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COMMENTS:

The AG has authorized us share these
draft regs and guidelines with White
House counsel. She has asked us not
to circulate more broadly (e.g. OMB)
until we hear further from her next week.

DRAFT Regulations for the Use of Classified Evidence in Immigration Proceedings
December 29, 2000

3.44 Notification to the Executive Office for Immigration Review of the potential use of classified information; stay of proceedings. In any case in which proceedings have commenced and the Service counsel notifies the immigration judge that the Service is in the process of determining whether classified information will be submitted to the Immigration Court, upon motion of the Service, the immigration judge shall grant a continuance of no less than fourteen days. At the hearing immediately following the continuance:

(a) ***Detained aliens.*** The Service counsel shall inform the immigration judge whether the Service is seeking authorization to submit classified information and whether a further continuance will be required. If a further continuance will be required, the Service counsel may request a reasonable period for such continuance, not to exceed thirty days. Such a request shall constitute "good cause" pursuant to § 3.29 of this chapter. Further continuances shall be adjudicated in accordance with § 3.29, except that if the Service counsel represents that such continuance is necessary in order to obtain the proper authorization to use classified information, the immigration judge shall consider this an important factor in determining whether a further continuance is warranted,

(b) ***Non-detained aliens.*** The Service counsel shall inform the immigration judge whether the Service is seeking authorization to submit classified information and whether the Service is ready to proceed. If the Service is not ready to proceed, upon motion of the Service counsel to administratively close the case, the immigration judge shall grant such motion. Once the case has been administratively closed and the Service determines it wishes to proceed with the case, the Service counsel shall submit a motion to re-calendar the case. If the Service intends to submit classified information in the case, the Motion to Re-Calendar must be entitled "Motion to Re-Calendar A Case for the Submission of Classified Information."

(c) ***Notification of authorization.*** In any case that has been continued under (a), the Service counsel must give written notification to the immigration judge within 2 business days of the grant of authorization to submit classified information. In any case that has been administratively closed under (b), the Service counsel shall provide such notification in the motion to re-calendar the case if the Service intends to submit classified information. If the immigration judge originally assigned the case is not properly designated to preside over a case involving classified information, the Chief Immigration Judge shall reassign the case to an immigration judge who is so designated. The new immigration judge shall familiarize himself or herself with the record and shall state for the record that he or she has done so.

4.1. Use of classified information. (a)(1) ***In general.*** Service adjudicators, immigration judges, and the Board may, as authorized or permitted under applicable law, receive and consider evidence classified under an applicable Executive Order.

(2) ***Duty to safeguard classified information.*** Employees of the Department shall protect at all times the security of classified information.

(3) **Authorization.** Classified evidence may be received and considered by Service adjudicators, and may be submitted to an immigration judge or the Board, only upon written authorization by the Attorney General or the Deputy Attorney General.

(4) **Notice.** The alien shall be informed by the Service in writing or orally on the record that classified evidence will be introduced or considered by a Service adjudicator, an immigration judge, or the Board. In exclusion, deportation, or removal proceedings, Service counsel shall notify the alien in advance of the submission.

(5) **Unclassified summaries.** The Service or the immigration judge shall request that the classifying agency provide, on an expedited basis, an unclassified summary of any classified information proposed for submission *ex parte* and *in camera* in proceedings before a Service adjudicator, an immigration judge, or the Board. Such an unclassified summary would be disclosed to the alien applicant or respondent if the classified evidence is ultimately submitted.

(6) **Classified brief.** Service adjudicators, immigration judges, and the Board may receive and consider a classified addendum to the Service's brief in a case in which classified evidence is submitted. The Service shall notify the applicant or respondent that a classified addendum has been submitted.

(7) **Hearing; examination by adjudicator.** Where the Service has submitted classified information concerning an alien in proceedings before a Service adjudicator, an immigration judge, or the Board, such information shall be considered *ex parte* and *in camera*. The authorization by the Attorney General or Deputy Attorney General of a classified submission shall not diminish the responsibility of the Service adjudicator, immigration judge, or Board for rendering an independent evaluation of the evidence. The adjudicator shall not pass on the validity of the classification, and shall not presume the evidence unreliable solely by reason of its classification pursuant to an applicable Executive Order or its submission *ex parte* and *in camera*.

(8) **Redacted transcript.** The Service or the immigration judge shall request that the classifying agency provide, on an expedited basis, a redacted transcript showing non-classified portions of any *ex parte*, *in camera* hearing for disclosure to the alien applicant or respondent.

(9) **Decision.** An adjudicator who has considered classified evidence shall issue a written decision and shall state whether the classified evidence was material to the decision. If it is necessary to include classified information as part of a decision, the portion of the decision discussing the classified information shall be drafted as a classified attachment. Any classified information shall be confined to the classified attachment.

(b) **Applicability.** (1) Except as otherwise provided in this subsection, subsection (a) shall apply where classified evidence is used, as authorized or permitted by law, in proceedings before a Service adjudicator, an immigration judge, or the Board.

(2) Subsection (a) shall not apply in proceedings under title V of the Act, in proceedings under section 235(c) of the Act, or where the existence of classified information is discovered subsequent to the arrest of an alien and the use of such information is necessary or appropriate to maintain custody of the alien provisionally pending further review of the use of such information.

(3) This section is not intended to apply to adjudications made or to persons situated outside the geographic limits of the United States as defined in section 101(a)(38) of the INA.

(c) **No private right of action or remedy.** Nothing in this section should be construed as

creating any private right of action or other judicially or administratively enforceable right, interest, privilege, claim, defense, presumption, or remedy.

(d) *Establishing deportability.* Classified evidence shall not be used to establish deportability, except as provided under title V of the Act.

DRAFT Guidelines for the Use of Classified Information in Immigration Proceedings
December 29, 2000

I. Application

§ 1.0 These Guidelines establish the basic procedures for the use of classified information by the Department of Justice in immigration proceedings. These Guidelines are applicable to all Department of Justice components and employees, but are not intended to create any private right of action or other judicially or administratively enforceable right, interest, privilege, claim, defense, presumption, or remedy. The Guidelines supersede the Attorney General's Interim Procedures for Removal Court Actions Against Alien Terrorists.

§ 1.1 For the purposes of these Guidelines, the term "Department" refers to the Department of Justice and its component offices, divisions, bureaus, and agencies. The term "immigration proceedings" includes all cases brought under Titles II and V of the Immigration and Nationality Act (INA) and any other adjudication by the Department under the INA in which the use of classified information is authorized or permitted by law. The term "national security investigation" includes FBI foreign intelligence, foreign counterintelligence, and international terrorism investigations. These Guidelines are not intended to apply to adjudications made or to persons situated outside the geographic limits of the United States as defined in section 101(a)(38) of the INA.

II. Statement of Principles

§ 2.0 The Department should avoid the *ex parte* and *in camera* use of classified information in immigration proceedings except in rare circumstances where such use is appropriate to protect the important governmental interests specified in § 4.6 of these Guidelines.

§ 2.1 Classified information should be introduced *ex parte* and *in camera* in immigration proceedings only with the personal approval of the Attorney General (AG) or the Deputy Attorney General.

§ 2.2 Classified information should be approved for submission *ex parte* and *in camera* in immigration proceedings only after a review pursuant to these Guidelines that includes consideration of the credibility, importance, and proper classification of the information.

§ 2.3 In any case in which the Department uses classified information in an immigration proceeding, the Department shall provide the alien with an unclassified summary of every portion of the classified information that is susceptible of such summary without disclosure of information classified under the pertinent Executive Order(s).

§ 2.4 Employees of the Department shall protect at all times the security of classified information.

III. Classified Evidence Review Committee

§ 3.0 The decision whether to use classified information in immigration proceedings shall be made by the AG or DAG upon the advice of the Classified Evidence Review Committee (Review Committee or Committee). This Committee replaces the Alien Terrorist Removal Court Task Force and any similar reviewing bodies.

§ 3.1 The Review Committee shall consist of representatives from the Deputy Attorney General's Office (ODAG), the Immigration and Naturalization Service (INS), the Federal Bureau of Investigation (FBI), the Civil Division, the Terrorism and Violent Crime Section (TVCS) of the Criminal Division, the Office of Intelligence Policy and Review (OIPR), and the Rights Division (CRT), and such additional or alternative representatives as the DAG may provide. Where the agency with classification authority over the pertinent information (hereinafter "the classifying agency") is not a component of the Department, the DAG may invite a representative of that agency to participate in meetings of the Review Committee. Each Department component shall be represented by an officer empowered to speak and act on behalf of that component.

§ 3.2 The DAG shall chair the Committee, but may delegate day-to-day operation of the Committee to a subordinate official in ODAG.

§ 3.3 The Review Committee shall be a standing committee and shall meet at the direction of the DAG or his delegate. The Committee shall seek to operate and advise the DAG by consensus. The ultimate responsibility to authorize or reject the use of classified information rests with the AG and the DAG.

IV. Review and Decision by the Review Committee

§ 4.0 When the INS learns of classified information that may be material to its decision (1) to initiate or pursue any type of removal proceeding, (2) to detain an alien, (3) to revoke a previously granted benefit or status, or (4) to grant, deny, or oppose an application for any immigration benefit or relief, the INS shall conduct an initial inquiry in consultation with the FBI or other relevant classifying agency.

§ 4.1 If upon such inquiry the INS makes an initial determination that the classified information is reliable and material to the case, the INS shall convene a Review Team (Team). The Team shall consist of one attorney each from INS District Office (as designated under § 7.0, and referred to hereinafter as "INS trial attorney"), INS General Counsel (as designated under § 7.1), FBI General Counsel in an FBI case, Criminal Division (either TVCS or the Internal Security Section, depending on the subject), Civil Division, and OIPR. The Team membership may be restricted or modified by the DAG for security or other reasons. The Review Team will be chaired by the attorney from the INS General Counsel's office except that, where it appears that the case may be appropriate for referral to the ATRC, the DAG or the DAG's representative may appoint a Civil Division attorney to serve as chair.

§ 4.2 (a) In General. All Department components shall assist in providing the Review Team with information (other than source or asset files) relevant to its inquiry.

(b) *Source and asset files.* Source and asset file information in an FBI case will be provided to FBI Headquarters by the relevant field offices. Two members of the Review Team, jointly designated by the AG and the Director of the FBI, shall be given access to all source and asset file material. The AG may, however, specify alternative arrangements for review (including review by the AG alone) if the AG believes that access by two members of the Review Team would be inappropriate.

(c) *Threat assessment.* In an FBI case, the FBI shall provide a written assessment of the reliability of the FBI information. Where the classified information is being used to demonstrate a national security threat in an FBI case, the FBI shall provide to the Team a written assessment that explains the nature of the threat on which the relevant investigation was predicated, the subject's relationship to that threat, and an assessment (if possible) of the likely consequences of the alien's release from custody with regard to that threat.

§ 4.3 The Department shall seek to establish protocols, where it has not already done so, with other classifying entities to the same effect as those described in §§ 4.0-4.2.

§ 4.4 If a majority of the Team, including the representative of the component with primary authority for the litigation of the case, is satisfied that the classified information meets the requirements of these Guidelines, it shall prepare a request to the Attorney General for approval ("Approval Request") of the use of a classified submission in immigration proceedings. The Approval Request will normally be drafted by the component with primary responsibility for the litigation, but may be drafted by another component with the consensus of the Team or by direction of the DAG or the DAG's representative. The Approval Request shall be forwarded to the Review Committee as provided in §§ 4.5-4.6. The Team should note in the Approval Request any specific objections raised or caveats expressed by particular components represented on the Team, and the components may elaborate on their objections or caveats in writing for inclusion with the Approval Request. Where information obtained or derived from electronic surveillance or physical search conducted pursuant to the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. sections 1801-11, 1821-29 [hereinafter "FISA information"] is proposed, the component drafting the Approval Request shall coordinate with OIPR in such drafting.

§ 4.5 The Approval Request shall include:

- a) The name of the alien;
- b) The alien's immigration status;
- c) The classified information proposed for submission;
- d) The purpose for the introduction of the classified information;
- e) A summary of the investigation that generated the classified information;

- f) A description of other pertinent information;
- g) Any possible grounds of removal (based on the information available at the time);
- h) Eligibility, if any, for immigration benefits or relief from removal;
- i) The nature and status of any pending applications for immigration relief or benefits;
- j) If the alien is detained, a brief statement of the reasons for detention;
- k) The proposed forum for the introduction of the classified information; and
- l) The unclassified summary of the classified information or, in those rare circumstances in which no such summary is possible, an explanation as to why no such summary is possible.

Where FISA information is proposed for use, the Approval Request shall also identify such information and the relevant FISA target(s), and specify whether the relevant FISA collection(s) involved electronic surveillance or physical search.

§ 4.6 (a) The Review Team shall propose and the Review Committee shall recommend the use of classified information in immigration proceedings only if each is satisfied that one or more of the following conditions have been met: (1) there are reasonable grounds to believe that the alien's continued presence or activities in the United States constitute a threat to the national security (as defined in § 219(c)(2) of the Act) or the public safety; (2) the alien has engaged in terrorist activity, serious human rights abuses, or clandestine intelligence activities on behalf of a foreign power; (3) the alien is an arriving alien and is described in § 212(a)(3)(A) (other than clause (ii)), (B), or (C) of the INA; or (4) the alien has made false or misleading claims with respect to an alleged intelligence affiliation with a department, agency, or component of the United States government.

(b) In addition, the Review Team shall propose and the Review Committee shall recommend the use of classified information in immigration proceedings only if each is satisfied that (1) the classified information is reliable and accurate; (2) the Department has received authoritative assurances from the classifying agency that the information is properly classified under the pertinent Executive Order(s); (3) there are reasonable grounds to believe that, absent the submission of the classified information, an alien meeting one or more of the conditions in paragraphs (1) through (4) of subsection (a) would likely be admitted to the United States, receive or retain an immigration benefit or relief (including a favorable custody determination), or be permitted to remain in the United States; (4) an unclassified summary of the classified information will be provided to the alien if possible, and the summary will be as detailed as possible; and (5) the proposed use of the information is authorized or permitted by law.

(c) Where the foregoing criteria have been met, the Team and the Committee should also consider whether the classified submission should be recommended, in light of the extent to which the unclassified summary, if any, informs the alien of the nature of the classified information, the alien's immigration status, the nature of any relief or benefit sought, the governmental interests at stake, and any other pertinent factors. In any case in which an unclassified summary cannot be provided to the alien, use of classified information should not be recommended unless the condition set forth in § 4.6(a)(1) or (a)(4) is satisfied.

§ 4.7 In addition to the requirements set forth in § 4.6, when determining whether classified information may be used in a custody determination (other than a parole determination relating to an arriving alien), the Review Team shall propose and the Review Committee shall recommend such use only when it is satisfied that the failure to detain the alien would pose a threat to the national security (as defined in § 219(c)(2) of the Act) or the public safety.

§ 4.8 As a general rule, the Review Committee should develop recommendations for the AG or DAG as quickly as possible. The Committee may meet once or more to consider a proposal, and may request additional information from the INS or the classifying agency. In all cases, however, the Review Committee shall comply, to the extent possible, with whatever filing deadlines may exist in a given case and shall request that the INS seek a filing extension only in exigent circumstances.

§ 4.9 At the conclusion of its review, the Review Committee shall present its recommendations in writing to the AG or DAG. The recommendations will normally be drafted by the component with primary responsibility for the litigation, with the assistance of the other components as needed, but may be drafted by another component in the discretion of the Committee. The Committee should note any specific objections raised or caveats expressed by particular components, and such components may elaborate on their objections or caveats in writing for inclusion with the Committee's recommendations. The recommendations may include such limitations or modifications of the original request as the Committee may deem appropriate.

§ 4.10 A recommendation under § 4.9 to approve the use in immigration proceedings of classified information shall be accompanied by the following:

(a) A certification by the Commissioner of the INS that the criteria set forth in these Guidelines have been met; and a recommendation by the Commissioner as to whether the proposed use should be approved;

(b) If the classified information includes FISA information, OIPR's recommendation as to whether the proposed use should be approved; and

(c) If the classified information has been provided by the FBI, a written certification by the Director of the FBI to the AG or DAG (1) that the information is properly classified, (2) that, pursuant to the FBI's review of all underlying materials and information relevant to the classified information proposed for submission, including source and asset file materials, the classified information is true and reliable to the best of the Director's knowledge, (3) that access to FBI information has been provided for review as specified in § 4.2, and (4) that any special agent familiar with the case, source, and/or investigation has been made available at the Team's request, and will be made available to brief the AG or DAG. If the FBI is providing the classified information to demonstrate that the alien poses a threat to the national security or the public safety, the Director shall certify, based on a thorough assessment, that the alien poses such a threat and shall provide an update of any threat assessment furnished by the FBI under § 4.2.

Special Procedures for Emergent Circumstances

§ 4.11 Special Rule for Arriving Aliens in Section 235(c) Proceedings.

(a) In any case where an immigration officer suspects, on the basis of classified information, that an arriving alien (as defined in 8 C.F.R. § 1.1(q)) may be inadmissible under sections 212(a)(3)(A) (other than clause (ii)), (B), or (C), of the Immigration and Nationality Act, the immigration officer, before issuing Form I-147 ("Notice of Temporary Inadmissibility") under 8 C.F.R. § 235.8(a), shall forward the relevant documentation, including the classified information, as expeditiously as possible to the Director of the INS Field Operations National Security Unit (NSU) and to the Chief of the INS General Counsel's Office National Security Law Division (NSLD).

(b) The Director of the NSU and the Chief of the NSLD will jointly assess that evidence and determine, within two business days of receipt of the documentation described in subsection (a), whether the classified information (1) supports the suspicion that the alien is inadmissible and (2) is reliable on its face. If the information is facially reliable and supports the suspicion that the alien is inadmissible as alleged, the matter shall be returned to the District Director with jurisdiction over the port of entry for issuance of Form I-147 in accordance with 8 C.F.R. § 235.8(a).

(c) Within five business days of the determination described in subsection (b), the INS, with the concurrence of the originating classifying agency, shall send to the DAG a written request to use classified information. The Review Team shall, within two weeks of that submission, present its recommendations under the standards in §§ 4.6-4.7 and in accordance with § 4.9 to the AG or the DAG for approval under § 4.13 without a formal recommendation from the Review Committee. Only if the DAG or the AG approves the request to use classified information may the INS take further action under 8 C.F.R. § 235.8(b)(1).

§ 4.12 Special Rule for Certain Arrests.

(a) If an immigration officer makes an arrest of any alien present in the United States in violation of the immigration laws and the immigration officer subsequently learns about classified information tending to show that the alien may pose a threat to the national security or public safety, that officer shall forward all relevant documentation, including the classified information, as expeditiously as possible through the chain of command to the Director of the NSU and the Chief of the NSLD. The Director of the NSU and the Chief of the NSLD shall, within two business days, jointly assess the information and determine whether it is (1) relevant to the issue of whether the alien should remain in custody, and (2) reliable on its face.

(b) If the Director of the NSU and the Chief of the NSLD determine that the information is relevant and reliable on its face, they may, with the concurrence of the originating classifying agency,

authorize such use of the information as may be necessary or appropriate to maintain custody of the alien, as authorized or permitted by law and notwithstanding §§ 4.6-4.7, pending further review under these Guidelines. In such circumstances, within two business days of such authorization, the INS shall send notice to the DAG that such action has been taken, and within one business day of such notice, shall initiate such further procedures as may be appropriate under this part.

Review and Decision by the AG or DAG

§ 4.13 Except for any interim use authorized under § 4.11(b) or § 4.12, the *ex parte* and *in camera* use of classified information in immigration proceedings shall proceed only upon the personal written authorization of the AG or DAG, subject to any limitations or modifications she or he deems appropriate. Unless the AG or DAG specifies otherwise, such authorization shall be deemed to permit *ex parte* and *in camera* oral testimony reasonably within the scope of the approved classified information. In exigent circumstances, the AG or DAG may authorize the use of substitute or abbreviated procedures in place of the procedures set forth in §§ 4.0-4.2, 4.5-4.7, and 4.9-4.13.

Special FISA Provisions

§ 4.14 FISA information may be disseminated to the Review Committee or a Review Team, insofar as such information is considered for *ex parte* submission or is otherwise relevant to the responsibilities of the Team or Committee under these Guidelines. Such dissemination shall be in accordance with FISA, applicable minimization procedures adopted by the AG and approved by the Foreign Intelligence Surveillance Court, and any other applicable order of the Foreign Intelligence Surveillance Court. The Team or Committee shall use FISA information so disseminated only for the purposes of discharging their responsibilities under these Guidelines. Any further dissemination or use of FISA information for criminal investigation or prosecution purposes shall comply with §§ 4.17 and 4.18 of these Guidelines.

§ 4.15 When the FBI provides FISA information to the Review Team, the FBI shall create a log stating the target(s) of the collection from which the FISA information was obtained or derived, and whether such collection involved electronic surveillance or physical search. This log shall be made available to members of the Review Team or Review Committee upon request.

§ 4.16 Regarding FBI national security investigations in which FISA surveillance or searches are being conducted, the Review Committee and the Review Team shall adhere to the guidance respecting the scope of permissible advice that applies to the Criminal Division under Part A, Paragraph 6 of the Attorney General's memorandum, dated July 19, 1995, on "Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations" (hereinafter "the AG's July 19, 1995 memorandum"), or any successor guidance from the AG.

§ 4.17 FISA information may be used in an immigration, criminal or other type of proceeding only with the prior authorization of the AG. If the FBI foresees a need to seek such authorization for use in an immigration proceeding, it shall request that OIPR review the FISA information and submit its recommendation to the Attorney General concerning such approval. OIPR's recommendation shall accompany the Review Committee's recommendations under § 4.9. Any dissemination of FISA information under these Guidelines shall be accompanied by a statement that such information may be used in a proceeding only with the prior authorization of the AG.

Relation to Criminal Investigation or Prosecution

§ 4.18 Although the purpose of these Guidelines is to evaluate the proposed use of classified information in immigration proceedings, the FBI, the Criminal Division, and, with regard to criminal immigration matters, the INS, may refer any alien subject to these Guidelines for criminal investigation at any time during this process after notice to all affected components. If FBI or OIPR objects to the referral of an alien who is or has been the subject of an FBI national security investigation, the DAG shall be asked to decide the matter. Classified information disseminated to the Review Team or the Review Committee pursuant to these Guidelines may also be disseminated for criminal investigation or prosecution purposes as authorized by law and in compliance with prior restrictions placed upon dissemination by the originating entity. In addition, dissemination of classified information from FBI national security investigations for criminal investigation or prosecution purposes shall require FBI approval, and dissemination of FISA information for such purposes shall require OIPR approval; however, if FBI or OIPR withholds such approval, the matter may be brought to the attention of the AG or DAG for final approval or disapproval. In the case of an FBI national security investigation, components shall also comply with such provisions of the AG's July 19, 1995 memorandum, or any successor guidance from the AG, as may be applicable in the circumstances of the case.

Additional Approvals

§ 4.19 The process and standards prescribed by this part shall be followed for each proposed classified submission, even if a different classified submission has been approved previously in the case. The process and standards prescribed by this part shall also be followed if previously approved classified information is to be introduced in a different proceeding. This section is subject, however, to the special procedures set forth in §§ 4.11-4.13. Nothing in this section shall be construed to restrict the discretion of the Review Team and the Review Committee to determine whether, and to what extent, it is appropriate to revisit particular determinations reached in a previous approval process.

V. Post-Approval Procedures for Non-ATRC Cases

§ 5.0 Absent extraordinary circumstances, the INS trial attorney appointed to the Review Team pursuant to § 4.1 shall represent the INS before the immigration court in cases in which classified

evidence is submitted. The trial attorney shall coordinate with the attorneys in the National Security Law Division of the INS Office of General Counsel. The trial attorney shall keep the General Counsel and the Review Committee apprised of significant developments in the case and shall consult with the Civil Division on matters that may affect federal court litigation.

§ 5.1 Administrative appeals shall be handled by the INS trial attorney appointed to the Review Team under § 4.1 in coordination with the INS headquarters attorneys in the National Security Law Division and the INS Appellate Counsel's Office. The INS trial attorney shall keep the INS General Counsel and the Review Committee apprised of significant developments in the case and shall consult with the Civil Division on matters that may affect federal court litigation.

§ 5.2 With limited exceptions, federal court litigation relating to administrative proceedings before the INS and EOIR shall be handled by the Civil Division, in consultation with the INS and other relevant components. The Civil Division shall keep the INS General Counsel and the Review Committee apprised of significant developments in the case. All FISA litigation related to administrative immigration proceedings shall be handled by the local United States Attorney's Office in conjunction with OIPR. These offices shall also inform the Committee of their actions in federal court.

§ 5.3 The INS National Security Law Division shall notify the General Counsel of EOIR as soon as practicable (even if proceedings have not been commenced) of the approval by the AG or DAG of a classified submission for presentation to an immigration judge, to enable EOIR to prepare for the special staffing and security arrangements that may be necessary for the proceedings. The INS National Security Law Division may also notify the General Counsel of EOIR in advance of such an approval as may be appropriate.

Part VI – Post-Approval ATRC Procedures

§ 6.0 If the AG or DAG has approved the use of classified information to remove an alien through the ATRC, the Alien Terrorist Trial Unit (ATTU or Trial Unit) shall assume responsibility for the case. This Unit will be chaired by the Civil Division and comprised of Civil Division, INS, and Criminal Division attorneys and support staff, with OIPR and FBI assistance as the ATTU deems necessary. The ATTU shall keep the Review Committee apprised of significant developments in the case.

§ 6.1 Upon case referral to the ATTU, the ATTU will:

(a) verify that the unclassified summary meets the statutory standard set forth in section 504(e)(3)(C) of the INA, or if no such summary is possible, that the case meets the statutory criteria for proceeding without a summary;

(b) determine prior to the filing of a section 503(a) application, whether and when the alien will be taken into custody pursuant to section 506;

(c) prepare the section 503(a) application, obtain the requisite statutory certification from the AG or the DAG, and submit the application to the Removal Court;

(d) inform the Removal Court of any detention of the alien, and prepare for a custody hearing if a detained alien is a lawful permanent resident; and

(e) draft and obtain Attorney General or Deputy Attorney General certifications as needed pursuant to sections 504(e)(1)(C) and 504(e)(3)(A), and otherwise prepare the case for trial;

§ 6.2 INS may request arrest or detention assistance from other agencies, and the alien may be detained in any appropriate federal or non-federal facility.

§ 6.3 Should the Removal Court grant the application, the Trial Unit will try the case before the Court.

§ 6.4 The Trial Unit will have principal responsibility for defending against any collateral attacks in other courts on the Removal Court provisions or process, except to the extent that the subject matter falls within the particular jurisdiction of another Department office, in which case the Trial Unit will assist as necessary.

§ 6.5 The Trial Unit, with the involvement and assistance, as needed, of the Civil Division's Appellate Staff, will have principal responsibility for:

(a) section 505(a) appeals of denials of section 503(a) applications;

(b) section 505(b) interlocutory appeals;

(c) section 505(c) appeals from final determinations; and

(d) section 505(e) appeals from section 507(b)(2)(C) continuing detention.

§ 6.6 INS will prepare and furnish to the alien, his attorney, and the Review Committee any periodic reports required by section 507(2)(C) with respect to aliens in continuing detention.

VII. Designation and Training of INS Attorneys and EOIR Adjudicators

INS Attorneys

§ 7.0 The INS General Counsel shall designate a cadre of attorneys to represent the INS in administrative cases involving the use of classified information. These attorneys shall be specially trained in the proper handling and use of classified information, the relevant statutes, regulations, and case law, and the trial of cases involving classified evidence. The General Counsel's designation shall last for a period of four years. The INS General Counsel may renew the designation, provided the attorney receives periodic training on the proper use of classified information, the relevant statutes, regulations, and case law, and the trial of cases involving classified evidence.

§ 7.1 The INS General Counsel shall also designate several headquarters attorneys in the National Security Law Division to coordinate the activities of the designated trial attorneys and monitor litigation involving classified information. These headquarters attorneys shall also receive special training on the proper handling and use of classified information and the relevant statutes, regulations, and case law.

Immigration Judges and Board Members

§ 7.2 In consultation with the Director of EOIR, the Chief Immigration Judge shall designate no more than thirty immigration judges to hear cases involving the use of classified information. These immigration judges shall be specially trained in the proper handling and use of classified information, the relevant statutes, regulations, and case law, and the trial of cases involving classified evidence. The designation shall last for a period of four years. The Chief Immigration Judge, in consultation with the Director, may renew the designation, provided the immigration judge receives periodic training on the proper use of classified information, the relevant statutes, regulations, and case law, and the trial of cases involving classified evidence.

§ 7.3 In consultation with the Director of EOIR, the Chairman of the Board of Immigration Appeals shall ensure that all members of the Board are periodically trained in the proper handling and use of classified information, the relevant statutes, regulations, and case law, and, as relevant to appellate practice, the trial of cases involving classified evidence.

Training Curriculum

§ 7.4 The INS and EOIR shall consult with the Civil Division, OIPR and the FBI to develop appropriate training for designated INS attorneys and EOIR adjudicators.



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Immigration and Naturalization Service

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SEP 20 2000

Refer To File No.
LIN-00-067-52570

CLAUDETTE TOUSSAINT
3330 SPANISH MOSS TERR APT 202
LAUDERHILL FL 33319

Dear Sir or Madam

On September 1, 1999, you submitted an Application for Travel Document.

You are requesting advance parole be granted to Brigitte BONHOMME, your claimed dependent unmarried daughter, for the purpose of filing an application for adjustment of status under section 902 of HRIFA.

Title 8, Code of Federal Regulations, Part 245.15 state in pertinent part:

...Parole authorization for the purpose of filing an application for adjustment of status under section 902 of HRIFA.

(i) An otherwise eligible applicant who is outside the United States, and wishes to come to the United States in order to apply for benefits under section 902 of HRIFA, may request parole authorization for such purpose by filing an Application for Travel Document (Form I-131) with the Nebraska Service Center, at P.O. Box 87245, Lincoln, NE 68501-7245. Such application must be supported by a photocopy of the Form I-485 that the alien will file once he or she has been paroled into the United States. You must include photocopies of all the supporting documentation listed in paragraph (h) of this section, except the filing fee, the medical report, the fingerprint card, and the local police clearances.

Title 8, Code of Federal Regulations, Part 245.15 further states in pertinent part:

...Application and supporting documents. Each applicant for adjustment of status must file an Application to Register Permanent Residence or Adjust Status (Form I-485). An applicant should complete Part 2 of Form I-485 by checking box "h - other" and writing "HRIFA - Principal" or "HRIFA - Dependent" next to that block. Each application must be accompanied by:...

... (j) Evidence of continuity of presence in the United States since December 31, 1995.
An alien seeking HRIFA benefits as a principal applicant, or as the unmarried son or

Brigitte BONHOMME

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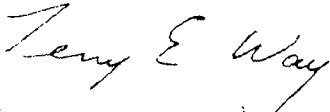
LIN-00-067-52570

daughter of a principal applicant, must provide with the application evidence establishing continuity of the alien's physical presence in the United States since December 31, 1995.

Since Brigitte BONHOMME is over the age of twenty-one, it must be established that she has had a continuity of physical presence in the United States since December 31, 1995. It appears from a review of the evidence submitted that Brigitte BONHOMME has never been in the United States. Therefore, you have not established that she is eligible for HRIFA benefits as either a principal applicant or an unmarried daughter of a principal applicant, and the purpose of the parole cannot be fulfilled.

In view of the above, the application is denied.

Sincerely,



Terry E. Way *am*
Acting Director
NSC/jhk

REGULATORY REVIEW WORKSHEET

OMB NUMBER: 1115-A539
 RIN NUMBER: 1115-AG02
 CHRONOLOGY: No previous reference

RECEIVED : 01/10/2001
 E.O. DUE DATE: 04/10/2001
 EXTENDED : (Y/N)
 APPEALED : / /

AGENCY : Department of Justice
 SUBAGENCY : Immigration and Naturalization Service

TITLE: Use of Classified Information in Proceedings Before the
 Executive Office for Immigration Review and the Immigration and
 Naturalization Service

STAGE: Proposed Rule
 LEGAL DEADLINE: No

ECONOMICALLY SIGNIFICANT: No
 UNFUNDED MANDATE : No

DESK OFFICER: Lauren Wittenberg
 ANALYST : Richard Theroux

ACTION:

- ☐ (1) Consistent Without Change
- ☐ (2) Consistent With Change
- ☐ (3) Withdrawn by Agency
- ☐ (7) Returned - Sent Improperly
- ☐ (9) Returned for Reconsideration
- ☐ (11) Emergency
- ☐ (12) Statutory or Judicial Deadline

ECONOMICALLY SIGNIFICANT: ☐ Yes ☐ No
 MAJOR : ☐ Yes ☐ No
 UNFUNDED MANDATE : ☐ Yes ☐ No
 (If yes, check all that apply)
☐ State, local, tribal governments
☐ Private Sector

REGULATORY IMPACT:
☐ (D) Deregulatory
☐ (R) Regulatory
☐ (N) Nonregulatory

FEDERALISM CERTIFICATION: ☐ Yes ☐ No
 (Applies only to Final Rules)

SIGNATURES AND DATES:

RMO	Desk Officer	Economist	OIRA
-----	-----	-----	-----
Date: _____	Date: _____	Date: _____	Date: _____

AGENCY NOTIFIED: / /

AGENDA REVIEW REPORT

DATE 01/10/2001 11:09:40 AM

AGENDA: APR 2001

PAGE 3

TITLE:

+Use of Classified Information in Proceedings Before the
Executive Office for Immigration Review and the Immigration and
Naturalization Service

RIN: 1115-AG02 (Proposed Rule)

REGULATORY PLAN: No

PRIORITY: Other Significant

UNFUNDED MANDATES: No

MAJOR: No

REINVENTING GOVERNMENT:
No

LEGAL AUTHORITY:

Public Law 104-208

CFR CITATION:

8 CFR 3; 8 CFR 4; 8 CFR 240

LEGAL DEADLINE:

None.

ABSTRACT:

This proposed rule would provide new procedures for the use of classified information in immigration-related adjudications. This rule, and the internal Department of Justice Guidelines which are published separately, respond to concerns expressed both within the Department and in various public fora that the use of classified national security information in immigration proceedings by the Immigration and Naturalization Service should be subject to careful limitation and scrutiny. The Guidelines describe the internal review and approval process within the Department of each case involving classified information. This rule proposes to amend regulations implementing the Immigration and Nationality Act to mandate a higher level of scrutiny and approval within the Department prior to the submission of classified information in immigration proceedings before the Immigration Judges and the Board of Immigration Appeals, or for use in the Service's adjudications. It provides new procedures for submitting and considering classified information, and brings those regulations into conformity with Executive Order 12958, 60 FR 19825 (April 17, 1995).

STATEMENT OF NEED:

SUMMARY OF THE LEGAL BASIS:

ALTERNATIVES:

AGENDA REVIEW REPORT

DATE 01/10/2001 11:09:40 AM

AGENDA: APR 2001

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TITLE:

+Use of Classified Information in Proceedings Before the
Executive Office for Immigration Review and the Immigration and
Naturalization Service

RIN: 1115-AG02 (Proposed Rule)

ANTICIPATED COSTS AND BENEFITS:

RISKS:

TIMETABLE:

ACTION
NPRM

DATE FR CITE
10/11/2001

REGULATORY FLEXIBILITY ANALYSIS REQUIRED:

No

SMALL ENTITIES AFFECTED:

No

GOVERNMENT LEVELS AFFECTED:

None

* FEDERALISM:

AFFECTED SECTORS:

001 None

* PROCUREMENT:

ADDITIONAL INFORMATION:

INS No. 2107-01

AGENCY CONTACT:

Charles Adkins-Blanch,
General Counsel, Executive Office for Immigration Review,
Department of Justice,
Immigration and Naturalization Service,
Suite 2400,
703 305-0470

- WILL NOT PRINT IN AGENDA

* - MISSING DATA ELEMENT

EXECUTIVE ORDER 12866 SUBMISSION

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1. Agency/Subagency originating request

Department of Justice
Immigration and Naturalization Service

2. Regulation Identifier Number (RIN)

1115-AG02

1115-A539

3. Title Use of Classified Information in Proceedings Before the Executive Office for Immigration Review and the Immigration and Naturalization Service

4. Stage of Development

- ☐ Prerule
☒ Proposed Rule
☐ Interim Final Rule
☐ Final Rule
☐ Final Rule - No material change
☐ Notice
☐ Other

Description of Other

5. Legal Deadline for this submission

- a) ☐ Yes ☒ No
b) Date ____ / ____ / ____
DD MM YYYY
c) ☐ Statutory ☐ Judicial

6. Designations

- a) Economically Significant (E.O. 12866)
☐ Yes ☒ No
b) Unfunded Mandate (2 U.S.C. 1532)
☐ Yes ☒ No

If either of the above is "Yes," submit four (4) complete packages to OIRA

7. Agency Contact (person who can best answer questions regarding the content of this submission)

Charles Adkins-Blanch
Phone (703) 305-0470

Certification for Executive Order 12866 Submissions

The authorized regulatory contact and the program official certify that the agency has complied with the requirements of E. O. 12866 and any applicable policy directives.

Signature of Program Official

Date

Signature of Authorized Regulatory Contact

Date

DRAFT 1/9/01

BILLING CODE: 4410-01

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 3, 4, 103, 207, 208, and 240

INS No. 2107-01; AG Order No.

RIN 1115-AG02

**Use of Classified Information in Proceedings
before the Executive Office for Immigration Review
and the Immigration and Naturalization Service**

AGENCY: Executive Office for Immigration Review, Justice; and
Immigration and Naturalization Service, Justice.

ACTION: Proposed rule and guidelines

SUMMARY: This rule, and the internal Department of Justice (Department) Guidelines which are published as an addendum, respond to policy concerns within the Department and commentary in various public fora that the use of classified national security information in immigration proceedings by the Immigration and Naturalization Service (Service or INS) should be subject to careful limitation and scrutiny. The Guidelines describe the internal review and approval process within the Department for each case involving classified information. This rule proposes to amend regulations implementing the Immigration and Nationality Act (Act or INA) to mandate a higher level of scrutiny and approval within the Department prior to the

submission of classified information in immigration proceedings before the Immigration Judges and the Board of Immigration Appeals, or for use in the Service's adjudications. It provides new procedures for submitting and considering classified information, and brings those regulations into conformity with Executive Order 12958, 60 FR 19825 (April 17, 1995).

DATES: Written comments must be submitted on or before [Insert date 60 days from date of publication in the FEDERAL REGISTER].

ADDRESSES: Please submit written comments **in triplicate**, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street NW, Room 4034, Washington, DC 20536. To ensure proper handling, please reference INS No. 2107-01 on your correspondence.

FOR FURTHER INFORMATION CONTACT: For matters relating to the Immigration and Naturalization Service--Andrew Arthur, Associate General Counsel, Immigration and Naturalization Service, 425 I Street, NW, Room 6100, Washington, DC 20536, telephone (202) 514-2895. For matters relating to the Executive Office for Immigration Review--Charles Adkins-Blanch, General Counsel, Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, Virginia 22041, telephone (703) 305-0470.

SUPPLEMENTARY INFORMATION:

Background

For several years, the Attorney General and the Deputy Attorney General have been concerned about the use of classified information in immigration proceedings. In 1998, the Attorney General commissioned a review of all existing immigration cases in which classified evidence was being used. The review, which covered all of the roughly 25 cases then pending, was conducted with the help of lawyers from the Civil Division, the Office of Intelligence Policy and Review, the INS Office of General Counsel, the National Security Law Unit of the Federal Bureau of Investigation, and the Office of the Deputy Attorney General. The review led to, among other results, a determination that some of the evidence in certain cases should be declassified and provided to the aliens.

That review also led to the development of a new, interim process for approving any proposed use of classified evidence in immigration cases. This proposed rule and the accompanying Guidelines reflect the Department's subsequent decision to put in place a more permanent process to limit and regulate the use of classified evidence in future cases. A working group comprising all interested components in the Department has developed the new process in the form of proposed Attorney General Guidelines, and has reformulated the current regulations on classified evidence so as to be consistent with the Guidelines. The working group included representatives from the components that had already participated in the review of pending cases, as well as the Civil

Rights Division, the Criminal Division, the Executive Office for Immigration Review, and the Office of Legal Counsel.

In drafting these Guidelines and regulations, the Department took as its starting point two premises. First, evidence submitted to an adjudicator should normally be examined by the party against whom the evidence is being used. Any deviation from that norm in immigration proceedings should be rare and should be justified by substantial interests of the government. Secondly, where such interests do exist and the use of classified evidence is therefore deemed justified, a comprehensive intra-Departmental process should be developed to ensure high-level confidence in the reliability of proposed classified submissions within the Department to the maximum extent consistent with protecting the important national security sources and methods involved.

The Guidelines embody both of these premises in the following ways. First, although (as explained in more detail below) the use of classified evidence is authorized or permitted by existing law, the Department believes that its use should be restricted as a policy matter by limiting the particular types of information that will be admissible and the manner in which it can be presented in immigration cases. The Guidelines establish the general principle that "the Department should avoid the ex parte and in camera use of classified information in immigration proceedings except in rare circumstances where such use is

appropriate to protect the important government interests specified in § 4.6 of these Guidelines." See Guidelines § 2.0. The referenced section then outlines four types of information or immigration issues to which classified evidence must pertain in order to be considered for submission in a particular case.

To give a concrete example of the changes effected by the Guidelines, under the current statute classified evidence can be used in any removal proceeding to demonstrate why an alien seeking discretionary relief from removal is not eligible for such relief. Thus, such evidence could simply contain derogatory information about the alien that the INS believes weighs against the favorable exercise of discretion on behalf of the alien. The Guidelines would not permit such a use of classified evidence. Rather, in order for the classified evidence even to be considered for submission in a removal proceeding, it would have to contain information that is needed either (a) to show that the alien's continued presence or activities in the United States "constitute a threat to national security . . . or the public safety," (b) to demonstrate that "the alien has engaged in terrorist activity, serious human rights abuses, or clandestine intelligence activities on behalf of a foreign power," or (c) to respond when "the alien has made false or misleading claims with respect to an alleged affiliation with a department, agency, or component of the United States government." See Guidelines § 4.6.

The Guidelines also implement the second of the working group's premises by establishing an extensive process within the Department for testing the reliability and accuracy of any classified evidence before recommending the evidence for submission in an immigration case. Given the constraint that properly classified evidence cannot be submitted and challenged in an open hearing, the Guidelines achieve this objective in several ways. First, classified evidence that is proposed for submission will be reviewed by a team of lawyers from four components in the Department **other than** the component that originated the classified evidence. In conducting this review, the team of lawyers will have access to most of the relevant classified background information and files that are necessary to assess the information's reliability.

By forming the review team from lawyers who have experience in immigration proceedings (INS General Counsel), in related federal court litigation (Civil Division), in prosecuting criminal cases under higher standards of proof (Criminal Division), and in preparing applications under the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. 1801-1811, 1821-1828 (Office of Intelligence Policy and Review), the Department expects that this first stage of the review process will provide an important mechanism for assessing the reliability and accuracy of the evidence. Given the constraint that properly classified evidence cannot be submitted in such a hearing, the Department

believes the review process established under the Guidelines will significantly assist in implementing the Guidelines' policy that information not be used unless it is found to be "reliable and accurate." And, of course, this process will only be used in those rare circumstances in which the evidence is also found to conform to the other standards in the guidelines, including the subject matter limitations set forth in § 4.6.

If the review team is satisfied that the evidence is reliable and accurate and meets the other standards set forth in the Guidelines, the evidence will be forwarded to a Review Committee, comprising senior officials from a broader range of components, which will again assess whether the evidence meets the reliability and other standards set forth in the Guidelines. See Guidelines § 4.6. If the Review Committee also approves the proposed submission of the classified evidence, it will be forwarded for final approval or disapproval of the submission by the Deputy Attorney General or the Attorney General. In addition, where the classified evidence originates from the Federal Bureau of Investigation (which is expected to be the case in most instances), the evidence cannot be proposed for Deputy Attorney General or Attorney General approval without a written certification from the FBI Director that, among other things, the evidence is properly classified and that, pursuant to the FBI's own review "of all underlying materials and information relevant to the classified information proposed for submission, including

source and asset file materials, the classified information is true and reliable to the best of the Director's knowledge." See Guidelines § 4.10(c).

In addition to these fundamental provisions, the Guidelines also contain other reforms, including provisions setting forth the firm expectation that an unclassified summary of any classified information that is submitted will be provided to the alien, and that it "will be as detailed as possible." The Department takes this expectation very seriously, and indeed even in the existing classified evidence cases an unclassified summary has always been presented. While the Guidelines permit the submission of classified evidence without a summary where this is unavoidable, this possibility has been left in place to accommodate the circumstance where evidence of a serious threat is so singular and self-identifying as to its source that it cannot even be summarized and yet cannot be safely withheld from the immigration proceedings. In accommodating that rare case, the Guidelines further provide that the possible uses of classified evidence that is not summarized will be further restricted.

The Guidelines are effective immediately, as they contain internal guidance from the Attorney General to subordinate officials within the Department of Justice, and relate to matters of agency procedure or practice within the meaning of 5 U.S.C. 553(b)(B). However, the Department will accept comments on the

Guidelines as well as on the proposed rule, and the Guidelines are subject to further revision in light of public comments.

Statutory and regulatory authority

Some use of classified information in the immigration context has been expressly permitted by regulation since 1917 and sanctioned by statute since 1952, and Congress largely codified its current uses in 1996. Currently, there are three provisions in the Act that allow the INS to use confidential or classified information in immigration proceedings. The first statutory basis for the use of classified information is section 235(c) of the Act. Under section 235(c) of the Act, if an immigration officer or immigration judge "suspects that an arriving alien may be inadmissible" on security or related grounds under INA 212(a)(3)(A) (other than clause (ii)), (B), or (C), the immigration judge or immigration officer shall "order the alien removed," without further inquiry. Pursuant to regulation, the case is referred to the appropriate INS regional director, who reviews the order, reviews any relevant "confidential information," and consults with "appropriate security agencies of the United States Government" over whether the "disclosure of the confidential information would be prejudicial to the public interest or security." 8 CFR 235.8. If the regional director concludes that the alien is inadmissible on the specified security related grounds based on the confidential information that cannot be disclosed, the regional director may issue the

final order of removal, or order any other action the regional director deems appropriate. Section 235(c) of the Act has been part of the immigration law since 1952, when Congress codified previously existing INS regulations.

Congress enacted the other two statutory provisions related to the use of classified information into law in 1996. One of these applies in the context of conventional removal proceedings under section 240 of the Act. Section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C, Public Law 104-208, 110 Stat. 3546 (Sept. 30, 1996), codified the previously existing INS regulations relating to the use of classified information. Section 240(b)(4)(B) of the Act states:

[T]he alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter.

Thus, the INS may introduce classified information to oppose the admission of an alien into the United States. If the INS seeks to remove an alien from the U.S. on a charge based on unclassified evidence, such as overstaying a visa, but the alien applies for discretionary relief, the INS may introduce

classified information to oppose the application for relief. Examples of discretionary applications for relief include asylum, cancellation of removal, suspension of deportation, voluntary departure, bond, and adjustment of status.

Finally, the Antiterrorism and Effective Death Penalty Act of 1996, Public Law 104-132, Title IV, Subtitle A, 110 Stat. 1258 (April 24, 1996), added a new Title V to the INA that established the Alien Terrorist Removal Court (ATRC). The Chief Justice of the United States has designated the Chief Judge and four other judges to serve on the ATRC. In proceedings before the ATRC, the Department of Justice may present classified evidence in camera and ex parte to prove that the alien is deportable under section 237(a)(4) of the Act, in that the alien "has engaged, is engaged, or at any time after admission engages in any terrorist activity." To initiate a case under Title V, the Attorney General must certify that probable cause exists that the alien's removal under Title II of the Act in conventional removal proceedings, "would pose a risk to the national security of the United States." INA 503(a)(D)(iii). For that and other reasons, no case has yet been initiated under the ATRC.

Several regulations currently authorize the use of classified information. The regulations that implement the statutory provisions discussed previously are 8 CFR 240.11(c)(3)(iv), 240.33(c)(4), 240.49(a), and 240.49(c)(4)(iv). There are also several regulations that permit the INS to base

adjudications of affirmative applications for discretionary relief upon confidential information that is not disclosed to the alien. 8 CFR 103.2(b)(16)(ii), (iii), and (iv).

Judicial review of the use of classified information

The Supreme Court has specifically upheld the use of classified evidence to deny an alien's discretionary application for suspension of deportation. Jay v. Boyd, 351 U.S. 345 (1956) (upholding the regulatory and statutory basis for the use of confidential information to deny suspension of deportation and indicating in a footnote that the statute's "constitutionality . . . as herein interpreted gives us no difficulty"). In addition, the Supreme Court has held that denial of admission to an alien on the basis of confidential information did not deprive him of due process. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953). These findings are consistent with longstanding immigration jurisprudence holding that deportation is not a criminal proceeding and is not a punishment. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984). Because immigration proceedings are civil innature, "many of the protections that are required by public policy or the Constitution in the context of a criminal proceeding simply do not apply." Ali v. Reno, 829 F.Supp. 1415, 11424 (S.D.N.Y. 1993), aff'd, 22 F.3d 442 (2d Cir. 1994), citing Lopez-Mendoza, supra.

Aliens subjected to the use of classified information and their supporters often cite two fairly recent appellate court

decisions disapproving particular uses of classified evidence. However, neither decision involved the kind of circumstances at issue in the current INS cases or that were at issue in the Supreme Court rulings upholding classified evidence use. See, e.g., American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045 (9th Cir. 1995) (enjoining the use of classified information to deny an alien legalization under Immigration Reform and Control Act's 1986 amnesty provision, which the court characterized as a "mandatory statutory provision" requiring "that 'the Attorney General shall adjust' the alien's status if the statutory eligibility requirements are satisfied"); Rafeedie v. Immigration and Naturalization Service, 880 F.2d 506 (D.C. Cir. 1989) (finding that the procedural minimum of section 235(c)'s summary exclusion proceedings, which included the use of classified evidence, was insufficient when applied to a lawful permanent resident returning to the United States from abroad after a brief three-week absence). See also Kiareldeen v. Reno, 92 F. Supp. 2d 403 (D.N.J. 1999) (finding that statute that appears to permit use of classified evidence to detain deportable aliens was unconstitutional as applied in particular case); Al Najjar v. Reno, 97 F. Supp. 2d 1329 (S.D. Fla. 2000) (holding that use of classified evidence in a bond proceeding violated due process because the Attorney General's discretion to grant bond "was not 'unfettered' or 'purely an act of grace'" and therefore substantial due process protections were required).

On the other hand, several other lower court rulings have upheld the use of classified evidence in support of decisions to deny immigration benefits. See, e.g., Azzouka v. Meese, 820 F.2d 585 (2d Cir. 1987) (per curiam) (upholding use of classified evidence to deny withholding of deportation - which the court persisted in calling "asylum" - on national security grounds); Suciu v. INS, 755 F.2d 127 (8th Cir. 1985) (per curiam) (upholding use of classified evidence "with national security implications" to deny adjustment of status, suspension and withholding); United States ex rel. Barbour v. INS, 491 F.2d 573 (5th Cir. 1973) (upholding the use of classified evidence to deny a bond redetermination during deportation proceedings); Bosch v. Rivkind, 724 F. Supp. 945 (S.D. Fla. 1989) (upholding use of classified evidence to exclude alien and deny his applications for asylum and withholding); El-Werfalli v. Smith, 547 F. Supp. 152 (S.D.N.Y. 1982) (upholding denial of visa to arriving Libyan based on classified information).

The Department recognizes that there is a considerable range of variables in classified evidence cases (e.g., the procedural posture of a case, the immigration status and history of an alien, the particular determination that classified information evidence is used to support) that may affect due process analysis. After careful analysis, the Department has concluded that the Guidelines and proposed rule set forth procedures and

standards that ensure that its use of classified information in immigration proceedings comports with due process.

Legislative developments

Some observers have expressed concern about the use of classified information in immigration proceedings and have recommended that classified evidence not be used except where the Department can demonstrate that the alien has engaged in or is planning to engage in specific criminal activity that threatens the national security. Some have also argued that classified evidence should never be used unless the alien is given a summary of the classified evidence so detailed that affords him or her substantially the same opportunity to defend himself or herself as would the classified evidence itself. Still others believe that there should be no use of classified information in immigration proceedings.

During the 106th Congress, Congress considered legislation that would significantly limit the authority of the INS to use classified information in camera and ex parte in immigration proceedings. H.R. 2121, the "Secret Evidence Repeal Act," as introduced, would have repealed the ability of the INS to use classified information in most instances. H.R. 2121, 106th Cong. § 1 (1999). During the second legislative session, the House of Representatives held two hearings on this bill. The FBI testified in opposition to H.R. 2121 on Feb. 10, 2000, and the FBI and the INS testified in opposition to the bill on May 23,

2000. H.R. 2121, "the Secret Evidence Repeal Act of 1999": Hearing Before the Subcomm. On Immigration and Claims of the House Comm. on the Judiciary, 106th Cong. (statement of Larry R. Parkinson, FBI General Counsel); H.R. 2121, "the Secret Evidence Repeal Act of 1999": Hearing Before the House Comm. on the Judiciary, 106th Cong. (statements of Larry R. Parkinson, FBI General Counsel, and Bo Cooper, INS General Counsel).

On September 26, 2000, the House Committee on the Judiciary held a mark-up of H.R. 2121 and reported out by voice vote an amendment in the nature of a substitute. The amendment would apply the requirements of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3 (1982), to all immigration cases in which the INS seeks to use classified information. The House Committee report was critical of the INS' use of classified evidence. H.R. REP. NO. 106-981 (2000). In September 2000, a bill similar to the to H.R. 2121, as amended, was introduced in the Senate as S. 3139. Neither the Senate nor the House took any further action on H.R. 2121 as amended or on S. 3139.

Interagency review and collaboration

As noted above, the Department shares some of the concerns expressed by the public and by the sponsors of the bills noted above, and has taken steps that are consistent with many of those concerns, culminating in the issuance of the Attorney General's guidelines, and the publication of the proposed rule set forth below.

The Department does not support either eliminating entirely the use of classified evidence or restricting its use to cases involving individuals engaged in criminal activity. Rather, the Department believes there will continue to be a limited but important number of immigration cases in which classified evidence should be placed before the immigration judge or other adjudicator (usually for the purpose of determining whether the alien should be admitted to the United States, granted relief from removal, or released from detention), and that in at least some of those cases it will be difficult to prove that the alien has committed a crime -- for example, because the particular conduct that indicates an alien threatens national security is not criminal (or was not criminal at the time or place that it occurred or does not fall within the criminal jurisdiction of a U.S. court).

The Department also does not believe that the standards set forth in CIPA can readily be applied in the immigration context, for which they were never designed. The CIPA standards for developing unclassified summaries of classified evidence (or, in the alternative, for stipulating to certain facts in lieu of the submission of such evidence) were designed for the specific context in which a criminal defendant seeks to put classified evidence that he has obtained in discovery into a criminal proceeding. 18 U.S.C. App. 3, § 6(c)(1). More specifically, the CIPA standards were intended to deal with the threat of

"greymail" by such a defendant who tries to stop a prosecution by insisting that certain classified evidence must be placed in the open court record. The Department does not believe that it is appropriate or feasible to apply such standards to the very different circumstance in which an alien either illegally present in this country or not admitted to this country is seeking a discretionary benefit or immigration relief and there is reliable classified evidence suggesting that he or she is specifically ineligible for such benefit or relief -- for example, because he or she is a threat to national security.

In evaluating the proposed reforms, it is important to remember that the use of classified evidence in immigration cases is extremely rare. The INS initiates and EOIR hears nearly 300,000 cases each year, and, currently, in only nine of those cases is classified evidence being used by the INS (and only one case involves a detained alien, who is also inadmissible). Moreover, that number suggests a recent decline. When the Department began its review of these cases 2 years ago, there were about 24 cases; a total of 29 cases were reviewed in the past 2 years. Many of those cases have either reached an end in the adjudication process or otherwise been resolved.

Also, the purposes for which classified evidence has been used are quite limited. For example, classified evidence is not used to prove that an alien is deportable. (That would only occur in a case before the ATRC.) In conventional removal

proceedings, the INS must prove deportability based on open source evidence. In such cases, classified information is only used to oppose an application for admission or for immigration relief (including release from custody).

For example, an alien who is out of status may seek asylum to avoid removal from the country. Asylum can be denied for several specified reasons, including that "there are reasonable grounds for regarding the alien as a danger to the security of the United States," (INA 208(b)(2)(A)(iv)), and it also can be denied as a general exercise of discretion by the Attorney General or her delegates. Although INS has nearly always offered classified evidence to show that a particular alien is a threat to national security or public safety (pursuant to a statutory standard such as the quoted language from the asylum statute), occasionally INS has been required to use classified evidence in a case where it has raised no such objection to the alien. Typically, in the latter kind of case, an alien seeking asylum (or other benefit) claims that he or she had a relationship with a U.S. intelligence agency that led to a promise of, or otherwise entitled him or her to, immigration relief. It is usually not possible to respond to such a claim without using some classified information. Other types of discretionary immigration decisions that the INS has made, at least in part, on the basis of classified evidence include decisions about admission,

cancellation of removal, and release from detention pending removal.

The Department believes it is appropriate to inform Immigration Judges or other adjudicators of risks posed by the aliens who are seeking such a discretionary benefit. If the INS has in its possession relevant, probative, and reliable information that an individual poses a risk to the national security, the INS should have the ability to present the information for consideration in this context, even if the information is classified. The immigration Judge or other adjudicator then determines the weight to give the evidence.

Incidents such as the recent bombing of the U.S.S. Cole in Yemen, the December 1999 arrest of an alien with bomb-making materials at the United States-Canadian border, the August 7, 1998, bombings of the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania, and the 1993 World Trade Center bombing have shown that the United States is a target for international terrorists. In recognition of the threat posed by terrorists and terrorist organizations, Congress added a new section 219 of the Act that authorizes the Secretary of State to designate "foreign terrorist organizations" (Section 302 of the Antiterrorism and Effective Death Penalty Act of 1996). The Secretary has published three lists of designated "foreign terrorist organizations." See 65 FR 57641 (Sept. 25, 2000); 64 FR 55012 (Oct. 8, 1999); 62 FR 52650 (Oct. 8, 1997). In making "foreign

terrorist organization" designations, the Secretary of State must find that the foreign organization "engages in terrorist activity" that "threatens the security of United States nationals or the national Security of the United States." Once an organization is designated as a "foreign terrorist organization," "representatives" and certain "members" of the organization are inadmissible to the United States. INA 212(a)(3)(B)(I)(IV) and (V). The Department believes that the use of classified information in appropriate immigration proceedings, to prevent aliens who engage in or support terrorist activity or pose a threat to our national security from entering or remaining in the United States, can be an important tool in responding to international terrorism, as well as counterintelligence, threats, and thus in protecting the security of the United States.

For these reasons, the Department believes that it is important to retain the ability of the INS to use classified information ex parte and in camera in a limited number of cases, but that it is also appropriate to scrutinize at a high-level all cases that potentially involve the use of classified information. The Guidelines and this proposed rule mandate such scrutiny.

Guidelines

The "Guidelines for the Use of Classified Information in Immigration Proceedings" (Guidelines) affirm Departmental principles regarding the use of classified information and describe the procedures that must be followed in any case that

involves the potential use of classified information. The Guidelines are intended to ensure that classified information is used only when necessary, and that the information is relevant and reliable. Since the information will not be subjected to the adversarial process in public, the interagency review process is expected to provide a means of subjecting the information to exacting review and scrutiny.

Section 1 states that the Guidelines apply to all Department employees but are not intended to create a private right of action. The Guidelines are not intended to apply to adjudications made or to persons situated outside the geographic limits of the United States.

Section 2 affirms that the Department should avoid the ex parte and in camera use of classified information in immigration proceedings, except in rare circumstances where such use is appropriate to protect the important governmental interests specified in the Guidelines. In any potential case involving the use of classified information, the review process outlined in the Guidelines must be followed, with the Attorney General or Deputy Attorney General personally approving the use of classified information in a particular case.

Section 3 establishes the Classified Evidence Review Committee (Review Committee), which will be chaired by the Deputy Attorney General and will comprise representatives of the Office of the Deputy Attorney General, INS, Civil Division, FBI, the

Criminal Division's Terrorism and Violent Crime Section (TVCS), the Office of Intelligence Policy and Review (OIPR), and the Civil Rights Division.

Section 4 sets out the various levels of scrutiny that a case must undergo and the conditions required for the use of classified information. Under § 4.1 of the Guidelines, the INS must make an initial determination that the classified information is reliable and material to the case. When that threshold is met, the INS must convene a Review Team (Team) comprising one attorney each from: the INS District Office, the INS Office of the General Counsel; the FBI Office of the General Counsel; the Criminal Division; the Civil Division; and OIPR. Under § 4.2 of the Guidelines, the Team will review and assess all information relevant to the case. Under § 4.4, if a majority of the Team is satisfied that the classified information meets the requirements of the Guidelines, the Team will prepare a written recommendation (with the information contained in § 4.5) to the Attorney General, through the Review Committee, for approval to use the classified information in immigration proceedings. When the Team forwards a request to the Review Committee, the Review Committee considers the request, meets as necessary, and makes a written request to the Attorney General. §§ 4.8-4.9.

Under § 4.6(a) of the Guidelines, the Review Team shall propose and the Review Committee shall recommend the use of

classified information in immigration proceedings only if each is satisfied that one or more of the following conditions have been met:

(1) there are reasonable grounds to believe that the alien's continued presence or activities in the United States constitute a threat to the national security (as defined in section 219(c)(2) of the Act) or the public safety;

(2) the alien has engaged in terrorist activity, serious human rights abuses, or clandestine intelligence activities on behalf of a foreign power;

(3) the alien is an arriving alien and is described in section 212(a)(3)(A) (other than clause (ii)), (B), or (C) of the Act; or

(4) the alien has made false or misleading claims with respect to an alleged intelligence affiliation with a department, agency, or component of the United States government.

In addition, under § 4.6(b) of the Guidelines, the Review Team shall propose and the Review Committee shall recommend the use of classified information in immigration proceedings only if each is satisfied that:

(1) the classified information is reliable and accurate;

(2) the Department has received authoritative assurances from the classifying agency that the information is properly classified under the pertinent Executive Order(s);

(3) there are reasonable grounds to believe that, absent the submission of the classified information, an alien meeting one or more of the conditions in section 4.6(a)(1)-(4) above would likely be admitted to the United States, receive or retain an immigration benefit or relief (including a favorable custody determination), or be permitted to remain in the United States;

(4) an unclassified summary of the classified information will be provided to the alien if possible, and the summary will be as detailed as possible; and

(5) the proposed use of the information is authorized or permitted by law.

Finally, even where the criteria in § 4.6(a) and (b) have been met, the Team and the Committee should also consider whether the classified submission should be recommended, in light of: the extent to which the unclassified summary, if any, informs the alien of the nature of the classified information; the alien's immigration status; the nature of any relief or benefit sought; the governmental interests at stake; and any other pertinent factors.

Under § 4.7 of the Guidelines, the Review Team shall propose and the Review Committee shall recommend the use of classified information in a custody determination only when the failure to detain the alien would pose a threat to the national security (as defined in section 219(c)(2) of the Act) or the public safety, in addition to meeting the requirements of § 4.6.

In §§ 4.11 and 4.12 of the Guidelines, there are specially prescribed procedures for emergent cases involving arriving aliens who are amenable to expedited removal proceedings under section 235(c) of the Act, and those who are arrested and detained on public source information but for whom the INS thereafter learns that relevant classified information exists. In such cases, the INS has the authority to use the classified information on an interim basis, but with subsequent review within time constraints, and always requiring final approval by the Attorney General or the Deputy Attorney General. The Review Team and Committee process is designed for cases that can be investigated before proceedings are initiated. The Department recognizes, however, that there will be some cases in which that is not possible because the INS will not know that the alien is in the United States or the alien simply appears at a port-of-entry. Sections 4.11 and 4.12 provide the INS with the authorization to use classified information temporarily on an emergent basis.

Sections 4.14 through 4.17 of the Guidelines describe the use and dissemination of information obtained under the Foreign Intelligence Surveillance Act (FISA), 18 U.S.C. 1801, et seq. Dissemination of FISA information must be in accordance with FISA, applicable Foreign Intelligence Surveillance Court orders, and relevant Department guidance. § 4.14. Regarding FISA investigations, the Review Committee and Review Team shall adhere

to the scope of permissible advice set out in applicable Department guidance. § 4.16. The Attorney General must authorize the use of FISA information in an immigration, criminal or other type of proceeding. § 4.17.

Section 4.18 of the Guidelines governs the referral of cases for criminal investigation and the dissemination of classified information for criminal investigation or prosecution purposes in this context. Such referrals and disseminations must comply with the originating entity's restrictions and applicable Departmental policy and guidance. Dissemination of FISA information for such purposes requires the approval of OIPR, the Deputy Attorney General, or the Attorney General.

Section 4.13 of the Guidelines state that the ex parte and in camera use of classified information in immigration proceedings shall proceed only upon the personal written authorization of the Attorney General or Deputy Attorney General, subject to any limitations or modifications he or she deems appropriate and except for any interim use authorized under §§ 4.11(b) or 4.12. Unless the Attorney General or Deputy Attorney General specifies otherwise, such authorization shall be deemed to permit ex parte and in camera oral testimony reasonably within the scope of the approved classified information. In exigent circumstances, the Attorney General or Deputy Attorney General may authorize the use of substitute or

abbreviated procedures in place of the procedures set forth in section 4 of the Guidelines.

Section 4.19 of the Guidelines states that the process and standards set forth in the Guidelines must be followed for each proposed classified submission.

Section 5 governs the post-approval division of responsibility among Departmental components in a removal proceeding under Title II of the Act. In general, the INS will handle the administrative removal proceedings, and the Civil Division will litigate any federal court action arising out of Title II removal proceedings.

Section 6 describes the division of responsibility in a Title V case before the ATRC. The Alien Terrorist Trial Unit (ATTU) will be chaired by the Civil Division and will include attorneys from the Civil Division, INS, and the Criminal Division, with support from the FBI and OIPR. The ATTU will handle the removal proceeding before the ATRC.

Section 7 requires the special designation of INS attorneys and EOIR immigration judges (IJs). The INS General Counsel will designate a cadre of trial attorneys to represent the INS before EOIR in cases involving classified information, and specific Headquarters attorneys to coordinate the activities of the designated field attorneys and monitor the litigation. Similarly, the Chief Immigration Judge shall designate no more than 30 IJs to hear cases involving classified information. All

designated INS attorneys and IJs, as well as all members of the Board of Immigration Appeals, must receive special training in the proper handling and use of classified information.

Proposed amendments to the regulations

As noted above, the use of classified evidence is currently the subject of several regulations found at various points within Title 8 of the Code of Federal Regulations. In view of the reforms proposed in the use of such evidence under the Guidelines, the working group determined that the existing regulations should be consolidated into a new § 4.1, and revised to make them consistent with the Guidelines. This proposed rule was drafted with those modest goals in mind. The rule does not address the procedures for determining whether or not classified information should be submitted or considered in an immigration proceeding. Those procedures are set forth in the Guidelines.

This proposed rule would also add a new EOIR procedural rule, in § 3.45, for cases pending before the immigration judges and the Board involving classified information. This rule provides for the Service to give notice to EOIR of the intended use of classified information, and provides appropriate procedures for the processing of such cases, both for cases involving detained aliens and for cases where the respondent is not detained. Finally, the rule establishes a framework for prompt decisions in any classified evidence case involving a detained alien.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant impact on a substantial number of small entities because this rule involves the process for the use of classified information in immigration proceedings. This process affects individuals and not small entities.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is considered by the Department of Justice to be a "significant regulatory action" under Executive Order 12866, Regulatory Planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget for review.

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibility among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988

This interim rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting or recordkeeping requirements inherent in a final rule. This rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects

8 CFR Part 3

Administrative practice and procedure, Immigration,

Organization and functions (Government agencies).

8 CFR Part 4

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements, Security.

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Privacy, Reporting and recordkeeping requirements.

8 CFR Part 207

Immigration, Refugees, Reporting and recordkeeping requirements.

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration Reporting and recordkeeping requirements.

8 CFR Part 240

Administrative practice and procedure, Immigration.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for part 3 continues to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1101 note, 1103, 1252 note, 1324b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949-1953 Comp., p. 1002.

§ 3.19 Custody/Bond.

2. Section 3.19 is amended by:

a. Revising (d); and by

b. Adding a new sentence immediately after the first sentence in paragraph (f), to read as follows:

§ 3.19 Custody/Bond.

* * * * *

(d)(1) Consideration by the immigration judge of an application or request of a respondent regarding custody or bond under this section shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding.

(2) The determination of the immigration judge as to custody status or bond may be based upon any information that is available to the immigration judge or that is presented to him or her by the alien or the Service.

(3) Upon request by the Service, the immigration judge shall conduct in camera and ex parte proceedings for the presentation of information classified under the applicable Executive Order. Any custody or bond proceedings in which the Service presents classified information shall be subject to the provisions of § 4.1 of this chapter and must be recorded.

* * * * *

(f) * * * An Immigration Judge must render a written decision in cases involving classified information as provided in § 4.1 of this chapter. * * *

* * * * *

3. In subpart C, a new § 3.45 is added to read as follows:

§ 3.45 Procedures for cases involving the use of classified

information. (a) Notification to the Executive Office for Immigration Review of the potential use of classified information; stay of proceedings. In any case in which proceedings have commenced and the Service counsel notifies the immigration judge that the Service is in the process of determining whether classified information will be submitted to the Immigration Court, upon motion of the Service, the immigration judge shall grant a continuance of no less than 14 days. At the hearing immediately following the continuance:

(1) Detained aliens. The Service counsel shall inform the immigration judge whether the Service is seeking authorization to submit classified information and whether a further continuance will be required. If a further continuance will be required, the Service counsel may request a reasonable period for such continuance, not to exceed 30 days. Such a request shall constitute "good cause" pursuant to § 3.29. Further continuances shall be adjudicated in accordance with § 3.29, except that if the Service counsel represents that such continuance is necessary in order to obtain the proper authorization to use classified

information, the immigration judge shall consider this an important factor in determining whether a further continuance is warranted.

(2) Non-detained aliens. The Service counsel shall inform the immigration judge whether the Service is seeking authorization to submit classified information and whether the Service is ready to proceed. If the Service is not ready to proceed, upon motion of the Service counsel to administratively close the case, the immigration judge shall grant such motion. Once the case has been administratively closed and the Service determines it wishes to proceed with the case, the Service counsel shall submit a motion to re-calendar the case. If the Service intends to submit classified information in the case, the Motion to Re-Calendar must be entitled "Motion to Re-Calendar A Case for the Submission of Classified Information."

(b)(1) Notification of authorization. In any case that has been continued under paragraph (a)(1) of this section, the Service counsel must give written notification to the immigration judge within 2 business days of the grant of authorization to submit classified information. In any case that has been administratively closed under paragraph (a)(2) of this section, the Service counsel shall provide such notification in the motion to re-calendar the case if the Service intends to submit classified information.

(2) Assignment of immigration judge. Once the use of classified information has been authorized in a case, if the immigration judge originally assigned the case is not properly designated to preside over a case involving classified information, the Chief Immigration Judge shall reassign the case to an immigration judge who is so designated. The new immigration judge shall familiarize himself or herself with the record and shall state for the record that he or she has done so.

(c) Decisions in cases involving detained aliens. (1) The immigration judge and the Board should expedite those cases involving the use of classified evidence in cases in which the alien is detained. For custody determinations, the immigration judge will render a decision within 30 days after the conclusion of the hearing, excluding any time required for classification review. The initial hearing in a merits case involving the use of classified evidence will be held no later than 30 days after the filing of the Notice to Appear, and the case will be given the highest priority within the class of cases that are currently on the detained or expedited docket. Further, the immigration judge will render a decision within 60 days of the closing of the record, excluding any time required for classification review, unless the Chief Immigration Judge certifies that exceptional circumstances exist making it impractical to meet the time specified.

(2) The Board will decide any merits appeal in a detained case involving classified evidence within 90 days after the expiration of all the briefing schedules in the case, excluding any time required for classification review. Absent a written stipulation filed with the Board by the parties requesting a longer period of time, the briefs of the appealing party and the opposing party will both be filed with the Board within 30 days of receipt of the briefing schedule. Any custody appeal in a detained case involving classified evidence will be decided by the Board within 90 days after receipt of the immigration judge's decision, excluding any time required for classification review. The 90-day period may be waived by agreement of both parties, or by certification from the Chairman of the Board of exceptional circumstances making it impractical to render the custody decision or merits decision within that period.

(3) These time periods shall be tolled if the alien causes a delay, or if other factors outside the control of the immigration judge or the Board cause a delay, including, but not limited to, collateral litigation relating to the immigration proceedings.

4. A new part 4 is added to read as follows:

PART 4-CLASSIFIED INFORMATION

Sec.

4.1. Use of classified information.

Authority: 8 U.S.C. 1225, and 1230.

§ 4.1. Use of classified information.

(a)(1) In general. Service adjudicators, immigration judges, and the Board may, as authorized or permitted under applicable law, receive and consider evidence classified under an applicable Executive Order.

(2) Duty to safeguard classified information. Employees of the Department shall protect at all times the security of classified information. Such classified information shall not be made available for inspection by the alien, and the alien must not be advised of the identity of the agencies or witnesses providing classified information (unless such agencies or witnesses choose to disclose their identities), nor the dates and times that the classified information will be considered by a Service adjudicator or submitted to an immigration judge or the Board.

(3) Authorization. Classified evidence may be received and considered by Service adjudicators, and may be submitted to an immigration judge or the Board, only upon written authorization by the Attorney General or the Deputy Attorney General.

(4) Notice. The alien shall be informed by the Service in writing or orally on the record that classified evidence has been or will be introduced or considered by a Service adjudicator, an immigration judge, or the Board. In exclusion, deportation, or removal proceedings, Service counsel shall notify the alien in advance of the submission.

(5) Unclassified summaries. The Service or the immigration judge shall request that the classifying agency provide, on an expedited basis, an unclassified summary of any classified information proposed for submission ex parte and in camera in proceedings before a Service adjudicator, an immigration judge, or the Board. Any unclassified summary provided by the classifying agency will be disclosed to the alien applicant or respondent if the classified evidence is ultimately submitted.

(6) Classified brief. Service adjudicators, immigration judges, and the Board may receive and consider a classified addendum to the Service's brief in a case in which classified evidence is submitted. The Service shall notify the applicant or respondent that a classified addendum has been submitted.

(7) Hearing; examination by adjudicator. Where the Service has submitted classified information concerning an alien in proceedings before a Service adjudicator, an immigration judge, or the Board, such information shall be considered ex parte and in camera. The authorization by the Attorney General or Deputy Attorney General of a classified submission shall not diminish the responsibility of the Service adjudicator, immigration judge, or Board to evaluate the evidence. The adjudicator shall not pass on the validity of the classification, and shall not presume the evidence unreliable solely by reason of its classification pursuant to an applicable Executive Order or its submission ex parte and in camera.

(8) Redacted transcript. The Service or the immigration judge shall request that the classifying agency provide, on an expedited basis, a redacted transcript showing non-classified portions of any ex parte, in camera hearing for disclosure to the alien applicant or respondent.

(9) Decision. An adjudicator who has considered classified evidence shall issue a written decision and shall state whether the classified evidence was material to the decision. If it is necessary to include classified information as part of a decision, the portion of the decision discussing the classified information shall be drafted as a classified attachment. Any classified information shall be confined to the classified attachment.

(b) Applicability. (1) Except as otherwise provided in this paragraph, paragraph (a) of this section shall apply where classified evidence is used, as authorized or permitted by law, in proceedings before a Service adjudicator, an immigration judge, or the Board.

(2) Paragraph (a) of this section shall not apply in proceedings under title V of the Act, in proceedings under section 235(c) of the Act, or where the Service becomes aware of classified information subsequent to the arrest of an alien and the use of such information is necessary or appropriate to maintain custody of the alien provisionally pending further review of the use of such information.

(3) This section is not intended to apply to adjudications made or to persons situated outside the geographic limits of the United States as defined in section 101(a)(38) of the Act.

(c) No private right of action or remedy. Except as expressly provided, nothing in this section should be construed as creating any private right of action or other judicially enforceable right, interest, privilege, claim, defense, presumption, or remedy.

(d) Establishing deportability. Classified evidence shall not be used to establish deportability, except as provided under title V of the Act.

PART 103-POWERS AND DUTIES OF SERVICE OFFICERS; AVAILABILITY OF SERVICE RECORDS

5. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 552, 552(a); 8 U.S.C. 1101, 1103, 1201, 1252 note, 1252b, 1304, 1356; 31 U.S.C. 9701; E.O. 12356; 47 FR 14874, 15557; 3 CFR, 1982 Comp., p 166; 8 CFR part 2.

6. Section 103.2 is amended by revising paragraphs (b)(16)(ii), (b)(16)(iii), and (b)(16)(iv), to read as follows:

§ 103.2 Applications, petitions, and other documents.

* * * * *

(b) * * *

(16) * * *

(ii) Determination of Statutory Eligibility. A

determination of statutory eligibility shall be based only on information contained in the record of proceeding which is disclosed to the applicant or petitioner, except that such determination may be based in whole or in part on classified information not contained in the record and not made available to the applicant, provided that the Attorney General or Deputy Attorney General has authorized its use under § 4.1(a)(3) of this chapter.

(iii) Discretionary determination. Where an application may be granted or denied in the exercise of discretion, the decision to exercise discretion favorably or unfavorably may be based in whole or in part on classified information not contained in the record and not made available to the applicant, provided that the Attorney General or Deputy Attorney General has authorized its use under § 4.1(a)(3) of this chapter.

(iv) Classified information. The use of classified information is governed by the provisions of § 4.1 of this chapter.

* * * * *

PART 207-ADMISSION OF REFUGEES

7. The authority citation for part 207 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1151, 1157, 1159, 1182; 8 CFR part 2.

8. Section 207.9 is revised to read as follows:

§ 207.9 Termination of refugee status.

(a) The refugee status of any alien (and of the spouse or child of the alien) admitted to the United States under section 207 of the Act shall be terminated by any district director in whose district the alien is found if the alien was not a refugee within the meaning of section 101(a)(42) of the Act at the time of admission. The district director shall notify the alien in writing of the Service's intent to terminate the alien's refugee status. The alien shall have 30 days from the date notice is served upon him/her or, delivered to his/her last known address, to present written or oral evidence to show why the alien's refugee status should not be terminated.

(b) In determining whether to terminate an alien's refugee status, the district director may consider, and base a termination decision on, material, including information that is classified under the applicable Executive Order, provided by the Department of State, the Office of International Affairs, other Service offices, or any other government agency or component. The use of classified information is governed by the provisions of § 4.1 of this chapter.

(c) There is no appeal under this chapter from the termination of refugee status by the district director. Upon termination of refugee status, the district director shall process the alien under sections 235, 240, and 241 of the Act.

PART 208-PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

9. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1226, 1252, 1282; 8 CFR part 2.

10. Section 208.9(f) is revised to read as follows:

§ 208.9 Procedure for interview before an asylum officer.

* * * * *

(f) The asylum application, all supporting information provided by the applicant, and any comments submitted by the Department of State or by the Service, and any other information specific to the applicant's case and considered by the asylum officer, including information that is classified under the applicable Executive Order and authorized by the Attorney General or Deputy Attorney General under § 4.1(a)(3) of this chapter, shall comprise the record. The use of classified information is governed by the provisions of § 4.1 of this chapter.

* * * * *

11. Section 208.12 is revised to read as follows:

§ 208.12 Reliance on information compiled by other sources.

(a) In deciding an asylum application, or in deciding whether the alien has a credible fear of persecution or torture pursuant to § 208.30, or a reasonable fear of persecution or torture pursuant to § 208.31, the asylum officer may rely on information provided by the Department of State, the Office of

International Affairs, or other Service offices, or any other government agency or component. The asylum officer may also rely on other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions. In deciding an asylum application, or a reasonable fear of persecution or torture pursuant to § 208.31, the asylum officer may also rely on material that is classified under the applicable Executive Order, provided that the Attorney General or Deputy Attorney General has authorized its use under § 4.1(a)(3) of this chapter. The use of classified information is governed by the provisions of § 4.1 of this chapter.

(b) Nothing in this part shall be construed to entitle the applicant to conduct discovery directed toward the records, officers, agents, or employees of the Service, the Department of Justice, the Department of State, or any other government agency or component. Persons may continue to seek documents available through a Freedom of Information Act (FOIA) request pursuant to 8 CFR part 103.

12. Section 208.24 is amended by adding a new paragraph (g), to read as follows:

§ 208.23 Termination of asylum or withholding of removal or deportation.

* * * * *

(g) In determining whether to terminate a grant of asylum or withholding of deportation or removal, an asylum officer,

immigration judge, or the Board of Immigration Appeals may consider, and base a termination decision on, material provided by the Department of State, the Office of International Affairs, other Service offices, or any other government agency or component. The asylum officer, the immigration judge, or the Board may also rely on material that is classified under the applicable Executive Order, provided that the Attorney General or Deputy Attorney General has authorized its use under § 4.1(a)(3) of this chapter. The use of classified information is governed by the provisions of § 4.1 of this chapter.

PART 240-PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES

13. The authority citation for part 240 continues to read as follows:

Authority: 8 U.S.C. 1103; 1182, 1186a, 1224, 1225, 1226, 1227, 1251, 1252 note, 1252a, 1252b, 1362; sec. 202, Pub. L. 105-100 (111 Stat. 2160, 2193); 8 CFR part 2.

14. Section 240.10 is amended by:

- a. Designating paragraph (d) as paragraph (d)(1);
- b. Adding a new paragraph (d)(2); and by
- c. Adding a new paragraph (h), to read as follows:

§ 240.10 Hearing.

* * * * *

(d)(1) * * *

(2) *Inadmissibility based on classified information.* In proceedings involving an alien charged with inadmissibility under section 212 of the Act, the immigration judge may consider and base the determination of whether the alien is admissible to the United States on information classified under the applicable Executive Order and presented by Service counsel in opposition to the alien's admission to the United States, provided that the Attorney General or Deputy Attorney General has authorized its use under § 4.1(a)(3) of this chapter. The use of classified information is governed by the provisions of § 4.1 of this chapter.

* * * * *

(h) Classified information. At the request of the Service, the Immigration Judge may hold in camera and ex parte hearings for the presentation of classified information during the course of proceedings, subject to the provisions of § 4.1 of this chapter.

15. Section 240.11 is amended by:

- a. Revising paragraph (a)(3); and by
- b. Revising paragraph(c)(3)(iv), to read as follows:

§ 240.11 Ancillary matters, applications.

(a) * * *

(3) In exercising discretionary power when considering an application for status as a permanent resident under this chapter, the Immigration Judge may consider and base the decision

on information classified under the applicable Executive Order, provided that the Attorney General or Deputy Attorney General has authorized its use under § 4.1(a)(3) of this chapter. The use of classified information is governed by the provisions of § 4.1 of this chapter.

* * * * *

(c) * * *

(3) * * *

(iv) Service counsel may call witnesses and present evidence for the record, including information classified under the applicable Executive Order, provided that the Attorney General or Deputy Attorney General has authorized its use under § 4.1(a)(3). The use of classified information is governed by the provisions of § 4.1 of this chapter.

* * * * *

16. Section 240.12 is amended by adding a sentence at the end of paragraph (a), to read as follows:

§ 240.12 Decision of the immigration judge.

(a) * * * In cases involving classified information, the immigration judge must render a written decision, according to the provisions of § 4.1 of this chapter.

* * * * *

17. Section 240.32 is amended by:

a. Redesignating paragraph (e) as paragraph (f);

b. Adding a new paragraph (e), and by

c. Adding two sentences at the end of newly redesignated paragraph (f), to read as follows:

§ 240.32. Hearing.

* * * * *

(e) In camera hearing. At the request of the Service, the Immigration Judge may also hold in camera and ex parte hearings for the presentation of classified information during the course of proceedings, subject to the provisions of § 4.1 of this chapter.

(f) Record. * * * In cases in which the alien contests excludability, the Immigration Judge may consider and base the decision of whether the alien is excludable on information classified under the applicable Executive Order and presented by Service counsel in opposition to the alien's admission to the United States, provided that the Attorney General or Deputy Attorney General has authorized its use under § 4.1(a)(3) of this chapter. The use of classified information is governed by the provisions of § 4.1 of this chapter.

18. Section 240.33 is amended by revising paragraph (c)(4), to read as follows:

§ 240.33 Applications for asylum or withholding of deportation.

* * * * *

(c) * * *

(4) Service counsel may call witnesses and present evidence for the record, including information classified under the

applicable Executive Order, provided that the Attorney General or Deputy Attorney General has authorized its use under § 4.1(a)(3) of this chapter. The use of classified information is governed by the provisions of § 4.1 of this chapter.

* * * * *

19. Section 240.35 is amended by adding a sentence at the end of paragraph (a), to read as follows:

§ 240.35 Decision of the immigration judge; notice to the applicant.

(a) * * * In cases involving classified information, the immigration judge must render a written decision, according to the provisions of § 4.1 of this chapter.

* * * * *

20. Section 240.48 is amended by adding a new paragraph (e), to read as follows:

§ 240.48 Hearing.

* * * * *

(e) In camera hearing. At the request of the Service, the Immigration Judge may also hold in camera and ex parte hearings for the presentation of classified information during the course of proceedings, subject to the provisions of § 4.1 of this chapter.

21. Section 240.49 is amended by revising paragraphs (a) and (c)(4)(iv), to read as follows:

§ 240.49 Ancillary matters, applications.

(a) Creation of the status of an alien lawfully admitted for permanent residence. (1) The respondent may apply to the immigration judge for suspension of deportation under section 244(a) of the Act; for adjustment of status under section 245 of the Act, or under section 1 of the Act of November 2, 1966, or under section 101 or 104 of the Act of October 28, 1977; or for the creation of a record of lawful admission for permanent residence under section 249 of the Act. The application shall be subject to the requirements of 8 CFR parts 240, 245, and 249.

(2) The approval of any application made to the immigration judge under section 245 of the Act by an alien spouse (as defined in section 216(g)(1) of the Act) or by an alien entrepreneur (as defined in section 216A(f)(1) of the Act), shall result in the alien's obtaining the status of lawful permanent resident on a conditional basis in accordance with the provisions of section 216 or 216A of the Act, whichever is applicable. However, the Petition to Remove the Conditions on Residence required by section 216(c) of the Act or the Petition by Entrepreneur to Remove Conditions required by section 216A(c) of the Act shall be made to the director in accordance with 8 CFR part 216.

(3) In conjunction with any application for creation of status of an alien lawfully admitted for permanent residence made to an immigration judge, if the respondent is inadmissible under any provision of section 212(a) of the Act and believes that he or she meets the eligibility requirements for a waiver of the

ground of inadmissibility, he or she may apply to the immigration judge for such waiver. The immigration judge shall inform the respondent of his or her apparent eligibility to apply for any of the benefits enumerated in this paragraph and shall afford the respondent an opportunity to make application therefor during the hearing.

(4) At the request of the Service, the immigration judge may hold in camera and ex parte hearings for the presentation of classified information during the course of proceedings, provided that the Attorney General or Deputy Attorney General has authorized its use under § 4.1(a)(3) of this chapter. In exercising discretionary power when considering an application for status as a permanent resident under this chapter, the immigration judge may consider and base the decision on information classified under the applicable Executive Order, subject to the provisions of § 4.1 of this chapter.

* * * * *

(c) * * *

(4) * * *

(iv) At the request of the Service, the immigration judge may hold in camera and ex parte hearings for the presentation of classified information during the course of proceedings, provided that the Attorney General or Deputy Attorney General has authorized its use under § 4.1(a)(3) of this chapter. In considering an application for asylum or withholding of

deportation, the immigration judge may consider and base the decision on information classified under the applicable Executive Order, subject to the provisions of § 4.1 of this chapter.

22. Section 240.50 is amended by revising the section heading, and by adding a sentence at the end of paragraph (a), to read as follows:

§ 240.50 Decision of the immigration judge; notice to the applicant.

(a) * * * In cases involving classified information, the immigration judge must render a written decision, according to the provisions of § 4.1 of this chapter.

* * * * *

Dated:

Janet Reno
Attorney General

ADDENDUM

[Will not be codified in the CFR]

Guidelines for the Use of Classified Information in Immigration Proceedings **DRAFT January 9, 2001**

I. Application

§ 1.0 These Guidelines establish the basic procedures for the use of classified information by the Department of Justice in immigration proceedings. These Guidelines are applicable to all Department of Justice components and employees, but are not intended to create any private right of action or other judicially or administratively enforceable right, interest, privilege, claim, defense, presumption, or remedy. The Guidelines supersede the Attorney General's Interim Procedures for Removal Court Actions Against Alien Terrorists.

§ 1.1 For the purposes of these Guidelines, the term "Department" refers to the Department of Justice and its component offices, divisions, bureaus, and agencies. The term "immigration proceedings" includes all cases brought under Titles II and V of the Immigration and Nationality Act (INA) and any other adjudication by the Department under the INA in which the use of classified information is authorized or permitted by law. The term "national security investigation" includes FBI foreign intelligence, foreign counterintelligence, and international terrorism investigations. These Guidelines are not intended to apply to adjudications made or to persons situated outside the geographic limits of the United States as defined in section 101(a)(38) of the INA.

II. Statement of Principles

§ 2.0 The Department should avoid the *ex parte* and *in camera* use of classified information in immigration proceedings except in rare circumstances where such use is appropriate to protect the important government interests specified in § 4.6 of these Guidelines.

§ 2.1 Classified information should be introduced *ex parte* and *in camera* in immigration proceedings only with the personal approval of the Attorney General (AG) or the Deputy Attorney General (DAG).

§ 2.2 Classified information should be approved for submission *ex parte* and *in camera* in immigration proceedings only after a review pursuant to these Guidelines that includes consideration of the credibility, importance, and proper classification of the information.

§ 2.3 In any case in which the Department uses classified information in an immigration proceeding, the Department shall provide the alien with an unclassified summary of every portion of the classified information that is susceptible of such summary without disclosure of information classified under the pertinent Executive Order(s).

§ 2.4 Employees of the Department shall protect at all times the security of classified information.

III. Classified Evidence Review Committee

§ 3.0 The decision whether to use classified information in immigration proceedings shall be made by the AG or DAG upon the advice of the Classified Evidence Review Committee (Review Committee or Committee). This Committee replaces the Alien Terrorist Removal Court Task Force and any similar reviewing bodies.

§ 3.1 The Review Committee shall consist of representatives from the Deputy Attorney General's Office (ODAG), the Immigration and Naturalization Service (INS), the Federal Bureau of Investigation (FBI), the Civil Division, the Terrorism and Violent Crime Section (TVCS) of the Criminal Division, the Office of Intelligence Policy and Review (OIPR), the Civil Rights Division (CRT), and such additional or alternative representatives as the DAG may provide. Where the agency with classification authority over the pertinent information (hereinafter "the classifying agency") is not a component of the Department, the DAG may invite a representative of that agency to participate in meetings of the Review Committee. Each Department component shall be represented by an officer empowered to speak and act on behalf of that component.

§ 3.2 The DAG shall chair the Committee, but may delegate day-to-day operation of the Committee to a subordinate official in ODAG.

§ 3.3 The Review Committee shall be a standing committee and shall meet at the direction of the DAG or his delegate. The Committee shall seek to operate and advise the DAG by consensus. The ultimate responsibility to authorize or reject the use of classified information rests with the AG and the DAG.

IV. Review and Decision by the Review Committee

§ 4.0 When the INS learns of classified information that may be material to its decision (1) to initiate or pursue any type of removal proceeding, (2) to detain an alien, (3) to revoke a previously granted benefit or status, or (4) to grant, deny, or oppose an application for any immigration benefit or relief, the INS shall coordinate an initial inquiry in consultation with the FBI or other relevant classifying agency.

§ 4.1 If upon such inquiry the INS makes an initial determination that the classified information is reliable and material to the case, the INS shall convene a Review Team (Team). The Team shall consist of one attorney each from INS District Office (as designated under § 7.0, and referred to hereinafter as "INS trial attorney"), INS General Counsel (as designated under § 7.1), FBI General Counsel in an FBI case, Criminal Division (either TVCS or the Internal Security Section, depending on the subject), Civil Division, and OIPR. The Team membership may be restricted or modified by the DAG for security or other reasons. The Review Team will be chaired by the attorney from the INS General Counsel's office except that, where it appears that

the case may be appropriate for referral to the Alien Terrorist Removal Court (ATRC), the DAG or the DAG's representative may appoint a Civil Division attorney to serve as chair.

§ 4.2 (a) *In General.* All Department components shall assist in providing the Review Team with information (other than source or asset files) relevant to its inquiry.

(b) *Source and asset files.* Source and asset file information in an FBI case will be provided to FBI Headquarters by the relevant field offices. Two members of the Review Team, jointly designated by the AG and the Director of the FBI, shall be given access to all source and asset file material. The AG may, however, specify alternative arrangements for review (including review by the AG alone) if the AG believes that access by two members of the Review Team would be inappropriate.

(c) *Threat assessment.* In an FBI case, the FBI shall provide a written assessment of the reliability of the FBI information. Where the classified information is being used to demonstrate a national security threat in an FBI case, the FBI shall provide to the Team a written assessment that explains the nature of the threat on which the relevant investigation was predicated, the subject's relationship to that threat, and an assessment (if possible) of the likely consequences of the alien's release from custody with regard to that threat.

§ 4.3 The Department shall seek to establish protocols, where it has not already done so, with other classifying entities to the same effect as those described in §§ 4.0-4.2.

§ 4.4 If a majority of the Team, including the representative of the component with primary authority for the litigation of the case, is satisfied that the classified information meets the requirements of these Guidelines, it shall prepare a request to the Attorney General for approval ("Approval Request") of the use of a classified submission in immigration proceedings. The Approval Request will normally be drafted by the component with primary responsibility for the litigation, but may be drafted by another component with the consensus of the Team or by direction of the DAG or the DAG's representative. The Approval Request shall be forwarded to the Review Committee as provided in §§ 4.5-4.6. The Team should note in the Approval Request any specific objections raised or caveats expressed by particular components represented on the Team, and the components may elaborate on their objections or caveats in writing for inclusion with the Approval Request. Where information obtained or derived from electronic surveillance or physical search conducted pursuant to the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. sections 1801-11, 1821-29 [hereinafter "FISA information"] is proposed, the component drafting the Approval Request shall coordinate with OIPR in such drafting.

§ 4.5 The Approval Request shall include:

- a) The name of the alien;
- b) The alien's immigration status;

- c) The classified information proposed for submission;
- d) The purpose for the introduction of the classified information;
- e) A summary of the investigation that generated the classified information;
- f) A description of other pertinent information;
- g) Any possible grounds of removal (based on the information available at the time);
- h) Eligibility, if any, for immigration benefits or relief from removal;
- i) The nature and status of any pending applications for immigration relief or benefits;
- j) If the alien is detained, a brief statement of the reasons for detention;
- k) The proposed forum for the introduction of the classified information; and
- l) The unclassified summary of the classified information or, in those rare circumstances in which no such summary is possible, an explanation as to why no such summary is possible.

Where FISA information is proposed for use, the Approval Request shall also identify such information and the relevant FISA target(s), and specify whether the relevant FISA collection(s) involved electronic surveillance or physical search.

§ 4.6 (a) The Review Team shall propose and the Review Committee shall recommend the use of classified information in immigration proceedings only if each is satisfied that one or more of the following conditions have been met: (1) there are reasonable grounds to believe that the alien's continued presence or activities in the United States constitute a threat to the national security (as defined in § 219(c)(2) of the Act) or the public safety; (2) the alien has engaged in terrorist activity, serious human rights abuses, or clandestine intelligence activities on behalf of a foreign power; (3) the alien is an arriving alien and is described in § 212(a)(3)(A) (other than clause (ii)), (B), or (C) of the INA; or (4) the alien has made false or misleading claims with respect to an alleged intelligence affiliation with a department, agency, or component of the United States government.

(b) In addition, the Review Team shall propose and the Review Committee shall recommend the use of classified information in immigration proceedings only if each is satisfied that (1) the classified information is reliable and accurate; (2) the Department has received authoritative assurances from the classifying agency that the information is properly classified under the pertinent Executive Order(s); (3) there are reasonable grounds to believe that, absent the submission of the classified information, an alien meeting one or more of the conditions in paragraphs (1) through (4) of subsection (a) would likely be admitted to the United States, receive or retain an immigration benefit or relief (including a favorable custody determination),

or be permitted to remain in the United States; (4) an unclassified summary of the classified information will be provided to the alien if possible, and the summary will be as detailed as possible; and (5) the proposed use of the information is authorized or permitted by law.

(c) Where the foregoing criteria have been met, the Team and the Committee should also consider whether the classified submission should be recommended, in light of the extent to which the unclassified summary, if any, informs the alien of the nature of the classified information, the alien's immigration status, the nature of any relief or benefit sought, the governmental interests at stake, and any other pertinent factors. In any case in which an unclassified summary cannot be provided to the alien, use of classified information should not be recommended unless the condition set forth in § 4.6(a)(1) or (a)(4) is satisfied.

§ 4.7 In addition to the requirements set forth in § 4.6, when determining whether classified information may be used in a custody determination (other than a parole determination relating to an arriving alien), the Review Team shall propose and the Review Committee shall recommend such use only when it is satisfied that the failure to detain the alien would pose a threat to the national security (as defined in § 219(c)(2) of the Act) or the public safety.

§ 4.8 As a general rule, the Review Committee should develop recommendations for the AG or DAG as quickly as possible. The Committee may meet once or more to consider a proposal, and may request additional information from the INS or the classifying agency. In all cases, however, the Review Committee shall comply, to the extent possible, with whatever filing deadlines may exist in a given case and shall request that the INS seek a filing extension only in exigent circumstances.

§ 4.9 At the conclusion of its review, the Review Committee shall present its recommendations in writing to the AG or DAG. The recommendations will normally be drafted by the component with primary responsibility for the litigation, with the assistance of the other components as needed, but may be drafted by another component in the discretion of the Committee. The Committee should note any specific objections raised or caveats expressed by particular components, and such components may elaborate on their objections or caveats in writing for inclusion with the Committee's recommendations. The recommendations may include such limitations or modifications of the original request as the Committee may deem appropriate.

§ 4.10 A recommendation under § 4.9 to approve the use in immigration proceedings of classified information shall be accompanied by the following:

(a) A certification by the Commissioner of the INS that the criteria set forth in these Guidelines have been met, and a recommendation by the Commissioner as to whether the proposed use should be approved;

(b) If the classified information includes FISA information, OIPR's recommendation as to whether the proposed use should be approved; and

(c) If the classified information has been provided by the FBI, a written certification by the Director of the FBI to the AG or DAG (1) that the information is properly classified, (2) that, pursuant to the FBI's review of all underlying materials and information relevant to the classified information proposed for submission, including source and asset file materials, the classified information is true and reliable to the best of the Director's knowledge, (3) that access to FBI information has been provided for review as specified in § 4.2, and (4) that any special agent familiar with the case, source, and/or investigation has been made available at the Team's request, and will be made available to brief the AG or DAG. If the FBI is providing the classified information to demonstrate that the alien poses a threat to the national security or the public safety, the Director shall certify, based on a thorough assessment, that the alien poses such a threat and shall provide an update of any threat assessment furnished by the FBI under § 4.2.

Special Procedures for Emergent Circumstances

§ 4.11 Special Rule for Arriving Aliens in Section 235(c) Proceedings.

(a) In any case where an immigration officer suspects, on the basis of classified information, that an arriving alien (as defined in 8 C.F.R. § 1.1(q)) may be inadmissible under sections 212(a)(3)(A) (other than clause (ii)), (B), or (C), of the Immigration and Nationality Act, the immigration officer, before issuing Form I-147 ("Notice of Temporary Inadmissibility") under 8 C.F.R. § 235.8(a), shall forward the relevant documentation, including the classified information, as expeditiously as possible to the Director of the INS Field Operations National Security Unit (NSU) and to the Chief of the INS General Counsel's Office National Security Law Division (NSLD).

(b) The Director of the NSU and the Chief of the NSLD will jointly assess that evidence and determine, within two business days of receipt of the documentation described in subsection (a), whether the classified information (1) supports the suspicion that the alien is inadmissible and (2) is reliable on its face. If the information is facially reliable and supports the suspicion that the alien is inadmissible as alleged, the matter shall be returned to the District Director with jurisdiction over the port of entry for issuance of Form I-147 in accordance with 8 C.F.R. § 235.8(a).

(c) Within five business days of the determination described in subsection (b), the INS, with the concurrence of the originating classifying agency, shall send to the DAG a written request to use classified information. The Review Team shall, within two weeks of that submission, present its recommendations under the standards in §§ 4.6-4.7 and in accordance with § 4.9 to the AG or the DAG for approval under § 4.13 without a formal recommendation from the Review Committee. Only if the DAG or the AG approves the request to use classified information may the INS take further action under 8 C.F.R. § 235.8(b)(1).

§ 4.12 *Special Rule for Certain Arrests.*

(a) If an immigration officer makes an arrest of any alien present in the United States in violation of the immigration laws and the immigration officer subsequently learns about classified information tending to show that the alien may pose a threat to the national security or public safety, that officer shall forward all relevant documentation, including the classified information, as expeditiously as possible through the chain of command to the Director of the NSU and the Chief of the NSLD. The Director of the NSU and the Chief of the NSLD shall, within two business days, jointly assess the information and determine whether it is (1) relevant to the issue of whether the alien should remain in custody, and (2) reliable on its face.

(b) If the Director of the NSU and the Chief of the NSLD determine that the information is relevant and reliable on its face, they may, with the concurrence of the originating classifying agency, authorize such use of the information as may be necessary or appropriate to maintain custody of the alien, as authorized or permitted by law and notwithstanding §§ 4.6-4.7, pending further review under these Guidelines. In such circumstances, within two business days of such authorization, the INS shall send notice to the DAG that such action has been taken, and within one business day of such notice, shall initiate such further procedures as may be appropriate under this part.

Review and Decision by the AG or DAG

§ 4.13 Except for any interim use authorized under § 4.11(b) or § 4.12, the *ex parte* and *in camera* use of classified information in immigration proceedings shall proceed only upon the personal written authorization of the AG or DAG, subject to any limitations or modifications she or he deems appropriate. Unless the AG or DAG specifies otherwise, such authorization shall be deemed to permit *ex parte* and *in camera* oral testimony reasonably within the scope of the approved classified information. In exigent circumstances, the AG or DAG may authorize the use of substitute or abbreviated procedures in place of the procedures set forth in §§ 4.0-4.2, 4.5-4.7, and 4.9-4.13.

Special FISA Provisions

§ 4.14 FISA information may be disseminated to the Review Committee or a Review Team, insofar as such information is considered for ex parte submission or is otherwise relevant to the responsibilities of the Team or Committee under these Guidelines. Such dissemination shall be in accordance with FISA, applicable minimization procedures adopted by the AG and approved by the Foreign Intelligence Surveillance Court, and any other applicable order of the Foreign Intelligence Surveillance Court. The Team or Committee shall use FISA information so disseminated only for the purposes of discharging their responsibilities under these Guidelines. Any further dissemination or use of FISA information for criminal investigation or prosecution purposes shall comply with §§ 4.17 and 4.18 of these Guidelines.

§ 4.15 When the FBI provides FISA information to the Review Team, the FBI shall create a log stating the target(s) of the collection from which the FISA information was obtained or derived, and whether such collection involved electronic surveillance or physical search. This log shall be made available to members of the Review Team or Review Committee upon request.

§ 4.16 Regarding FBI national security investigations in which FISA surveillance or searches are being conducted, the Review Committee and the Review Team shall adhere to the guidance respecting the scope of permissible advice that applies to the Criminal Division under Part A, Paragraph 6 of the Attorney General's memorandum, dated July 19, 1995, on "Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations" (hereinafter "the AG's July 19, 1995 memorandum"), or any successor guidance from the AG.

§ 4.17 FISA information may be used in an immigration, criminal or other type of proceeding only with the prior authorization of the AG. If the FBI foresees a need to seek such authorization for use in an immigration proceeding, it shall request that OIPR review the FISA information and submit its recommendation to the Attorney General concerning such approval. OIPR's recommendation shall accompany the Review Committee's recommendations under § 4.9. Any dissemination of FISA information under these Guidelines shall be accompanied by a statement that such information may be used in a proceeding only with the prior authorization of the AG.

Relation to Criminal Investigation or Prosecution

§ 4.18 Although the purpose of these Guidelines is to evaluate the proposed use of classified information in immigration proceedings, the FBI, the Criminal Division, and, with regard to criminal immigration matters, the INS, may refer any alien subject to these Guidelines for criminal investigation at any time during this process after notice to all affected components. If FBI or OIPR objects to the referral of an alien who is or has been the subject of an FBI national security investigation, the DAG shall be asked to decide the matter. Classified information disseminated to the Review Team or the Review Committee pursuant to these Guidelines may also be disseminated for criminal investigation or prosecution purposes as authorized by law and in compliance with prior restrictions placed upon dissemination by the originating entity. In addition, dissemination of classified information from FBI national security investigations for criminal investigation or prosecution purposes shall require FBI approval, and dissemination of FISA information for such purposes shall require OIPR approval; however, if FBI or OIPR withholds such approval, the matter may be brought to the attention of the AG or DAG for final approval or disapproval. In the case of an FBI national security investigation, components shall also comply with such provisions of the AG's July 19, 1995 memorandum, or any successor guidance from the AG, as may be applicable in the circumstances of the case.

Additional Approvals

§ 4.19 The process and standards prescribed by this part shall be followed for each proposed classified submission, even if a different classified submission has been approved previously in

the case. The process and standards prescribed by this part shall also be followed if previously approved classified information is to be introduced in a different proceeding. This section is subject, however, to the special procedures set forth in §§ 4.11-4.13. Nothing in this section shall be construed to restrict the discretion of the Review Team and the Review Committee to determine whether, and to what extent, it is appropriate to revisit particular determinations reached in a previous approval process.

V. Post-Approval Procedures for Non-ATRC Cases

§ 5.0 Absent extraordinary circumstances, the INS trial attorney appointed to the Review Team pursuant to § 4.1 shall represent the INS before the immigration court in cases in which classified evidence is submitted. The trial attorney shall coordinate with the attorneys in the National Security Law Division of the INS Office of General Counsel. The trial attorney shall keep the General Counsel and the Review Committee apprised of significant developments in the case and shall consult with the Civil Division on matters that may affect federal court litigation.

§ 5.1 Administrative appeals shall be handled by the INS trial attorney appointed to the Review Team under § 4.1 in coordination with the INS headquarters attorneys in the National Security Law Division and the INS Appellate Counsel's Office. The INS trial attorney shall keep the INS General Counsel and the Review Committee apprised of significant developments in the case and shall consult with the Civil Division on matters that may affect federal court litigation.

§ 5.2 With limited exceptions, federal court litigation relating to administrative proceedings before the INS and EOIR shall be handled by the Civil Division, in consultation with the INS and other relevant components. The Civil Division shall keep the INS General Counsel and the Review Committee apprised of significant developments in the case. All FISA litigation related to administrative immigration proceedings shall be handled by the local United States Attorney's Office in conjunction with OIPR. These offices shall also inform the Committee of their actions in federal court.

§ 5.3 The INS National Security Law Division shall notify the General Counsel of EOIR as soon as practicable (even if proceedings have not been commenced) of the approval by the AG or DAG of a classified submission for presentation to an immigration judge, to enable EOIR to prepare for the special staffing and security arrangements that may be necessary for the proceedings. The INS National Security Law Division may also notify the General Counsel of EOIR in advance of such an approval as may be appropriate.

Part VI – Post-Approval ATRC Procedures

§ 6.0 If the AG or DAG has approved the use of classified information to remove an alien through the ATRC, the Alien Terrorist Trial Unit (ATTU or Trial Unit) shall assume responsibility for the case. This Unit will be chaired by the Civil Division and comprised of Civil Division, INS, and Criminal Division attorneys and support staff, with OIPR and FBI

assistance as the ATTU deems necessary. The ATTU shall keep the Review Committee apprised of significant developments in the case.

§ 6.1 Upon case referral to the ATTU, the ATTU will:

(a) verify that the unclassified summary meets the statutory standard set forth in section 504(e)(3)(C) of the INA, or if no such summary is possible, that the case meets the statutory criteria for proceeding without a summary;

(b) determine prior to the filing of a section 503(a) application, whether and when the alien will be taken into custody pursuant to section 506;

(c) prepare the section 503(a) application, obtain the requisite statutory certification from the AG or the DAG, and submit the application to the Removal Court;

(d) inform the Removal Court of any detention of the alien, and prepare for a custody hearing if a detained alien is a lawful permanent resident; and

(e) draft and obtain Attorney General or Deputy Attorney General certifications as needed pursuant to sections 504(e)(1)(C) and 504(e)(3)(A), and otherwise prepare the case for trial;

§ 6.2 INS may request arrest or detention assistance from other agencies, and the alien may be detained in any appropriate federal or non-federal facility.

§ 6.3 Should the Removal Court grant the application, the Trial Unit will try the case before the Court.

§ 6.4 The Trial Unit will have principal responsibility for defending against any collateral attacks in other courts on the Removal Court provisions or process, except to the extent that the subject matter falls within the particular jurisdiction of another Department office, in which case the Trial Unit will assist as necessary.

§ 6.5 The Trial Unit, with the involvement and assistance, as needed, of the Civil Division's Appellate Staff, will have principal responsibility for:

(a) section 505(a) appeals of denials of section 503(a) applications;

(b) section 505(b) interlocutory appeals;

(c) section 505(c) appeals from final determinations; and

(d) section 505(e) appeals from section 507(b)(2)(C) continuing detention.

§ 6.6 INS will prepare and furnish to the alien, his attorney, and the Review Committee any periodic reports required by section 507(2)(C) with respect to aliens in continuing detention.

VII. Designation and Training of INS Attorneys and EOIR Adjudicators

INS Attorneys

§ 7.0 The INS General Counsel shall designate a cadre of attorneys to represent the INS in administrative cases involving the use of classified information. These attorneys shall be specially trained in the proper handling and use of classified information, the relevant statutes, regulations, and case law, and the trial of cases involving classified evidence. The General Counsel's designation shall last for a period of four years. The INS General Counsel may renew the designation, provided the attorney receives periodic training on the proper use of classified information, the relevant statutes, regulations, and case law, and the trial of cases involving classified evidence.

§ 7.1 The INS General Counsel shall also designate several headquarters attorneys in the National Security Law Division to coordinate the activities of the designated trial attorneys and monitor litigation involving classified information. These headquarters attorneys shall also receive special training on the proper handling and use of classified information and the relevant statutes, regulations, and case law.

Immigration Judges and Board Members

§ 7.2 In consultation with the Director of EOIR, the Chief Immigration Judge shall designate no more than thirty immigration judges to hear cases involving the use of classified information. These immigration judges shall be specially trained in the proper handling and use of classified information, the relevant statutes, regulations, and case law, and the trial of cases involving classified evidence. The designation shall last for a period of four years. The Chief Immigration Judge, in consultation with the Director, may renew the designation, provided the immigration judge receives periodic training on the proper use of classified information, the relevant statutes, regulations, and case law, and the trial of cases involving classified evidence.

§ 7.3 In consultation with the Director of EOIR, the Chairman of the Board of Immigration Appeals shall ensure that all members of the Board are periodically trained in the proper handling and use of classified information, the relevant statutes, regulations, and case law, and, as relevant to appellate practice, the trial of cases involving classified evidence.

Training Curriculum

§ 7.4 The INS and EOIR shall consult with the Civil Division, OIPR and the FBI to develop appropriate training for designated INS attorneys and EOIR adjudicators.