

The Protective Order Regulation

Background

On May 28, 2002,¹ the Department of Justice published an interim regulation that provided the Immigration Judges with authority to issue protective orders and to seal evidence in Immigration Court proceedings. The current regulation is provided at 8 C.F.R. § 1003.46 (2003).

- ⊖ Before the publication of this regulation, there was no procedural mechanism that would enable the Immigration and Naturalization Service (INS), now the United States Immigration and Customs Enforcement (ICE) to protect sensitive but unclassified law enforcement and national security information² from public disclosure after such information is introduced in Immigration Court proceedings and made known to the alien.
- ⊖ This regulation authorizes Immigration Judges to issue protective orders to prevent the public disclosure of such information.
- ⊖ Protective orders may be issued for law enforcement or national security information that is not classified. The use of classified information in removal proceedings is covered by separate, pre-existing regulations.
- ⊖ A protective order prohibits the parties from divulging the protected information to third parties and requires them to exercise care when transmitting or storing the information. The rule provides immigration judges with administrative enforcement authority to ensure compliance.
- ⊖ An alien's willful violation of a protective order may result in the alien being denied all forms of discretionary relief, except bond. An attorney's willful violation of a protective order may result in suspension of the attorney's privilege of practicing law before the Immigration Court or the Board of Immigration Appeals.
- ⊖ The regulation strikes a proper balance between protecting the government's interest in protecting sensitive law enforcement and national security information and safeguarding an alien's right to a fair removal proceeding.

¹ This rule was effective May 21, 2002. Written comments were due on or before July 29, 2002.

² For example, ICE may need to introduce grand jury information or information that reveals the identity of confidential informants, witnesses, or sources to establish that release from custody of a particular respondent poses a danger to the safety of other persons under section 236 of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1226. Similarly, ICE may need to introduce sensitive evidence of organized criminal activity, either in the United States or in a foreign country, to establish the basis on which ICE believes that the respondent "is or has been an illicit trafficker in any controlled substance" under section 212(a)(2)(C)(i) of the Act, 8 U.S.C. § 1182(a)(2)(C)(i). The disclosure of such information could clearly jeopardize ongoing criminal investigations and the safety of any sources and law enforcement officers. This rule is necessary to ensure that a respondent in proceedings will not disclose that information to individuals not authorized to possess the information.

- 3 The rule requires ICE to demonstrate that protection of the information is required by significant law enforcement or national security interests.
- 3 The issuance of a protective order will not preclude the alien from challenging the admissibility of the information in Immigration Court proceedings. The alien may also challenge the protective order on appeal.

Process for Obtaining a Protective Order³

- ICE may file at any time after filing a Notice to Appear, or other charging document a motion, with or without sealed information, to acquire a protective order for that information. The motion shall describe, to the extent practical, the information that the Service seeks to protect from disclosure.
- The motion will be served on the respondent, who may respond within ten days. The information will not be made available to the respondent. The Immigration Judge may review the information in camera only to determine whether to grant or deny the motion.
- The Immigration Judge shall give appropriate deference to the expertise of senior officials in law enforcement and national security agencies in any averments in any submitted affidavit in determining whether the disclosure of information will harm the national security or law enforcement interests of the United States.
- Three Declaration Process:
 - 1) Substantive Declaration from the case agent (filed under seal); 2) Declaration from senior officials in law enforcement or national security agency asserting necessity for protective order (i.e., possible harm if the information is disclosed or disseminated) (filed under seal); 3) Declaration from senior officials stating substantial likelihood of significant harm (not filed under seal).
- If a motion is denied, the information must be returned to ICE. ICE may appeal that decision immediately and any appeal must be decided expeditiously. This process maintains the status quo to the greatest extent possible while the protective order is considered.
- If the motion is granted, an appropriate protective order is issued and the respondent will be provided with the information under the protective order.
 - o The respondent may challenge the admissibility of the information as evidence. The respondent may appeal the determination at the conclusion of proceedings.

³ This rule utilizes several elements of protective orders in federal courts in the immigration administrative adjudication process. See Federal Rule of Civil Procedure 26(c).

Standards for Issuance of a Protective Order

- Showing that there is a substantial likelihood that disclosure or dissemination will harm the law enforcement or national security interests of the United States.
 - The rule must be construed to comply with constitutional requirements. For example, the rule could not be applied to preclude a respondent from publicly stating the content of his own testimony before the immigration judge. See Butterworth v. Smith, 494 U.S. 624 (1990).
 - A respondent could, however, be ordered not to disclose what he or she has learned from the protected information during the proceedings, including, for example, the significance of information that the respondent already knows. Id. at 632 (“right to divulge information of which he was in possession before he testified before the grand jury, and not information which he may have obtained as a result of his participation in the proceedings of the grand jury”).

Consequences of Not Complying With the Protective Order

- A respondent, who violates a protective order, or whose attorney or accredited representative violates a protective order, will not be granted any form of discretionary relief from removal, except for the possibility of release on bond. Matter of R-S-H-, 23 I&N Dec. 629, 638-39 (BIA 2003).
- Attorneys and accredited representatives may also be barred from appearing in further proceedings before EOIR or the Department of Homeland Security. An attorney’s or accredited representative’s failure to comply with the protective order may be charged to the client and may impair the client’s ability to obtain discretionary relief.