



# U.S. Department of Justice

Executive Office for Immigration Review

*Office of the Chief Immigration Judge*

Chief Immigration Judge

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March 28, 2005

## MEMORANDUM

TO: All Immigration Judges  
All Court Administrators  
All Judicial Law Clerks  
All Immigration Court Staff

FROM: The Office of the Chief Immigration Judge

SUBJECT: Interim Operating Policies and Procedures Memorandum 05-03:  
Background and Security Investigations in Proceedings before Immigration  
Judges and the Board of Immigration Appeals

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This document provides guidance on background investigations and security checks in immigration proceedings. Thus, sections IV B, XII B, and XIII B of OPPM 00-01 (Asylum Request Processing) are hereby superseded. In addition, sections A 2 and A 3 of OPPM 90-5 (Applications Requiring Good Moral Character; and Filing Appeals Briefs In Detained Cases) are hereby superseded.

## **I. INTRODUCTION**

On January 31, 2005, the Executive Office for Immigration Review (“EOIR”) published an interim rule entitled, *Background and Security Investigations in Proceedings before Immigration Judges and the Board of Immigration Appeals* (“Background and Security Investigations Rule”). The rule is effective April 1, 2005, and amends Department regulations governing proceedings before Immigration Judges and the Board of Immigration Appeals (“Board”) when a respondent has applied for particular forms of immigration relief. The rule provides that such relief cannot be granted until the Department of Homeland Security (“DHS”) completes the necessary identity, law enforcement, and security investigations. The rule also provides that a decision granting relief shall include instructions that the respondent will need to contact an appropriate DHS office for a document evidencing the new status.

## **II. PROHIBITION ON GRANTING RELIEF**

The Background and Security Investigations Rule provides that “[i]n no case shall an Immigration Judge grant an application for immigration relief that is subject to the conduct of identity, law enforcement, or security investigations or examinations under this [rule] until after DHS has reported to the Immigration Judge that the appropriate investigations or examinations have been completed and are current as provided in this section and DHS has reported any relevant information from the investigations or examinations to the immigration judge.” 8 C.F.R. § 1003.47(g).

## **III. COVERED FORMS OF RELIEF**

The following forms of relief are covered by the rule and therefore cannot be granted until DHS completes the necessary background investigations and security checks:

- (1) Asylum under section 208 of the Immigration and Nationality Act (“Act”);
- (2) Adjustment of status to that of a lawful permanent resident under sections 209 or 245 of the Act, or any other provision of law;
- (3) Waiver of inadmissibility or deportability under sections 209(c), 212, or 237 of the Act, or any provision of law;
- (4) Permanent resident status on a conditional basis or removal of the conditional basis of permanent resident status under sections 216 or 216A of the Act, or any other provision of law;
- (5) Cancellation of removal or suspension of deportation under section 240A or former

- section 244 of the Act, or any other provision of law;
- (6) Relief from removal under former section 212(c) of the Act;
  - (7) Withholding of removal under section 241(b)(3) of the Act or under the Convention Against Torture;
  - (8) Registry under section 249 of the Act; and
  - (9) Conditional grants relating to the above, such as for applications seeking asylum pursuant to section 207(a)(5) of the Act or cancellation of removal in light of section 240A(e) of the Act.

In addition to these forms for relief, the rule broadly applies to “any form of immigration relief in immigration proceedings which permits the alien to reside in the United States.” However, as noted in section VIII below, the rule does not apply to voluntary departure applications or to custody redeterminations.

#### **IV. IMMIGRATION JUDGES HANDLING COVERED FORMS OF RELIEF**

At the master calendar or any other hearing during which a respondent states his or her intent to file an application for relief covered by the Background and Security Investigations Rule, the DHS must provide certain instructions and the Immigration Judge must provide certain advisals to the respondent regarding the conducting of background investigations and security checks.

##### **A. REQUIRED INSTRUCTIONS AND ADVISALS FOR COVERED FORMS OF RELIEF**

When a respondent states his or her intent to file an application for a covered form of relief, counsel for DHS must provide respondent with the DHS biometrics instructions form which will inform the respondent that he or she must mail a copy of his or her application to a specific DHS office in order to get a biometrics appointment, unless DHS advises the Immigration Judge that such information is unnecessary in the particular case.<sup>1</sup> The DHS will then request a reasonable period of time for (1) the respondent to comply with the DHS biometrics instructions, and (2) DHS to initiate and complete the necessary background investigations and security checks.

Thereafter, the Immigration Judge, on the record, must inform the respondent: (1) that DHS has provided him or her with the biometrics instructions form; (2) of the date he or she must comply with those instructions; and (3) that failure to comply with those instructions or later provide biometrics or other biographical information to DHS, without good cause, will constitute an abandonment of the application for relief and an order will be entered dismissing the application.

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<sup>1</sup> These procedures do not apply to detained cases. The regulation provides “DHS is responsible for obtaining biometrics and other biographical information with respect to any alien in detention.” 8 C.F.R. § 1003.47(d).

The merits hearing should be scheduled to a date that affords the respondent a reasonable period of time to comply with the DHS biometrics instructions and DHS time to complete the background investigations and security checks.

**B. BACKGROUND INVESTIGATIONS AND SECURITY CHECKS NOT COMPLETED**

At the commencement of the merits hearing, the Immigration Judge must inquire on the record from counsel for DHS if the background investigations and security checks have been completed. If the background investigations and security checks were not completed, the Immigration Judge should inquire as to why they were not completed before the date of the merits hearing. The Immigration Judge may deem the application for the covered form of relief abandoned and enter an order dismissing the application if the background investigations and security checks were not completed because the respondent failed to comply with the DHS biometrics instructions without good cause.

If the background investigations and security checks were not completed because DHS did not complete those investigations and checks or did not receive the results from another agency, the Immigration Judge may proceed with the merits hearing; however, he or she cannot render a decision granting any covered form of relief. In addition, DHS can seek a continuance and explain, to the extent practical, the time needed to complete the background investigations and security checks. Under no circumstances should a case be administratively closed, instead it should be continued.

If an Immigration Judge chooses to conduct the merits hearing, he or she cannot render a decision granting any covered form of relief; however, he or she can deny the relief. Further, Immigration Judges are not authorized to make a conditional grant of a covered form of relief pending completion of the background investigations and security checks. However, if the Immigration Judge would grant relief after hearing all the evidence, he or she may dictate a draft oral decision outside the presence of the parties in the interest of efficiency. The immigration judge should render that decision on a separate tape marked "draft oral decision." The Immigration Judge cannot inform the parties that he or she is dictating a draft oral decision or inform the parties of the substance of that decision. Rather, the Immigration Judge should reschedule the case to a date that affords DHS time to complete the background investigations and security checks. At the rescheduled hearing, if DHS counsel reports that the background investigations and security checks have been completed, the Immigration Judge should issue his or her oral decision by playing the previously recorded decision and making that his or her final decision in the case. The Immigration Judge should delete the word "draft" from the tape before returning it to the ROP. If the Immigration Judge does not issue the draft oral decision as his or her final decision in the case, he or she should remove the tape containing the draft decision from the ROP because it is not part of the record.

**C. BACKGROUND INVESTIGATIONS AND SECURITY CHECKS HAVE BEEN COMPLETED**

If at the commencement of the merits hearing, DHS counsel indicates that the background investigations and security checks have been completed, the Immigration Judge must 1) ensure that DHS counsel has stated on the record that the background investigations and security checks have been completed; and 2) note on the Immigration Judge Worksheet the name of DHS counsel who reported that the background investigations and security checks have been completed and the date.

**V. ADJOURNMENT CODES**

All continuances granted in application for relief cases must be accurately assigned to the appropriate requesting party. Immigration Judges must ensure that they have accurately indicated on the Immigration Judge Worksheet the specific reason for adjournment. Clerks or interpreters entering information into the system must also ensure that adjournment codes are accurately entered. Using the correct adjournment code will reveal that a case was not completed within the case completion goal because it had to be adjourned for completion of the background investigations and security checks.

**A. CODE 24**

If the Immigration Judge adjourns a case because DHS needs time to complete the background investigations and security checks, the proper adjournment code is 24.

**B. CODE 36**

If the Immigration Judge adjourns a case to allow respondent time to complete the necessary paperwork or other requirements for the background investigations and security checks, the proper adjournment code is 36.

**VI. PROCEDURES WHEN RELIEF IS GRANTED**

At the time that the Immigration Judge grants relief, the decision granting relief must include advice that the respondent will need to contact an appropriate office of DHS to obtain a new document. DHS has issued *Post Order Instructions For Individual Granted Relief Or Protection From Removal By Immigration Court*, which is appended to this OPPM at [Attachment A](#). The Immigration Judge must ensure that this notice is provided to the respondent when he or she issues an oral or written decision granting relief which entitles the respondent to a document from DHS.

## VII. REMANDS FROM THE BOARD

With regard to cases pending before the Board, the rule provides that if background investigations and security checks have not been completed, or DHS reports that the results of prior investigations are no longer current, then the Board will determine the best means to facilitate the final disposition of the case as follows: (1) the Board may issue an order remanding the case to the Immigration Judge with instructions, to allow DHS to complete or update the appropriate security investigations; or (2) the Board may provide notice to both parties that in order to complete adjudication of the appeal the case is being placed on hold until such time as all identity, law enforcement, or security investigations or examinations are completed or updated and the results have been reported to the Board.<sup>2</sup> *See* 8 C.F.R. § 1003.1(d)(6)(ii). The Board is not required to remand or hold a case if it decides to dismiss the respondent's appeal or deny the relief sought. *See* 8 C.F.R. § 1003.1(d)(6)(iv).

Thus, the Board is permitted to remand cases to the Immigration Courts for the sole purpose of allowing DHS to complete the required background investigations and security checks. The Board's order in such a case should contain instructions which make it clear that the case is being remanded only for DHS to complete the background investigations and security checks.<sup>3</sup> Further, the Board's decision should contain instructions on how the case is to be handled upon remand. The Immigration Judges should not readjudicate cases which are remanded for DHS to complete the required security investigations. Rather, the Immigration Judge is to consider *only the results* of the security investigations. 8 C.F.R. § 1003.47(h). The Immigration Judge's role is to await the results of the background investigations and security checks and to rule on the application for relief after the DHS presents the results of the security investigations.

These remanded cases should be calendared as master calendar hearings, not merits hearings. At the master calendar hearing, DHS may notify the respondent of the need to provide biometrics and other biographical information and provide a biometrics instructions form to the

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<sup>2</sup> The Supplementary Information states that “[i]n the short term, the Department anticipates that remanding cases to the immigration judge may be the most efficient means to complete or update results for pipeline or transitional cases.” The provision goes on to note that “[o]ver time, however, as DHS is able to improve its internal procedures for updating the results of previous investigations or examinations without the need for aliens to provide a new set of fingerprints, the Department expects that the Board and DHS should make greater use of the procedure for holding appeals where necessary in order to allow the opportunity for DHS to update prior results without requiring a remand.”

<sup>3</sup> In addition, the Board will use a decision code which indicates that the case is being remanded for the sole purpose of allowing DHS to complete the required security investigations. It will be possible, therefore, to track in ANSIR/CASE how many of these cases are remanded from the Board and the ultimate disposition of these cases.

respondent for such procedures. The DHS will then request a reasonable period of time for (1) the respondent to comply with the DHS biometrics instructions, and (2) DHS to initiate and complete the necessary background investigations and security checks. The Immigration Judge, on the record, must then inform the respondent: (1) that DHS has provided him or her with the biometrics instructions form; (2) of the date he or she must comply with those instructions; and (3) that failure to comply with those instructions or later provide biometrics or other biographical information to the DHS, without good cause, will constitute an abandonment of the application for relief and an order will be entered dismissing the application. *See* section IV A, above.

If DHS reports that the background investigations and security checks uncovered no new information, the Immigration Judge should issue a decision in accordance with the Board's instructions. If, however, DHS presents new information in reporting the results of the security investigations, the Immigration Judge may set an individual merits hearing to consider any legal or factual issues, including issues related to credibility, if relevant.

### **VIII. VOLUNTARY DEPARTURE AND CUSTODY REDETERMINATIONS**

The background investigations and security checks requirement does not apply to the granting of voluntary departure. Thus, an Immigration Judge may schedule a hearing for adjudication of a voluntary departure application and may grant a voluntary departure application without waiting for the DHS to complete background investigations and security checks. The regulation provides, however, that “[i]f DHS seeks a continuance in order to complete pending identity, law enforcement, or security investigations or examinations, the Immigration Judge may grant additional time in the exercise of discretion.” *See id.* The rule further provides that if the Immigration Judge grants additional time, the 30-day period for the Immigration Judge to grant voluntary departure, as provided in § 1240.26(b)(1)(ii), shall be extended accordingly. *Id.*

Because custody decisions must be made promptly, the background investigations and security checks requirement does not apply to proceedings seeking the redetermination of conditions of custody of an alien during the pendency of immigration proceedings under section 236 of the Act. However, the regulation states that “[i]n scheduling an initial custody redetermination hearing, the Immigration Judge shall, to the extent practicable consistent with the expedited nature of such cases, take account of the brief initial period of time needed for DHS to conduct the automated portions of its identity, law enforcement, or security investigations or examinations with respect to aliens detained in connection with immigration proceedings.” *See* 8 C.F.R. § 1003.47(k).

**IX. CONCLUSION**

The Background and Security Investigations Rule provides that an Immigration Judge cannot grant an application for relief for which background investigations and security checks are required if DHS has not reported on the completion of those investigations. This Interim OPPM is intended to provide guidance in implementing the rule which is effective April 1, 2005.

If you have any questions regarding this Interim OPPM, please contact Brenda O'Malley, Counsel to the Chief Immigration Judge, at (703) 305-1247, or your Assistant Chief Immigration Judge.



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Michael J. Creppy  
Chief Immigration Judge

Attachment





**POST-ORDER INSTRUCTIONS FOR INDIVIDUALS GRANTED RELIEF OR PROTECTION FROM REMOVAL  
BY IMMIGRATION COURT**

*Please follow the applicable instructions marked below.*

**If you fail to present yourself to the U.S. Citizenship and Immigration Services (USCIS) as instructed, and fail to follow USCIS instructions for providing your biometrics (such as fingerprints, photograph, and signature) and other biographical information, you may not receive your immigration documents.**

<input type="checkbox"/> <b>A. Instructions for Individuals with Final Orders</b>	<input type="checkbox"/> <b>B. Instructions for Individuals Without Final Orders</b>
<p><input type="radio"/> You have been granted permanent residence or asylum, and that decision is final. In order to receive a Permanent Resident Card or asylum and employment authorization documents, you must contact USCIS in one of the following ways:</p> <ul style="list-style-type: none"><li>• You may schedule an appointment with your local USCIS office through INFOPASS, an internet-based online system at <a href="http://www.uscis.gov">www.uscis.gov</a>, or</li><li>• In case of a true emergency, your local USCIS office will try to assist you without an appointment.</li></ul> <p><b><u>In order to allow sufficient time for the USCIS office to receive information about your court order, please do not make your appointment or visit USCIS any earlier than 3 business days after the date of your immigration court order.</u></b></p> <p><b><i>You <u>must</u> bring a copy of your final order granting you asylum or permanent residency when you come to USCIS to complete processing for your status and/or work authorization documents.</i></b></p> <p><input type="radio"/> You have been granted another form of relief or protection, such as withholding of removal, and you <i>may</i> be eligible for work authorization. You may obtain an I-765, Application for Employment Authorization, from the USCIS website at <a href="http://www.uscis.gov/graphics/formsfee/forms/index.htm">www.uscis.gov/graphics/formsfee/forms/index.htm</a>, or by calling (800) 375-5283. Submit the application as directed in the instructions to the application.</p>	<p>Your application for relief/protection has been granted, but the decision is not final. Therefore, you will not receive a Permanent Resident Card or documentation of asylum at this time.</p> <ul style="list-style-type: none"><li>• The government has 30 days to file an appeal of the Immigration Judge’s decision with the Board of Immigration Appeals (BIA). You may check whether the government has filed an appeal by calling (800) 898-7180.</li><li>• If the government does not file an appeal, the Immigration Judge’s decision will become final after 30 days, and you may then schedule an appointment with USCIS to receive your immigration documents (e.g., Permanent Resident Card or asylum and employment authorization). Follow the instructions on the left side (A) of this paper for making an appointment at your local USCIS office. Be sure to bring the judge’s order to USCIS.</li><li>• If the government files an appeal of the Immigration Judge’s decision, the BIA will issue a filing receipt. You may consult the BIA Practice Manual at <a href="http://www.usdoj.gov/eoir">www.usdoj.gov/eoir</a> for information on the appellate process.</li><li>• While an appeal of your case is pending at the BIA, you may be eligible to apply to USCIS for an employment authorization document. For further information, see <a href="http://www.uscis.gov">www.uscis.gov</a>.</li><li>• If the BIA issues an administratively final order granting you relief or protection, at that time you may schedule an appointment with USCIS to receive your immigration status documents. Be sure to bring your BIA order to USCIS.</li></ul>