

COMMUNITY

JOURNAL

Confidentiality provisions of legalization

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OVER the last several decades, Legalization under Section 245A of the Immigration and Nationality Act provided amnesty to millions of individuals seeking lawful status in the US. At the time their Legalization application and supporting documentation was filed, many individuals seeking to capitalize on the opportunity for Legalization submitted documentation to US immigration authorities which had all-to-often been prepared hastily by notarios or "immigration consultants". Not understanding US Immigration law, and often not having a strong command of the English language, many Legalization applicants were insufficiently aware of exactly what was being filed in their name.

After filing, some Legalization applicants were denied and deportation proceedings ensued, while others returned home. Other Legalization applicants remained in the US and later found new paths to obtaining permanent residency ("Green Card"), such as family or employment-based applications. As a part of both the Green Card and Citizenship processes, applicants are normally called for interviews at a Department of Homeland Security (DHS) field office, before a DHS officer.

During such interviews, Green Card applicants can expect that the officer has undertaken a thorough review of that applicant's entire history of immigration documentation. Applicants are often worried that something that was submitted in their Legalization application (years and often decades before) could be used against them in their current permanent residency case. It is precisely for this reason, that the confidentiality provisions of the Legalization laws were created. Confidentiality provisions built into the Immigration and Nationality Act (INA) state that the information contained in an application for Temporary Residency under Section 245A cannot be used in making a decision on any immigration application other than the Legalization application itself. As such, the confidentiality provisions aimed to encourage individuals to come forward and apply for immigration benefits without the fear that their previous applications would be used against them in other contexts.

The plain meaning of the confidentiality provision is very clear. Nonetheless, R&A attorneys, who make numerous appearances on behalf of applicants weekly, report that DHS officers at times are not always aware that they are prohibited from using information contained in Legalization applications to make determinations on subsequent applications. It has also been reported that officers attempt to discuss the Legalization application in a roundabout manner, such as by questioning the applicant about past fraud, then later charging the immigrant with misrepresentation under Section 212(a)(6)(C)(i) if the INA.

Legalization for individuals who applied under the Seasonal Agricultural Worker (SAW) program also benefit from confidentiality provisions. Under INA Section 210(b)(6), similar confidentiality provisions to those benefiting other legalization applicants are enumerated. Protection for SAW applicants goes a step further: a violation of the confidentiality provision can result in a criminal violation, with fines of up to \$10,000. It is important to note that there exists an exception to the confidentiality provision: if a duly recognized law enforcement entity, in the course of an investigation or prosecution or to identify a de-

ceased individual needs to use the information contained in the SAW application, the government can use information contained in some previous applications.

While criminal proceedings were not brought against a DHS officer for a violation of the confidentiality provisions in one published decision of the Administrative Appeals Office (AAO), the use of a Legalization application was deemed improperly used. The August 29, 2007 decision (name redacted), involved an individual who applied for Legalization under the SAW program in 1990. Thereafter, the same applicant applied for permanent residency pursuant to his marriage to his US citizen wife. Subsequently, the DHS office informed the applicant that he is inadmissible due to alleged fraud in his 1990 Legalization application, and that he required an approved waiver of inadmissibility. In his letter requiring the waiver, the officer stated that the applicant's prior permanent resident status under Section 210 of the INA contained elements of "fraud and/or misrepresentation," and that the applicant is therefore "excludable under section 212(a)(6)(C) [of the INA]."

The applicant's attorney submitted a legal brief arguing that the officer made his finding based on the Legalization application, and that the use of such information is impermissible under Section 210 as no criminal proceedings against the applicant had ensued. The AAO agreed, and found that information contained in the SAW application could not be used by the officer, and that as such, no inadmissibility ground exists warranting a waiver. The appeal was sustained, and the confidentiality provisions were properly upheld.

Many individuals, having filed

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