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Memorandum dated May 17, 2007,
from Robert I. Cusick, Director,
to Designated Agency Ethics Officials
Regarding Immigration Support Letters
and 18 U.S.C. § 205

The Office of Government Ethics (OGE) recently has become aware of inconsistent guidance, and sometimes misguidance, regarding the application of 18 U.S.C. § 205 to Federal employees who write and submit letters to the Federal Government in support of aliens applying for a change in immigration status (immigration support letters). We previously have provided guidance regarding representational activity that violates section 205. See e.g., OGE Informal Advisory Letter 98 x 18 and Memorandum 00 x 10. However, in light of the questions we continue to receive, we would like to clarify that submitting an immigration support letter generally does not violate section 205.

The applicable portion of section 205 prohibits Federal employees from:

act[ing] as agent or attorney for anyone before any department, agency, court, court-martial, officer, or civil, military, or naval commission in connection with any covered matter in which the United States is a party or has a direct and substantial interest

18 U.S.C. § 205(a)(2).

OGE interprets section 205 to require the exercise of some control by the principal over the agent. "[W]here an employee makes a communication to the Government in support of the interests of another person, the employee does not violate 18 U.S.C. § 205, unless there is 'some degree of control by the principal over the agent who acts on his or her behalf.'" OGE 00 x 10, p. 2 (quoting OGE 98 x 18 and Luttig Memorandum, *infra*, n. 2). In fact, OGE 98 x 18 addresses the analogous situation of a Federal employee writing a letter of support for a former colleague in

connection with a sentencing hearing. OGE explained that the mere fact that such a letter may benefit the person for whom the support letter is being written does not mean that the Federal employee writing the letter is necessarily under the control of that person, *i.e.*, acting as his agent.¹

Section 205 does not appear to apply in the case of a Federal employee submitting an immigration support letter. As explained above, in order to act as another's agent, the principal must exercise at least some control over the agent. In the case of writing an immigration support letter, the author of the letter typically is free to write his personal opinion regarding the alien's abilities and character. Generally, a Federal employee who writes an immigration support letter and submits the letter to an arm of the Federal Government would not normally be "act[ing] as agent or attorney" for another within the meaning of the statute. In the unusual case where the alien did somehow exert control over the Federal employee in drafting and submitting the letter, the Federal employee would be the alien's agent for that purpose, and therefore would violate

¹ When analyzing this issue, OGE relied largely on a 1990 opinion of the Office of Legal Counsel at the Department of Justice determining that a Federal employee who submits an affidavit to the President in support of a pardon for another does not violate 18 U.S.C. § 207 if the Federal employee is expressing his personal opinion and not acting as agent for the pardon seeker. Memorandum of October 17, 1990, from J. Michael Luttig, Assistant Attorney General, Office of Legal Counsel, to Michael Boudin, Deputy Assistant Attorney General, Antitrust Division, regarding Application of 18 U.S.C. § 207(a) to Pardon Recommendation Made by a Former Prosecutor [hereinafter Luttig Memorandum]. Though the prohibitive language of section 207 differs slightly from the language found in section 205, both phrases address the same representational conduct. The Office of Legal Counsel explained that "[a]n agency or representational relationship entails at least some degree of control by the principal over the agent who acts on his or her behalf." Luttig Memorandum p. 6. *Cf. O'Neil v. Dept. of Housing and Urban Development*, 220 F.3d. 1354, 1360 (Fed. Cir. 2000) (requiring, as an element of the common law definition of "agency," that the principal exercise some control over the would-be agent).

Section 205. Thus, when determining whether a Federal employee acted as another's agent for purposes of Section 205 by writing and submitting an immigration support letter, the critical factor to consider is whether the Federal employee was under the control of the alien on whose behalf the letter was submitted.²

If you have any questions regarding this matter, please contact my Office.

² This memorandum addresses only whether section 205 prohibits a Federal employee from providing immigration support letters. The writing of an immigration support letter may also implicate section 702 of the Standards of Ethical Conduct for Employees of the Executive Branch: Using Public Office for Private Gain. 5 C.F.R. § 2635.702. Subsection (b) prohibits a Federal employee's creating the appearance of Governmental sanction or endorsement of his or another's personal activities. Therefore, a Federal employee may sign a letter of recommendation using his official title and/or agency letterhead only:

1. in response to a request for an employment recommendation or character reference, and
2. based upon personal knowledge of the ability or character of an individual
 - a. with whom he has dealt in the course of Federal employment, or
 - b. whom he is recommending for Federal employment.