



JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2014-03

August 8, 2014

BACKGROUND:

Judges have recently been presented with requests to complete a Nonimmigrant Status Certification Form I-918 Supplement B (I-918B), a document from the federal office of the U.S. Citizenship and Immigration Services (USCIS) within the Department of Homeland Security. It appears that federal law provides temporary immigration benefits to aliens who are victims of certain qualifying criminal activity. This often allows these victims to remain available as witnesses for the prosecution of that activity, or potentially other related activity.

This federal document is used to certify that certain individuals who have submitted a Form I-918 Petition for Nonimmigrant Status are victims of qualifying criminal activity and are, have been, or are likely to be helpful in the investigation or prosecution of that qualifying activity. The instructions the I-918B define "helpful" as assisting law enforcement authorities in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim. USCIS has recently begun to contact judges to collect and maintain "Certifying Official" information; i.e. the names of individuals authorized to sign the I-918B on behalf of law enforcement agencies.

The instructions for the I-918B advise that a judge's decision to provide certification is entirely discretionary and that the judge is under no legal obligation to complete a I-918B for any particular alien, but that without a completed I-918B the alien crime victim will be ineligible for "U Nonimmigrant Status", a preferential status under the law. The I-918B may also be filled out by prosecutors, traditional law enforcement officers, and other agencies that have criminal investigative jurisdiction in their respective areas of practice, such as child protective services, the Equal Employment Opportunity Commission, the Department of Labor, and others.

QUESTION:

- Should judges complete a document to certify that individuals submitting I-918B are victims of certain qualifying criminal activity and are, have been, or are likely to be helpful in the investigation or prosecution of that qualifying activity?
- Should judges register with the USIC office of the Department of Homeland Security that they are a "Certifying Official" authorized to sign a I-918B on behalf of law enforcement agencies?
- If a judge has already completed a I-918B, certifying his or her assessment of an individual as a victim of a qualifying criminal offense and the individual's helpfulness in assisting in the investigation or prosecution of a criminal matter, what are the judge's obligations in any future matter concerning adjudication of that individual?

COMMISSION CONCLUSION:

The Judicial Standards Commission determined that judges should not execute I-918B forms, certifying the likelihood that an alien victim of criminal activity is, has been, or will be helpful in the investigation or prosecution of that activity. As a judge should not execute one of these forms, a judge should not provide information for a federal "Certifying Official" registry.

Where a judge has executed a I-918B certifying the helpfulness or potential helpfulness of an alien victim in the prosecution of a crime, that judge should disqualify himself or herself from any criminal matters involving that victim.

DISCUSSION:

The Commission first reasoned that certification by a judge as to the potential "helpfulness" of a witness to the prosecution of a criminal matter would seem to violate the North Carolina Code of Judicial Conduct's prohibition on a judge providing voluntary character testimony, under Canon 2B. A judge should not make personal recommendations to a federal agency predicting how useful a victim or witness might or might not be to a future prosecution. Such assessments are, in essence, the endorsement of the victim's honesty, reliability, potential for cooperation and other character traits.

Secondly, the Commission finds that, by the language used in the I-918B and its instructions, the form clearly solicits information more appropriately provided by law enforcement or prosecutors. A judge sits in the role of an impartial arbiter and is responsible for the adjudication, not the prosecution, of criminal matters. A judge is not a representative of the prosecutorial team and should not collude with law enforcement or prosecutors in evaluating the helpfulness of potential witnesses in a case. A judge's determination as to the credibility of victims should be formed through the hearing and trial process, and not be determined prior to adjudication. Such active involvement in securing witnesses for the prosecution and predetermining their helpfulness puts the judge in an inappropriate role that could reasonably suggest bias, or the appearance of bias, on

the part of the judge in potential violation of Canon 2A and Canon 3 which require a judge to act to promote public confidence in the impartiality of his or her office.

Canon 3 also proscribes, under subsection 3A(6) that a judge should “abstain from public comment about the merits of a pending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law...” While Canon 3A(6) permits a judge to make public statements in the course of official duties, the I-918B essentially asks that a judge forecast the helpfulness of a potential witness. To do so would be improper.

In recognition of cases where a judge has already executed a I-918B, the judge is thereafter obligated to disclose that certification of the helpfulness of the victim and, upon motion of any party, disqualify himself or herself from any further involvement in that matter and any matter in which the judge’s certification as to the victim’s helpfulness would present a reasonable question as to the judge’s impartiality in the matter.

References:

North Carolina Code of Judicial Conduct

Canon 1

Canon 2A

Canon 2B

Canon 3A

Canon 3C

Instructions for Form I-918 Supplement B, “U Nonimmigrant Status” Certification (1/15/13)

Form I-918 Supplement B, “U Nonimmigrant Status” Certification (1/15/13)