



U.S. OFFICE OF SPECIAL COUNSEL

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

The Special Counsel

June 25, 2013

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

Re: OSC File Nos. DI-12-0320 and DI-12-2963

Dear Mr. President:

Pursuant to 5 U.S.C. § 1213(e)(3), please find enclosed reports received from Patrick Kennedy, Under Secretary of State for Management, in response to disclosures that employees at the Department of State, Bureau of Consular Affairs, Passport Services Directorate, Office of Adjudication, were engaging in conduct that may constitute a violation of law, rule, or regulation, gross mismanagement, and an abuse of authority. The disclosures were made by Joel Warne, a Passport Specialist at the Western Passport Center in Tucson, Arizona, who consented to the release of his name. In two referrals to the Department of State, Mr. Warne alleged that Western Passport Center employees were: 1) instructed to require certain passport applicants to pay an unnecessary File Search Fee; and 2) directed to suspend valid passport applications that established U.S. citizenship pursuant to the Child Citizenship Act of 2000, 8 U.S.C. § 1431 (CCA).

**In response to Mr. Warne's first disclosure, the investigation substantiated his allegation that in October 2011, Western Passport Center employees received incorrect guidance regarding File Search Fees. The investigation revealed, however, that superseding, corrective guidance was sent to all passport centers in January 2012, and that no applicant was affected by the incorrect guidance issued to the Western Passport Center. The agency's supplemental report confirmed that an audit of applications submitted to all other passport centers between October 2011 and January 2012 did not reveal any instance in which an applicant was improperly charged a File Search Fee pursuant to the incorrect guidance. Further, the investigation did not find that Passport Specialists were instructed not to discourage applicants from paying the File Search Fee.**

The investigation into Mr. Warne's second disclosure found that, as he alleged, management has directed employees to suspend passport applications that attempt to document acquisition of citizenship at a time other than birth pursuant to the CCA where there is evidence that the applicant may have acquired citizenship at birth. The agency determined, however, that this practice is in accordance with guidance from Passport Services Headquarters, is consistent with the agency's mission, and does not

The President  
June 25, 2013  
Page 2 of 10

**violate a law, rule, or regulation. I have determined that the agency's findings appear to be reasonable.**

The disclosures were referred to The Honorable Hillary Clinton, then-Secretary of State, on April 4, 2012 and July 18, 2012. Secretary Clinton delegated her authority to Under Secretary Kennedy, who tasked the Passport Services Directorate, Division of Legal Affairs, to conduct the investigations in both matters. OSC received the agency report and supplemental report responding to the first referral on July 18, 2012 and August 30, 2012, respectively. The agency report in response to the second referral was provided to OSC on September 17, 2012. Mr. Warne provided comments on the reports. As required by 5 U.S.C. § 1213(e)(3), I am now transmitting the agency's reports and Mr. Warne's comments to you.<sup>1</sup>

**OSC File No. DI-12-0320**

*Allegations*

Mr. Warne explained that on October 1, 2011, a new policy went into effect requiring that all birth certificates submitted in support of an application for a U.S. passport include the names of the parents of the applicant, regardless of the age of the applicant. Following the dissemination of this new rule, several follow-up questions arose. Passport Services Headquarters informed employees that if an applicant submits a birth certificate that does not contain the parents' names, but the applicant has a prior passport in the system, a letter must still be mailed to the applicant requesting a birth certificate containing the parents' names. Mr. Warne explained that prior to this rule change, secondary evidence of citizenship coupled with a record of a prior passport was sufficient to issue the applicant a new passport. Under that policy, birth certificates lacking parents' names or photocopies of secondary evidence showing the applicant attempted to provide primary evidence would suffice.

Upon learning of the policy change, Mr. Warne inquired as to whether an applicant who paid a \$150 File Search Fee to have the Passport Specialist look up the applicant's passport record would need to provide a policy-compliant birth certificate if the prior passport was

---

<sup>1</sup>The Office of Special Counsel (OSC) is authorized by law to receive disclosures of information from federal employees alleging violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. 5 U.S.C. § 1213(a) and (b). The Special Counsel determines that there is a substantial likelihood that one of the aforementioned conditions exists, she is required to advise the appropriate agency head of her determination, and the agency head is required to conduct an investigation of the allegations and submit a written report. 5 U.S.C. § 1213(c) and (g).

Upon receipt, the Special Counsel reviews the agency report to determine whether it contains all of the information required by statute and that the findings of the head of the agency appear to be reasonable. 5 U.S.C. § 1213(e)(2). The Special Counsel will determine that the agency's investigative findings and conclusions appear reasonable if they are credible, consistent, and complete based upon the facts in the disclosure, the agency report, and the comments offered by the whistleblower under 5 U.S.C. § 1213(e)(1).

The President  
June 25, 2013  
Page 3 of 10

found to have been issued on a U.S. birth certificate. In response, Supervisory Passport Specialist Brian Rigolizzo confirmed that Passport Specialists would need to request a new birth certificate from the applicant. Mr. Warne was concerned about this scenario because, prior to the policy change, the only applications that required parents' information on a birth certificate were applications for children. He further noted that it is not possible for a Passport Specialist to identify whether a birth certificate used for a prior passport contained parents' names. Thus, there was no way a file search would result in the issuance of a new passport. Mr. Warne's colleague subsequently inquired whether a Passport Specialist could inform applicants that even if they paid the File Search Fee, it would still be likely that a new passport would not be issued until a proper birth certificate was provided. Mr. Rigolizzo stated that Passport Specialists should not do anything to discourage applicants from paying the File Search Fee.

Mr. Warne noted that, according to 7 FAM 1300 Appendix I, File Search Fees should not be charged in cases where the applicant submits secondary evidence of citizenship but has previously been issued a passport. Thus, if Passport Specialists were permitted to inform applicants who request a file search that it is likely they will still need to submit a proper birth certificate to receive a new passport, the applicant could avoid paying the File Search Fee altogether by simply submitting a new application with a compliant birth certificate. Mr. Warne contended that this policy potentially affected tens of thousands of applicants each year, resulting in a large number of unnecessary File Search Fees collected by the agency, and that the policy conflicted with the purpose of 7 FAM 1300 Appendix I.

#### *The Agency's Report*

The investigation substantiated Mr. Warne's allegation concerning the instructions that Western Passport Center employees received following the issuance of the new policy on birth certificates. The investigation found that Mr. Rigolizzo, relying on guidance he received from Passport Services, instructed employees that an applicant who paid a File Search Fee to look up his or her passport record would need to provide a birth certificate that complied with the new policy if the record showed that the prior passport had been issued on a birth certificate. The investigation further revealed, however, that the guidance provided to Mr. Rigolizzo by Passport Services was issued in error, and subsequent, corrective guidance was issued in January 2012.

According to the agency report, the initial guidance that Passport Services provided to Mr. Rigolizzo in response to his request for clarification was based on information contained in a draft memorandum that had not been cleared for release. Based on the draft memorandum, Program Analyst Brian West advised Mr. Rigolizzo that applications that did not comply with the new policy requiring parents' names on the birth certificate must be suspended, even if there is a prior passport record. He further advised that a limited passport could be issued in cases of urgent travel until the compliant birth certificate was submitted.

The President  
June 25, 2013  
Page 4 of 10

Shortly after this guidance was given to Mr. Rigolizzo and disseminated to Western Passport Center staff, Florence Fultz, Managing Director of Passport Issuance Operations, directed Passport Services personnel to revise the draft memorandum to state that Passport Specialists may issue a passport on the basis of a prior passport record if a search is requested and a File Search Fee is paid. The revised memorandum, "Clarification on Requirements for Parent(s) Names on Domestically Issued Birth Certificates," was sent to all passport centers on January 12, 2012. On that same date, Adjudication Manager Marti Rice forwarded the new guidance to all Western Passport Center employees. Within the following week, she held a meeting with all Passport Specialists and supervisors to discuss the guidance and sent a follow-up e-mail, again attaching the memorandum. The report notes that Passport Services Director Don Simpkins expressed his concern that guidance based on an un-cleared draft memorandum was provided to the Western Passport Center, and he planned to address the issue with his office. The investigation did not substantiate Mr. Warne's allegation that Passport Specialists were instructed not to discourage applicants from paying the File Search Fee; rather, it revealed that employees were encouraged to explain all possible options to applicants, including ways to avoid additional fees.

The investigation further confirmed that no applicants were affected by the erroneous guidance initially provided to the Western Passport Center. To reach this determination, Passport Services reviewed all passport applications for which the Western Passport Center charged a File Search Fee between October 1, 2011 and January 12, 2012. It found that none of the 68 applicants who paid the File Search Fee during this time period had their application suspended based on the erroneous guidance, pending the submission of a birth certificate with the parents' names.

Subsequently, Passport Services conducted a broader audit of approximately 2,000 applications with associated File Search Fees that were submitted to all other passport centers during the October 2011 to January 2012 time frame. On August 30, 2013, the agency provided a supplemental report to OSC outlining the audit findings. The supplemental report states that the audit did not find any instance in which an applicant was charged a File Search Fee and required to produce a birth certificate reflecting the parents' names of the applicant.<sup>2</sup> In sum, based on the finding of the investigation, the agency concluded that the provision of guidance based on an un-cleared draft memorandum, while erroneous, did not constitute an abuse of authority, and that no applicants were affected.

---

<sup>2</sup> The review of applications revealed one case in which the File Search Fee should have been refunded for reasons unrelated to the allegations in this matter. That case was investigated and the applicant was refunded. In addition, investigators found cases where File Search Fees were paid and the Passport Specialists determined that the secondary evidence submitted was insufficient. Although unrelated to the allegations in this matter, the agency is reviewing each of those applications to ensure that the File Search Fee was properly charged.

The President  
June 25, 2013  
Page 5 of 10

*Mr. Warne's Comments*

Mr. Warne expressed his gratitude to personnel within Passport Services and the Western Passport Center who shared his concern regarding the initial guidance on charging File Search Fees. He noted, however, that when the initial guidance was provided and concerns were raised, he urged Western Passport Center management to respond to Passport Services and suggest they reconsider their position. He asserted that his suggestions to question the information and propose alternatives were discouraged by management.

In addition, Mr. Warne refuted the agency's finding that Passport Specialists were not instructed to refrain from discouraging applicants from paying the File Search Fee, but to instead explain all options to applicants. He noted the absence of any memorandum or directive providing such guidance. He further pointed out that the vast majority of passport applications they process are "lockbox" cases, in which the applicant has submitted the application at a certified passport center outside of the agency, such as at a post office. He noted that the Passport Agent's Reference Guide, which is used to train employees in these non-agency passport centers, does not contain any such instruction.

Further, Mr. Warne was critical of the fact that the agency interviewed three supervisors in his chain of command, while interviewing only one non-supervisory Passport Specialist in addition to Mr. Warne. He suggested that interviewing additional Passport Specialists would have resulted in a more objective investigation process.

Mr. Warne also questioned the validity of the results of the passport application review and maintained that the documentation does not prove that a File Search Fee was not improperly charged based on the initial, incorrect guidance. Mr. Warne disagreed with the agency's conclusion that the issuance of the incorrect guidance was not an abuse of authority because it did not result in negative consequences. He believes the policy would not have changed had he not reported the matter to OSC.

Mr. Warne emphasized that the core issue in this case is communication. He asserted that without a direct channel for communication for non-managerial employees who have legitimate concerns regarding policies, their concerns must be filtered through office-level managers. He maintained that those managers often refuse to push issues forward and discourage employee feedback.

**OSC File No. DI-12-2963**

*Allegations*

Mr. Warne explained that Passport Services issues passports to individuals who provide evidence that they acquired U.S. citizenship at birth or, alternatively, under the CCA. The CCA provides that children born outside the United States automatically acquire U.S.

The President  
June 25, 2013  
Page 6 of 10

citizenship when at least one parent is a U.S. citizen, the child is under the age of 18, and the child is residing in the United States in the custody of the citizen parent pursuant to lawful admission for permanent residence. Mr. Warne noted that 22 C.F.R. § 51.43(a) indicates that an applicant must provide documentary evidence fulfilling the statutory requirements of the provision of law under which the person is claiming U.S. citizenship. Under the CCA, citizenship can be established by documentation showing at least one parent of the child is a citizen, that the child is under the age of 18 at the time the CCA requirements are met, and that the child is legally residing in the United States in the custody of the citizen parent. Based on the foregoing, Mr. Warne alleged that if an individual chooses to apply for a passport by claiming citizenship under the CCA and provides adequate evidence to support that claim, the passport should be issued.

However, Mr. Warne explained that since the Western Passport Center opened in August 2009, he and his colleagues have been instructed to: 1) suspend applications made pursuant to the CCA if there is any indication that citizenship was acquired at birth; 2) require these applicants to submit documents showing that they acquired citizenship at birth; and 3) deny these applications if the requested documentation is not submitted within 90 days, which results in forfeiture of the applicant's application fees. Mr. Warne alleged that this direction is improper, because it overrides the applicant's authority under § 51.43 to choose the provision of law under which he or she wishes to apply for a passport. Moreover, this direction effectively requires the Passport Specialist to make a determination that is outside their duties and responsibilities: in essence, to make a preliminary assessment that the individual applicant may have acquired citizenship at birth, rather than assessing the evidence of citizenship presented by the applicant.

Mr. Warne also pointed to 22 C.F.R. § 51.45, which stipulates that the State Department may require a passport applicant to provide evidence that it deems necessary to establish that the applicant is a citizen or national of the United States. He noted that this provision does not empower the agency to require evidence concerning the first possible point in time at which citizenship was acquired when citizenship has already been established by the applicant under the CCA. Thus, Mr. Warne alleged that the Western Passport Center has exceeded its authority in requiring applicants filing for a passport using evidence establishing CCA citizenship to instead submit evidence of their acquisition of citizenship at birth.

Mr. Warne further alleged that the practices in place at the Western Passport Center impose an undue financial burden on thousands of passport applicants, because employees are instructed to deny suspended applications where the requested documentation is not submitted within 90 days of the request. He stated that for a variety of reasons, applicants fail to submit the requested information to establish an earlier date of acquisition. He alleged that this has resulted in a loss of application fees exceeding \$100 per applicant, in addition to obstructing applicants from receiving passports to which they are entitled under the CCA.

The President  
June 25, 2013  
Page 7 of 10

Further, Mr. Warne asserted that this practice is a bureaucratic redundancy and may be contrary to the intent of 31 U.S.C. § 9701(b)(2), which requires that any fees charged by an agency of the Federal Government must be based on either costs to the government, the value of the service rendered, or public policy concerns. Mr. Warne reported that passport applicants under the CCA have generally obtained either immigration visas and/or permanent resident cards, which are not issued to individuals who acquire citizenship at birth. If an applicant has been issued an immigration visa or permanent resident card, it is therefore an indication that the question of whether they may have acquired citizenship at an earlier date has already been answered. Thus, Mr. Warne contended that the additional requirements imposed by the Western Passport Center have no value to the recipient, do not serve public policy in any way, and result in costs to the government as a result of redundancy.

#### *The Agency's Report*

The investigation substantiated Mr. Warne's allegation that management has directed Passport Specialists to suspend passport applications made under the CCA where there is evidence that the applicant might have acquired citizenship at birth. The investigation further confirmed, however, that the practice of suspending such applications is legally permissible, is consistent with nationwide guidance issued by Passport Services Headquarters, and is justified as a matter of agency policy.

The report explains that the Secretary of State has the authority to issue passports to U.S. citizens, and make rules and regulations governing the granting, issuance, and denial of passports. Pursuant to 22 C.F.R. § 51.45, the agency has discretion to require an applicant to provide any evidence it deems necessary to establish that the person is a U.S. citizen or non-citizen national. As noted by Mr. Warne, 22 C.F.R. § 51.43 requires applicants born outside the United States to establish that they meet the statutory requirements of the provision of law under which the applicant is claiming U.S. citizenship. The report explains, however, that § 51.43 is not intended to suggest that the applicant has discretion in choosing the provision of law under which he or she will seek to establish citizenship for the purpose of a passport application.

The report further explains that while an applicant may submit evidence suggesting acquisition under the CCA, this may not be the applicant's legal basis for citizenship. According to the report, suspension of an application under the CCA typically occurs only in the unusual case in which an applicant indicates that both of his or her parents are U.S. citizens, but only provides evidence of one parent naturalizing subsequent to the applicant's birth. This raises the possibility that the other parent was a U.S. citizen at the time of the applicant's birth and, thus, that the applicant may have actually acquired citizenship at birth. The report states that in order for an individual to acquire citizenship under the CCA, he or she cannot have already acquired citizenship at an earlier date under a different statute. According to agency officials, the purpose of suspending such applications and requesting

The President  
June 25, 2013  
Page 8 of 10

additional information is to ensure that the agency properly adjudicates passport applications by considering all available evidence.

The investigation found that the Western Passport Center's practice of suspending CCA applications where there is evidence of earlier acquisition of citizenship is consistent with the national policies of Passport Services Headquarters in its guidance, manuals, and training materials. The report notes that Passport Services' "longstanding policy has been to document the passport applicant's earliest claim of citizenship." This policy was articulated in nationwide guidance issued by Passport Services Headquarters in an April 2012 memorandum alerting managers to revisions of the citizenship worksheet used by Passport Specialists. The memorandum instructs that Passport Specialists are now required to document, based on the evidence presented, the strongest claim to citizenship or nationality, which is the earliest date of acquisition.

Further, the report found that under agency regulations, Passport Specialists must adjudicate passport applications to determine whether applicants have met their burden of establishing U.S. citizenship. The report states that "[t]his is a core function of passport adjudication and not outside the normal duties and responsibilities of a passport specialist." Thus, the report concludes that the practice of suspending CCA applications under the circumstances discussed does not require Passport Specialists to act outside the scope of their duties.

In addition, the investigation did not substantiate Mr. Warne's allegation that this practice resulted in a bureaucratic redundancy. The report notes that Lawful Permanent Residence Cards, used by CCA applicants to establish lawful admission to the United States, can be erroneously issued to individuals who actually acquired citizenship at birth. Thus, the potential duplication of effort resulting from suspension of a very few CCA applications to determine the earliest acquisition of citizenship does not constitute a redundancy. Rather, it is a backstopping measure taken by Passport Services to ensure that the government has accurate information on citizenship acquisition. This, in turn, protects the applicant, whose federal and state benefits may turn on the date of such acquisition. Although not specifically noted in the report, the agency confirmed that Passport Specialists may issue a limited passport for urgent travel where an application under the CCA has been suspended for additional information.

Finally, the investigation did not substantiate Mr. Warne's allegation that the Western Passport Center improperly denied applications made under the CCA when applicants failed to respond to requests for documentation showing an earlier acquisition of citizenship. The report states that under the Passport Services policy, if the applicant does not submit documentation showing an earlier acquisition date, but has established citizenship under the CCA, Passport Specialists are directed to issue a passport. Further, there was no evidence of any case in which such a denial occurred. Nevertheless, the report states that Passport

The President  
June 25, 2013  
Page 9 of 10

Services intended to use this review as an opportunity to issue a nationwide reminder regarding its policy.

*Mr. Warne's Comments*

Mr. Warne refuted the agency's representation that it has been Passport Services' "longstanding policy" to document the applicant's earliest acquisition of citizenship. He acknowledged that the agency began requiring the annotation of the acquisition date on the citizenship worksheet in 2010; however, he contended that it was not until April 2012 that the agency issued an updated worksheet requiring annotation of the earliest date of acquisition. He further acknowledged that acquisition dates are important, but not for the purpose of determining whether someone is a U.S. citizen. He asserted that pursuant to 22 C.F.R. § 51.40 and the agency's policy guidelines, applicants have the burden of proving that they are citizens and are not required to prove the earliest possible acquisition date. Thus, he contended that suspending an application where the documentation establishes citizenship under the CAA improperly raises the standard above that of a preponderance of the evidence, which applies to passport applicants in meeting their burden of proof of citizenship.

Further, Mr. Warne disagreed with the agency's conclusion that 22 C.F.R. § 51.43 does not provide the applicant discretion to choose the provision of law under which he or she will claim citizenship. Noting that § 51.43 requires an applicant to submit evidence that he or she meets the statutory requirements of "the provision of law or treaty under which the person is claiming U.S. citizenship," he argued that it is clear that the law under which the applicant applies is at the applicant's discretion. In addition, he noted that U.S. citizens do not qualify for immigration visas. Thus, when an applicant bears an immigration visa, it is sufficient evidence that he or she did not acquire citizenship at birth. He noted that errors in issuing such visas should be addressed by the responsible agency, the Department of Homeland Security, rather than the Department of State, which is responsible for issuing passports to eligible U.S. citizens.

Mr. Warne was also critical of the agency's data, and lack thereof, provided to support its findings that cases in which the question of earlier acquisition arises are rare and that no applications were improperly denied. In particular, he noted that the agency only provided data from 2010 to show that these cases represent merely 0.1% of all passport applications, and that the report did not present any evidence of a search of passport application denials to confirm that none were denied improperly. He further clarified that he did not claim that making citizenship determinations falls outside the duties and responsibilities of Passport Specialists; rather, he intended to assert that the extent to which they are required to do so, because of the policy requiring suspension and additional inquiry for certain CCA applications, is outside their normal duties. Mr. Warne maintained that suspending issuance of a passport denies that benefit to a U.S. citizen for unfounded reasons.

The President  
June 25, 2013  
Page 10 of 10

**The Special Counsel's Findings**

I have reviewed the original disclosure, the agency reports and the whistleblower's comments. Based on that review, I have determined that the reports contain all of the information required by statute and that the findings appear to be reasonable.

As required by 5 U.S.C. § 1213(e)(3), I have sent copies of the agency reports and the whistleblower's comments to the Chairmen and Ranking Members of the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs. I have also filed a copy of the agency reports and whistleblower comments in OSC's public file, which is available online at [www.osc.gov](http://www.osc.gov). This matter is now closed.

Respectfully,



Carolyn N. Lerner

Enclosures