U.S. Department of Justice
Immigration and Naturalization Service

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Office of the General Counsel

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Washington, DC 20536

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MEMORANDUM FOR JEFFREY WEISS
DIRECTOR, OFFICE OF INTERNATIONAL AFFAIRS

FROM: Bo Cooper
General Counsel

SUBJECT: Confidentiality of Asylum Applications and Overseas Verification of Documents and Application Information

This memorandum discusses the confidentiality requirements that apply to information contained in or pertaining to asylum applications and gives guidance to Immigration and Naturalization Service (INS) overseas personnel conducting verifications of documents and facts contained in asylum applications. Overseas verification of documents or facts submitted in support of asylum applications is essential to combat fraud in the asylum process and ensure the integrity of the asylum program. INS attorneys are grateful for the invaluable assistance that your offices have provided and continue to provide in furtherance of these goals. The following guidance is intended to assist in the accomplishment of these goals while minimizing the risk of confidentiality breaches. This memo supercedes all prior guidance provided by this office on this topic.

LEGAL FRAMEWORK

The regulation governing the confidentiality of asylum applications is found at 8 C.F.R. § 208.6 (2000), as amended at 65 Federal Register 76121, 76133 (Dec. 6, 2000). This regulation contains mandatory language and is binding on all INS personnel. The regulation provides:

> (a) Information contained in or pertaining to any asylum application, records pertaining to any credible fear determination conducted pursuant to § 208.30, and records pertaining to any reasonable fear determination conducted pursuant to § 208.31, shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General.

> (b) The confidentiality of other records kept by the Service and the Executive Office for Immigration Review that indicate that a specific alien has applied for asylum, received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review shall also be protected from disclosure. The Service will coordinate with the Department of State to ensure that the confidentiality of those records is maintained if they are transmitted to Department of State offices in other countries.
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> (c) This section shall not apply to any disclosure to:
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> (1) Any United States Government official or contractor having a need to examine information in connection with:
> (i) The adjudication of asylum applications;
> (ii) The consideration of a request for a credible fear or reasonable fear interview, or a credible fear or reasonable fear review;
> (iii) The defense of any legal action arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible fear determination or reasonable fear determination under § 208.30 or § 208.31;
> (iv) The defense of any legal action of which the asylum application, credible fear determination, or reasonable fear determination is a part; or
> (iv) Any United States Government investigation concerning any criminal or civil matter; or
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> (2) Any Federal, state, or local court in the United States considering any legal action:
> (i) Arising from the adjudication of, or failure to adjudicate, the asylum application, or from a credible feaf or reasonable fear determination under § 208.30 or § 208.31; or
> (ii) Arising from the proceedings of which the asylum application, credible fear determination, or reasonable fear determination is a part.

8 C.F.R. § 208.6.

As a general matter, the regulation prohibits INS personnel from commenting to any third party on the nature or even the existence of individual applications for asylum, and requires that the INS maintain the confidentiality of any INS records that indicate that an alien has applied for asylum or withholding of removal. See 8 C.F.R. § 208.6(b). The regulations, however, enumerate several exceptions to the general rule. First, the records may be disclosed at the discretion of the Attorney General. See 8 C.F.R. § 208.6(a). The INS has interpreted the

Attorney General's discretion under this provision as not extending to INS personnel. Pursuant to his discretion, however, the Attorney General has set up specific guidelines for the release of asylum information to the Federal Bureau of Investigation and he may issue further guidelines for the release of such information to specific entities such as the Department of Health and Human Services. Second, the records may be disclosed to any United States Government official or contractor having a need to examine information in connection with the adjudication of the application, the defense of any legal action arising from the application, or any United States Government investigation concerning any criminal or civil matter. See 8 C.F.R. § 208.6(c)(1)(i)-(iv). Third, the records may be disclosed to any Federal, state, or local court in the United States considering any legal action arising from the adjudication or failure to adjudicate the asylum application or arising from the proceedings of which the asylum application is a part. See 8 C.F.R. § 208.6(c)(2)(i)-(ii). Thus, while the Attorney General has limitless discretion to disclose information in asylum files to third parties, INS employees, as well as any other government official, are limited to disclosing information in asylum files to United States government officials or contractors, or courts in a limited number of circumstances that are specifically defined by the regulations. Disclosure is prohibited to all other persons.

The regulatory provisions do not offer specific guidance on how to proceed with an investigation of a claim. The propriety of an investigative procedure will vary in many instances from post to post, and the method of compliance with the regulation will primarily depend on how the investigation is performed. The following guidance is offered to help interpret these requirements and guide INS overseas personnel as they undertake verifications of evidence submitted in support of asylum applications.

CONFIDENTIALITY GUIDELINES

Preserving the confidentiality of asylum applications must always be a primary consideration in processing requests for investigations. The following guidelines will assist in the interpretation of 8 C.F.R. § 208.6 and help INS overseas personnel preserve the confidentiality of applications. In order to ensure consistency in evidentiary submissions to immigration courts, these guidelines are intended to be similar and, in some cases, identical to those issued, after consultation with this office, by the Department of State's Office of Asylum Affairs to their consular officers performing investigations of asylum applications. A copy of the cable is attached.

(1) If an investigation cannot be accomplished without compromising the confidentiality of the application, the investigation should be abandoned and the investigator should inform the requestor of the investigation of this fact.

(2) Generally, confidentiality of an asylum application is breached when information contained therein or pertaining thereto is disclosed to a third party, and the disclosure is of a nature that allows the third party to link the identity of the applicant to: (1) the fact that the applicant has applied for asylum; (2) specific facts or allegations pertaining to the

individual asylum claim contained in an asylum application; or (3) facts or allegations that are sufficient to give rise to a reasonable inference that the applicant has applied for asylum. If one or the other part of this link is missing, then no breach has occurred.

The propriety of an investigative procedure will vary in many instances from post to post, and successful compliance with the regulation will primarily depend upon the type of information to be verified and upon how the investigation is performed. An INS investigator may request information from the host government or third parties concerning an applicant for asylum or application information, so long as the investigator does not disclose information that would allow a third party to link the identity of the applicant to either the fact that the applicant has applied for asylum, to specific facts or allegations contained in the asylum application or to facts or allegations that are sufficient to give rise to a reasonable inference that the applicant has applied for asylum.

Disclosure of the applicant's identity might be permissible if the request for information is made where similar requests for information are routinely made by the United States government for other purposes – e.g., for visa applicants, prospective employees, etc. – and there is no mention of asylum. Many aspects of an asylum claim – including the occurrence of events central to the claim, the addresses and locations of such events, etc. – could be verified or disproved without disclosing the identity of the applicant or any details of his or her claim to anyone. If possible, such an approach is preferable. In particularly sensitive cases, or where similar requests for information are not routinely made, it may not be prudent to approach the host government or third parties at all.

Overseas verification of documents presented in support of asylum applications may present unique difficulties. For example, if an Assistant District Counsel sends a birth certificate included by an asylum applicant in his or her asylum application to the overseas OIC for verification of the ethnic status listed thereon, the birth certificate could be verified in a number of ways, some of which would breach the confidentiality of the application, while others would not. If the OIC provides the birth certificate directly to foreign government officials for verification of its contents, this would be a breach because the birth certificate discloses both the applicant's identity and information - indeed, an actual document - contained in the asylum application. In addition, the possession and investigation of certain personal documents by the US government might be sufficient to give rise to a reasonable inference that the applicant submitted the document to the US government to buttress an asylum claim. This would be especially true if a document submitted directly to a foreign government were the type of document – such as a PRC hospital record pertaining to coercive family planning measures – that evidences events commonly known to form the basis of asylum claims in the United States.

On the other hand, if the OIC only sent the name of the applicant to the foreign government authorities with a request that they inspect their birth records for information

on the applicant, confidentiality would probably not be breached if such an inquiry is routinely conducted for reasons unrelated to an asylum application, such as for an employment application or a visa application. Such an inquiry, although it divulges the applicant's identity, does not disclose specific facts or allegations contained in the asylum application, nor does it disclose facts sufficient to give rise to a reasonable inference that the applicant has applied for asylum. The only fact divulged is that the United States government is interested in the birth records of the alien. In a similar vein, if the OIC personally inspects the logs in which birth certificates would be contained, the confidentiality of the asylum application would remain intact. This last approach, resources permitting, is the preferable approach from the standpoint of maintaining confidentiality.

(3) Material that identifies an applicant and discloses that he or she has applied for asylum may only be transmitted to INS posts in other countries or between foreign posts by official and reliable means. This includes unclassified government telegrams, official fax and approved DOJ / INS electronic mail. Within the United States, material may be transmitted by mail, regular fax, or the approved DOJ / INS electronic mail. Specific asylum cases should never be discussed over personal electronic mail accounts.

(4) Foreign service national (FSN) employees of the INS may be allowed access to information contained in or pertaining to asylum applications at the discretion of the District Director having jurisdiction over the INS overseas District Office or Sub-Office in which they are employed. In exercising this discretion, the District Director should consider any factor which may affect the likelihood that asylum information may be improperly disclosed at a given INS overseas post or by a given FSN employee including, but not limited to: (1) the integrity and competence of a given FSN employee; (2) whether there is a history or practice of corruption, impropriety or unauthorized disclosure of protected information at a given post; and (3) the ties between FSN employees at a given post and the host government.

(5) INS overseas personnel may disclose information contained in or pertaining to asylum applications to employees of the Department of State (DOS) with the need to know. The regulations specifically contemplate such a disclosure for the purpose of conducting an overseas investigation. See 8 C.F.R. § 208.6(b). As noted above, the DOS has issued a cable to its overseas posts governing the confidentiality of asylum applications. If an INS officer transmits such information to a DOS employee with a need to know, the INS officer must inform the DOS employee of the requirements of 8 C.F.R. § 208.6. Overseas INS personnel may also disclose an asylum application to any United States government official or contractor having need to examine the information in connection with any of the situations described in 8 C.F.R. § 208.6(c)(1)(i)-(iv). Any such government official or contractor should be apprised of the confidentially requirements of § 208.6.

(6) All INS overseas personnel who handle information contained in or pertaining to asylum applications must be instructed on the confidentiality requirements found in 8 C.F.R. § 208.6.

(7) In the event of a general disclosure of the asylum application – for example, if the applicant holds a press conference to discuss his claim – an INS response that discusses the claim *may* be appropriate in some circumstances. Before preparing any such response, however, INS employees must receive approval from the INS Office of International Affairs, which will consult with the Office of the General Counsel.

(8) In responding to requests for information or for verification of documents or factual information, overseas officers should include, at a minimum:

(i) the applicant's name;
(ii) the applicant's A-number;
(iii) name and address of the requesting officer (either INS or EOIR);
(iv) name of responding officer and title; and
(v) an investigative report as outlined in number (9) below.

(9) The content of the investigative report is critical if it is to effectively convey information to the adjudicating official, be it an asylum officer or an immigration judge. In proceedings before an immigration judge, for example, the quality of the investigative report can determine the report's admissibility as evidence and, if admitted, the weight the immigration judge will accord to it. A report that is simply a short statement that an investigator has determined an application to be fraudulent is of little benefit. Instead, the reports should lay a proper foundation for its conclusion by reciting those factual steps taken by the investigator that caused the investigator to reach his or her conclusion. In addition, the conclusion of the investigator should be stated in neutral and unbiased language. In the case of a fraudulent document, a comprehensive and, therefore, effective report will lead the adjudicator down the path taken by the investigator, and hopefully help the adjudicator reach the same conclusion. Such a report must contain, at a minimum:

(i) the name and title of the investigator;
(ii) a statement that the investigator is fluent in the relevant language(s) or that he or she used a translator who is fluent in the relevant languages(s);
(iii) any other statements of the competency of the investigator and the translator deemed appropriate under the circumstances (such as education, years of experience in the field, familiarity with the geographic terrain, etc.);
(iv) the specific objective of the investigation;
(v) the location(s) of any conversations or other searches conducted;
(vi) the name(s) and title(s) of the people spoken to in the course of the investigation;

(vii) the method used to verify the information;
(viii) the circumstances, content and results of each relevant conversation or searches; and
(ix) a statement that the Service investigator is aware of the confidentiality provisions found in 8 C.F.R. § 208.6.

CONCLUSION

This memorandum is intended to assist overseas INS personnel conducting verifications of documents and facts contained in asylum applications. We hope the recommended steps simply reflect those already taken by the investigators, and will not be overly burdensome. While anti-fraud initiatives are imperative to maintain the integrity of the asylum application process, such initiatives must always maintain the confidentiality of the application. Compliance with the regulation will primarily depend on how the investigation is performed and the propriety of an investigative procedure will vary from post to post. This memo is intended to provide guidance of general applicability to assist the INS personnel who perform such investigations. If you have any questions regarding this memorandum, please contact Ron Whitney at the Office of the General Counsel at (202) 514-9699.

cc: Regional Directors
Regional Counsel