



U.S. OFFICE OF SPECIAL COUNSEL

1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

www.osc.gov

The Special Counsel

July 15, 2003

The President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-02-0413

Dear Mr. President:

In accordance with 5 U.S.C. § 1213(e)(3), I am transmitting a report from the Honorable John Ashcroft, Attorney General pursuant to 5 U.S.C. § 1213(c) and (d). The report sets forth the findings and conclusions of the Attorney General's review of disclosures of information allegedly evidencing violations of law, rule or regulation arising out of actions by employees of the U.S. Department of Justice (DOJ), Immigration and Naturalization Service (INS), John F. Kennedy International Airport, Jamaica, New York. The whistleblower in this case has requested anonymity.

The whistleblower's allegations were referred for investigation to Attorney General John Ashcroft, on April 12, 2002. The Attorney General's office referred the allegations to DOJ's Office of the Inspector General (DOJ OIG). Thereafter, DOJ OIG referred the matter to INS for investigation. The INS' report was sent to the Office of Special Counsel on February 3, 2003. Additional information was received from the agency on February 25, 2003. The whistleblower's comments on the agency's report are also included.

We have carefully examined the original disclosures and reviewed the agency's response. Pursuant to 5 U.S.C. § 1213(e)(2), I have determined that the findings in the agency's report include all of the information required by statute and appear reasonable.

The Whistleblower's Disclosures

The whistleblower alleged that Immigration Inspectors and Supervisory Immigration Officials known as "Secondaries" admitted a significant number of foreign nationals into the U.S. in violation of the Immigration and Naturalization Act (INA), 8 U.S.C. § 1182. According to the information provided by the whistleblower, the Immigration Inspectors conduct the first review of foreign nationals arriving in the U.S. When a discrepancy or problem is identified, the foreign national is temporarily detained and the matter is referred to the Secondary on duty for review. In this case, the whistleblower alleged that foreign nationals were attempting to gain entry into the U.S. using fraudulent passports and aliases and without

proper documentation. The whistleblower alleged that there were instances where foreign nationals were admitted to the U.S. despite evidence that they illegally overstayed their prior visa authorizations and were, thus, ineligible for reentry.

The whistleblower alleged that the foreign nationals were permitted to enter the U.S. because the Secondaries on duty did not want to complete the additional paperwork required to detain a foreign national. The whistleblower identified eleven Immigration Inspectors who served as Secondaries, seventeen Senior Immigration Inspectors, five Special Operations Immigration Inspectors and one Assistant Area Port Director as officials who improperly admitted foreign nationals into the U.S. The whistleblower also identified 150 foreign nationals who were allegedly admitted into the U.S. improperly.

The Report of the Department of Justice

The INS' Office of Internal Audit (OIA) conducted the investigation into these allegations. The OIA did not substantiate the whistleblower's allegations but did identify two systemic issues for management to review. The report and its findings were also referred to INS' Assistant Commissioner, Inspections, and the District Director of the New York District Office. The investigation and the agency's report are summarized more fully below.

The OIA contacted the INS Office of Inspections (Inspections) which is responsible for the oversight of inspection programs at INS ports of entry. Inspections conducted a computer record check of the 150 foreign nationals identified by the whistleblower through the Interagency Border Inspection System (IBIS). Because some of the admission dates were more than one year old and others were not found, Inspections was only able to analyze 78 of the 150 records. The report states that none of the names provided by the whistleblower resulted in a hit or a flag from the database indicating that the individual had a possible criminal history or presented a national security concern.

Based on its review of the secondary referrals, Inspections noted that, in some cases, there may have been more than one possible disposition for the referrals. In other words, there was information that supported both admitting the foreign national and denying admission. The report notes, however, that the review did not reveal any information in the primary inspector's referral or from the inspection done by Secondary that would allow Inspections to conclude that foreign nationals had been admitted improperly or as a result of intentional misconduct. Inspections also searched additional systems of records, such as the Treasury Enforcement Communication System and the Non-Immigrant Information System and found no evidence of improper admission of foreign nationals. In addition, the report states that no pattern of admitting foreign nationals or of criminal intent was discerned for any of the 35 Immigrations Inspectors and Secondary Immigration Inspectors identified in the whistleblower's allegations.

Generally, the report explains, secondary inspection focuses on a number of issues. For instance, the secondary inspection may include closer examination of travel documents, reviewing arrivals and departures to and from the U.S., verifying the foreign national's U.S. accommodations and departure date, searching luggage and personal effects as well as checking databases for immigration and criminal history. The Secondary inspector must ensure the foreign national shows that he or she does not intend to be an immigrant. Determinations of inadmissibility require the review and approval of a supervisor and the Assistant Port Director. The agency noted that there is no requirement for a Secondary to explain how the foreign national overcame the basis for the referral, or provide the rationale for admitting foreign nationals who have been referred for further review. Thus, the report does not provide explanations for admission of the foreign nationals in this case. As a result of this investigation, Inspections recommended that a procedure be implemented to ensure that all secondary inspections include detailed information on the decision to admit or deny admission to the foreign nationals they inspect.

The OIA also interviewed a number of INS personnel as part of its investigation. The OIA interviewed the Immigration Inspector who was the primary inspector on 71 of the foreign nationals identified in OSC's allegations and selected five additional Immigration Inspectors to interview at random. Ultimately, OIA was not able to interview two of the inspectors because one's employment was terminated and another was on annual leave during the time of the interviews. Based on the interviews with the four Immigration Inspectors, six employees and three supervisors were identified as individuals who may have additional information regarding the allegations. Interviews with those employees were conducted as well. Although some of the Immigration Inspectors interviewed expressed similar sentiments regarding the admission of foreign nationals to those disclosed by the whistleblower, they did not identify any specific instances of misconduct.

The OIA also reviewed computer printouts for 2000 and 2001 that showed which Immigration Inspector had the most referrals resulting in a foreign national being refused entry to the U.S. The report explains that these statistics were originally compiled to recognize the work of the Immigration Inspectors. However, the report notes that this information is no longer compiled because the agency determined that the monthly compilation was neither useful nor efficient. Many referrals were automatic, some Immigration Inspectors were "flooding" secondary inspection with referrals, and some Immigration Inspectors were conducting in-depth reviews, which should be conducted during the secondary inspection, thereby slowing down the primary inspection process.

Finally, the report states that the OIA investigation identified two systemic issues affecting INS at JFK. First, when the Secondary Inspectors admit a foreign national after completion of the secondary review, the admission is noted in the computer. However, no explanation of how the foreign national overcame the problem identified in the primary

inspection is given. The investigation also revealed that primary Immigration Inspectors did not receive feedback on their referrals. The lack of feedback and explanation of the determinations made by the Secondary appear to generate speculation among the primary Immigration Inspectors that some admissions are improper. The OIA's conclusions were referred to INS management officials for any action deemed appropriate.

The Whistleblower's Comments

The whistleblower reiterates the allegation that the INA was violated by the admission of foreign nationals who had overstayed previous visits to the U.S. and engaged in other fraudulent methods to enter the country. The whistleblower also suspects that management wants to limit the Non-Immigrant Information System queries so the immigration inspectors will not be aware of all INA violations that are occurring. In addition, the whistleblower notes that secondary is often crowded due to the problem with illegal immigration into the U.S.

Of considerable concern to the whistleblower is INS' concerted attempt to identify the whistleblower during the course of the investigation perhaps to discredit that individual in the future. The whistleblower also states that the report did not include information from NIIS, DSCS and CIS records that may have been helpful to the investigation. Finally, the whistleblower asserts that violations of the INA, such as those alleged in the disclosure continue today.

Conclusion

Based on the representations made in the report and as stated above, I have determined, pursuant to 5 U.S.C. § 1213(e)(2), that the findings in the agency's report include all of the information required by statute and appear to be reasonable.

I remain troubled, however, by certain aspects of the INS investigation, specifically, INS' focus on identifying the whistleblower. In every summary of witness testimony provided, it appears that the witness was asked whether or not he or she was the whistleblower. In some cases, it appears that the witness was asked to hypothesize who the whistleblower might be.

Federal employees have the right to come to the Office of Special Counsel to disclose allegations of wrongdoing in federal agencies. The secure channel provided by OSC allows employees who fear reprisal for whistleblowing to report wrongdoing outside the agency's chain of command. The INS' search for the whistleblower's identity, as in this case, has a chilling effect on the employees' right to come forward with disclosures to OSC. For this reason, OSC has cautioned INS officials about such questioning.

The Special Counsel

The President

Page 5

As required by 5 U.S.C. § 1213(e)(3), a copy of the report and the whistleblower's comments have been sent to the Chairman of the Senate Committee on the Judiciary and to the Chairman of the House Committee on the Judiciary. In addition, because the Department of Homeland Security assumed jurisdiction over immigration and U.S. ports of entry, a copy has been sent to the Chairman of the House Committee on Homeland Security and to Secretary of Homeland Security, Tom Ridge. We have also filed a copy of the report and the whistleblower's comments in our public file and closed the matter.

Respectfully,



William E. Reukauf
Acting Special Counsel

Enclosures