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Files

U.S. Department of Justice

Office of Legal Counsel

Reading File  
Ret. (Grant) amnesty

Office of the  
Deputy Assistant Attorney General

Washington, D.C. 20530

August 12, 1993

Mary Jo White  
United States Attorney  
Southern District of New York  
One Saint Andrew's Plaza  
New York, New York 10007

Dear Ms. White:

By letter dated August 10, 1993, you requested our opinion concerning the use in a criminal prosecution of documents filled out by an employee of the Immigration and Naturalization Service (INS) in connection with applications by illegal aliens for employment authorization cards. As explained in more detail below, we agree with your conclusion that 8 U.S.C. § 1255a(c)(5) would not generally bar you from using these documents by introducing them into evidence in a criminal trial.

As enacted by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1255a established a program by which certain illegal aliens could have their status adjusted to that of aliens lawfully admitted for permanent residence. To encourage aliens to apply under this program without fear of deportation by the INS, Congress enacted a provision ensuring the confidentiality of the information furnished by the alien applicants. See H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 73 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5677. This confidentiality provision mandates:

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 or for enforcement of paragraph (6) or for the preparation of reports to Congress under section 404 of [IRCA],

(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 . . . to examine individual applications.

8 U.S.C. § 1255a(c)(5).\*

This provision prohibits the Department of Justice from using "information furnished pursuant to an application filed under this section," from publishing "information furnished by any particular individual," and from allowing anyone else to examine "individual applications." The "information" referred to is the information furnished by the alien as part of the "application filed [with the INS] under [section 1255a]." We would expect such information to appear either on a document filled out by the alien (such as a written application form) or perhaps on a document filled out by an INS employee to record an alien's oral responses to questions posed by the employee.

By contrast, although they appear in files together with the applications filed by aliens under section 1255a, the 20 documents that you seek to introduce in the prosecution of an INS employee are of an entirely different character. Each document is entitled "C.S.S. V. THORNBURGH -- PROCESSING SHEET AND INFORMAL NOTES" and calls for an INS employee to record his name, the file number, and the date; to indicate whether the alien applicant has established jurisdiction and identity and whether the employee has issued the employment authorization card; and, if the card was not issued, to indicate the reasons therefor. Thus, the information contained in these documents generally would not consist of any information furnished by the alien applicant, but would consist instead of the conclusions, judgments, and impressions of the INS employee. In addition, the documents are not themselves applications by aliens, but are rather the INS responses to the applications.

Accordingly, we agree with your conclusion that the documents that you seek to introduce at trial, and the information contained in them, are generally not covered by 8 U.S.C. § 1255a(c)(5), and therefore they may be used, published, or examined without regard to that provision. As you indicated, however, it is possible that a particular document, in the space for the employee to write the "reasons for action taken," might specify information furnished by the alien applicant. We find reasonable your plan in such cases to redact any such information from the particular document in which it appears, and we assume that you will otherwise treat such information consistently with section 1255a(c)(5).

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\* The paragraph (6) referred to in quoted subparagraph (A) is 8 U.S.C. § 1255a(c)(6), which provides criminal penalties for fraud by persons filing applications under section 1255a.

Please let us know if we may be of further assistance.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Richard L. Shiffrin', written over the word 'Sincerely,'.

Richard L. Shiffrin  
Deputy Assistant Attorney General  
Office of Legal Counsel