



## AMERICAN IMMIGRATION LAW FOUNDATION

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### EOIR Background and Security Check Regulations – Effective April 1, 2005

#### Q and A

April 6, 2005

#### Introduction

On Friday, April 1, 2005, the Executive Office for Immigration Review's (EOIR) Background and Security Check regulations went into effect at the immigration courts and the Board of Immigration Appeals (Board or BIA). EOIR published the regulations as an interim rule on January 31, 2005. *See* Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 Fed. Reg. 4743 (January 31, 2005). Comments to the rule are due on May 2, 2005.<sup>1</sup> The rule is codified at 8 C.F.R. §§ 1003.1, 1003.19, 1003.47, 1208.4, 1208.10 and 1208.14.

The interim rule bars immigration judges and the BIA from granting most forms of relief until the Department of Homeland Security (DHS) has informed them that background and security checks have been completed. Under the rule, IJs will grant continuances and the Board will remand or “hold” the appeals until the checks are complete. The rule also says that respondents applying for relief are responsible for submitting biometric and biographical data; if applicants fail to submit this data, their applications may be deemed abandoned.

The following Q and A provides basic information about the requirements under the interim rule and highlights the major changes to the current procedures. At this time, it is not clear how this rule will be implemented. It appears that applicants for relief will have to send copies of their applications to a USCIS service center, along with the application fees; the service center then will mail the applicant a receipt notice and instructions to appear for a biometrics appointment. The Office of the Chief Immigration Judge issued an Interim Operating Policies and Procedures Memorandum (OPPM), 05-03 (Mar. 28, 2005)(<http://www.usdoj.gov/eoir/efoia/ocij/oppm05/05-03.pdf>), which gave guidance to IJs regarding the notice requirements and scheduling of remanded cases.

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<sup>1</sup> For more information about submitting comments, see Infonet, AILA Doc. No. 05033167.

**Q: Which forms of relief are covered by the rule?**

**A:** This rule covers the following applications for relief from removal: asylum, adjustment of status, conditional permanent resident status, waivers under 209(c), 212 or 237, cancellation of removal, withholding of removal, and registry.

Although the rule does not preclude IJs from making decisions without completed background checks, the rule indicates that IJs, when scheduling bond redetermination hearings, should take into account the time needed for DHS to conduct a preliminary security check. The rule also permits – but does not require – IJs to grant “one or more” continuances for DHS to conduct security checks prior to the bond hearing.

**Q: What are applicants’ responsibilities under the rule?**

**A:** Applicants for relief must provide biometrics and other biographical data.<sup>2</sup> DHS is responsible for obtaining this information from applicants who are detained.

At the hearing where the respondent first indicates that he or she intends to apply for relief, DHS and the IJ will provide the applicant with notice of the obligations under this rule and instructions for submitting the necessary information. On March 31, 2005, DHS began distributing an instructions form. The form is posted on Infonet (AILA Doc. No. 05040472). The form states:

For Asylum, Withholding of Removal and CAT Applications:

Asylum applicants must send copies of the first three pages of the I-589, the E-28, and the instructions to the USCIS Nebraska Service Center. The Nebraska Service Center will mail a receipt notice and a separate Application Support Center (ASC) notice providing the applicant with instructions to appear for a biometrics appointment.

For Other Applications (including adjustment of status, cancellation of removal, and suspension of deportation):

Applicants for other forms of relief from removal must send a copy of the application, the application fee, the biometrics fee, a copy of the E-28 and a copy of the instructions to the USCIS Texas Service Center.

The instructions form does not specify procedures for respondents applying for waivers of inadmissibility and it leaves many questions unanswered. It also results in a major change in the way that fees and applications have been submitted.

Presumably, the procedures set forth in this instruction form will apply uniformly nationwide. However, applicants should comply with the specific instructions that are provided at the hearing.

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<sup>2</sup> Biometrics currently include fingerprints, photographs, and signatures, but in the future, may include other digital technology. Other biographical data includes information such as name, address, date and place of birth, marital status, current immigration status, and employment authorization.

**Q: What are the consequences of failing to provide biometrics and biographical data?**

**A:** The interim rule says that failure to provide biometrics and other biographical data in conformity with the rule and the instructions provided by DHS and the IJ constitutes abandonment of the application. The IJ may enter an order dismissing the application for relief unless the applicant demonstrates that failure to provide the data was the result of good cause.

**Q: Does the interim rule say which security checks DHS must complete?**

**A:** No. The interim rule does not specify which background and security checks DHS must conduct. EOIR takes the position that “it remains the province of DHS to determine what identity, law enforcement, and security investigations and indices checks are required (this may vary over time and from case to cases) and when those investigations and indices are complete.” 70 Fed. Reg. at 4747.

**Q: What happens if the applicant submits the necessary data, but the check is not complete on the day of the merits hearing?**

**A:** The interim rule says that DHS shall endeavor to complete the security checks “as promptly as possible” and that “DHS shall attempt to give reasonable notice to the immigration judge” if the security check will not be complete on the date of the merits hearing. Nonetheless, if a security check is not complete on the day of the hearing, the IJ has two options:

- (1) Continue the case, or
- (2) Proceed with the hearing

The IJ, however, cannot grant the application for relief. According to OPPM 05-03, IJs also may not make a conditional grant of relief. The IJ may dictate and record a draft oral decision outside of the presence of the parties; the IJ cannot inform the parties that he or she is drafting a decision. The draft decision may be played to the parties and issued at a hearing after the security checks are complete.

**Q: What happens to cases at the BIA?**

**A:** The BIA may not grant or affirm a grant of relief from removal if the security checks are incomplete, if they are not current, or if new information has been uncovered. If the security checks are not complete or are not current, the BIA has two options:

- (1) Remand the case to the IJ for completion of the checks, or
- (2) Place the case on hold until the checks are complete

The supplemental information to the rule says that the BIA will remand most pending cases because the records do not indicate whether the security check was completed. EOIR anticipates that in the future, the BIA will establish internal procedures that will make “holding” cases the more efficient option. In these cases, the BIA must inform the parties that the cases are being placed on hold; DHS then must report to the BIA when the security checks are complete.

**Q: What happens if a case is remanded to the IJ pursuant to this rule?**

**A:** According to OPPM 05-03, the Board's order should contain instructions that the case is being remanded *solely* for DHS to complete the background check. The OPPM advises IJs that they should not readjudicate cases remanded for security checks. The immigration courts will schedule remanded cases for master hearings. If the security checks uncover no new information, the IJ will enter an order consistent with the Board's decision. The IJ will only schedule a merits hearing as needed if new information is uncovered by the security checks.

**Q: What notice is provided to applicants that are granted relief?**

**A:** The IJ and BIA decisions granting relief must advise applicants granted relief that they need to contact DHS for further proof of their status. DHS must inform EOIR of locations and follow-up procedures for applicants granted relief. DHS just issued a standard form; this form is posted on Infonet. See AILA Doc. No. 05040473.

**Q: How does this rule affect *Santillan v. Ashcroft* and *Padilla v. Ridge* – the lawsuits challenging the government's refusal to issue evidence of LPR status?**

There are two pending class action lawsuits that challenge the government's refusal to issue evidence of LPR status even after EOIR has granted adjustment of status. These cases are *Santillan v. Ashcroft*, No. 04-2686 (N.D. Cal.) (certified national class), and *Padilla v. Ridge*, No. M-03-126 (S.D. Tex.) (certified district class). After the interim rule was published, the defendants in these lawsuits filed motions to dismiss. The courts have not issued final decisions on the motions. For more information about these lawsuits, see Infonet AILA Doc. No. 04102262 and <http://www.txlawyerscommittee.org/news/releases/SantillanClassCertification.htm>.