gross tons, which is the Officers' Competency Convention, 1936. While the Officers' Competency Convention does not expressly require U.S. citizenship for certain positions, it requires certain positions to have U.S. merchant marine credentials.

46 USC § 8304--

(b) The Officers' Competency Certificates Convention, 1936 . . . on the minimum requirement of professional capacity for **masters and officers** on board merchant vessels . . . applies to a documented vessel operating on the high seas except--

(1) a public vessel;

(2) a wooden vessel of primitive build, such as a dhow or junk;

(3) a barge; and

(4) a vessel of less than 200 gross tons . . .

(c) A person may not engage or employ an individual to serve as, and an individual may not serve as, a **master, mate, or engineer** on a vessel to which this section applies, if the individual does not have a **license** issued under section 7101 of this title authorizing service in the capacity in which the individual is to be engaged or employed.

The Coast Guard regulations applicable to the issuance of U.S. merchant marine credentials (MMCs) include citizenship requirements for MMCs with officer endorsements:

46 CFR § 10.221 Citizenship

(a)

(1) **MMCs with officer Endorsements.** Only individuals with valid U.S. citizenship may apply for officer endorsements, except individuals applying for endorsements as operators of uninspected passenger vessels authorizing service on undocumented vessels in accordance with § 11.201(d) of this subchapter.

(2) **All other MMCs.** All other applicants, except as noted in § 12.809 of this subchapter, must be either:

(i) A citizen of the United States;

(ii) An alien, as defined under section 101(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1101 *et seq.*) (the Act), who is lawfully admitted to the United States for permanent residence, as defined by section 101(a)(20) of the Act.; or

(iii) A foreign national who is enrolled in the United States Merchant Marine Academy (USMMA).

(b) Proof of citizenship or alien status must be submitted to the Transportation Security Administration (TSA) with the applicant's TWIC application in accordance with 49 CFR 1572.17(a)(11).

(c) TSA and the Coast Guard may reject any evidence of citizenship that is not believed to be authentic. Acceptable evidence of citizenship may be an original or a copy certified as true by the agency responsible for issuing the document of the following:

(1) If the individual is applying for an officer endorsement (with the exception of those applying for an MMC endorsed only as Operator of an Uninspected Passenger Vehicle (OUPV) of an undocumented vessel), the individual must provide an original of any one of the following documents:

(i) Certified copy of a birth certificate, issued by a State, county, municipality or outlying possession of the U.S. bearing an official seal;

(ii) U.S. passport (expired or unexpired);

(iii) Certificate of Citizenship issued by U.S. Citizenship and Immigration Services or the Immigration and Naturalization Service;

(iv) Certificate of Naturalization issued by U.S. Citizenship and Immigration Services or the Immigration and Naturalization Service; or

(v) Merchant mariner's document issued by the Coast Guard after February 3, 2003, that shows that the holder is a citizen of the United States.

The effect of the Officers' Competency Convention is that a master, mate, or engineer on a U.S. documented vessel over 200 gross tons must be a U.S. citizen, because these officers require officer MMCs, and under Coast Guard regulations, officer MMCs are only available to U.S. citizens.

II. CBP Increases Enforcement of Penalties for Failure to Provide Notices of Arrival

A recent uptick in enforcement for Notice of Arrival and Departure (NOAD) violations has caused a stir among yacht owners. The reason is because the failure to submit an NOAD carries a maximum penalty of up to \$95,881.00 per day. With the high owner/operator turnover rate in yachting and our proximity to the Bahamas in South Florida, it is easy to see how costly mistakes can be made.

A. What are Notice of Arrival and Departure regulations?

Generally, foreign yachts over 300 gross tons and U.S. commercial vessels are required to submit notices of arrival and departure to and from ports and places in the United States. The regulations are found in 33 CFR §§160.201-216. The purpose of these regulations is to enhance maritime domain awareness so the U.S. Coast Guard can track vessels and address maritime safety and security threats. Importantly, compliance with these regulations is totally separate from U.S. Customs and Border Protection reporting requirements. Having a cruising license or permit to proceed from Customs and Border Protection does not exempt vessels from filing NOADs. Moreover, vessels are required to submit NOADs when they are moving within U.S. waters between U.S. Coast Guard Captain of the Port Zones, not just on arrival from foreign voyages. Violations of NOAD regulations are inconvenient and costly. Violations lead to civil penalty cases with fines imposed, and could also lead to the vessel being restricted from moving, denied entry, or expelled from the Captain of the Port Zone.

B. What vessels do the NOAD regulations apply to?

With some exceptions,

- (1) U.S. vessels in commercial service, and
- (2) All foreign vessels, except most notably, foreign vessels 300 gross tons or less that are not engaged in commercial service and are not carrying dangerous cargo (i.e., foreign pleasure yachts 300 GT or less).

C. When must vessels submit an NOAD?

If your voyage time is—	Then you must submit an NOAD—
96 hours or more...	At least 96 hours before arriving at the port or place of destination
Less than 96 hours...	Before departure but at least 24 hours before arriving at the port or place of destination

NOADs are submitted electronically at enoad.nvmc.uscg.gov and are referred to as “eNOADs.” Vessels are also required to update their eNOADs when any information in their eNOAD changes, such a change in arrival port or time.

If a vessel is unable to comply with the NOAD requirements, especially because of a hazardous condition like a structural or mechanical failure, which also require reporting to the Coast Guard, you should submit the eNOAD as soon as possible and **immediately contact your nearest Coast Guard Sector Prevention Arrivals Department and follow their instructions.**

D. What if the vessel already arrived without submitting an eNOAD?

Submit a belated eNOAD, which could be mitigating evidence in your favor. Expect to receive a Letter of Undertaking Demand from the Coast Guard, and eventually, a civil penalty. Customs and Border Protection might also withhold your clearance from port and confiscate your registry until security for the civil penalty is satisfactorily provided to the Coast Guard.

E. What is the Letter of Undertaking Demand?

The Letter of Undertaking Demand is the Coast Guard’s notice to the owner or operator that it believes there has been a violation and is withholding your clearance until the owner provides satisfactory proof that the owner will appear and ultimately pay the civil penalty, if issued. The owner should acknowledge receipt of the Letter of Undertaking Demand to the Coast Guard as soon as possible.

F. What is a Letter of Undertaking?

A Letter of Undertaking is simply a promise to pay in the event the penalty is issued, and the Coast Guard has its own preferred format. The biggest issue for owners is usually how to get one, and whether the Coast Guard will accept it. The Coast Guard accepts Letters of Undertaking

only from reputable insurers that are certified by the Treasury Department or a U.S. entity, preferably a U.S. maritime law firm.

G. Why don't insurers usually issue a Letter of Undertaking?

It is always best to check if your insurer can provide you the Letter of Undertaking first. Not all insurers will, though, because the underlying penalty is not normally covered under the policy. The reason is because the penalty is not a third-party liability; it is more like a speeding ticket, which your car insurance would not cover, either.

H. Can a maritime attorney issue a Letter of Undertaking?

Yes, and a maritime attorney is in the best position to guide the owner through the civil penalty process once the restrictions placed on the vessel are lifted. Depending on the circumstances, the owner may have to escrow the maximum amount of the civil penalty in the law firm's trust account.

I. What happens after the restrictions are lifted?

Once the Letter of Undertaking has secured the release of the vessel from restrictions, the administrative civil penalty process begins. Depending on the circumstances, it could take several weeks to months to receive your Preliminary Assessment Letter. The case file should be closely tracked.

J. What will the civil penalty be?

That is impossible to predict, but the vessel's history of eNOAD violations, and any mitigating or aggravating circumstances, are relevant. The Coast Guard will first issue a Preliminary Assessment Letter with its findings and a Preliminary Assessed Amount. We've seen penalty amounts trending upwards, including to the maximum. It is very unlikely that any vessel will receive only a warning, even for a first-time violation.

K. Can the Preliminary Assessed Amount be reduced?

After receiving the Preliminary Assessment Letter, the owner has an opportunity to pay the Preliminary Assessed Amount or submit written evidence or request a hearing without fear that the final penalty ultimately issued will be greater than the Preliminary Assessed Amount. The Coast Guard Hearing Officer will consider your submission and issue a Final Assessed Amount. However, in some cases, it may be most cost-effective to pay the Preliminary Assessed Amount, if it is reasonable in light of other cases.

L. What happens after the assessed amount becomes final?

There is an administrative appeal process for civil penalties, but eNOAD violations are generally not worth appealing beyond the Final Assessed Amount. Once the penalty becomes final, the owner should pay the penalty in a lump sum or set up a payment plan with the Coast Guard. If the owner does not pay the final assessed penalty amount, the Coast Guard will file suit against the owner under the Letter of Undertaking.