



September 17, 2010

BIA 10-05

MEMORANDUM TO: Board Legal Staff

FROM: David L. Neal
Acting Chairman

SUBJECT: Processing Cases Subject to a Protective Order

This memorandum addresses the processing of cases by Board of Immigration Appeals (“Board”) legal staff that involve a protective order. The attached Standard Operating Procedure for Protective Order describes the procedures that the Office of the Chief Clerk will follow when processing these types of cases. The processing procedures contained within this memorandum will usually arise either (1) when a case contains a protective order issued by an Immigration Judge, or (2) an interlocutory appeal has been filed by the Department of Homeland Security (DHS) challenging the Immigration Judge’s denial of their motion for issuance of a protective order.

Background. An Immigration Judge has the authority to issue protective orders and seal records in immigration proceedings in order to ensure that sensitive but unclassified information can be protected from general disclosure. *See* 8 C.F.R. § 1003.46. DHS may, at any time after the filing of a charging document, file a motion to protect specific information that it intends to submit or is submitting under seal. The Immigration Judge may issue a protective order barring disclosure of such information upon a showing by DHS of a substantial likelihood that the information, if disclosed, would harm national security or law enforcement interests of the United States. *Id.*

Protective Orders. Unlike classified information, the information subject to the protective order may be reviewed by the respondent and his or her counsel.¹ However, the respondent and counsel are restricted from divulging any information submitted under the protective order or any information derived therefrom, as directed by the Immigration Judge. When it is established by DHS that the respondent or their counsel disclosed information or failed to comply with a protective order, all forms of discretionary relief shall be

¹ The respondent (and counsel) are not entitled to review classified information. The protective order regulation applies only to sensitive law enforcement or national security information which is not classified, but the disclosure of which would nonetheless jeopardize investigations or harm national security. *See* Protective Orders in Immigration Administrative Proceedings, 67 Fed. Reg. 36799 (May 28, 2002).

denied unless the respondent meets certain requirements established in the regulations. *See* 8 C.F.R. § 1003.46(i). Failure to comply may also result in the suspension of respondent's counsel from appearing before EOIR and/or DHS. Also a protective order issued by an Immigration Judge remains in effect until vacated by the judge. The Office of the Chief Immigration Judge has issued a Operating Policies and Procedures Memorandum for Protective Orders and the Sealing of Records in the Immigration Proceedings (OPPM 09-02). That memorandum is available on the EOIR Intranet.

Although information subject to a protective order does not require Board employees to have a special clearance for handling or reviewing the sensitive information subject to the protective order, all Board employees must make every effort to prevent inadvertent disclosure.² If you handle a case that involves a protective order and are unsure how to proceed, please advise and consult your supervisor. Additionally, if you or your supervisor have questions, please consult Senior Legal Advisor Amy Minton, who serves as our primary point of contact on protective order issues.

² The procedures covered in this memorandum and the Office of the Clerk's SOP do not apply to the handling of classified information. The Board's *Classified Control Memo* addresses the procedures that must be followed when receiving and processing case-related classified information. It is possible that a case could involve both classified information and sensitive information. In such cases, the procedures outlined in the *Classified Control Memo* will primarily dictate how the case is processed.

Processing Protective Order Cases by Board Legal Staff

The Office of the Clerk (Clerk's Office) will follow the procedures set forth in their Standard Operating Procedure (SOP) for Protective Order. When a case which involves a protective order is ready for adjudication, a Clerk's Office Program Analyst, who is responsible for protective order processing in the Clerk's Office will forward the case to a Senior Legal Advisor (SLA) or Federal Court Remand Coordinator, if involving a federal court remand. The SLA will consult the Chairman and/or Vice-Chairman regarding the assignment of the case to a Panel. The SLA and/or Federal Court Remand Coordinator will then coordinate with the Senior Panel Attorneys (SPA), regarding the assignment of the case to a staff attorney. The SLA will provide the SPA and/or Team Leader (TL) with the necessary processing paperwork for circulation of a proposed Board decision to the Board Member(s).

1. Assignment - The SPA and/or TL shall advise the staff attorney assigned to the case of the sensitive nature of the protective order related matter. Staff attorneys should be reminded of the following:
 - The record of proceedings (ROP) may not be removed from the Board.
 - "Special Processing Instructions" sheet to be attached to the front of the circulation sheet when proposed order circulated to Board Member(s).
 - Additional processing procedures that may be required for the particular case. For example, the Immigration Judge may have segregated portions of their decision or transcript. In such cases, if the Board's decision discusses the information subject to the protective order or information derived therefrom, the information shall be discussed in a separate attachment.
 - High Profile Memorandum - consult with SPA and/or TL.
2. Circulation - When the proposed decision is to be circulated to the Board Member(s), the staff attorney must attach the "Special Processing Instructions" sheet to the front of the circulation sheet.
3. Signed Decision - When the Board's decision has been signed, the designated Board Member Legal Assistant will notify (via e-mail) the appropriate SPA, Chief Clerk (Donna Carr), SLA (Amy Minton), and the Clerk's Office Program Analyst (Paulomi Dhokai) that the case has completed Board Member review and has been signed. The Legal Assistant will deliver the ROPs to the SLA after scanning their location in CASE.
4. SLA Review - A SLA will review the case for administrative purposes
 - Apprise the Chairman and/or Vice Chairman of the pending issuance of the decision.
 - If a High Profile Memorandum has been prepared, the SLA will collect the memorandum and forward it to the appropriate individual upon the issuance of the Board's signed decision
 - The SLA or Program Analyst will deliver the signed decision and ROPs to the Docket Team Leader or Acting Team Leader for issuance of the Board decision.