

Editorial Notes

REFERENCES IN TEXT

This chapter, referred to in subsec. (d), was in the original, “this Act”, meaning act June 27, 1952, ch. 477, 66 Stat. 163, known as the Immigration and Nationality Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 1101 of this title and Tables.

Statutory Notes and Related SubsidiariesABOLITION OF IMMIGRATION AND NATURALIZATION
SERVICE AND TRANSFER OF FUNCTIONS

For abolition of Immigration and Naturalization Service, transfer of functions, and treatment of related references, see note set out under section 1551 of this title.

§ 1534. Removal hearing**(a) In general****(1) Expeditious hearing**

In any case in which an application for an order is approved under section 1533(c)(2) of this title, a removal hearing shall be conducted under this section as expeditiously as practicable for the purpose of determining whether the alien to whom the order pertains should be removed from the United States on the grounds that the alien is an alien terrorist.

(2) Public hearing

The removal hearing shall be open to the public.

(b) Notice

An alien who is the subject of a removal hearing under this subchapter shall be given reasonable notice of—

(1) the nature of the charges against the alien, including a general account of the basis for the charges; and

(2) the time and place at which the hearing will be held.

(c) Rights in hearing**(1) Right of counsel**

The alien shall have a right to be present at such hearing and to be represented by counsel. Any alien financially unable to obtain counsel shall be entitled to have counsel assigned to represent the alien. Such counsel shall be appointed by the judge pursuant to the plan for furnishing representation for any person financially unable to obtain adequate representation for the district in which the hearing is conducted, as provided for in section 3006A of title 18. All provisions of that section shall apply and, for purposes of determining the maximum amount of compensation, the matter shall be treated as if a felony was charged.

(2) Introduction of evidence

Subject to the limitations in subsection (e), the alien shall have a reasonable opportunity to introduce evidence on the alien's own behalf.

(3) Examination of witnesses

Subject to the limitations in subsection (e), the alien shall have a reasonable opportunity

to examine the evidence against the alien and to cross-examine any witness.

(4) Record

A verbatim record of the proceedings and of all testimony and evidence offered or produced at such a hearing shall be kept.

(5) Removal decision based on evidence at hearing

The decision of the judge regarding removal shall be based only on that evidence introduced at the removal hearing.

(d) Subpoenas**(1) Request**

At any time prior to the conclusion of the removal hearing, either the alien or the Department of Justice may request the judge to issue a subpoena for the presence of a named witness (which subpoena may also command the person to whom it is directed to produce books, papers, documents, or other objects designated therein) upon a satisfactory showing that the presence of the witness is necessary for the determination of any material matter. Such a request may be made *ex parte* except that the judge shall inform the Department of Justice of any request for a subpoena by the alien for a witness or material if compliance with such a subpoena would reveal classified evidence or the source of that evidence. The Department of Justice shall be given a reasonable opportunity to oppose the issuance of such a subpoena.

(2) Payment for attendance

If an application for a subpoena by the alien also makes a showing that the alien is financially unable to pay for the attendance of a witness so requested, the court may order the costs incurred by the process and the fees of the witness so subpoenaed to be paid from funds appropriated for the enforcement of subchapter II.

(3) Nationwide service

A subpoena under this subsection may be served anywhere in the United States.

(4) Witness fees

A witness subpoenaed under this subsection shall receive the same fees and expenses as a witness subpoenaed in connection with a civil proceeding in a court of the United States.

(5) No access to classified information

Nothing in this subsection is intended to allow an alien to have access to classified information.

(e) Discovery**(1) In general**

For purposes of this subchapter—

(A) the Government is authorized to use in a removal proceedings¹ the fruits of electronic surveillance and unconsented physical searches authorized under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) without regard to subsections (c), (e), (f), (g), and (h) of section 106

¹ So in original. Probably should be “proceeding”.

of that Act [50 U.S.C. 1806(c), (e), (f), (g), (h)] and discovery of information derived pursuant to such Act, or otherwise collected for national security purposes, shall not be authorized if disclosure would present a risk to the national security of the United States;

(B) an alien subject to removal under this subchapter shall not be entitled to suppress evidence that the alien alleges was unlawfully obtained; and

(C) section 3504 of title 18 and section 1806(c) of title 50 shall not apply if the Attorney General determines that public disclosure would pose a risk to the national security of the United States because it would disclose classified information or otherwise threaten the integrity of a pending investigation.

(2) Protective orders

Nothing in this subchapter shall prevent the United States from seeking protective orders and from asserting privileges ordinarily available to the United States to protect against the disclosure of classified information, including the invocation of the military and State secrets privileges.

(3) Treatment of classified information

(A) Use

The judge shall examine, ex parte and in camera, any evidence for which the Attorney General determines that public disclosure would pose a risk to the national security of the United States or to the security of any individual because it would disclose classified information and neither the alien nor the public shall be informed of such evidence or its sources other than through reference to the summary provided pursuant to this paragraph. Notwithstanding the previous sentence, the Department of Justice may, in its discretion and, in the case of classified information, after coordination with the originating agency, elect to introduce such evidence in open session.

(B) Submission

With respect to such information, the Government shall submit to the removal court an unclassified summary of the specific evidence that does not pose that risk.

(C) Approval

Not later than 15 days after submission, the judge shall approve the summary if the judge finds that it is sufficient to enable the alien to prepare a defense. The Government shall deliver to the alien a copy of the unclassified summary approved under this subparagraph.

(D) Disapproval

(i) In general

If an unclassified summary is not approved by the removal court under subparagraph (C), the Government shall be afforded 15 days to correct the deficiencies identified by the court and submit a revised unclassified summary.

(ii) Revised summary

If the revised unclassified summary is not approved by the court within 15 days

of its submission pursuant to subparagraph (C), the removal hearing shall be terminated unless the judge makes the findings under clause (iii).

(iii) Findings

The findings described in this clause are, with respect to an alien, that—

(I) the continued presence of the alien in the United States would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person, and

(II) the provision of the summary would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person.

(E) Continuation of hearing without summary

If a judge makes the findings described in subparagraph (D)(iii)—

(i) if the alien involved is an alien lawfully admitted for permanent residence, the procedures described in subparagraph (F) shall apply; and

(ii) in all cases the special removal hearing shall continue, the Department of Justice shall cause to be delivered to the alien a statement that no summary is possible, and the classified information submitted in camera and ex parte may be used pursuant to this paragraph.

(F) Special procedures for access and challenges to classified information by special attorneys in case of lawful permanent aliens

(i) In general

The procedures described in this subparagraph are that the judge (under rules of the removal court) shall designate a special attorney to assist the alien—

(I) by reviewing in camera the classified information on behalf of the alien, and

(II) by challenging through an in camera proceeding the veracity of the evidence contained in the classified information.

(ii) Restrictions on disclosure

A special attorney receiving classified information under clause (i)—

(I) shall not disclose the information to the alien or to any other attorney representing the alien, and

(II) who discloses such information in violation of subclause (I) shall be subject to a fine under title 18, imprisoned for not less than 10 years nor more than 25 years, or both.

(f) Arguments

Following the receipt of evidence, the Government and the alien shall be given fair opportunity to present argument as to whether the evidence is sufficient to justify the removal of the alien. The Government shall open the argument. The alien shall be permitted to reply. The Government shall then be permitted to reply in

rebuttal. The judge may allow any part of the argument that refers to evidence received in camera and ex parte to be heard in camera and ex parte.

(g) Burden of proof

In the hearing, it is the Government's burden to prove, by the preponderance of the evidence, that the alien is subject to removal because the alien is an alien terrorist.

(h) Rules of evidence

The Federal Rules of Evidence shall not apply in a removal hearing.

(i) Determination of deportation

If the judge, after considering the evidence on the record as a whole, finds that the Government has met its burden, the judge shall order the alien removed and detained pending removal from the United States. If the alien was released pending the removal hearing, the judge shall order the Attorney General to take the alien into custody.

(j) Written order

At the time of issuing a decision as to whether the alien shall be removed, the judge shall prepare a written order containing a statement of facts found and conclusions of law. Any portion of the order that would reveal the substance or source of information received in camera and ex parte pursuant to subsection (e) shall not be made available to the alien or the public.

(k) No right to ancillary relief

At no time shall the judge consider or provide for relief from removal based on—

- (1) asylum under section 1158 of this title;
- (2) by² withholding of removal under section 1231(b)(3) of this title;
- (3) cancellation of removal under section 1229b of this title;
- (4) voluntary departure under section 1254a(e)³ of this title;
- (5) adjustment of status under section 1255 of this title; or
- (6) registry under section 1259 of this title.

(l) Report on terrorist removal proceedings

Not later than 3 months from December 28, 2001, the Attorney General shall submit to Congress a report concerning the effect and efficacy of alien terrorist removal proceedings, including the reasons why proceedings pursuant to this section have not been used by the Attorney General in the past and the effect on the use of these proceedings after the enactment of the USA PATRIOT Act of 2001 (Public Law 107-56).

(June 27, 1952, ch. 477, title V, § 504, as added Pub. L. 104-132, title IV, § 401(a), Apr. 24, 1996, 110 Stat. 1260; amended Pub. L. 104-208, div. C, title III, §§ 308(g)(7)(B), (8)(B), 354(a)(1), (2), (b), 357, Sept. 30, 1996, 110 Stat. 3009-623, 3009-624, 3009-641 to 3009-644; Pub. L. 107-108, title III, § 313, Dec. 28, 2001, 115 Stat. 1401.)

Editorial Notes

REFERENCES IN TEXT

The Foreign Intelligence Surveillance Act of 1978, referred to in subsec. (e)(1)(A), is Pub. L. 95-511, Oct. 25,

² So in original. The word "by" probably should not appear.

³ See References in Text note below.

1978, 92 Stat. 1783, which is classified principally to chapter 36 (§1801 et seq.) of Title 50, War and National Defense. For complete classification of this Act to the Code, see Short Title note set out under section 1801 of Title 50 and Tables.

The Federal Rules of Evidence, referred to in subsec. (h), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

Section 1254a(e) of this title, referred to in subsec. (k)(4), was in the original a reference to "section 244(e)", meaning section 244(e) of act June 27, 1952, which was classified to section 1254(e) of this title. Pub. L. 104-208, div. C, title III, §308(b)(7), Sept. 30, 1996, 110 Stat. 3009-615, repealed section 244 and renumbered section 244A as section 244, which is classified to section 1254a of this title. For provisions relating to voluntary departure, see section 1229c of this title.

The USA PATRIOT Act of 2001, referred to in subsec. (l), is Pub. L. 107-56, Oct. 26, 2001, 115 Stat. 272, known as the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 or the USA PATRIOT Act. For complete classification of this Act to the Code, see Short Title of 2001 Amendment note set out under section 1 of Title 18, Crimes and Criminal Procedure, and Tables.

AMENDMENTS

2001—Subsec. (l). Pub. L. 107-108 added subsec. (l).

1996—Subsec. (e)(1)(A). Pub. L. 104-208, §354(b)(1)(A)(ii), substituted "pursuant to such Act" for "pursuant to the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.)".

Pub. L. 104-208, §354(b)(1)(A)(i), inserted "the Government is authorized to use in a removal proceedings the fruits of electronic surveillance and unconsented physical searches authorized under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) without regard to subsections (c), (e), (f), (g), and (h) of section 106 of that Act and" before "discovery of information".

Subsec. (e)(3)(A). Pub. L. 104-208, §354(b)(1)(B), substituted "and neither the alien nor the public shall be informed of such evidence or its sources other than through reference to the summary provided pursuant to this paragraph. Notwithstanding the previous sentence, the Department of Justice may, in its discretion and, in the case of classified information, after coordination with the originating agency, elect to introduce such evidence in open session." for period at end.

Subsec. (e)(3)(D)(ii). Pub. L. 104-208, §354(a)(1)(A), inserted "unless the judge makes the findings under clause (iii)" before period at end.

Subsec. (e)(3)(D)(iii). Pub. L. 104-208, §354(a)(1)(B), added cl. (iii).

Subsec. (e)(3)(E), (F). Pub. L. 104-208, §354(a)(2), added subpars. (E) and (F).

Subsec. (f). Pub. L. 104-208, §354(b)(2), inserted at end "The judge may allow any part of the argument that refers to evidence received in camera and ex parte to be heard in camera and ex parte."

Subsec. (j). Pub. L. 104-208, §354(b)(3), inserted at end "Any portion of the order that would reveal the substance or source of information received in camera and ex parte pursuant to subsection (e) shall not be made available to the alien or the public."

Subsec. (k)(2). Pub. L. 104-208, §308(g)(7)(B), substituted "by withholding of removal under section 1231(b)(3) of this title" for "withholding of deportation under section 1253(h) of this title".

Subsec. (k)(3). Pub. L. 104-208, §308(g)(8)(B), substituted "cancellation of removal under section 1229b of this title" for "suspension of deportation under subsection (a) or (e) of section 1254 of this title".

Subsec. (k)(4) to (6). Pub. L. 104-208, §357, added par. (4) and redesignated former pars. (4) and (5) as (5) and (6), respectively.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by section 308(g)(7)(B), (8)(B) of Pub. L. 104-208 effective, with certain transitional provisions,

on the first day of the first month beginning more than 180 days after Sept. 30, 1996, see section 309 of Pub. L. 104-208, set out as a note under section 1101 of this title.

Amendment by sections 354(a)(1), (2), (b), and 357 of Pub. L. 104-208 effective as if included in the enactment of subtitle A of title IV of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, see section 358 of Pub. L. 104-208, set out as a note under section 1182 of this title.

ABOLITION OF IMMIGRATION AND NATURALIZATION
SERVICE AND TRANSFER OF FUNCTIONS

For abolition of Immigration and Naturalization Service, transfer of functions, and treatment of related references, see note set out under section 1551 of this title.

§ 1535. Appeals

(a) Appeal of denial of application for removal proceedings

(1) In general

The Attorney General may seek a review of the denial of an order sought in an application filed pursuant to section 1533 of this title. The appeal shall be filed in the United States Court of Appeals for the District of Columbia Circuit by notice of appeal filed not later than 20 days after the date of such denial.

(2) Record on appeal

The entire record of the proceeding shall be transmitted to the Court of Appeals under seal, and the Court of Appeals shall hear the matter *ex parte*.

(3) Standard of review

The Court of Appeals shall—

- (A) review questions of law *de novo*; and
- (B) set aside a finding of fact only if such finding was clearly erroneous.

(b) Appeal of determination regarding summary of classified information

(1) In general

The United States may take an interlocutory appeal to the United States Court of Appeals for the District of Columbia Circuit of—

- (A) any determination by the judge pursuant to section 1534(e)(3) of this title; or
- (B) the refusal of the court to make the findings permitted by section 1534(e)(3) of this title.

(2) Record

In any interlocutory appeal taken pursuant to this subsection, the entire record, including any proposed order of the judge, any classified information and the summary of evidence, shall be transmitted to the Court of Appeals. The classified information shall be transmitted under seal. A verbatim record of such appeal shall be kept under seal in the event of any other judicial review.

(c) Appeal of decision in hearing

(1) In general

Subject to paragraph (2), the decision of the judge after a removal hearing may be appealed by either the alien or the Attorney General to the United States Court of Appeals for the District of Columbia Circuit by notice of appeal filed not later than 20 days after the date on which the order is issued. The order shall not

be enforced during the pendency of an appeal under this subsection.

(2) Automatic appeals in cases of permanent resident aliens in which no summary provided

(A) In general

Unless the alien waives the right to a review under this paragraph, in any case involving an alien lawfully admitted for permanent residence who is denied a written summary of classified information under section 1534(e)(3) of this title and with respect to which the procedures described in section 1534(e)(3)(F) of this title apply, any order issued by the judge shall be reviewed by the Court of Appeals for the District of Columbia Circuit.

(B) Use of special attorney

With respect to any issue relating to classified information that arises in such review, the alien shall be represented only by the special attorney designated under section 1534(e)(3)(F)(i) of this title on behalf of the alien.

(3) Transmittal of record

In an appeal or review to the Court of Appeals pursuant to this subsection—

- (A) the entire record shall be transmitted to the Court of Appeals; and
- (B) information received in camera and *ex parte*, and any portion of the order that would reveal the substance or source of such information, shall be transmitted under seal.

(4) Expedited appellate proceeding

In an appeal or review to the Court of Appeals under this subsection—

- (A) the appeal or review shall be heard as expeditiously as practicable and the court may dispense with full briefing and hear the matter solely on the record of the judge of the removal court and on such briefs or motions as the court may require to be filed by the parties;

(B) the Court of Appeals shall issue an opinion not later than 60 days after the date of the issuance of the final order of the district court;

(C) the court shall review all questions of law *de novo*; and

(D) a finding of fact shall be accorded deference by the reviewing court and shall not be set aside unless such finding was clearly erroneous, except that in the case of a review under paragraph (2) in which an alien lawfully admitted for permanent residence was denied a written summary of classified information under section 1534(c)(3)¹ of this title, the Court of Appeals shall review questions of fact *de novo*.

(d) Certiorari

Following a decision by the Court of Appeals pursuant to subsection (c), the alien or the Attorney General may petition the Supreme Court for a writ of certiorari. In any such case, any in-

¹ So in original. Probably should be section "1534(e)(3)".