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U.S. Department of Justice

Office of Legal Counsel

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Office of the
Assistant Attorney General

Washington, D.C. 20530

December 9, 1987

Memorandum for Richard K. Willard
Assistant Attorney General
Civil Division

Re: Use of Confidential Information

This responds to your request for our opinion on whether the Immigration and Naturalization Service (INS) may use information furnished pursuant to an application for amnesty under the Immigration Reform and Control Act of 1986 (IRCA) to institute deportation proceedings.¹ We believe that INS may not use the information for this purpose.

Analysis

IRCA permits certain aliens in the United States to apply for legalized status. IRCA, secs. 201, 302, adding secs. 245A and 210 to the Immigration and Nationality Act (INA), to be codified at 8 U.S.C. 1255a, 1160.² Both sections contain limits on the use that may be made of information provided to INS in the applications. Section 245A, for example, provides, in relevant part:

(5) Confidentiality of Information.-- Neither the Attorney General, nor any other official or employee of the Department of Justice, or bureau or agency thereof, may --

(A) use the information furnished pursuant to an application filed under this section for any purpose other than to make a determination on the application

¹ Memorandum for Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, from Richard K. Willard, Assistant Attorney General, Civil Division, November 17, 1987. We requested the views of INS on this issue. See Memorandum for Mark Everson, Deputy Commissioner, INS, from Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, July 1, 1987. However, the INS has declined to provide us with a written statement of its views and its General Counsel, Mr. Raymond Momboisse, expressly waived this opportunity on November 18, 1987.

² The first section provides general authority while the second is limited to special agricultural workers.

or for enforcement of paragraph (6),

(B) make any publication whereby the information furnished by any particular individual can be identified, or

(C) permit anyone other than the sworn officers and employees of the Department or bureau or agency or, with respect to applications filed with a designated entity, that designated entity, to examine individual applications.

Anyone who uses, publishes, or permits information to be examined in violation of this paragraph shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(6) Penalties for False Statements.-- Whoever files an application for adjustment of status under this section and knowingly and willfully falsifies, misrepresents, conceals or covers up a material fact or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

INA, sec. 245A(c)(5), (6).³ We quote the statutory language in full to demonstrate that Congress set up a specific and narrow scheme to govern the use of this information.⁴ No one may use the information "other than to make a determination on the application or for enforcement of paragraph (6)." Id. sec.

³ The section governing special agricultural workers contains virtually identical language. INA, sec. 210(b)(6), (7).

⁴ The legislative history indicates that the policy underlying the confidentiality provisions was to encourage aliens to use the legalization process without fear that their truthful participation in the program could operate against them.

The Committee has learned that legalization programs in other countries have usually produced a low rate of participation among the eligible candidates. At least part of the reason is distrust of authority

. . . The confidentiality of the records is meant to assure applicants that the legalization process is serious, and not a ruse to invite undocumented aliens to come forward only to be snared by the INS.

H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 73 (1986).

245A(c)(5). Even within those contexts the information must be closely held. Id. Thus, there are only two permissible uses for this information: to process the application and to prosecute anyone who makes a false statement during the application process. Any other use by the Attorney General or anyone else in the Department of Justice is forbidden.

As a component of the Department of Justice, the INS is bound by these restrictions. INS has issued regulations stating that it will use information furnished pursuant to an amnesty application to initiate deportation proceedings if the United States Attorney has reviewed the case and has declined to prosecute an individual for false statements. 8 C.F.R. 210.2(e)(4), 245a.2(t)(4).⁵ Deportation proceedings are not among the statutorily permissible uses of such information.⁶ Accordingly, INS's regulations on this subject are invalid. Moreover, use by INS officials of such information in connection with deportation proceedings would subject those officials to IRCA's criminal penalties.

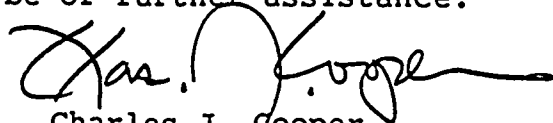
Conclusion

The confidentiality provisions of IRCA are specific and forbid any use of the information obtained during the application process except for two: to process the application or to prosecute an applicant who has made false statements. INS has failed to provide us with any explanation of why, notwithstanding the plain language of these provisions, it believes that the information may be used to deport individuals. For the reasons stated above, we conclude that INS may not use the information obtained from applicants under sections 245A and 210 of the INA in deportation proceedings. Finally, we must emphasize that section 245A provides criminal penalties for those who use the information in an unauthorized manner.

⁵ 52 Fed. Reg. 16190, 16201, 16214 (1987). Both sections state: "If prosecution is declined, the Service may issue an order to show cause and warrant of arrest if the United States Attorney returns the matter to the Service for initiation of deportation proceedings in lieu of prosecution."

⁶ The fact that information has been shared with the United States Attorney for possible enforcement of sec. 245A(d)(6) does not mean that it can then be used freely by the INS for other purposes not specifically permitted by law. Because the United States Attorney has declined prosecution in such cases, the statute's exception for prosecution for false statements is simply inapplicable.

Please let me know if we can be of further assistance.



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Randy L. Levine
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