HIGHLIGHTS

Three STEM Visa Bills Introduced, but House Unable to Pass GOP Bill
Three bills are introduced in both the House and the Senate in mid-September that would provide green cards to immigrants who obtain advanced STEM degrees from U.S. universities, but the House rejects a bill (H.R. 6429) from House Judiciary Committee Chairman Smith (R-Texas). During floor debate, Democratic legislators decry the Smith bill’s elimination of the diversity visa lottery program, which would remain in place in bills introduced by Rep. Lofgren (D-Calif.) and Sen. Schumer (D-N.Y.).

USCIS Releases DACA Data; ICE Won’t Get Employers’ Information
USCIS announces that it has completed 29 deferred action for childhood arrivals requests out of some 82,000 applications received since Aug. 15, adding that it does not plan on sharing employers’ information with Immigration and Customs Enforcement for enforcement purposes. The data receive mixed reactions from advocacy groups and legislators, while the announcement about information sharing with ICE is praised by practitioners as a welcome development for employers.

Mexico Accepts Complaint That Alabama Law Breaches NAFTA Accord
The Mexican government is seeking consultation with the U.S. government and reviewing claims by the Service Employees International Union and a Mexican labor lawyers group that Alabama’s enforcement-style immigration law violates the supplemental labor agreement of the North American Free Trade Agreement, SEIU announces. The complaint asserts that H.B. 56 violates seven labor principles in the North American Agreement on Labor Cooperation.

Labor Certification Applications to Be Available Through DOL’s iCERT Portal
Employers wishing to hire low-skilled guestworkers under the H-2A and H-2B visa programs soon will be able to file their temporary labor certification applications through the Labor Department’s iCERT online portal, DOL announces. Those using the electronic system will be able to establish web-based accounts, create associate user accounts and manage security privileges, file the labor certification application online and upload supporting documentation, track the status of all applications filed and processed, and receive email notifications and other official correspondence.

Brookings Report Highlights Programs for Bolstering Immigrants’ Skills
Metropolitan areas could boost their economies by investing in programs that tap into the skills of immigrants who could move into better jobs with help navigating the U.S. job market or honing their English language skills, according to a report from the Brookings Institution. According to report author Audrey Singer, immigrants and their U.S.-born children already make up 25 percent of the labor force and “will become the primary source of labor in the coming decade.”

ALSO IN THE NEWS

H-1B VISAS: DOL’s proposed expansion of the labor condition application for the H-1B program would invade workers’ and businesses’ privacy and impose bureaucratic hurdles, according to a report from the National Foundation for American Policy.

EMPLOYMENT VISAS: USCIS acted arbitrarily and capriciously when it denied an E-2 treaty investor visa to a foreign national who founded a sanitation company, a federal court in Florida holds, remanding the case to the agency.

AGRICULTURE: Although Congress is pushing to change immigration law with respect to workers with STEM degrees, lawmakers and the executive branch need to focus on the labor needs of the agricultural industry, speakers say during a National Immigration Forum conference call.

ENFORCEMENT: One of three general partners of a small company in Arizona was not an “employee,” and so the company could not be liable for completing an I-9 form for him incorrectly, DOJ’s OCAHO holds.

ENFORCEMENT ROUNDUP: Chart summarizes recent federal and state enforcement actions.
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**Lead Report**

**Legislation**

**STEM Visa Bills Introduced in House, Senate; House Unable to Pass Controversial GOP Bill**

Three bills were introduced in both the House and the Senate in mid-September that would provide green cards to immigrants who obtain advanced degrees in science, technology, engineering, and math from U.S. universities, but the House already rejected one of those bills Sept. 20 by a 257-158 mostly party-line vote.

Because the measure was being considered under suspension of the rules, it required two-thirds of the House—288 votes—in order to pass.

The bill (H.R. 6429), introduced Sept. 18 by House Judiciary Committee Chairman Lamar Smith (R-Texas) and garnering 67 co-sponsors, would have allocated up to 55,000 green cards per year first to foreign students who obtain a doctorate in a STEM field from a U.S. university and any remaining green cards to foreign students who obtain a master’s degree in a STEM field from a U.S. university.

To obtain a green card under the program, foreign graduates would have to agree to work for at least five years in the United States in a STEM field or for an employer who petitions on their behalf, according to a fact sheet from Smith’s committee.

Only graduates of universities that meet certain criteria would be eligible for green cards under H.R. 6429, and the bill would set up a labor certification process to show that there are insufficient American workers able, willing, qualified, and available for the job.

Lawmakers supporting the bill included 227 Republicans and 30 Democrats, while opposing lawmakers numbered 153 Democrats and five Republicans.

After the vote, Smith criticized the bill’s rejection. “For America to be the world’s economic leader, we must have access to the world’s best talent,” Smith said. “Unfortunately, Democrats today voted to send the best and brightest foreign graduates back home to work for our global competitors. Democrats voted against a bill that helps American businesses hire the most qualified foreign graduates with advanced STEM degrees. Their vote against this bill is a vote against economic growth and job creation.”

**Elimination of Diversity Lottery Criticized.** Although H.R. 6429 received numerous endorsements, it also drew harsh criticism from House Democrats, who objected to the bill’s elimination of the diversity lottery green card program in exchange for the STEM green card program.

House Judiciary Subcommittee on Immigration Policy and Enforcement ranking Member Zoe Lofgren (D-Calif.) Sept. 14 introduced the Attracting the Best and Brightest Act (H.R. 6412), that would supplement, rather than replace, the diversity lottery program.

The diversity lottery randomly awards green cards to immigrants from countries with low rates of immigration to the United States who meet certain criteria.

During floor debate, Smith stressed the need to eliminate the diversity lottery program, stating that it is open to fraud and invites security problems. But House Democratic Whip Steny Hoyer (D-Md.) called that aspect of the bill a “partisan poison pill” that would ensure its failure in the Senate.

Smith refused Hoyer’s request to allow a motion to replace the language of his bill with that of H.R. 6412.

**House Democratic Whip Steny Hoyer (D-Md.) called elimination of the diversity lottery program a “partisan poison pill” that would ensure its failure in the Senate.**

On the eve of the House vote, Lofgren wrote an email to her fellow House Democrats stating why she planned not to vote for Smith’s bill despite her general support for more green cards for STEM graduates.

H.R. 6429, she said, “is cynically designed to reduce legal immigration to the United States” by failing to offer unused green cards under the STEM program to immigrants in other categories who also are waiting for green cards—which she said is common under current immigration law. “This is a naked attempt to satisfy anti-immigrant groups that have long lobbied for reduced levels of legal immigration,” Lofgren said.

On the bill’s elimination of the diversity lottery program in exchange for the STEM program, Lofgren argued that it is a “zero-sum approach” that would “prevent us in the future from working to address the needs of other family- and employment-based immigrants who are now stuck in green card backlogs.”

Lofgren also took issue with the potential inclusion of for-profit schools, saying it would “allow such schools to essentially sell visas to young foreigners overseas.”

**Lack of Bipartisanship Claimed.** In addition to the substance of H.R. 6429, Lofgren criticized the way it is being handled in the House, stating that “the Republicans have . . . chosen to rush a partisan bill that has no chance of becoming law to score political points.”

“It seems the only reason our colleagues have chosen to pursue this strategy right before an election is to attempt to appear more immigrant-friendly and to curry favor with high-tech groups. But this bill is anti-immigration and only sets back the high-skilled visa cause,” Lofgren wrote.

“By forcing a partisan fight on a bipartisan issue, Republicans have chosen to blow up consensus on an otherwise noncontroversial issue,” she said.
Also critical of H.R. 6429 was Rep. Luis Gutierrez (D), one of the original co-sponsors of Lofgren’s competing STEM legislation.

In statements on the House floor Sept. 20, Gutierrez said the Republicans’ bill would boost the numbers of “immigrants they can tolerate,” and “they will make other immigrants, ones they can’t tolerate, pay for that increase.”

As did Lofgren, Gutierrez said Democrats support giving visas to STEM graduates. Gutierrez added that the nation needs “other workers too: construction workers, machinists, chefs,” who come from all over the country.

Instead, with H.R. 6429, the country is “changing the rules about who can, and more importantly, who cannot come to America,” Gutierrez said.

**Smith Hits Back.** Smith responded to Lofgren in his own email Sept. 20, noting that the diversity lottery program does not provide for rollovers of unused green cards—for which Lofgren advocated—and that the program is flawed because “[t]he American people deserve better than an immigration program that selects immigrants at random and with little regard to the education and skills they can bring to America.”

As to claims about reducing immigration levels, Smith said recent polls show that Americans by “overwhelming margins” do not want increased immigration.

In addition, Smith said he saw nothing wrong with including for-profit universities among those from which STEM graduates could obtain their degrees, as long as they meet the other criteria. “Why should we oppose free enterprise and profits?” he asked.

Smith added that he was not rushing his bill, and in fact delayed its introduction at the request of Democrats in both the House and the Senate, to whom he “reached out” before introducing the bill.

He also noted that the House Judiciary Committee already has held hearings on STEM visas and the diversity lottery program, and has approved a measure to end the latter program.

**House Democrats Push Competing Bill.** Lofgren’s bill, H.R. 6412, instead of eliminating the diversity lottery program would create a new EB-6 green card category for foreign graduates with advanced STEM degrees from U.S. universities, allocating 50,000 green cards for that purpose.

In addition, H.R. 6412 would make available any green cards not used by STEM graduates to other immigrants waiting for employment-based green cards.

Similar to Smith’s bill, Lofgren’s legislation would require an advanced degree from a university accredited by the National Science Foundation as a research institution or as otherwise excelling in STEM instruction. However, H.R. 6412 would exclude for-profit schools, instead requiring a degree from a public or nonprofit university.

Lofgren’s bill additionally would require that wages offered to foreign STEM graduates not undercut wages to U.S. workers with similar levels of experience.

H.R. 6412 also would fix a legal technicality that currently prevents employers from sponsoring green cards for foreign students without first sending them home or getting them temporary work visas; would ensure that children are not separated from their families because processing delays cause them to age out of protection under their parents’ visas; and would allow immigrants whose family relationships change to receive credit for time they already have waited for a green card.

The measure contains a two-year sunset provision. It currently has 56 co-sponsors and has been referred to the House Judiciary Committee.


According to a summary from Schumer’s office, the proposed Benefits to Research and American Innovation through Nationality Statutes (BRAINS) Act would create a pilot program to provide 55,000 green cards to foreign STEM graduates with advanced degrees.

Foreign students would be eligible if they have a master’s degree or higher from an eligible U.S. university in science, technology, engineering, or math; have an offer of employment in the United States in a STEM field; and are petitioned for by an employer that has gone through a labor certification process showing there are not sufficient American workers able, willing, equally qualified, and available at the wage level paid to all other individuals with similar experience and qualifications for the job.

“Given this failed vote in the House, we urge Chairman Smith to return to the negotiating table,” Sen. Charles Schumer (D-N.Y.) said. “A bipartisan compromise can easily be ready for the lame-duck session. There is too broad a consensus in favor of this policy to settle for gridlock.”

Eligible universities must be accredited, at least 10 years old, and classified as a research institution by the director of the National Science Foundation. The university also cannot provide incentive payments to persons based on securing foreign students.

**Other Provisions of Senate Bill.** In addition, the Schumer bill would grant student visas to foreign STEM students without their having to show they intend to remain in the United States permanently.

Any unused green cards would go to STEM graduates with advanced degrees from foreign universities who currently are awaiting employment-based green cards. High-skilled workers on H-1B guestworker visas also would be able to renew their visas from within the United States under the bill.

In addition, Schumer’s bill would:

- codify the practice that the priority date for determining an alien’s place in line for an employer’s green card petition is the date the employer files the labor certification application, also ensuring that an alien who switches from one green card family-preference category to another retains his or her original priority date,
and that an alien who switches from one green card employer-preference category to another retains his or her original priority date;

- expand “age-out” protections to benefit minor children of adult visa holders who turn 21 while they wait for their green cards; and
- encourage highly skilled workers to remain in the United States through faster reunification with their spouses and minor children by creating a new entry slot for a nuclear family member of a highly skilled permanent resident when a lawful permanent resident was “removed from the United States in the preceding fiscal year.”

The bill has been referred to the Senate Judiciary Committee.

After the House vote on H.R. 6429, Schumer said Smith should start over.

“Given this failed vote in the House, we urge Chairman Smith to return to the negotiating table,” Schumer said. “A bipartisan compromise can easily be ready for the lame-duck session. There is too broad a consensus in favor of this policy to settle for gridlock.”

Bills Garner Broad Support. The three measures—along with a fourth bill introduced in May by Sen. John Cornyn (R-Texas) (6 WIR 320, 5/28/12)—were praised Sept. 17 by the bipartisan Partnership for a New American Economy, which said it was “optimistic that STEM legislation based on these four bills can be quickly passed by both houses and signed into law by the President.”

A coalition of 26 national organizations, 46 employers, and 42 state and local organizations Sept. 19 threw their support behind Smith’s bill, urging its passage in a letter to the House.

“America has been greatly enriched by the contributions of gifted engineers, researchers, and scientists from around the world who have chosen to come here to study and innovate. However, our immigration system has failed to adapt in ways that help ensure we maintain this advantage,” the letter said. “These are highly educated professionals who will create jobs wherever they settle, whether in the U.S. or elsewhere.”

Tamar Jacoby, president of ImmigrationWorks USA—one of the letter’s signatories—separately said Sept. 19 about Smith’s bill that it “is only a start on the immigration fixes necessary to bring America’s annual legal intake of foreign workers more realistically into line with the country’s labor needs—but it’s an important start, with significance for all economic sectors that rely on an immigrant labor force.”

But the Federation for American Immigration Reform, which advocates for lower immigration levels, called Smith’s bill in particular a “mixed bag.”

In a Sept. 17 statement, FAIR approved the elimination of the diversity lottery program and the focus on highly skilled immigrants, but said “the increased number of green cards for foreign STEM grads will impose more competition for jobs” at a time when many highly skilled native-born Americans with STEM degrees are unemployed or underemployed.

By Laura D. Francis

Employment

USCIS Releases First Round of DACA Data, Says ICE Won’t Get Employers’ Information

U.S. Citizenship and Immigration Services Sept. 14 announced that it has completed 29 deferred action requests out of some 82,000 applications received since Aug. 15, adding that it does not plan on sharing employers’ information with Immigration and Customs Enforcement for enforcement purposes.

As of Sept. 13, USCIS had received 82,361 DACA applications, scheduled 63,717 biometrics appointments, set up 1,660 applications for final adjudication, and completed 29 applications. The agency said the biometrics numbers may be inflated because of rescheduling requests.

Christopher Bentley, a USCIS spokesman, clarified Sept. 17 that the numbers merely show that the agency has made a final determination on 29 applications—they do not indicate that all of those applications have been approved. Bentley said USCIS is not releasing numbers of approved versus denied DACA applications.

Announced June 15 (6 WIR 371, 6/25/12) and launched two months later (6 WIR 509, 8/20/12), DACA averts deportation of and provides work authorization to illegal immigrants who came to the United States as children and who meet certain criteria, including that they:

- entered the United States when they were younger than 16 years old;
- are under age 31 as of June 15, 2012;
- have continuously resided in the United States since June 15, 2007, and are present in the country as of June 15, 2012, and at the time they request deferred action;
- are currently in school, have graduated from high school, have obtained a general education development (GED) certificate, or are honorably discharged veterans of the Coast Guard or U.S. armed forces; and
- have not been convicted of a felony, a significant misdemeanor, or three or more misdemeanors, and do not otherwise pose a threat to national security or public safety.

Different Reactions to Figures. The early numbers were cheered by immigrant advocates, who saw the figures as a positive sign.

“They have not taken the DREAMers’ applications to court to challenge their validity. They have not fast-tracked or expedited any of the applications. They have not spoken negatively about the DREAMer movement,” said Alex Quian, National Co-Director of United We Dream Network.

“The DACA approval process is evidence of government at its best. DREAMers who have provided complete applications have been notified of subsequent steps in their application processes in a timely fashion. Newly revised guidelines by USCIS have helped clarify certain issues, and we expect to see approval numbers grow in the near future,” National Immigration Law Center Executive Director Marielena Hincapié said in a statement.

“We are very excited to see these numbers—they are higher than we expected and show that DREAMers are fired up and ready to go,” Evelyn Rivera, a national coordinator of the United We Dream Network said in a separate statement. “DREAMers have organized for years to win this victory and are now organizing to make deferred action a success.”

At the same time, House Judiciary Committee Chairman Lamar Smith (R-Texas) blasted the early approval of DACA applications, when President Obama’s “jobs council hasn’t met in over eight months to find solutions to put unemployed Americans back to work.”

“With 23 million Americans unemployed or looking for full-time work, it is unconscionable that this Administration prioritizes illegal immigrants over American workers,” Smith said in a Sept. 12 statement ahead of the data’s official release.

Legislators Seek Additional Information. Smith along with Sen. Charles Grassley (R-Iowa) Sept. 20 sent a letter to Homeland Security Secretary Janet Napolitano stating that the data USCIS released is “far from sufficient to properly oversee the executive branch’s implementation of DACA.”

The letter is the third the lawmakers have sent regarding the program. In August, Smith and Grassley sent letters questioning USCIS’s calculation of the fee for DACA application processing and seeking information on efforts to prevent and detect fraud in the process (6 WIR 512, 8/20/12).

“We have received very few details and have no access to documents that outline the program,” they said in the Sept. 20 letter.

The letter asked the agency to publish and provide to Congress certain statistics on a weekly basis, starting at the DACA program’s inception. They include:

- the number of I-821D deferred action applications received, approved, denied, approved despite a criminal conviction, approved despite a pending criminal charge, approved despite a juvenile criminal conviction, denied for suspicion of fraud or on the basis of fraud—including how many have been referred for prosecution or removal and how many have been prosecuted and removed for fraud—and containing fraud indicators;
- the number of I-765 work authorization applications received, approved, denied, and granted a fee waiver;
- the number of individuals granted deferred action who have applied for advance parole; have been granted advance parole; have been granted advanced parole, traveled outside the country, allowed back into the United States, and granted lawful permanent residency; and have been granted lawful permanent residency under another means;
the number of parents of DACA applicants who have requested prosecutorial discretion, received prosecutorial discretion, and denied prosecutorial discretion;

- the number of applications received for individuals in removal proceedings as well as the number of deferred action or work authorization applications approved for individuals in removal proceedings; and

- the number of DACA applicants denied deferred action who have been placed in removal proceedings, denied due to ineligibility, denied due to fraud or other violations of immigration law, denied due to criminal history, and deported from the United States.

Assurance Provided to Employers. Also on Sept. 14, USCIS updated its frequently asked questions on DACA, most notably including an assurance to employers that their information, if provided to verify DACA applicants' employment, will not be handed over to ICE for enforcement purposes.

“‘You may, as you determine appropriate, provide individuals requesting deferred action for childhood arrivals with documentation which verifies their employment,’” USCIS said in its FAQs. “This information will not be shared with ICE for civil immigration enforcement purposes pursuant to [Immigration and Nationality Act] section 274A unless there is evidence of egregious violations of criminal statutes or widespread abuses.”

Practitioners and immigrant advocates earlier had expressed concern that USCIS was assuring DACA applicants that information they submitted would not be used against them for enforcement purposes—but a similar assurance was not being provided to employers.

During an Aug. 14 press call on the eve of the DACA program’s launch, a senior administration official said the government would not provide assurances to employers, although he noted that ICE has implemented workplace enforcement priorities that focus on enforcing immigration law where employers also are engaging in a widespread pattern of abusive practices.

Muzaffar Chishti, director of the Migration Policy Institute Office at the New York University School of Law, said at an Aug. 7 MPI event that much of the documentation contained in DACA application packages would come from employers because they have consistent records, and that in order for the program to run smoothly, employers need an assurance that they will not be prosecuted.

‘A Very Positive Development.’ Chishti Sept. 17 called USCIS’s statement about use of employers’ information “a very positive development,” telling BNA that the agency responded to “a very legitimate concern by employers that if they provide information about current or past employment of a DACA applicant, that it could potentially trigger an investigation” into their employment practices.

As with the DACA program as a whole, the employer assurance in the FAQs lacks the “classic protections of a regulation or a statute,” Chishti said. But “this is the best you can come to an agency giving an understanding” of how it will proceed, he said.

Chishti explained that DACA applicants’ ability to obtain employment verification documents can be critical for proving some of the eligibility criteria, in particular age and physical presence in the United States.

“Since these people typically have tried not to establish proof of their existence in the United States,” one of the few places where that information exists is with their employers, he said, noting that about 58 percent of those potentially eligible for the DACA program are currently employed.

Chishti said that, for those employers that are “extremely risk averse,” the new statement in USCIS’s FAQs “will make no difference” because they still will not want to risk being exposed as an employer of undocumented workers. For others, however, he said the statement provides an additional assurance over and above the fact that the law does not punish merely employing undocumented workers, but rather knowingly employing undocumented workers.

Greg Siskind, a founding partner of Siskind Susser in Memphis, Tenn., told BNA Sept. 18 that employers are not completely off the hook, just that “there’s not going to be data mining of applications for DACA” for purposes of prosecuting employers. However, he said, the statement from USCIS “should make employers a little less nervous.”

The statement that USCIS will not turn employers’ information over to ICE unless there is “evidence of egregious violations of criminal statutes or widespread abuses” suggests that the agency will be looking for something “more than just a paperwork or technical violation,” along the lines of an employer aiding employees in identity theft as opposed to simply being fooled by “a bogus Social Security card.”

Attorney Says Employers Should Remain Cautious. At the same time, Siskind said he stands by the advice he gave during a Sept. 7 call sponsored by ImmigrationWorks USA (6 WIR 571, 9/17/12), that employers still should avoid situations where they might gain knowledge that one or more of their employees are undocumented.

While it is now less likely that ICE will prosecute employers who provide DACA information, they should not be “actively assisting” their employees in completing applications, Siskind said.

“IRCA [the Immigration Reform and Control Act] is what it is,” Siskind said, stating that if an employer knowingly employs an immigrant not authorized to work in the United States, the employer is breaking the law. Therefore, employers who know their employees are applying for DACA should fire them and hire them later if they obtain work authorization through the program.

Both Chishti and Siskind said they did not believe that Republican presidential candidate Mitt Romney, if elected president in November, would end DACA.

“Romney has issued no statement that I have read that would suggest or imply that he intends to reverse” DACA, and instead has suggested that he would “improve” the program, Chishti said.

Siskind added that he is advising clients that it is better to have an application pending at the time of a potential presidential transition than to wait until after the election to apply. He too believed that Romney, instead of eliminating DACA, would replace it with a similar but permanent program.

Optimism About Program Success. Chishti found the early DACA numbers “very promising,” remarking that they were high despite the lack of statutory protection or assurances that the program will continue long-term.
He said “this has the trappings of a successful program.”

Siskind said the number of applicants might have been higher but for the difficulty some are having with obtaining the documentation necessary to prove their eligibility and coming up with the $465 application fee. For some people, “that’s a huge amount of money,” he said.

He added that others may be waiting until after the election to apply. According to Siskind, employers’ hesitancy to provide employment verification documents is a “very small factor” in the number of applicants, considering that school records can suffice to prove the eligibility criteria for which employment records would be used.

Speaking to the impact of the DACA program, Siskind said it would not have “a particularly negative impact on workers in the U.S.,” and in fact likely will be a benefit because the influx of educated and newly work-authorized individuals could address “worker shortages in key areas.”

“It’s still not going to be the numbers that they probably need,” but DACA “is going to be helpful for employers in the long run,” Siskind said.

USCIS’s FAQs and other information on DACA are available at http://www.uscis.gov/childhoodarrivals.

Labor Certification

Electronic Labor Certification Applications To Be Available Through DOL’s iCERT Portal

Employers wishing to hire low-skilled guestworkers under the H-2A and H-2B visa programs soon will be able to file their temporary labor certification applications through the Labor Department’s iCERT online portal. DOL announced in a notice published in the Sept. 28 Federal Register (77 Fed. Reg. 59,670).

According to the notice, labor certification applications under the low-skilled guestworker programs currently must be filed with the DOL Office of Foreign Labor Certification’s Chicago National Processing Center. Switching to iCERT applications is part of DOL’s E-Government initiative.

Those using the electronic system will be able to establish web-based accounts, create associate user accounts and manage security privileges, file the ETA Form 9142 labor certification application online and upload supporting documentation, track the status of all applications filed and processed by the Chicago NPC, and receive email notifications and other official correspondence during the adjudication process, DOL said.

The implementation of this new electronic filing capacity will enhance the accessibility and quality of labor certification services, reduce the data collection and reporting burden on small employers, facilitate more streamlined business processes, and establish a greater level of transparency in the Department’s decision making,” according to DOL.

Employers using the H-2B nonagricultural guestworker program can use iCERT beginning Oct. 15, while employers using the H-2A agricultural guestworker program can do so beginning Dec. 10. Labor certification applications still may be filed in paper form, but the NPC will enter the information into iCERT and process them in a manner similar to those filed electronically, DOL said.

DOL encouraged employers and their authorized representatives to sign up for an iCERT account as soon as possible, but agricultural associations will not be able to do so until Dec. 10.

‘Important Process Changes’ Announced. DOL said the regulatory requirements regarding when to file labor certification applications for H-2A and H-2B workers are not impacted by the new electronic application option; however, there are “important process changes.”

Because the ETA Form 9142 must be signed by the employer and its authorized attorney or agent—if so represented—the iCERT account holder must upload a signed and dated copy of either the Appendix A.2 (for the H-2A program) or Appendix B.1 (for the H-2B program) and retain the original, DOL said.

For job contractors filing under the H-2B program as joint employers with their employer-clients, a separate attachment with the employer-client’s business and contact information and a signed and dated Appendix B.1 still are required.

An ETA Form 9142 with original signatures no longer is necessary, DOL noted. Where an employer is granted temporary labor certification, it and its attorney or agent will have to sign and date the appropriate appendix on the ETA Form 9142 sent from the Chicago NPC, which satisfies the original signature requirement, the agency said.

Required supporting documentation must be scanned into the system before sending the labor certification application because iCERT will not permit the uploads once the application is sent, DOL warned. Any documentation required after the initial application must be sent via mail, email, or fax, the agency said.

The surety bond that H-2A labor contractors must send with their applications pursuant to DOL regulations cannot be sent electronically, even if the labor contractor files its labor certification application through iCERT, and instead must be sent by mail to the Chicago NPC, DOL added.

Approvals on Special Paper. Approvals of all H-2B labor certification applications filed on or after Oct. 15 and all H-2A labor certification applications filed on or after Dec. 10 will be issued on special security paper that contains the electronic signature of the OFLC administrator in Section K and a completed “For Department of Labor Use Only” footer on each page identifying the iCERT case number, determination status, and validity period, DOL explained.

Employers and their agents must sign and date the appendix containing the requisite program assurances and obligations and submit the original certification to U.S. Citizenship and Immigration Services, DOL said.

Employers who submit their labor certification applications prior to the iCERT implementation dates will receive their certifications in the current manner, even if the certification occurs after iCERT implementation.

DOL said it will hold four webinars to provide a technical demonstration of how to use iCERT and file H-2A and H-2B labor certification applications electronically. The two H-2B webinars will be held Oct. 1 and Oct. 4 at 1:30 p.m. Eastern Time. The two H-2A webinars will be held Nov. 26 and Nov. 29 at 1:30 p.m. Eastern Time.

H-1B Visas

**NFAP Report Says Proposed New H-1B Form Raises Privacy, Other Concerns for Employers**

The Department of Labor’s proposed expansion of the Form ETA-9035, the labor condition application for employers wishing to hire foreign nationals under the H-1B highly skilled guestworker program, would inverse both workers’ and businesses’ privacy and impose additional, unnecessary bureaucratic hurdles, according to a report released Sept. 18 by the National Foundation for American Policy.

The report, **DOL Threatens Personal and Commercial Privacy in Proposal Directed Against Skilled Foreign Nationals**, said DOL’s proposed changes to the form would double its length and “add 50 new information fields” as a means of improving the agency’s “integrity review” of the applications.

“But what appears to be a straightforward administrative action is, in fact, an impermissible expansion of the agency’s statutory and regulatory authority,” wrote report author R. Blake Chisam of Fragomen, Del Rey, Bernsen & Loewy in Washington, D.C.

“Since an H-1B visa is often the only practical way to hire a skilled foreign national long-term in America, DOL’s proposal will make it harder to attract and retain highly skilled and educated foreign-born scientists, engineers and professionals. That will encourage more work and projects to be done abroad,” NFAP Executive Director Stuart Anderson said in a statement.

According to the NFAP statement, a “host of organizations” oppose the proposed changes, which appeared in the July 9 Federal Register (77 Fed. Reg. 40,383).

The report also took issue with the proposal that DOL Threatens Personal and Commercial Privacy in Proposal Directed Against Skilled Foreign Nationals. The American Immigration Lawyers Association, the American Immigration Council on International Personnel, the Society for Human Resource Management, the American Immigration Lawyers Association, and NAFSA: Association of International Educators.

**Intended as Quick, Streamlined Process.** The report explained that Congress intended the H-1B program to allow employers to obtain highly skilled guestworkers quickly, and that DOL in turn designed a streamlined labor condition application.

Under the labor condition application (LCA), an employer must attest that it will pay H-1B workers the higher of the prevailing wage for the occupation or the actual wage paid to similarly situated U.S. workers, that the H-1B workers’ working conditions will not adversely affect those of U.S. workers, that there is no strike or lockout at the work place, and that it has provided notice of the LCA filing to employees in the occupational classification for which the employer is seeking H-1B workers.

DOL screens LCAs only for completeness and “obvious inaccuracies,” the report said, adding that the agency cannot challenge a complete LCA until after it is in effect. Furthermore, the report said, DOL generally is not empowered to initiate investigations on its own and instead only responds to complaints by aggrieved parties.

The report said the information solicited on the current version of the Form ETA-9035 focuses on the job opportunity itself. “In contrast, the proposed revision of the LCA would shift the form away from its appropriately job-centered focus” without authority and in contravention of Congress’s intent, the report said.

For example, the report said the proposed form would solicit “extensive information” about the H-1B workers the employer anticipates will be hired. This new collection of information raises “significant privacy issues” because LCAs are available for public access, and therefore including H-1B workers’ personally identifiable information such as name, birth date, and country of birth opens them up to identity theft, the report said.

“DOL seems to pay little heed to the federal statutes and recommendations aimed at minimizing the disclosure of personally identifiable information,” the report said, adding that the agency also is ignoring state privacy laws and international data privacy rules.

**Blanket LCAs May Be Unavailable.** In addition to privacy concerns, the proposed requirement to include identifying information about H-1B workers means employers would not be able to file “blanket” LCAs covering multiple openings for H-1B workers they plan to identify in the future, the report said. “Blanket LCAs are useful for employers who want the flexibility to move employees to new work locations or projects to meet business needs,” the report asserted.

Also, the report said the proposed requirement would hamper the H-1B process because employers may identify the need to fill job openings before identifying the specific H-1B employees who would fill those positions, especially given that the “highly competitive” H-1B application process begins six months before the start of the next fiscal year.

The report also took issue with the proposal that H-1B workers be assigned an “OFLC [Office of Foreign Labor Certification] H number” that would follow the worker to any future LCAs filed on his or her behalf. This number, the report said, would impose “a new and burdensome requirement for employers” because it would require that they track each worker’s number, and would create potential problems where a prospective hire currently works under an H-1B visa for another employer.

The proposed LCA also would require employers to list the application number for any PERM labor certification—allowing for permanent employment of a foreign worker—pending on behalf of an H-1B worker. The report said the proposed form does not specify whether this requirement relates to PERM applications for different positions or employers, and “it is unclear why the comparison of an LCA with a pending PERM application would enhance the integrity of either process.”

**Privacy Issues for Employers.** In addition, the report said the proposed LCA would raise privacy concerns for employers, especially closely held companies that would, for the first time, have to publicly divulge information about their annual income.
The proposed form also would require employers to list each address where the H-1B workers will work, thus requiring employers to list each end-client if H-1B workers would be placed at clients’ worksites, the report added.

Under the current process, employers can send H-1B workers to locations within the area of intended employment without having to complete new LCAs. But under the proposed form a new LCA may have to be submitted if an H-1B worker is transferred to a different worksite, even within the same area of intended employment, the report noted, adding that the identity of end clients is “sensitive business information.”

The report also said the proposed LCA would ask whether the employer “looked at” whether there are similarly employed U.S. workers in the occupation and the “approximate number” of U.S. workers similarly employed by the employer. “These questions do not accurately reflect the applicable wage regulations,” the report claimed.

Finally, the report said the proposed LCA would require employers to declare that they cannot deduct business expenses related to the H-1B petition and LCA, including attorneys’ fees and other costs, from H-1B workers’ wages. Calling this declaration inaccurate, the report said employers can deduct certain costs from H-1B workers’ wages as long as it does not reduce their pay to below the required wage.

**DOL Could Be Expanding Review.** The report raised concerns about the ramifications of the proposed changes, noting that they suggest that DOL may start reviewing LCAs for more than just completeness and obvious inaccuracies.

Furthermore, the report said, H.R. 3012, currently pending in Congress, would expand DOL’s investigatory powers in this area. Among other things, the measure would end the employment-based per-country cap on green cards and would hike the family-sponsored per-country cap to 15 percent from the current 7 percent.

The bill, which passed the House last November (5 WIR 631, 12/12/11), was under a hold by Sen. Charles Grassley (R-Iowa) until July 11, when he reached an agreement with Sen. Chuck Schumer (D-N.Y.) to include the additional DOL oversight (6 WIR 458, 7/23/12). H.R. 3012 now is stalled under a hold by Sen. Charles Grassley (R-Iowa) until July 11, when he reached an agreement with Sen. Chuck Schumer (D-N.Y.) to include the additional DOL oversight.

A spokesman for DOL could not be reached for comment on the report.


**Agriculture**

**As Harvest Season Arrives, Farmers Stress Need for Changes in Immigration System**

Although Congress is pushing to change immigration law with respect to workers with science, technology, engineering, and math degrees, lawmakers and the executive branch need to focus on the labor needs of the agricultural industry, speakers said during a Sept. 19 conference call sponsored by the National Immigration Forum.

NIF supports efforts to encourage immigrants with STEM degrees to work in the country, Executive Director Ali Noorani said, but America needs skilled farmworkers as much as it needs skilled engineers.

This is the “height of the harvest,” but fruits and vegetables are “rotting on the vine” because of “the agricultural industry’s labor crisis,” Noorani said.

“We don’t need STEM, we need STEAM”—science, technology, engineering, agriculture, and math—according to Craig Regelbrugge, co-chair of the Agricultural Coalition for Immigration Reform. “Pro-business Republicans should be doing everything in their power to prevent U.S. farms from closing,” he said.

**I-9 Audits Too Aggressive.** But it is not just Congress that is contributing to the labor shortages in the agriculture industry—the Obama administration has been too aggressive in conducting audits of agricultural employers’ I-9 employment eligibility verification forms, Regelbrugge said.

“It’s absolutely true that worksite audits are happening at an unprecedented pace,” he said, noting that the Obama administration is more focused on employers than the Bush administration, which was more likely to conduct high-profile worksite raids targeting employees. Anecdotally, Regelbrugge said, Immigration and Customs Enforcement disproportionately is targeting agricultural employers.

What is troublesome, Regelbrugge said, is that instead of targeting employers with a history of breaking the law, ICE is “going after any employer hoping to find . . . that they’re a bad actor,” when most farms are “fully compliant with the law.”

As a result of the I-9 audits, some farms have to fire 80 percent of their workforce, Regelbrugge said. “It all sounds good,” but the Obama administration’s enforcement policy is “having terrible unintended consequences,” he observed.
Noorani added that the I-9 audits do not appear to be a prioritization of enforcement resources, contrary to statements from the Homeland Security Department. These audits are forcing the fired employees into the hands of unscrupulous employers, he said.

“[I-9 audits are] pretty close to a complete failure,” Noorani said.

**Workforce Shortages Documented.** Ralph Broetje, president of Broetje Orchards in Washington state, said his farm employs about 1,200 workers year-round, but must find 800 to 1,000 seasonal workers each year to harvest crops. Currently about a third of the way through his apple harvest, Broetje said, he is short about 500 workers despite recruitment efforts.

U.S. immigration policy “has just devastated the skilled labor force that we’ve depended upon,” Broetje said, adding that workers his farm is able to hire often have no experience and do not last more than a day because of the demands of the job.

Maureen Torrey, vice president of marketing for Torrey Farms Inc. in New York, echoed Broetje’s sentiments, noting that her farm has trouble recruiting workers despite “help wanted ads in the paper every day” promising health benefits and a 401(k).

Compounding the labor shortage is an effort by state legislators to make New York “the yogurt capital of the United States,” setting up yogurt processing plants but doing nothing to help secure the needed labor in the dairy industry, she said. Torrey pointed out that the H-2A agricultural guestworker program does not apply to dairy farmers, and so cannot be used to secure a seasonal workforce.

Even for those who can use the H-2A program, it is “totally inadequate” for getting a sufficient supply of seasonal workers in a timely manner, according to Nan Stockholm Walden, vice president and counsel for Farmers Investment Co. in Arizona.

“[T]here has never been a greater need for federal leadership, for immigration reform,” Walden said. The Legal Arizona Workers Act—which requires employers in the state to use E-Verify, the federal electronic employment eligibility verification system—and Arizona’s controversial enforcement-style legislation, S.B. 1070, have created a “climate of fear” that is driving immigrant agricultural workers to other states, Walden added.

Larry Wooten, president of the North Carolina Farm Bureau, said his state is the country’s largest user of the H-2A program, but he agreed that labor shortages remain, as well as problems with getting workers in a timely manner. “It’s a real issue that’s going to continue to get worse,” he said.

**Subject Controversial, Polarizing.** “This issue is so toxic and so controversial and . . . polarizes folks so quickly” that most legislators will not even discuss changes to the immigration system, Wooten said.

“[W]e’ve got to remove the word ‘amnesty,’ ” he said, noting that the term polarizes lawmakers and leads to a dead end.

Torrey said when agricultural employers and their advocates meet with elected officials, changing immigration laws to secure an adequate labor supply always is the top issue. But agriculture represents only two-tenths of 1 percent of the overall vote, she said, so industry employers lack the political clout to push the issue.

Regelbrugge added that there has always been a “greater comfort level” in talking about encouraging employment of highly skilled immigrants.

Even so, a House bill that would have reallocated 55,000 green cards to foreign graduates of U.S. universities with advanced STEM degrees failed Sept. 20 to garner the two-thirds supermajority necessary for it to pass under suspension of the rules (see related report).

Wooten added that the general public and the media need to see the connection between agricultural jobs and jobs in other industries. Some 20 percent of working people in North Carolina owe their jobs to the agriculture industry, he said. “[O]ur political leaders are not looking at this issue from a jobs standpoint and the impact on our economy,” he observed.

Regelbrugge said he believes the best course of action would be legislative enactment.

“But I think we need to keep all options open if Congress continues to refuse to address the issue,” he said.

**Employment**

**Brookings Report Highlights Programs Aimed at Bolstering Immigrants’ Skills**

Metropolitan areas could boost their economies by investing in programs that tap into the skills of immigrants who could move into better jobs with help navigating the U.S. job market or honing their English language skills, according to a report released Sept. 20 by the Brookings Institution.

“We must embrace the demographic revolution” to stay competitive in a global economy, Amy Liu, co-director and senior fellow of Brookings’s Metropolitan Policy Program, said at an event to release the report, ‘Investing in the Human Capital of Immigrants, Strengthening Regional Economies.’ A presentation of the report was followed by a panel discussion.

In addition, Liu said, “we must not assume that all immigrants are low-skilled,” and instead must leverage those skills that immigrants do have so that they can contribute to “economic and social progress.”

Citing a study by the Georgetown University Center on Education and the Workforce, the report said by 2018 nearly two-thirds of all job openings will require applicants to have at least some post-secondary education. This rise in higher-skilled work is not a shift in available jobs, but rather an “upskilling” of existing occupations that previously did not require those credentials, the report said.

**Immigrants, Children ‘Primary Source of Labor,’** Audrey Singer, a senior fellow with the Metropolitan Policy Program and author of the report, said that, with the aging of the native-born workforce, immigrants and their children “will become the primary source of labor in the coming decade.” Immigrants already make up 16 percent of the labor force, and that number climbs to 25 percent if their children—born in the United States—are included in that figure, she said.

Instead of advocating for more visas to bring immigrants into the country, the report focused on those immigrants who already are here and how they can benefit their local economies.
According to the report, while immigrants are more likely than the native-born population to lack a high-school diploma, they hold bachelor’s degrees at a similar rate. The majority of immigrants are mid-skilled, having completed high school and some post-secondary education.

The ability to speak English is a factor affecting immigrants’ integration into the American workforce at all skill levels, the report said.

In addition, the report said, immigrants are more likely than their native-born counterparts to be underemployed, especially those with post-secondary education, who take “survival jobs” such as taxi driving or child care because of a lack of social networks and credentials that U.S. employers do not recognize.

The question, Singer said, is “how do forward-looking regions make the most” of their immigrant populations through training and helping them overcome obstacles to career advancement?

**Regional Programs Highlighted.** The report recognized several programs that either provide immigrants with job and English language training or help them navigate the job market.

For example, the Welcome Back Initiative, which has 10 locations across the country, works with professionally trained immigrants in the health care industry to help them retrain for jobs in the United States or to obtain the necessary credentials or licenses.

José Ramón Fernández-Peña, WBI’s director, said the program started when immigrants who wanted jobs at clinics serving the Latino population—and who could relate to them culturally and speak their language—lacked the U.S. license needed to practice there. He stressed that the health care industry currently is experiencing a labor shortage, and so the country should look to immigrants to fill those positions.

Fernández-Peña said WBI provides its clients with information about all of their options, even if they would not be able to return to their original professions without extensive schooling.

Another organization mentioned in the report, Upwardly Mobile—located in Chicago, New York, and San Francisco—provides skills training, mentoring, and coaching to help immigrants with the job search process.

Kevin Kelly, chair of the organization’s national board of directors, said the idea is to save immigrants “time and grief” in getting into better jobs, resulting in a “major bump in income.” Kelly added that Upwardly Global partners with employers to design programs to help immigrants get jobs in specific industries.

In New York, where Kelly is based, he said businesses need to hire employees with the technical skills to perform the job but also the ability to serve communities that speak a variety of languages other than English.

Kelly said Upward Mobility looks at what kind of workers a company needs and then links the employer with immigrants trying to get out of “survival jobs” and into occupations that more closely match their skills.

**Efforts by Community Colleges.** The report also mentioned community colleges’ participation in job training programs that partner with local employers. These programs, the report said, are not necessarily designed specifically for immigrants, but many immigrants take advantage of them.

Robert Templin Jr., president of Northern Virginia Community College, said more and more workers need to be able to function in a “knowledge economy.” In northern Virginia alone, the “vast majority” of the 650,000 job openings projected over the next 10 years will require some post-secondary education, he said, citing an NVCC study.

The college, in partnership with Northern Virginia Family Service, runs the Training Futures program, which prepares workers for entry-level administrative health care jobs through a combination of general skills and college preparation coursework and vocational training. The students earn college credits through the program and increasingly are continuing their community college education, according to the report.

There are “four critical elements” of a successful program, Templin said: competent, passionate leadership; jointly owning the outcome with any partners; organizing the program with scale in mind, so that it starts big if it is intended to reach a large client base; and a business model that promotes sustainability.

Fernández-Peña also stressed the “value of data” so that immigrants and employers are aware of the program’s outcomes and how it achieves them. He added that the program must be clear in its purpose to eliminate fears such as immigrants taking jobs away from native-born Americans.

**Involving Local Government.** Suzette Brooks Masters, director of the Migrations program at the J.M. Kaplan Fund, said one important element is finding a way to engage local government in efforts to get immigrants into more high-skilled jobs.

She noted that the New York City Economic Development Corporation recently released a request for proposals for its new Immigrant Bridge Program, which provides job training for immigrants and microloans to cover the cost of training necessary for them to develop their skills.

“My starting point is always not with the immigrants, but with business,” Templin said. The businesses that need the workers are the ones who lobby the government about programs the community colleges take up, he noted. Otherwise, if the discussion is not business-oriented, it is “a social welfare discussion” that will not gain traction among elected officials, he said.

“Regional economies matter, but state and local governments, educational institutions, nonprofits, and civic and community leaders all play a role in how immigrants integrate into regional labor markets,” the report concluded. “Ultimately, human capital is the most important ingredient for long-run regional economic prosperity, and efforts to augment human capital must include immigrants and take account of their particular assets and challenges.”


A video and audio recording of the event are available at http://www.brookings.edu/events/2012/09/20-immigrant-skills.
**Legislation**

**Obama Signs Into Law Reauthorization Covering E-Verify, Three Visa Programs**

President Obama Sept. 28 signed into law legislation (S. 3245) that reauthorizes four immigration-related programs, including E-Verify, for three years.

The law also extends authorization for the EB-5 regional center program, the special immigrant nonminister religious worker program, and the Conrad State 30 J-1 visa waiver program.

All four programs were set to expire Sept. 30, and the law sets a new expiration date of Sept. 30, 2015.

The Senate approved the measure by unanimous consent Aug. 2 (6 WIR 484, 8/6/12), and it subsequently was passed by the House Sept. 13 on a 412-3 vote (6 WIR 573, 9/17/12).

The E-Verify program is the federal government’s electronic employment eligibility verification system, which began as a voluntary program but now is mandatory for federal contractors and some employers in 19 states that require its use.

The law additionally makes the pilot EB-5 regional center program into a permanent program, although it still will be subject to the three-year reauthorization.

EB-5 visas are designated for immigrants who invest between $500,000 and $1 million in a U.S. business that creates 10 full-time jobs for U.S. workers. The EB-5 regional center program allows immigrants to invest through a regional center rather than running a new business themselves, and allows the immigrants to count indirect job creation toward the job creation requirement.

**Two Other Visa Programs Extended.** The law also extends the special immigrant nonminister religious worker program and the Conrad State 30 J-1 visa waiver program.

The nonminister religious workers program provides for up to 5,000 special immigrant visas per year that U.S. religious organizations may use to sponsor immigrants including nuns and lay missionaries to perform religious services in this country. This type of visa permits such workers to immigrate permanently to the United States and eventually become U.S. citizens.

Under the Conrad State 30 program, each state receives 30 J-1 visa waivers each fiscal year for foreign medical graduates. J-1 visas allow foreign physicians who pursue graduate medical training in the United States to stay in the country until they finish their studies, at which point they must return to their home countries for two years before applying for a permanent U.S. visa.

The J-1 visa waiver drops the residency requirement and allows a J-1 physician to remain in the United States to practice in a federally designated facility if sponsored by a federal agency.


**Employment Visas**

**Court Remands USCIS Decision That Owner Of Company Was Not Entitled to E-2 Visa**

U.S. Citizenship and Immigration Services acted arbitrarily and capriciously when it denied an E-2 treaty investor visa to a foreign national who founded a sanitation company using a combination of gifts from his father and loans, the U.S. District Court for the Southern District of Florida held Sept. 11, remanding the case to USCIS (All Bright Sanitation of Colo. Inc. v. USCIS, S.D. Fla., No. 1:10-cv-21808, 9/11/12).

According to the court, the E-2 visa is available to a national from a country with which the United States has a treaty in order to develop and direct the operations of a business in which he or she has invested, or in which he or she is in the process of investing a “substantial amount of capital.”

Under the Immigration and Nationality Act, an “investment” is capital that is in the treaty investor’s “possession” and “control,” and must be the treaty investor’s unsecured personal business capital or capital secured by the investor’s personal assets, the court explained. As long as the funds are obtained by legitimate means, even if they were a gift, they qualify as an investment, as do equipment and loans as long as they are not secured with the business’s assets.

In the present case, Simon Geisler, a citizen of Austria, formed and incorporated All Bright Sanitation of Colorado Inc. and invested, through All Bright, $653,329 to purchase Canyon Waste & Recycling Inc., an existing sanitation company. The investment was made up of $226,690 in equipment—a gift from Geisler’s father—a $175,000 loan from Canyon without collateral, a $200,750 loan from a third party with the equipment as collateral, and the rest in cash, also a gift from Geisler’s father.

All Bright petitioned USCIS on behalf of Geisler to change his status to an E-2 treaty investor from his F-1 student visa status. USCIS initially denied the petition and later denied All Bright’s motion to reopen.

The company then filed a federal court complaint in June 2010, claiming a violation of the Administrative Procedure Act, but the case was administratively closed after USCIS indicated that it would receive additional evidence.

Thereafter USCIS reopened the case—but again denied All Bright’s petition in January 2011 after finding that Geisler lacked the requisite possession and control over the capital invested in the company. The agency reasoned that the equipment was a gift from Geisler’s father directly to All Bright, and so was never in Geisler’s possession and control because he and the company were separate legal entities despite his being its owner and sole shareholder. It also found that Geisler was not personally liable on either of the loans used to form the business.

The parties returned to court after USCIS denied All Bright’s motion to reconsider, and both moved for summary judgment.

**Chevron Deference Not Appropriate.** Judge Robert N. Scola first determined that USCIS was not entitled to a high level of deference in reviewing its decision. Chev-
ron deference—pertaining to Chevron USA Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837 (1984)—is available when an agency is interpreting the law in a formal setting such as notice-and-comment rulemaking or formal, adjudicative decisionmaking, he said.

Noting that the U.S. Court of Appeals for the Eleventh Circuit has declined to afford Chevron deference in immigration-related cases, Scola found that a lower level of deference—based on the agency’s “power to persuade”—was appropriate here.

“The decision is geared only to the facts presented, does not purport to bind parties beyond All Bright and Geisler, and does not rely upon prior decisions or interpretations of the regulations at issue on the key points of decision,” Scola wrote. “The decision was issued and signed by the Director of the Agency’s California Service Center, a government bureaucrat; it does not come from an adjudicative arm of the Agency and does not bear any indicia of formal agency rulemaking or adjudication.”

“Plainly, this is not the sort of administrative action designed to carry ‘the force of law,’” the court determined.

Turning to the merits, the court noted that USCIS regulations governing the E-2 treaty investor program do not define what it means to “possess” and “control” the investment capital, nor did USCIS identify any controlling precedent defining those terms. Citing Merriam-Webster’s Dictionary, the court found that “possession” and “control” are broader than ownership and encompass control and power without regard to title or ownership.

“[USCIS] found Geisler ineligible for treaty investor status simply because All Bright, rather than he, had ownership and title to the garbage collection equipment. But the regulation requires ‘possession’ and ‘control’ over the assets; it does not say anything about ‘title’ or ‘ownership,’” Scola wrote, noting that Geisler still possessed and controlled the equipment as owner and sole shareholder of the business.

**Distinction Between Company, Owner Inapposite.** The agency’s argument that Geisler is legally distinct from the company was not persuasive, the court found. “Although a corporation and its sole shareholder are legally distinct, it does not follow that the shareholder, for that reason, fails to have ‘possession’ and ‘control’ of corporate assets and property. In fact, in this case, it appears that just the opposite is true,” the court said.

“[USCIS] fails to acknowledge that corporate property must always be ‘possessed’ and ‘controlled’ by some person; the corporation itself, a fictitious entity, cannot do so on its own. Accordingly, the Agency’s point that a corporation is legally separate from its shareholders does not exclude the possibility that Geisler nonetheless had ‘possession’ and ‘control’ over the equipment,” the court reasoned.

At the same time that USCIS denied Geisler the E-2 visa because he supposedly did not possess and control the equipment, the agency also found that the $200,750 loan did not count as part of his investment because he used the equipment as collateral, the court noted.

“But to acknowledge that the equipment was pledged as collateral also ultimately requires the acknowledgement that Geisler ‘possessed’ and ‘controlled’ the equipment in the first place, because only through Geisler—as sole owner of All Bright—was the equipment able to be pledged,” Scola wrote.

“The Agency cannot have it both ways. Either he had ‘possession’ and ‘control’ of the equipment and, therefore, the ability to pledge it as collateral, or he did not,” Scola stressed.

In addition, the court pointed out that just because the equipment is collateral for a loan does not mean that Geisler does not possess and control it—collateral does not automatically become the property of the lienholder, but rather transfers to the lienholder only in the event of a default on the loan.

“The decision provides no explanation for its conclusions, but instead just repeats, over and over, the same conclusory finding that Geisler failed to show he was in ‘possession’ and ‘control’ of the equipment at issue. But saying something again and again does not make it so,” Scola said.

**Faulty Reasoning on Loans.** The court additionally found fault with USCIS’s determinations with regard to Geisler’s two loans because the agency did not take into account that he signed personal guarantees on both of them. “These analytic failures by the Agency draw into question the conclusion that ‘there is no element of risk’ for Geisler here,” it held.

The court declined to weigh in on the ultimate implications of the personal guaranty versus the equipment as collateral, noting that it was possible that Geisler could be liable for the remaining balance on the loan if at the time of default the equipment had lost enough value that it no longer satisfied the outstanding balance.

USCIS additionally argued before the court that it was Geisler’s father, rather than Geisler himself, who did the investing in All Bright.

But the court said Geisler’s father’s gift of the equipment to All Bright was a separate transaction from All Bright’s purchase of Canyon. Furthermore, the court said, USCIS’s argument that Geisler merely was a “front” for his father’s investment ignored the regulations’ allowance for gifts to be counted as investments as long as they came from a legitimate source and are in the treaty investor’s possession and control.

USCIS’s reliance on Nice v. Turnage, 752 F.2d 431 (9th Cir. 1985), was misplaced because that case turned on the source of the funds, Scola said. “The Agency does not, in its decision, question the source or legitimacy of Geisler’s assets; it only finds that they were not in his ‘possession’ and ‘control’—a determination that the Court has found arbitrary and capricious, for the reasons discussed above,” he wrote.

Remanding the case to USCIS, the court stressed that it was not making a determination as to the ultimate outcome with regard to the visa petition. “While these are serious deficiencies, one point must be stressed: the significance of the problems discussed herein to the ultimate outcome of this case is not for this Court to decide. The Agency is in the best position to apply its regulations to the facts, and the Court does not intend to interfere with that task,” it said.

Stephen Jay Polatnick of Miami represented All Bright. Stephanie I. R. Fidler of the U.S. Attorney’s Office in Miami and Melissa S. Leibman of the Justice Department in Washington represented USCIS.

H-1B Visas

Knowing Failure to Post LCA Notices Was ‘Willful’ Violation, ARB Determines

A company that repeatedly failed to post notices of its filing of labor condition applications for H-1B highly skilled guestworkers at all locations where they worked—including the company’s end clients—willfully violated the Immigration and Nationality Act and is subject to a civil assessment and debarment, the Labor Department’s Administrative Review Board held Aug. 31 (Administrator v. Camo Techs. Inc., DOL ARB, No. 11-026, 8/31/12 [released 9/13/12]).

The decision reversed that of an administrative law judge, who found that Camo Technologies Inc. (CTI) acted in “good faith” when it posted LCA notices at its main offices, developed a system to document its attempts to post notices at its end clients’ worksites following a 2005 DOL investigation, and when it posted notices at several sites outside its control.

ARB said the ALJ’s findings directly contradicted the facts to which CTI stipulated, including that it did not post notices of its LCA filings at 67 worksites it listed as places of intended employment in the LCAs, and that it sent H-1B guestworkers to work at those locations regardless of whether the notices were posted.

“On the facts of this case, we hold that CTI’s failure to comply was knowing and therefore willful, sufficient to support the imposition of remedies as assessed by the Administrator [of DOL’s Wage and Hour Division],” ARB said. “In short, a ‘knowing failure’ to comply is a willful failure to comply, and the ALJ erred in not finding a willful violation of the Act warranting imposing civil money penalties.”

According to ARB, employers who want to hire H-1B highly skilled guestworkers must file an LCA with DOL stating, among other things, the H-1B workers’ rate of pay, period of employment, occupation, and information related to their work location.

Within 30 days before the LCA is filed, the employer must provide notice to U.S. workers of its intent to hire H-1B workers—if there is no employee union, notice must be posted at two conspicuous locations for 10 days at each location where H-1B workers will be placed, regardless of whether that location is owned or operated by the employer, ARB said.

History of Compliance Failures. CTI, an information technology firm based in New Jersey, contracts with direct, primary clients to place H-1B workers with secondary, or end clients.

The company, according to ARB, has a history of failing to follow the law with respect to posting notice of its intent to file LCAs for H-1B workers, dating back to Oct. 15, 2001, when predecessor Bit Tech Inc. received an email from a Wage and Hour Division investigator detailing the notice posting requirements and finding that solely posting a notice at the company’s principal place of business was insufficient.

In response to the email, Bit Tech said it posted notice of the LCA at 60 third-party worksites in 17 states, but after Bit Tech became CTI, the company received a determination letter in June 2002 finding that notice was not posted at all 60 locations.

A 2005 investigation then resulted in a determination letter in 2006 for the same violation. ARB said CTI admitted that it did not post an LCA notice at 67 locations. WHD again investigated CTI in 2010 for violations subsequent to the 2006 determination letter.

CTI Vice President of Human Resources and Administration Nalini Parsram testified during the litigation that the company would place H-1B workers at its clients’ worksites, or in the alternative at the worksites of its clients’ clients. In the latter instance, CTI would ask the end clients’ permission to post the LCA notice—regardless of whether permission was granted, CTI would direct the H-1B workers to post the LCA notice once they arrived at their worksites and developed a form to document the success or failure of these efforts.

CTI failed to post a notice in connection with 67 LCAs, although Parsram testified that in April 2010 the company changed its practices so as to mandate notice-posting at end clients’ locations.

WHD issued a determination letter May 7, 2010, assessing civil penalties of $192,625 and proposing at least a two-year debarment from participating in the H-1B program. The ALJ rejected WHD’s recommendations, finding CTI’s violations not willful or substantial.

Knowing, Intentional Violation. ARB disagreed with the ALJ that CTI did not knowingly and intentionally violate the INA’s notice posting requirements for the H-1B program despite having actual knowledge of its obligations.

CTI admitted that it sent H-1B workers to the 67 locations regardless of whether notice posting was successful and that the H-1B workers were to be employed for one year or more, “which means that the 67 Worksites clearly satisfied the definition of a ‘place of employment’ under DOL regulations, ARB said.

The company also admitted that a WHD investigator sent an email stating that an LCA notice posting at CTI headquarters was insufficient and that there were numerous instances where WHD raised concerns about the sufficiency of CTI’s notice posting practices—including a 2006 determination letter, the board added. “CTI’s admissions established that it violated the posting requirements 67 times from 2006 through 2009 and that Wage and Hour repeatedly notified it over several years of its deficient posting before 2006. Consequently, these admissions establish as a matter of law that from 2006 through 2009, CTI willfully violated the posting requirements of 8 U.S.C.A. § 1182(n)(1) and 20 C.F.R. § 655.734,” ARB wrote.

ARB thus found reasonable the WHD administrator’s $192,625 civil penalty and referred the case for CTI’s debarment.


ICE Denied Summary Decision on Faulty I-9 For Company Partner It Said Was Employee

One of three general partners of a small company in Arizona was not an “employee” despite what tax records indicated, and so the company could not be liable for completing an I-9 employment eligibility verification form for him incorrectly, the Justice Department’s Office of the Chief Administrative Hearing Officer held Aug. 24 (United States v. Santiago’s Repacking Inc., DOJ OCAHO, No. 11A00134, 8/24/12).

Although admitting that it did not have I-9 forms for 54 employees in violation of the Immigration and Nationality Act, Santiago’s Repacking Inc. argued that the third count brought by Immigration and Customs Enforcement—that the I-9 form it produced for Santiago Moreno was not completed properly—was invalid because Moreno was not an employee.

Administrative Law Judge Ellen K. Thomas said the government asserted that Moreno was an employee because he was listed as such in the company’s tax filings. But the company argued that inclusion of Moreno’s name was “a procedural error made by an unsophisticated businessman,” and instead Moreno was a partner in the business.

“Neither party explained why the single factor of the tax treatment of Santiago’s compensation should be regarded as determinative, and neither addressed the question of what factors other than compensation might be relevant to determining whether a working partner should be treated as an employee,” Thomas wrote.

After considering several court cases, OCAHO determined that Moreno was more a partner than an employee and so the company was not required to complete an I-9 form for him.

“Santiago Moreno is one of only three original partners in Santiago’s Repacking. The government’s exhibit G-8 reflects that he has a one-third interest and shares equally in profits and losses as well as in the management of the partnership business. The government made no suggestion that Moreno is subject to supervision, discipline, or performance evaluations, or that, apart from the appearance of his name on the unemployment tax and wage reports, there are any other indicia of employee status,” Thomas wrote.

“The preponderance of the evidence accordingly indicates that Moreno’s status is that of a working partner, not an employee,” she concluded.

Did Not Have I-9 Forms for Employees. According to OCAHO, Santiago’s Repacking received an audit notice from ICE in July 2009 requesting that the company produce I-9 forms, payroll records, and other employment records for all current employees and all former employees terminated after Jan. 1, 2009. The company produced various employment documents in response, but only one I-9—for Santiago Moreno.

Moreno told ICE he was the sole owner of the company and responsible for all the hiring at the time of the audit. While he asked all new employees for documents and routinely kept copies of them, he said, he never completed an I-9 form and lacked knowledge of it.

ICE issued a notice of suspect documents in April 2010, listing the names of 31 individuals it believed were not authorized to work in the United States based on queries of several databases that revealed that their alien registration numbers were assigned to other individuals or never had been assigned.

The agency then issued a notice of intent to fine in September 2010, seeking $981 for each of the violations in the first count—involving 24 employees—$935 for each of the violations in the second count—involving 30 employees—and $935 for the third count—Moreno’s faulty I-9—for a total fine of $52,529.

Precedent Suggests Owner, Not Employee. Addressing the company’s claim that Moreno was not an employee, OCAHO cited Clackamas Gastroenterology Associates v. Wells, 538 U.S. 440, 14 AD Cases 289 (2005), an Americans with Disabilities Act case that held that a person’s title is not necessarily determinative of whether he or she is an employee versus a proprietor.

More recently, OCAHO said, the U.S. Court of Appeals for the Seventh Circuit in Solon v. Kaplan, 398 F.3d 629, 95 FEP Cases 289 (7th Cir. 2005), applied Clackamas to find that an individual was an employer because he was one of only four general partners and substantially controlled the direction of the company, his own employment and compensation, and the hiring, firing, and compensation of others.

Based on this precedent and the evidence provided, OCAHO determined that Moreno was a partner and not an employee, and so the company did not need to complete an I-9 form for him.

OCAHO also agreed with the company that the fines ICE was seeking should be reduced.

“This is a small company with ordinary business income in 2010 of only $38,457.00; its payroll for that entire year was $226,531.00,” Thompson wrote. “The penalties as proposed are thus quite close to the total of the company’s business income for 2010,” she noted.

OCAHO therefore reduced the fines to $400 for each employee in the first count and $350 for each employee in the second count, for a total of $20,100.


Sheriff’s Office May Have Violated Title VII In Timing of Inquiry Into Deputy’s Citizenship

A deputy sheriff who raised concerns about the treatment of Mexican inmates and was suspended and then fired while her citizenship was investigated raised triable claims of national origin bias and retaliation, the U.S. District Court for the District of Colorado ruled Sept. 24 (Garcia v. Arapahoe Cnty. Sheriff’s Office, D. Colo., No. 1:11-cv-01950, 9/24/12).

Judge R. Brooke Jackson found that questions remain regarding the legality of imposition by the Arapahoe County Sheriff’s Office of a U.S. citizenship requirement on Teresa Garcia after she had worked in the office as a deputy for 13 years.

The court also found a jury question “concerning whether there is a causal connection between Deputy sheriff’s citizenship status and her suspension and termination.”

The government asserted that she was not an employee but instead a worker or independent contractor. But the court held that the jury could decide whether he was an employee under Title VII of the Civil Rights Act.

The case arose when Garcia, a Latina, requested in writing that the county sheriff’s office change Hispanic inmate housing to safe isolation. Garcia and another Latina deputy, Englund, were removed from their positions and an internal investigation was opened.

The sheriff hired a private investigator and an opinion was requested from the FBI to determine whether Garcia and Englund, both low-level deputies, engaged in misconduct.

The court found that the sheriff’s office did not satisfy its burden of proof to show that it reasonably believed they did.

The sheriff suspended both deputies for 60 days, and they were fired when the sheriff’s office concluded that its investigation showed they were engaging in misconduct.

The court found that this was not a reasonable belief because the sheriff’s investigation was flawed by the conclusion that it concluded Garcia and Englund were engaging in misconduct without any evidence that was reasonable for such a belief.

A key issue in the case is whether Garcia and Englund were employees or independent contractors. Garcia and Englund argued that they were employees because they were paid by the county and supervised by the sheriff’s office.

The sheriff argued that they were independent contractors because they were paid by the sheriff’s office and supervised by the sheriff’s office.

The court held that it was a question of fact for the jury to decide whether Garcia and Englund were employees or independent contractors.

Garcia’s complaint about discrimination in the workplace and her suspension and termination.”

Accordingly, the court denied the parties’ cross-motions for summary judgment on Garcia’s Title VII of the 1964 Civil Rights Act retaliation claim. It also denied summary judgment to the sheriff’s office, Sheriff J. Grayson Robinson, and two other individual defendants on Garcia’s national origin discrimination and common law civil conspiracy claims, finding possible evidence of willful and wanton conduct on the latter claim.

But Garcia failed with her claims under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, the court decided. It said she did not identify similarly situated individuals outside of her classification who received more favorable treatment. It also dismissed her common law outrageous conduct claim.

Complained of Hostile Environment. According to the opinion, Garcia joined the sheriff’s office staff as a deputy in 1997. In December 2010, she submitted a written complaint to the internal affairs division, charging, “I work in a hostile, offensive environment.”

The letter recounted derogatory comments regarding and discriminatory treatment of Mexican inmates who were not lawfully present in the United States. A sheriff’s office official interviewed Garcia about her concerns the same day she submitted her complaint.

During the course of that interview, the court said, Garcia mentioned that she was born in Mexico and raised in the United States, but that she had been trying to get a passport from the State Department for the past year. The interviewer then asked Garcia, “you’re a U.S. citizen, correct?” to which she responded yes.

Garcia told the interviewer she had always been told she was a U.S. citizen and that her mother had been born in Colorado. However, she also acknowledged that U.S. immigration personnel were telling her that she had not presented sufficient documentation to prove she was a U.S. citizen.

The following day, Garcia was informed that she was suspended with pay. The written notice of suspension did not state a reason, but the sheriff’s office has an internal policy requiring that deputies must be U.S. citizens, the court observed.

According to Garcia, she was not given a reason for her suspension, although she testified at deposition that she was told she was suspended because of the bias complaints she filed, the seriousness of the matters raised in those complaints, and the number of people involved. The defendants countered that, regardless of whether Garcia was given a reason, it was clear she was suspended so that an investigation could be conducted into whether she was a U.S. citizen.

Employee Fired but Later Reinstated. A little more than a week after she was suspended, Garcia was called into a meeting at the sheriff’s office and asked, without notice, to produce proof of her citizenship.

When she was unable to produce such proof, Garcia was handed a written termination letter, which instructed her to schedule a meeting with Sheriff Robinson within one week to present “evidence relevant to your employment status.” The meeting, the court said, “lasted 11 minutes.”

On Dec. 22, 2010, Garcia met with Robinson and presented her mother’s birth certificate and Social Security information. Garcia also told the sheriff that she possessed her own Social Security number. Nevertheless, Robinson told her that her termination stood because the only proof of citizenship he would accept was a passport, birth certificate, certificate of citizenship, or naturalization certificate.

However, Garcia’s termination ultimately was overturned, as the State Department issued her a passport a week later and she subsequently presented that document to Robinson. He reinstated her, with full back pay, effective Feb. 9, 2011, the court recounted.

Garcia sued Robinson in his official and personal capacities and four other sheriff’s office officials in their personal capacities. However, she later voluntarily dismissed her claims against two of those defendants, leaving claims against Robinson and the other two officials: under Title VII, for national origin discrimination and retaliation; under the Civil Rights Act of 1871 (42 U.S.C. § 1983), for denial of equal protection; and under 42 U.S.C. § 1985(3) and 42 U.S.C. § 1986, for conspiracy based on national origin. She also asserted common law claims of civil conspiracy and outrageous conduct.

Some Claims Triable. The defendants sought summary judgment on all claims, and Garcia cross-moved for summary judgment on her Title VII retaliation claim.

“Deputy Garcia points to the timing—that [the question about her citizenship] was raised the day after she complained about discrimination and after she had been a deputy sheriff in that office for 13 years—and contends that it was an act of retaliation,” Jackson observed. However, while Garcia’s evidence was sufficient to raise “a dispute of fact and possibly a dispute of law as to whether the citizenship requirement is a legitimate business reason,” it was not enough to warrant summary judgment in her favor, the judge ruled.

Instead, the court said, the issue of the legitimacy of the county’s requirement that law enforcement officers be U.S. citizens should be briefed by the parties. It added, however, that Garcia still raised a triable fact question as to whether that reason was a pretext for a decision actually motivated by her discrimination complaints, even if the county’s citizenship requirement for law enforcement officers is found to be legitimate.

Similar factual issues precluded summary judgment on Garcia’s Title VII national origin discrimination claim, the court decided.

On the common law civil conspiracy claim, the court rejected the defendants’ contention that jurisdiction was lacking—which was founded on the incorrect belief that the Title VII claims would be dismissed—or that governmental immunity applied. The Colorado Governmental Immunity Act provides an exception when it can be shown that the government acted in a willful and wanton manner, the court observed.

Here, Jackson found, even assuming that a legitimate concern regarding Garcia’s citizenship status “was the reason, and the only reason, for suspending Deputy Garcia, a rational person could question whether that was a reasonable way to treat a 13-year employee and why she wasn’t given a reason for the suspension.”

Other Claims Fail. Garcia’s other claims failed, the court ruled. It said her equal protection claim under Section 1983 relied on a misconstruction of the U.S. Court of Appeals for the Tenth Circuit’s decision in Plotke v. White, 405 F.3d 1092, 95 FEP Cases 1025 (10th Cir. 2005).

During oral argument, Garcia’s lawyer repeatedly was asked “to identify the groups of similarly situated
persons who received differential treatment” and, citing Plotke, “[c]ounsel doggedly insisted that a comparison of similarly situated persons is unnecessary,” Jackson wrote. “However, Plotke has nothing to do with the Equal Protection Clause,” he said, and Garcia never identified a group of similarly situated persons.

Garcia’s conspiracy based on national origin claim also relied on the equal protection clause and thus was likewise deficient, the court added. Her outrageous conduct claim under Colorado common law lacked merit because the sheriff’s office promptly reinstated Garcia with back pay upon her presentation of the passport, the court found.

“That does not excuse the conduct that allegedly occurred on December 8, 16 and 22, 2010,” the court stressed. “However, the fact that plaintiff's own comments raised the issue of her possibly not being a citizen, as the Sheriff's policy required, and the fact that she was reinstated with full back pay upon submission of acceptable proof of citizenship are sufficient for this Court to hold, as a matter of law, that these facts collectively do not support a finding by reasonable jurors of extreme and outrageous conduct.”


Text of the opinion is available at http://op.bna.com/eg.nsf?Open=pyjon-8ykjkg.

National Origin

Court Says Laid-Off Filipino Factory Worker Can Raise ‘Cat’s Paw’ in Origin, Sex Claims

A Filipino factory worker who was laid off after a poor performance review can proceed with discrimination claims against her former employer on the “cat’s paw” theory of liability because she presented evidence that her supervisor harassed her prior to the evaluation, the U.S. District Court for the Middle District of Pennsylvania ruled Sept. 18 (Miller v. Tyco Elec. Ltd., M.D. Pa., No. 1:10-cv-02479, 9/18/12).

Emma Miller, an assembly line worker at a Tyco Electronics plant in Harrisburg, Pa., claimed that her direct supervisor called her a “stupid Filipino” and told her that women should not be doing her job, before rating her performance as “below expectations” in a subsequent evaluation.

When the company later laid off part of the plant staff, Miller was among those terminated because of her low rating.

In an opinion by Judge Yvette Kane, the court denied Tyco’s motion for summary judgment on Miller’s sex and national origin discrimination claims under Title VII of the 1964 Civil Rights Act and the Pennsylvania Human Relations Act.

Although the claims were supported largely by Miller’s own testimony, not evidence that she was treated differently from similarly situated workers, the court ruled that the alleged harassment raised an inference of unlawful discrimination, on which a fact-finder could conclude that the supervisor’s discriminatory animus influenced the negative performance review.

Performance Review Led to Layoff. Miller began working on an assembly line machine at Tyco’s East Berlin, Pa., facility in 1998, the court recounted.

The facility closed in 2007 and Miller was transferred to the company’s Harrisburg plant, where her job duties were expanded to include running the entire assembly line as well as setting up and repairing machines.

James Smith, Miller’s direct supervisor, completed performance reviews for each of his employees in November 2008. The reviews graded employees on a scale of one to three, with one representing performance below expectations, two representing performance meeting expectations, and three meaning the employee’s performance exceeded expectations.

Smith gave Miller a score of one, according to the court, explaining in a written review that her demonstrated skills did not meet her job description.

The following month, Miller complained to Tyco’s human resources department that Smith was harassing her and discriminating against her based on her sex and national origin. Miller alleged in particular that Smith often reprimanded her for wearing jewelry and not keeping her hair pulled back. She also claimed that she was not afforded the same help and training as white, male co-workers.

The company investigated the claims and concluded that Miller had not been unlawfully discriminated against or harassed.

In a deposition, Miller additionally alleged that Smith told her that women should not be doing her job, called her a “dumb Filipino,” laughed at her accent, and “tried to flick her in the head,” according to the court.

In March 2009, Tyco announced that it would be laying off employees, including some at the Harrisburg plant. In keeping with its workforce reduction policy, the company selected for layoffs workers who had received a score of one on their most recent performance reviews. Miller was terminated March 4, 2009, as a result of the layoffs.

She sued Tyco, alleging that the company discriminated against her based on sex and national origin, in violation of Title VII and the PHRA.

No ‘Stray Remarks.’ The court found that Miller provided sufficient evidence to support her claims against Tyco on a cat’s paw theory of liability, alleging that Smith discriminated against her in conducting the performance review, which ultimately led to her termination.

In addition to Smith’s alleged discriminatory behavior, Miller presented evidence indicating that he was aware of the planned layoffs at the time of the performance review and knew that employees would be selected for termination based on review scores.

Miller presented a memo from Smith indicating that he was required to consider performance evaluations in determining layoffs. Moreover, a number of Tyco employees testified that “everybody knows that” layoffs are based on performance ratings, according to the court. This criterion also was included in the employee handbook.

While Miller did not provide evidence that similarly situated employees received higher performance review scores, despite doing their jobs at the same level, the court found that the evidence of Smith’s harassment raised an inference of both national origin and sex discrimination.
The court rejected Tyco’s argument that Smith’s alleged comments were simply “stray remarks,” noting that Smith was Miller’s direct supervisor and that he allegedly called her a “dumb Filipino” in the months leading up to her performance review. The court similarly pointed out that Smith allegedly told Miller that women should not be working in her position at some point prior to the evaluation.

The evidence presented regarding Smith’s behavior also was sufficient to show that the company’s stated reason for Miller’s low performance review score—poor performance—was pretextual and, as a result, that her termination was a result of Smith’s discriminatory animus.

“While much of Plaintiff’s evidence in support of a finding of pretext consists of her own testimony, ‘there is no rule of law that the testimony of a discrimination plaintiff, standing alone, can never make out a case of discrimination that could withstand a summary judgment motion,’” Kane wrote, quoting Weldon v. Kraft Inc., 896 F.2d 793, 52 FEP Cases 355 (3d Cir. 1990).

According to the court, weighing Miller’s testimony would require a credibility determination not proper at the summary judgment stage. Similarly, evidence that Smith gave other women high performance review scores and also gave at least one male employee a “below expectations” score was appropriately left for a jury to consider, the court said.

“[T]he record is sufficient to allow a reasonable fact-finder to believe that a discriminatory reason was more likely than not a motivating cause of Mr. Smith’s poor evaluation of Plaintiff,” Kane wrote.


National Origin

California Hospital to Pay $975,000 To Settle National Origin Bias Charges

LOS ANGELES—A regional hospital in California’s Central Valley has agreed to pay $975,000 and implement sweeping changes to its policies in order to settle claims that it discriminated against and harassed some 70 Filipino American employees through the medical center’s alleged selective enforcement of an “English-only” language policy, the U.S. Equal Employment Opportunity Commission announced Sept. 17 (EEOC v. Central Calif. Found. for Health, E.D. Cal., No. 1:10-cv-01492, consent decree approved 9/17/12).

The $975,000 penalty would represent the largest settlement ever for a workplace language discrimination case on the West Coast, and the largest settlement of a language discrimination case anywhere in the U.S. healthcare industry, according to the EEOC and the Asian Pacific American Legal Center, which intervened on behalf of some 41 plaintiffs.

As such, it should serve as a caution to employers, particularly in California’s health care industry, against implementing language restrictions that violate either federal or state employment discrimination statutes, Anna Y. Park, EEOC regional attorney in Los Angeles, told a press briefing.

EEOC Cites Patients’ Rights Laws. California patients’ rights statutes require that medical facilities communicate with patients in a language they understand, and all too often, that leads to “English-only” work rules, Park said.

But that poses two problems: first, in a state with as diverse a population as California, English may not be appropriate; and secondly, workplace language policies cannot be written in such a way as to violate the anti-discrimination provisions of Title VII of the 1964 Civil Rights Act or the state’s Fair Employment and Housing Act (FEHA), she added.

Under FEHA, English-only policies are “presumptively unlawful,” Laboni Hoq, APALC’s litigation director, told the press conference.

In response to a question from BNA, Park said EEOC’s position is that “draconian” English-only rules—like those prohibiting the use of other languages anywhere in the workplace, even break rooms—or, as in the instant case, where management singled out one national origin group for enforcement, were clearly illegal under Title VII.

Filipinos Allegedly Single Out. In its lawsuit, filed in 2010 in U.S. District Court for the Eastern District of California, EEOC alleged that starting in 2006, Delano Regional Medical Center (DRMC) began singling out Filipino American employees and prohibited them from speaking Tagalog and other Filipino languages anywhere in the hospital, including break rooms, the cafeteria, and in hallways.

No such requirements were enforced on any other bilingual staff, it added.

In August 2006, Filipino American workers at the medical center were called to a mandatory meeting with the hospital’s chief executive officer, who told them they were prohibited from speaking any Filipino languages in the workplace.

Furthermore, hospital management encouraged volunteers and other members of the staff to act as “vigilantes,” to monitor the Filipino American staff for compliance with the English-only rule, and to insist that they “speak English,” Park said.

Even when they did speak English, the plaintiffs were ridiculed for their accents and humiliated in front of their fellow workers, the complaint alleged.

“The hospital allegedly failed to take adequate measures to stop or prevent Filipino employees from being harassed, even after more than 100 Filipino employees complained about discrimination and harassment in a petition they submitted to DRMC management,” APALC noted in a statement.

Injunctive Remedies. In addition to the monetary relief—which will go to the 70 members of the class according to a formula still being worked out—DRMC agreed to sweeping injunctive remedies, including a new language policy that allows workers to speak the language of their choice in appropriate circumstances.

The hospital also must hire an external EEO monitor and train all staff to comply with equal employment laws and the new language policy.

The consent decree was filed with the U.S. District Court Sept. 14 and approved Sept. 17.
In a statement to BNA Sept. 17, the hospital said it “did nothing wrong” and that “DRMC’s primary concern was bringing this matter to a fair and economically reasonable resolution.”

The hospital stated that it did not make “financial sense” to continue with the lawsuit “and further waste valuable assets which could be better spent on the community’s healthcare needs.” Calling the litigation “an attack” on the hospital’s policy requiring staff to use English or the patient’s preferred language, the statement said the policy was designed “solely” for the protection of its patients and to ensure the quality of their care.

“DRMC is and always has been committed to ensuring that all of its employees and patients are treated with dignity and respect and the hospital intends to move forward with this commitment as it continues to render outstanding medical care to its patients and the community,” the statement said.

Robert D. Harding of Clifford & Brown in Bakersfield represented DRMC.


Visa Fraud

GAO Reports Temporary Worker Visas, Summer Work Travel Subject to Fraud

Temporary worker visas—most commonly the H and L visas—as well as visas under the State Department’s Summer Work Travel Program are subject to fraud, the Government Accountability Office said in a report released Sept. 10.

While the majority of visa fraud involves tourist and business visitor visas, the report, Border Security: State Could Enhance Visa Fraud Prevention by Strategically Using Resources and Training, said some instances of fraud occur during the application process for temporary worker visas.

In particular, the report said, some petitioners in the United States create fake companies to petition for foreign workers—with the visa applicants’ knowledge and participation. Other examples of fraud include fraudulent educational degrees, forged signatures, and workers performing duties and/or receiving payments significantly different from what was described in the visa application.

The report said a Homeland Security Department study found that 21 percent of the H-1B highly skilled guestworker visa petitions that it examined contained fraud or technical violations. As a result, U.S. Citizenship and Immigration Services launched its Administrative Site Visit and Verification Program (ASVVIP), under which the agency visits the worksites of companies that hire highly skilled foreign workers and which are at a higher risk of fraud (3 WIR 664, 12/14/09).

The report added that the H-1B Visa Reform Act of 2004 imposed an additional $500 visa fee in order to combat fraud, as well as an additional $2,000 fee for petitions filed through Sept. 15, 2015, by employers with 50 or more U.S. employees and with more than 50 percent of those U.S. employees on an H-1B or L intracompany transfer visa.

Fraud in SWT Program. GAO also said J visas obtained through the State Department’s Summer Work Travel (SWT) Program also are subject to fraud.

GAO said State Department officials it interviewed reported that many SWT applicants either misrepresent their status as students or their intentions for using the program. In addition, the report said, many U.S. sponsors of SWT participants misrepresent their businesses and how they plan to employ SWT workers.

In response to findings that some employers have been exploiting SWT workers, the State Department in May issued an interim final rule amending the program in order to protect participants’ health and welfare and to reinforce its cultural exchange aspects (6 WIR 289, 5/14/12).

Finding that the State Department could do more to combat visa fraud, the GAO report recommended that it formulate a policy to systematically utilize anti-fraud resources at its Kentucky Consular Center based on workload and fraud trends and establish standardized training requirements for the agency’s fraud prevention managers.

Text of the report is available at http://op.bna.com/dlrcases.nsf/r?Open=lfrs-8y9m5f.

Human Trafficking

Obama Issues Executive Ban on Contractor Involvement in Human Trafficking Activities

President Obama issued an executive order Sept. 25 calling for changes in the Federal Acquisition Regulation that would prohibit federal contractors, contractor employees, subcontractors, and their employees from engaging in any activities related to human trafficking.

The order was announced by Obama in a speech in New York City to the annual meeting of the Clinton Global Initiative. It requires contracts to include a clause stipulating that contractors and subcontractors may be audited and investigated by the contracting agency, as well as other enforcement agencies, to determine their compliance with the Trafficking Victims Protection Act and other laws and regulations restricting trafficking in persons, the procurement of commercial sex acts, or the use of forced labor.

The president’s order also calls on contracting officers to notify their agency’s inspector general and suspension and debarment officials of any activities that would justify termination under the TVPA.

In addition, the order directs the administrator of the Office of Federal Procurement Policy to provide guidance to agencies on developing appropriate internal procedures and controls for awarding and administering federal contracts that will improve monitoring of and compliance with actions to prevent human trafficking.

OFPP also is responsible for developing methods for tracking the number of violations reported and remedies applied, and for ensuring that the federal acquisition workforce is trained in both the relevant policies and their responsibilities in combating trafficking.

As the “largest single purchaser of goods and services in the world, the United States Government bears a responsibility to ensure that taxpayer dollars do not
contribute to trafficking in persons,’ Obama said in his order. The order is intended to provide additional tools to enforce the long-standing ‘zero-tolerance policy’ against government employees and contractor personnel engaging in criminal actions related to trafficking, he said.

In his speech in New York, Obama described the order as providing additional protections to workers, ensuring stronger safeguards, and ‘making clear that American tax dollars must never, ever be used to support the trafficking of human beings.’

“We will have zero tolerance,” Obama said. “We mean what we say. We will enforce it.”

‘By providing our government workforce with additional tools and training to apply and enforce existing policy, and by providing additional clarity to government contractors and subcontractors on the steps necessary to fully comply with that policy, this order will help to protect vulnerable individuals as contractors and subcontractors perform vital services and manufacture the goods procured by the United States,’ the order says.

Prohibited Activities. The order specifically prohibits contractor and subcontractor involvement in such activities as:

- using misleading or fraudulent employee recruitment practices, such as failing to disclose basic information or making material misrepresentations regarding the key terms and conditions of employment, including wages and fringe benefits, the location of work, living conditions, and any hazards of the work;
- charging employees recruitment fees;
- destroying, concealing, confiscating, or otherwise denying access by an employee to the employee’s identity documents, such as passports or driver’s licenses; and
- failing to pay return transportation costs at the end of employment when an employee is not a national of the country in which the work is taking place and was brought into that country for the purpose of working on a U.S. government contract or subcontract.

Additional Requirements. For contracts with supplies acquired or services performed outside the United States valued at more than $500,000, the order states that a compliance program must be in place that ensures employee awareness of the anti-trafficking policy; spells out actions that will be taken for violations of the policy; and sets out a process for employees to report, without fear of retaliation, any activity that would justify termination under the TVPA.

The order also sets requirements governing the terms of contractors’ plans with respect to recruiting, paying, and housing employees and the procedures they develop to prevent subcontractors at any tier from engaging in trafficking in persons.

In addition, the order requires certification by contractors and subcontractors, prior to receiving an award and annually throughout the term of the contract or subcontract, that a compliance plan is in place, that its terms are being adhered to, and that appropriate steps have been taken to address any violations.

The order takes effect immediately and sets a 180-day deadline for OFPP, the FAR Council, and other relevant government entities to take the necessary steps to amend the FAR. The new order will apply to solicitations issued on or after the effective date of the FAR changes.

Mixed Response. Stan Soloway, president and chief executive officer of the Professional Services Council, issued a statement supporting the order’s objectives and offering to work with the FAR Council “to develop executable regulations” for enforcing the directive.

PSC’s more than 350 member companies “stand with the administration in its efforts to ensure that American tax dollars are used as intended and do not flow to individuals or organizations that participate in the tragic practice of human trafficking,” Soloway said. “Fortunately, such cases are exceedingly rare. But reasonable and focused vigilance is nonetheless the responsible approach to ensure the eradication of any cases,” Soloway said.

However, Rep. James Lankford (R-Okla.) expressed misgivings about the order. Lankford sponsored the proposed End Trafficking in Government Contracting Act (H.R. 4259) (6 WIR 204, 4/2/12).

“For more than a year, a bipartisan group has worked in the House and Senate to address the global issue of human trafficking in federal contracting, since more than twenty executive policies and regulations have failed to stop the practice,” he said. “One more executive order will not solve the problem. We have a loophole in our law that must be closed, and we have serious enforcement issues of existing law.”

Rep. Darrell Issa (R-Calif.), chairman of the House Oversight and Government Reform Committee, said in a statement that while the president’s executive order “borrows many components from Congress’ legislative effort, it does not include the most important part: expanding the criminal code to encompass foreign labor bondage for work performed outside the U.S. and cracking down on grants and grantees as well as just contractors.”

However, Sen. Richard Blumenthal (D-Conn.), sponsor of a companion bill in the Senate (S. 2234), said the order “stops government contractors from using workers who are brought from other countries surreptitiously or illegally—and who may be exploited by imposing substandard wages and working conditions, sexual exploitation, or other abuses.”

Nonetheless, he conceded, since “it is only an executive order, there is still a clear need for comprehensive legislation to impose criminal penalties and other tough enforcement tools that can end trafficking at home and abroad.” The order “reaffirms the need for Congress to enact a comprehensive bill to end trafficking in government contracting at home and abroad,” he said.

H.R. 4259 was attached to the fiscal year 2013 defense authorization bill (H.R. 4310); the companion bill sponsored by Blumenthal has been approved by the Senate Homeland Security and Governmental Affairs Committee and is expected to be attached to the Senate version of the FY 2013 defense authorization bill (6 WIR 406, 7/9/12).

Text of the executive order is available at http://www.whitehouse.gov/the-press-office/2012/09/25/
Pakistan teacher who resigned after she allegedly was harassed by supervisors, forced to perform menial tasks, and threatened with firing because of her race, national origin, and religion provided enough evidence to show that she was constructively discharged from her job, the U.S. District Court for the Middle District of Pennsylvania ruled Sept. 11 (Syed v. YWCA of Hanover, M.D. Pa., No. 1:10-cv-02177, 9/11/12).

Mussarat Rufi Syed—an American citizen born in Pakistan and the only nonwhite employee at YWCA of Hanover—claimed she was subject to a barrage of discriminatory comments, including being called a “brown bitch,” told not to wear an “awful” native dress, and instructed not to talk to her students’ parents because of her accent.

Syed alleged that despite her complaints, the conduct continued to escalate until she resigned after being suspended for three days for insubordination.

Judge Sylvia H. Rambo denied YWCA’s motion for summary judgment on Syed’s claims under Title VII of the 1964 Civil Rights Act and the Pennsylvania Human Relations Act, ruling that both the alleged overt discriminatory behavior and “ethnically-neutral abusive conduct,” could be found to have made Syed’s working conditions not only hostile, but so intolerable as to cause her to resign.

‘Only One Holiday . . . Christmas.’ Syed began working for YWCA in November 1999 and was promoted to group supervisor the following year.

In that position, she acted as the “lead teacher” for a class of 3- to 4-year-old children, supported by assistant group supervisors Donna Galemore and Tina Raffensberger.

In November 2008, Syed asked her immediate supervisor—assistant child care director Heidi Durst—for a day off to celebrate Eid, an Islamic holiday. Although YWCA policy required Syed to submit a formal written request, she said it was common practice for employees to make an oral request initially. Durst denied the request and, according to Syed, explained that she knew “only one holiday . . . Christmas.”

Syed further alleged that in 2009, child care director Sherri Staub denied her request to organize a Christmas party for her class, but later gave permission for the party to Raffensberger and Galemore.

Syed claimed that around the same time, the sign outside the classroom was changed. Despite her seniority, she said, her name was moved to the bottom of the sign, below Raffensberger’s and Galemore’s. Meanwhile, she was forced to perform menial tasks, such as cleaning up bodily fluids in the classroom, that should have been done by her assistants.

In a deposition, Syed also alleged that Staub told her not to speak with parents of the children in her class because “no one could understand her due to her accent.”

The alleged discrimination continued in January 2009, according to Syed, when Durst told her not to wear a traditional Pakistani dress to the YWCA Christmas party, explaining that it was “awful” and that Syed looked “weird” in it. Durst allegedly called Syed a “brown bitch” on at least two other occasions.

Syed sent an email to Staub Feb. 8, 2009, complaining about harassment and discrimination by Durst and asserting that she was being treated differently from other teachers.

Despite the complaint, Syed claimed that her superiors began openly referring to Syed’s Pakistani origin in a negative manner. In a March 2009 incident, for example, Syed alleged that Staub became upset at the way in which Syed entered Staub’s office, knocking on the door while entering. Staub allegedly told Syed “I know . . . in Pakistan you don’t know . . . how . . . you enter the room.”

Suspension After Series of Complaints. In April 2009, Heffner informed Syed that a parent of a child in Syed’s class had complained that she used force on the child, which led to bruising on the child’s arm.

Syed received a verbal warning after she confronted the parent, despite being instructed otherwise. In response, Syed wrote a memo to Staub and executive director Tina Heffner, defending her actions and also saying that they had failed to address the discrimination complaints raised in her Feb. 8 email.

In another incident in October 2009, Syed claimed that Durst directed Syed and other senior employees to go home early. When Syed, who does not drive, said she would have to try to find a ride home, Durst allegedly screamed at her, saying: “You need to learn how to drive. This is not your Pakistan and we are not riding camels here.”

Durst reported the incident to Heffner, claiming that Syed was insubordinate. When Heffner scheduled a meeting with Syed for the following day, the two argued over Syed’s request to bring a witness “of her native language.” Syed balked at Heffner’s offer to allow a YWCA employee to be present, saying none of the other employees would be neutral because they are white.

Characterizing Syed’s statement as a “racial slur,” Heffner issued a written warning in which she explained that Syed’s employment was “at-will” and said if the relationship between Syed and the YWCA did not improve, the employer would “terminate” it.

Syed sent another email to Heffner Feb. 8, 2010, again complaining of harassment and discrimination and asking Heffner to take action.

After Heffner observed Syed’s classroom later that month, she told Syed, Galemore, and Raffensberger that the class was “out of order” and gave them 30 days to make improvements. According to Heffner, Syed became argumentative and insubordinate during this conversation. Heffner issued Syed a final written warning as a result and placed her on unpaid suspension for three days ending March 4, 2010.

Syed allegedly suffered a stress-related illness during the suspension period and did not return to work for three days after the suspension ended on the advice of her doctor. She did, however, go to YWCA on the evening of March 8 to retrieve a lesson plan from the classroom, where she was confronted by Heffner. During the encounter, Heffner allegedly pushed Syed and looked in her handbag.
Syed submitted a letter of resignation March 10, 2010. She later sued YWCA alleging race, national origin, and religious discrimination under Title VII and the PHRA.

Claims ‘Facially Plausible.’ Although YWCA did not actually terminate, demote, or reassign Syed during the course of her employment, the court found that the organization could be held liable for constructive discharge based on the circumstances of her resignation.

Finding her allegations of discrimination “facetiously plausible,” the court ruled that the evidence was sufficient to show that Syed was subjected to work conditions so intolerable that she was forced to resign.

In addition to being threatened with discharge in the written warning from Heffner, Syed also claimed that Durst suggested that Syed quit on at least one occasion, according to the court.

Syed also provided evidence showing that her job responsibilities were altered over the course of her employment to include more menial and less desirable duties in the classroom, such as cleaning up bodily fluids, despite her supervisory position. She further alleged that she was undermined in front of her co-workers and subordinate employees, disciplined without reason, and subjected to baseless accusations.

Despite the various emails and memos complaining about this and other alleged discriminatory behavior, the court noted, Heffner dismissed the complaints as simple “miscommunications.” “[A] reasonable jury could conclude that YWCA permitted the discriminatory conditions and that the conditions were so unpleasant or difficult that a reasonable person in Syed’s position would have felt compelled to resign,” Rambo wrote.

The court declined to consider whether Syed’s claim that the assignment of menial tasks alone was an effective demotion, finding that the constructive discharge and the claim that Syed’s supervisors not only failed to stop the discrimination, but also contributed to it, were sufficient to impose liability on YWCA.

‘Overall Scenario’ Hostile. The alleged discrimination also was sufficiently severe and pervasive to establish a hostile work environment, according to the court.

Syed complained of “daily abuse and torment,” in the Feb. 8, 2010, email to Heffner and later testified to at least six instances of overt discriminatory behavior. While YWCA presented testimony that this and other conduct was not driven by discriminatory motive, the court found that the conflicting evidence showed that there was an issue of material fact as to whether the behavior was discriminatory.

Considering the “overall scenario,” the court ruled that “a reasonable fact-finder could conclude that the seemingly racially and ethnically neutral abusive conduct was motivated by a discriminatory intent, thus inflating the overall frequency of the discriminatory conduct.”

Jeffrey R. Elliott of Kozloff Stoudt in Wyomissing, Pa., represented Syed. YWCA was represented by Edward J. Easterly and Steven E. Hoffman of Tallman, Hudders & Sorrentino in Allentown, Pa.

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Text of the opinion is available at http://op.bna.com/dlr/cases.nsf/r?Open=corp-8y8n5z.

National Origin

New Jersey Transit Settles for $5.8 Million Bias Claims of 10 Minority Police Officers

ew Jersey Transit and a group of minority police officers allegedly subjected to severe harassment by their white former chief and other white managers have settled for $5.8 million the officers’ state court claims under New Jersey’s Law Against Discrimination, an attorney for the officers confirmed to BNA Sept. 26 (Hester v. New Jersey Transit, N.J. Super. Ct. Law Div., No. ESX-L-2614-11, settlement approved 9/24/12).

The monetary award may be one of the largest, if not the largest, against a New Jersey public employer, said plaintiffs’ counsel Nancy Erika Smith of Smith Mullin in Montclair, N.J. “I’m not aware of any other settlements with a state public entity that was this large,” she said, adding that she has litigated many cases against New Jersey governmental agencies.

The settlement is especially large considering that all of the plaintiffs—nine African American officers and one Latino officer—are still working for NJ Transit, so lost future pay was not part of the settlement equation, Smith said.

Hispanics Called ‘Wetbacks,’ ‘Illegals.’ According to the second amended complaint filed in the New Jersey Superior Court, Law Division, in Essex County, the alleged racial, sexual, and national origin-based harassment included plaintiff Jose Martinez hearing a sergeant call Hispanic individuals “wetbacks” and “fucking illegals” as well as seeing the sergeant stop Hispanic individuals without reason and ask them for their green cards.

He also overheard former Chief Joseph Bober state, “I’m not promoting that spic no matter what he does. I’m gonna get all of these niggers and spics in line, I promise I will weed them all out.”

The settlement, for which the plaintiffs agreed to release all claims against the agency and various individual defendants, also requires the reinstatement of one of the plaintiffs. According to Smith, Laquan Hudson was fired and subjected to unwarranted disciplinary charges after mistakenly failing to disclose—prior to a scheduled drug test—a prescription medication he was taking.

Hudson returned to work at NJ Transit yesterday, Smith told BNA. Negotiating the details of Hudson’s return to work delayed approval of the agreement, which was signed by the parties in July, until Sept. 24, when it was approved by the court, she said.

The other plaintiffs are Laura Hester, Safiya Daniels, James Garrison, Jonathan Giles, Zena Gurley, Brian Shirden, Thomas Springs, and Melvin Webb. Hester, the complaint states, was the first African American female police officer in the transit agency’s history.

The complaint also named Bober’s successor, Chief Christopher Trucillo, as a defendant. After his appointment, Trucillo allegedly failed to effectively monitor or remediate the discriminatory and retaliatory work environment to which the plaintiffs were subjected.

Other Terms; Reaction of Parties. In addition to the monetary relief—which includes attorneys’ fees—and Hudson’s reinstatement, the settlement also requires NJ Transit to appoint an ombudsman to oversee, for a pe-
EEOC Files National Origin, Religion Claims

On Behalf of Muslim Aviation Services Worker

Turkish/Palestinian Muslim employee of a Phoenix-based aeronautical services company was subjected to harassment based on his national origin and religion and ultimately forced to resign, according to a lawsuit filed Sept. 5 by the Equal Employment Opportunity Commission (EEOC v. Swift Aviation Group, D. Ariz., No. 2:12-cv-01867, complaint filed 9/5/12).

According to EEOC, Adam Donmez was an employee of the Swift Aviation Group, which operates a private air terminal at Phoenix’s Sky Harbor Airport and provides services such as fueling and hanging aircraft, aircraft sales, chartering of aircraft, aircraft maintenance, and amenities for flight crews and passengers.

The commission’s complaint, filed in the U.S. District Court for the District of Arizona, claimed that since at least early 2008, Donmez was subjected to a barrage of harassment based on his national origin and religion, creating a hostile work environment.

Examples of the harassment included:

- asking Donmez, “Can you tell me why you came to work today dressed like you are gonna blow up the World Trade Center?”;
- stating “I don’t know why we don’t just kill all them towelheads”;
- describing a baby born by a U.S. soldier overseas as a citizen if born on a military base, “but if it was born in the desert then it’s an Arab, and you just shit the enemy”;
- surveilling Donmez while he was working but not other employees;
- not allowing Donmez to work his requested assignments and instead giving him assignments he was perceived to dislike;
- defacing a copy of the Quran Donmez kept in his work locker; and
- harassing Donmez after he was injured at work and making him wait nearly an hour before being allowed to leave, despite being in “severe pain.”

The complaint claimed that Donmez reported the harassment to his supervisors, that management witnessed one or more of the incidents, and that management was aware of similar treatment of other employees of Middle Eastern descent.

National Origin

Court Says ‘Hitler’ Mannequin in Office Did Not Create Hostile Work Environment

A Jewish Mexican office worker who claimed that fellow employees displayed a mannequin with a “Hitler-style” mustache and an arm raised in a Nazi salute was unable to show that the conduct was sufficiently severe or pervasive to create a hostile work environment, the U.S. District Court for the District of Arizona ruled Sept. 4 (De La Rosa v. Hanger Prosthetics & Orthotics Inc., D. Ariz., No. 2:11-cv-00306, 9/4/12).

Although David De La Rosa was offended by the mannequin, the court found that its presence was not specifically directed at him and that the display over the course of one day represented a single incident of alleged discrimination.

In an opinion by Judge David G. Campbell, the court also ruled that “off hand” offensive remarks allegedly made by co-workers and a supervisor, most of which...
were not directed at De La Rosa, did not establish that he was subjected to a hostile environment by his employer, medical rehabilitative products company Hanger Prosthetics & Orthotics Inc.

De La Rosa also failed to prove that he was terminated from his job in retaliation for an Equal Employment Opportunity Commission charge he filed against Hanger, claiming the company transferred him to another office in response to complaints about his supervisor’s discriminatory behavior.

The manager who made the decision to fire De La Rosa—based on performance complaints and De La Rosa’s response to them—was not aware of the charge until he confronted De La Rosa about the complaints, according to the court. The claim that the decision-maker conspired with another manager to terminate De La Rosa in retaliation for the charge was purely speculative.

**Transferred After Hotline Complaint.** De La Rosa began working as a soft goods fitter in Hanger’s Phoenix office in August 2004.

In October 2009, he called the company’s compliance hotline and complained about a mannequin with “a Hitler-style mustache taped to it” and an arm “posed in a Nazi salute” in the office’s hospital department.

De La Rosa later testified that he saw the mannequin several times in the course of one day and that he changed the positioning of the mannequin’s arm because he was offended by it. Co-worker Gretchen Wellman, meanwhile, testified that she witnessed De La Rosa’s supervisor, Brett Bostock, notice the mannequin, laugh at it, and raise the mannequin’s arm in a Nazi salute.

De La Rosa also later claimed that on one occasion, Bostock looked distastefully at a Star of David necklace De La Rosa was wearing outside of his shirt. During this incident, Bostock allegedly “screwed up his face” and said “oh, that’s gaudy.” Wellman testified about a similar incident in which Bostock noticed that she was wearing a necklace with a Jewish religious symbol, pointed to it and said “we don’t like your kind.”

During the October 2009 hotline call, De La Rosa complained that Bostock referred to company cleaning crews as “those Mexicans.” De La Rosa additionally expressed concern about a co-worker, Mike Gardner, whom he described as having “racist tendencies.”

Frank Bostock, Hanger’s manager of operations in Arizona and the father of Brett Bostock, met with De La Rosa in response to his complaints. Bostock offered De La Rosa the option to transfer to the company’s Glendale office, located in the same county. De La Rosa agreed to the transfer and began working in the Glendale office, managed by David McCallmont, in November 2009.

Among other duties, De La Rosa had been one of a few employees in the Phoenix office authorized to provide “on-call” services to Phoenix Children’s Hospital. As a result of the move, however, he was taken off the PCH on-call list. At his request, De La Rosa was later placed on a similar list for workers in the Glendale office.

Unsatisfied with the frequency of assignments on the Glendale list, De La Rosa emailed Frank Bostock, requesting that he be placed back on the PCH list. Bostock replied that there were no openings on the list and suggested that De La Rosa ask McCallmont about additional opportunities. De La Rosa claimed that he would not have accepted the transfer had he known that he would be removed from the PCH list, which resulted in a decrease in wages of about $250 per two-week pay period.

De La Rosa filed a charge of discrimination with EEOC Jan. 12, 2010, alleging discrimination and retaliation.

On May 10, 2010, De La Rosa met with McCallmont to discuss four separate complaints about De La Rosa’s work made by co-workers and hospital patients in the two months prior to the meeting. He challenged the validity of these complaints and, according to McCallmont, argued that they had been trumped up in retaliation for his EEOC charge. Claiming that De La Rosa was “belligerent” in this and a second meeting May 14, 2010, McCallmont terminated his employment following the second meeting.


**Mannequin Display Considered Single Incident.** The court ruled that, although the mannequin was offensive, its display was not sufficiently severe and pervasive to establish a hostile environment.

“The mannequin incident, even if not specifically directed at Plaintiff, presents evidence that Plaintiff was subjected to conduct particularly offensive to someone of Jewish ancestry,” Campbell wrote.

Nevertheless, the court noted that the mannequin was displayed over the course of one day, in what it considered a single occurrence.

In *Manatt v. Bank of America*, NA, 339 F.3d 792, 92 FEP Cases 599 (9th Cir. 2003), the Ninth Circuit held that two incidents of racially offensive behavior were not sufficiently severe and pervasive to constitute a hostile environment. That action was brought by a Chinese woman who claimed co-workers made fun of her by pulling back the corners of their eyes to simulate the appearance of Asians in one instance and mocked her pronunciation of the word “Lima” in another, calling her “China woman” and making her pronounce the word in a call to an employee in Peru.

De La Rosa’s allegations did not rise to the same level, according to the court. “Plaintiff presents no evidence that the offensively posed mannequin was directed at him, and his encounter with the mannequin does not match the frequency or severity of the two personalized attacks found insufficient to support a hostile work environment claim in *Manatt*,” Campbell wrote.

De La Rosa also did not show that Brett Bostock’s comment about De La Rosa’s necklace was directed at his race or religion, rather than the appearance of the necklace. Nor, the court found, did he provide evidence that he heard or was even aware of Bostock’s alleged statement to Wellman—“we don’t like your kind”—prior to his termination.

The court rejected De La Rosa’s argument that the court should consider the aggregate effect of the alleged conduct, including behavior offensive to him based on his Mexican heritage.

Campbell countered that “such an approach would, at most, result in the addition of only a few isolated incidents of offhand comments not directed toward Plaintiff.” Most of this alleged behavior—Brett Bostock’s ref-
eference to the cleaning staff as “those Mexicans,” a sup-
posed directive to two co-workers that they could not
speak Spanish at the office, and racist statements by co-
worker Mike Gardner to other employees—did not in-
clude verbal conduct directed at De La Rosa, Campbell
said.

Retaliation Claim ‘Speculation.’ Finally, De La Rosa
also was unable to establish an issue of material fact as
to whether he was terminated in retaliation for filing
the EEOC charge.

The court viewed his claim as alleging that
McCalmont, the sole decisionmaker in De La Rosa’s fir-
ing, and Frank Bostock conspired to retaliate against
De La Rosa because he complained about discrimina-
ry behavior by Bostock’s son.

“This theory is based entirely on speculation,”
Campbell wrote, finding that De La Rosa provided no
evidence showing that Frank Bostock was involved in
the termination decision.

Nor did he show that McCalmont was aware of the
EEOC charge prior to the May 10, 2010, meeting, which
McCalmont called to discuss complaints about De La
Rosa’s performance.

Thus, according to the court, any knowledge that
McCalmont had of the EEOC charge came during the
meeting, which occurred after McCalmont had received
the complaints that De La Rosa claimed were used
against him in retaliation.

Furthermore, the court said, the timing of the termi-
nation decision, four months after De La Rosa filed the
charge, was not in itself per se evidence of retaliation
because McCalmont’s lack of knowledge severed any
causal link between the protected activity and the ter-
minalization.

“Plaintiff’s theory simply does not work,” Campbell
wrote.

De La Rosa was represented by Stephen G. Montoya
of Montoya Jimenez in Phoenix. Robert K. Jones and
Jeffrey W. Toppel of Jackson Lewis in Phoenix repre-
sented Hanger.

Text of the opinion is available at http://op.bna.com/
drncases.nsf/r?Open=copr-8y3mhj.

Unions

RWDSU Announces First Organizing Win
In Drive for New York Car Wash Workers

EW YORK—Employees at a New York City car
wash have voted to join the Retail, Wholesale, and
Department Store Union in the first union victory
in a citywide organizing campaign, RWDSU announced
Sept. 9.

The union prevailed in a vote of 21-5 among the
largely immigrant employees of Astoria Car Wash & Hi-
Tek 10 Minute Lube, RWDSU reported. The vote came
some six months after the union joined with two adva-
cacy groups in a drive to improve working conditions at
car washes in the city (6 WIR 180, 3/19/12).

In the WASH-NY (Workers Aligned for a Sustainable
and Healthy New York) campaign, RWDSU and the
groups Make the Road New York and New York Com-
munities for Change have targeted an industry that they
said has more than 200 car washes and 5,000 employ-
ees in the city and “exploits its workforce with wages
that are low and too often illegal.”

A survey conducted for the campaign found that 75
percent of New York car wash workers were not paid
overtime for working more than 40 hours a week. Most
of the facilities are individually owned small businesses,
the survey found.

FLSA Lawsuit Pending. Employees at Hi-Tek, assisted
by lawyers from Make the Road, also have a Fair Labor
Standards Act lawsuit pending against the employer,
charging overtime and other wage violations (Flores v.
Astoria Car Wash Hi-Tek 10 Minute Lube Inc., E.D.N.Y.,
No. 12-cv-3531, complaint filed 7/17/12).

In announcing the organizing win, RWDSU President
Stuart Appelbaum said his union “has long been dedi-
cated to improving the lives of immigrant workers.”

He credited the Hi-Tek employees for taking “a his-
toric step toward improving their jobs and their lives by
voting to join the union.”

Appelbaum added: “Their courage in standing up for
themselves sends a powerful message to other car wash
and low-wage workers throughout New York City: You
can fight back against poor wages and working condi-
tions, and you can win by joining the RWDSU.”

Calling the vote “an unprecedented victory,” Execu-
tive Director Jon Kest of New York Communities for
Change said in a statement that he expects that “this
vote will be the first of many.”

Added RWDSU organizer Joseph Dorismond: “Hi-
Tek workers may be the first, but they aren’t the only
car wash workers in New York City who are fighting for
change. Throughout the city, car wash workers are de-
manding that they be treated fairly, and declaring that
the old way of doing business at these establishments is
over.”

A representative of the Hi-Tek car wash could not be
reached for comment.

The New York drive follows union gains in organiz-
ing car wash workers in Los Angeles, where the United
Steelworkers has negotiated pioneering collective bar-
gaining agreements with three employers in a similar
community-union campaign (6 WIR 152, 3/5/12).

California, New York Enforcement Sweeps. Labor prac-
tices at car washes have been the target of continuing
enforcement sweeps by state regulators in California (6
WIR 56, 1/23/12) and New York, which have yielded $1
million-plus pay settlements.

More recently, a San Francisco car wash owner
agreed to pay $500,000 to settle a city-brought wage ac-
tion (6 WIR 455, 7/23/12).

Also in July, New York Attorney General Eric T.
Schneiderman announced that a New York City car
wash and gas station owner was ordered to pay
$150,000 in restitution to workers and serve four
months of weekends in jail and three years of probation
for wage violations (New York v. Moreno, N.Y. Sup. Ct.,
No. 2235/2010, guilty plea 5/24/12).

In that case, Victor Moreno pleaded guilty in May to
one misdemeanor count of failure to pay wages and his
company, Moreno Service Corp., admitted to one felony
count for workers’ compensation violations. He also
was ordered to pay $52,492 in unemployment insurance
and $30,000 in workers’ compensation.
Compliance

Maine, Florida Companies Are Latest To Become IMAGE Certified, ICE Says

A Maine industrial chemical company has become the second employer in the state to be certified under Immigration and Customs Enforcement’s ICE Mutual Agreement between Government and Employers (IMAGE) program, while a Florida produce distributor becomes the 13th in that state to be IMAGE certified, ICE announced Sept. 20 and 26.

The voluntary IMAGE program is designed to strengthen hiring practices and combat unlawful employment of undocumented workers, ICE said.

GAC Chemical Corp., which has over 50 employees and is based in Searsport, Maine, manufactures and distributes industrial chemicals related to the pulp and paper, power plant, industrial manufacturing, agriculture, potable municipal water, and waste water industries.

“As a chemical manufacturer, GAC strives to maintain programs and policies that enhance the safety and security of our operations in Searsport for the benefit of our employees and surrounding communities,” GAC’s President and Chief Operating Officer David Colter said in a Sept. 20 statement. “Our participation with ICE through the IMAGE program is an example of our commitment to this effort.”

“Having GAC Chemical as a partner helps us ensure that only authorized personnel have access to the critical assets that are overseen by this company,” Bruce M. Foucart, special agent in charge of ICE’s Homeland Security Investigations in Boston, added.

Over 17,000 Florida Employees Covered. Florida Potato & Onion LLC has 61 employees and distributes different types of potatoes and onions to Florida markets.

“In today’s world, employers have a responsibility to protect the integrity of their labor force by ensuring that their employees are who they represent themselves to be and that they are legally authorized to work in this country,” Susan McCormick, special agent in charge of HSI Tampa, said in a Sept. 26 statement. ICE said there are now 13 Florida employers with a total of over 17,000 employees participating in IMAGE.

According to ICE, employers wishing to become IMAGE certified must establish a written hiring and employment eligibility verification policy that includes internal Form I-9 audits at least once a year, enroll in the E-Verify electronic employment eligibility verification program within 60 days of joining IMAGE, and submit to a Form I-9 inspection by ICE.

In Brief

Maria Odom Appointed CIS Ombudsman

Maria Odom has been appointed the new Citizenship and Immigration Services ombudsman, Homeland Security Secretary Janet Napolitano announced Sept. 14.

Odom replaces former Ombudsman January Contreras, who was appointed in late 2009 (3 WIR 646, 11/30/09).

According to the announcement from DHS, Odom most recently served as executive director of the Catholic Legal Immigration Network Inc. (CLINIC), a network of immigrant advocacy organizations. She also previously worked at the Justice Department’s Executive Office for Immigration Review and served as counsel for the former Immigration and Naturalization Service.

Odom holds a bachelor’s degree from Florida State University and a law degree from Mercer University in Georgia.

The CIS Ombudsman’s Office is an independent body within DHS that helps individuals and employers resolve problems with U.S. Citizenship and Immigration Services and makes recommendations to improve USCIS.

Chicago WHD and Dominican Consulate Sign Pact

The Labor Department’s Wage and Hour Division and the Dominican consulate in Chicago signed an agreement Aug. 30 to collaborate in protecting the rights of Dominican nationals working in Illinois under the Fair Labor Standards Act, the Migrant and Seasonal Agricultural Worker Protection Act, and the H-2A and H-2B visa programs operated under the Immigration and Nationality Act, DOL announced Sept. 13.

In the memorandum of understanding, WHD officials and the consul said WHD will provide educational materials for the consulate to distribute and conduct informational forums for Dominican nationals and employers regarding minimum wage, overtime, recordkeeping, child labor, and safe housing and transportation for migrant workers. They also intend to establish a system for referring complaints to WHD and to provide a contact person to coordinate implementation of the program.

In addition, they will set up a system through which WHD can forward payments for back wages to Dominicans who have returned to the Dominican Republic. The consulate will maintain contact with workers returning to the Dominican Republic who still are owed back wages. When WHD collects back wage payments, it will provide checks to the consulate, made out to the workers, and the consulate will arrange to have the checks delivered to the workers in the Dominican Republic. The document also calls for the consulate to verify the birth dates of Dominican-born minors who live in Illinois to help WHD enforce child labor regulations.

The agreement will last for two years.

Consul General Gisselle Castillo Veremis invited WHD District Director Thomas Gauza to speak at a private gathering of other Latin American consuls general to discuss the benefits of partnering, DOL said.

In recent months, the Wage and Hour Division has signed similar agreements with several consulates, including the Dominican consulate in New York (6 WIR 558, 9/3/12).

Enforcement

Landscaping

Landscaping Company, Owner Sentenced For Fraudulently Employing H-2B Workers

T. LOUIS—A St. Louis area landscaper who pleaded guilty in June to fraudulently obtaining H-2B guestworker visas to support his business was sentenced Sept. 13 to forfeitures and probation, Immigration and Customs Enforcement announced the same day (United States v. Brake, E.D. Mo., No. 4:12-cr-00047, sentenced 9/13/12).

Robert Brake, the owner of Brake Landscaping & Lawn Care Inc., previously pleaded guilty to one misdemeanor count of employing illegal aliens. In addition, the company pleaded guilty to one felony count of conspiracy to commit visa fraud (6 WIR 385, 6/25/12). Brake and the company were sentenced to two years of probation, and the company was required to forfeit $145,000.

According to an ICE statement, between March 2007 and February 2010, Brake and his company illegally subcontracted H-2B workers to an associate on a weekly basis at a profit of more than $2 per hour per alien. As part of the scheme, Brake and the company fraudulently overstated their need for alien workers to immigration officials in order to have a supply of workers to subcontract to the associate.

In filling out applications for the visas, Brake falsely claimed to immigration officials that his company exclusively would employ the workers and that the workers would perform solely nonagricultural work, and would be employed on a temporary or seasonal basis, according to an indictment handed down in February (6 WIR 119, 2/20/12).

Second Company Incorporated. The indictment also alleged that Brake incorporated another company, Brake Snow and Ice Removal, to create the appearance of a need for temporary or seasonal workers that did not actually exist. Brake Snow and Ice Removal essentially was the same company as Brake Landscaping, with the same clients, contracts, equipment, management structure, and physical location, the indictment said. The purpose of the incorporation was to provide a year-round pretext for having a supply of workers with H-2B visas.

The H-2B nonagricultural guestworker program permits employers to bring foreign workers to the United States to perform temporary services on a one-time, seasonal, peak-load, or intermittent basis, ICE said. The number of H-2B visas available each fiscal year is limited and the visas are in high demand.


Brake’s attorney, Joe G. Harms II of Salivar and Harms in St. Louis, declined to comment on the case.

Services

Arkansas Businessman to Serve 30 Months For Employing Illegal Aliens in Three States

A n Arkansas business owner was sentenced Sept. 24 to 30 months in prison for employing illegal immigrants and providing them with fraudulent work authorization documents, Immigration and Customs Enforcement announced Sept. 26 (United States v. Gutierrez, W.D. Ark., No. 5:09-cr-50007, judgment filed 9/25/12).

According to ICE, Valentin Gutierrez—also known as Valente Gutierrez—owned Action Staffing and Action Labor Contractors, which had operations in Arkansas, Mississippi, and Alabama.

ICE’s Homeland Security Investigations received information in November 2008 that Gutierrez was employing undocumented workers and providing them with fake Social Security cards and work authorization documents. As a result, the agency arrested 13 foreign nationals.

During the investigation law enforcement officers learned that Gutierrez had made some $6.4 million between May and December 2008 as a result of contracting out illegal aliens to other companies. HSI was able to recover about $117,000 in forfeited funds after seizing Gutierrez’s bank accounts, ICE said.

Gutierrez pleaded guilty May 10, 2012, in the U.S. District Court for the Western District of Arkansas to one count of harboring and shielding illegal aliens for financial gain.

In addition to the prison term, Gutierrez must pay $10,000 in fines and serve two years of supervised release.

“This case shows that individuals who violate immigration laws face significant penalties along with the forfeiture of proceeds gained as a result of their criminal activity,” said Scott Crawford, resident agent in charge of HSI in Fayetteville, Ark. “This sentence serves as a stark reminder that employing illegal aliens or assisting others in doing so is a serious crime that carries serious penalties. Federal, state and local law enforcement partners work vigilantly each day and will continue to identify these criminals and ensure they face justice.”

Fayetteville attorney Kenneth L. Osborne, who represented Gutierrez, could not be reached for comment.

Legal Services

Paralegal in Connecticut Firm Pleads Guilty To Fraud in Obtaining Immigration Benefits

BOSTON—A former paralegal at a Connecticut immigration law firm pleaded guilty Sept. 18 to document fraud charges in federal court and faces up to 10 years in prison and a fine of $250,000 when he is sentenced later this year (United States v. Goncalves, D. Conn., No. 3:12-cr-00201, plea agreement 9/18/12).

Fernando Goncalves, a citizen of Brazil and former resident of Bethany, Conn., waived his right to indictment and pleaded guilty in U.S. District Court for the District of Connecticut before Judge Alfred V. Covello to one count of document fraud.

According to federal prosecutors, Goncalves, a practicing attorney in Brazil, served as the office manager and paralegal at a law practice in Stamford, Conn., that assisted individuals in obtaining immigration benefits, including employment authorization and permanent resident status.

The U.S. attorney’s office alleged that his responsibilities included meeting with potential clients, preparing documents for submission to various state and federal agencies, and collecting monies paid by clients for legal representation by the law firm. Prosecutors charged that as part of his duties, Goncalves knowingly filed fraudulent employment-based visa applications for foreign nationals.

Paid Over $7,000 for Each Fraudulent Application. According to the U.S. attorney’s office, Goncalves prepared and submitted eight fraudulent Application to Register Permanent Residence or Adjust Status (I-485) forms and was paid more than $7,000 by each foreign national for whom he performed immigration services.

Each of the applications submitted on behalf of the eight individuals contained false statements and fraudulent documents in support of the application, including false rental agreements, false affidavits, false employment experience, and false letters, according to U.S. Attorney David B. Fein.

Goncalves is scheduled to be sentenced Dec. 11.


Text of the plea agreement is available at http://op.bna.com/dllrcases.nsf/r?Open=lfrs-8yi7h4u.

Services

Pennsylvania Woman Charged With Fraud Involving Employment of Illegal Immigrants

PHILADELPHIA—A Pennsylvania woman was charged in federal court Sept. 18 with conspiring to commit mail fraud related to hiring undocumented workers (United States v. Nguyen, M.D. Pa., No. 3:12-cr-235, information filed 9/18/12).

Eleni Nguyen is the third person charged in the U.S. District Court for the Middle District of Pennsylvania in connection with a scheme involving a temporary employment agency that hired illegal aliens to work for firms that needed temporary labor, federal prosecutors alleged. She allegedly participated by filing false documents with the state’s unemployment compensation program.

Ethan Nguyen, the owner of the agency, which operated under names that included Express Staffing Services and Four Seasons Services, pleaded guilty in May 2011 to bringing in and harboring aliens and to mail fraud (United States v. Nguyen, M.D. Pa., No. 3:11-cr-118, guilty plea entered 5/19/11). Andri Gunawan, a local representative for the employment agency, pleaded guilty in June 2010 to conspiracy to transport illegal aliens (United States v. Gunawan, M.D. Pa., No. 3:10-cr-144, guilty plea entered 6/2/10).

Sentencing dates have not been set for either man.

Contracted to Provide Day Laborers. Members of the employment agency contracted with various firms, including a manufacturing company in Wilkes-Barre, Pa., to provide temporary day laborers, according to the charging document.

The U.S. attorney’s office said the defendants would fulfill the contracts by hiring illegal aliens, paying them cash under the table, and failing to pay federal, state, and local taxes and fees.

The co-conspirators reported employee earnings each week to a payroll processing company that used the information to produce a quarterly report filed with the Pennsylvania Office of Unemployment Compensation.

By intentionally and systematically omitting workers from seven quarterly wage reports filed from September 2008 to March 2010, Eleni Nguyen and others involved in the scheme increased their proceeds and defrauded the state unemployment compensation program of $45,129, federal prosecutors alleged.

Scranton, Pa., attorney Robert M. Buttner, who represents Eleni Nguyen, could not be reached for comment.

Text of the criminal information against Eleni Nguyen is available at http://op.bna.com/dllrcases.nsf/r?Open=lfrs-8yi7j7d.

Services

Five People Indicted in Scheme to Use License Office for Illegal Immigrant False IDs

ST. LOUIS—Five additional people were indicted Sept. 25 for participating in a more than $5 million conspiracy to use a Missouri Department of Revenue license office to procure more than 3,500 fraudulent identity documents to illegal aliens across the United States, many of whom used them to unlawfully obtain employment, Acting U.S. Attorney for the Western District of Missouri David Ketchmark announced Sept. 26 (United States v. Flores, W.D. Mo., No. 5:12-cr-06001, indictments 9/25/12).

Christopher B. Escobar, Shayna R. Vanvacter, Melissa L. Scallions, and Jon L. Grippo, all of St. Joseph, Mo., and Rafael Hernandez-Ortiz, a citizen of Mexico who resides in Owatonna, Minn., were charged in a 45-count indictment, according to a statement from Ketchmark’s office.
The superseding indictment also contains additional counts of unlawfully producing identification documents and aggravated identity theft against two co-defendants who were charged in the original indictment: Sherri E. Gutierrez, of St. Joseph, and Luis A. Felip-Lopez, a citizen of Guatemala residing in Mt. Olive, N.C.

In addition, the superseding indictment contains an additional charge of Social Security fraud against Gutierrez and additional charges against Felipe-Lopez of transporting illegal aliens and illegally re-entering the United States after having been deported.

Seven co-defendants in the original indictment were charged with the same offenses in the superseding indictment: Deborah J. Flores, of St. Joseph; Elder E. Ordonez-Chanas and Ranfe A. Hernandez-Flores, both citizens of Guatemala residing in Carthage, Mo.; Brenda De La Cruz, of San Antonio; Martin A. Llanas-Rodriguez and Julio C. Llanas-Rodriguez, both citizens of Mexico residing in San Antonio; and Martin Lara-Rodriguez, a citizen of Mexico residing in Chicago (6 WIR 592, 9/17/12; 6 WIR 495, 8/6/12; 6 WIR 301, 5/14/12; 6 WIR 53, 1/23/12).

According to the statement, Martin and Julio Llanas-Rodriguez, Ordonez-Chanas, Hernandez-Flores, Nelson D. Bautista-Orozco, Felipe-Lopez, Hernandez-Oritz, and Lara-Rodriguez were present unlawfully in the United States. Martin Llanas-Rodriguez and Felipe-Lopez had each previously been deported.

Over 3,500 Licenses Issued to Illegal Aliens. The statement charged that the defendants were part of a conspiracy to encourage illegal aliens from across the United States to travel to a Missouri DOR license office in St. Joseph to illegally obtain a driver’s license or non-driver’s license. The state licenses were then used by the illegal aliens to remain in the United States, to illegally obtain employment, and for other illegal purposes.

More than 3,500 licenses were issued to illegal aliens by the St. Joseph license office, the statement said. Illegal aliens each paid around $1,500 to obtain documents and a license. In total, they paid more than $5.2 million to members of the conspiracy.

According to the statement, some of the conspirators recruited illegal aliens as customers for fraudulent identification documents, and then instructed them to travel to St. Joseph to receive the documents. Sometimes conspirators provided transportation to St. Joseph, the statement said.

San Antonio residents Martin and Julio Llanas-Rodriguez and De La Cruz allegedly purchased state-issued birth certificates and Social Security cards, usually from Texas residents who were willing to sell their identification documents, the statement said. They then mailed the documents to either Ordonez-Chanas in Carthage, or to the defendants who lived in St. Joseph. The documents were then given to the illegal aliens when they arrived in St. Joseph, and the St. Joseph defendants collected payment from the illegal aliens.

Helped Clients Obtain Licenses. The St. Joseph defendants allegedly accompanied illegal aliens into the local license office under the guise of being translators, the statement said. The St. Joseph defendants helped their clients practice memorizing the information on the birth certificates and Social Security cards, and helped them practice signing the applications so that the signatures would be similar. They also helped the illegal aliens prepare for potential questions from the license office employees, it said.

In addition to the conspiracy, the indictment charges various defendants with six counts of transporting illegal aliens, nine counts of unlawfully producing identification documents, nine counts of unlawfully transferring another person’s identification, nine counts of Social Security fraud, 10 counts of aggravated identity theft, and one count of illegally re-entering the United States after having been deported. The indictment also contains a forfeiture allegation, which would require the defendants to forfeit to the government any property obtained from the proceeds of the alleged offenses, including a money judgment of $5,250,000.


Services

Mexican National Sentenced to Two Years For Providing Illegal Aliens to Florida Firms

Tampa, Fla.—A Mexican national illegally in the United States was sentenced to more than two years in prison for conspiring to transport illegal aliens to fill jobs at the requests of local Florida businesses, federal prosecutors said Sept. 19 (United States v. Vazquez-Padilla, M.D. Fla., No. 8:12-cr-00207, sentenced 9/19/12).

The 27-month prison term handed down to Herman Vazquez-Padilla by Judge Steven D. Merryday of the U.S. District Court for the Middle District of Florida followed Vazquez-Padilla’s guilty plea in June to one count of conspiracy to transport 100 or more illegal aliens.

According to court documents and a written statement by the office of U.S. Attorney Robert E. O’Neill, Vazquez-Padilla since 2010 conspired with the proprietors of multiple businesses in Pinellas County, Fla., to recruit and transport more than 100 undocumented workers for the businesses.

“Vazquez-Padilla served as a point of contact for the business owners whenever they needed employees who were not legally present in the United States and who did not possess work authorization documents,” the statement said.

After a business owner requested new employees, Vazquez-Padilla would find prospective workers and bring them to the business, the U.S. attorney’s office said. For his recruiting and transporting services, Vazquez-Padilla charged the new workers a fee, the office said.

According to an affidavit filed in the case by a special agent with Immigration and Customs Enforcement, Vazquez-Padilla was arrested after he provided two workers to a Chinese restaurant, charging a fee of $220 per worker.

Following his arrest, Vazquez-Padilla told ICE agents he had provided more than 100 workers to businesses in the county, the affidavit stated.

Vazquez-Padilla’s attorney, Daniel M. Hernandez of Tampa, was not available for comment.
## HIGHLIGHTS OF RECENT ENFORCEMENT ACTIONS

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In the States

State Laws

**Mexican Government Accepts SEIU Complaint That Alabama Law Breaches NAFTA Accord**

The Mexican government is seeking consultation with the U.S. government and reviewing claims by the Service Employees International Union and a Mexican labor lawyers group that Alabama’s enforcement-style immigration law violates the supplemental labor agreement of the North American Free Trade Agreement, SEIU announced Sept. 20.

In a Sept. 3 letter from Mexico’s secretary of labor and social welfare that was received by SEIU Sept. 17, the Mexican government said it accepted a complaint sent April 27 by the union and the Mexican National Association of Democratic Lawyers (ANAD) asserting that H.B. 56 violates the North American Agreement on Labor Cooperation (6 WIR 305, 5/14/12).

The complaint charged that the law includes numerous “discriminatory, punitive, and abusive” terms, including provisions making it a misdemeanor for an undocumented alien to seek employment, preventing employers from claiming as business tax deductions any wages paid to unauthorized aliens, creating a civil cause of action against an employer that fails to hire or fires a U.S. worker while employing an unauthorized alien, and rendering it unlawful for a person to conceal, harbor, or transport an illegal immigrant.

SEIU and ANAD alleged that H.B. 56 violates seven labor principles in the NAALC:

- freedom of association and protection of the right to organize;
- the right to bargain collectively;
- minimum employment standards;
- elimination of employment discrimination;
- prevention of occupational injuries and illnesses;
- compensation in cases of occupational injuries and illnesses; and
- protection of migrant workers.

“We hope that further review of Alabama’s racial profiling law will make clear its devastating impact on workers,” SEIU International Secretary-Treasurer Eliseo Medina said in a statement Sept. 20. Medina also decried “the law’s potential for minimum wage and overtime violations” and its effect on workers’ freedom of association, “which are supposed to be protected under the NAFTA labor clause.”

**Employment Provisions Struck Down.** The U.S. Court of Appeals for the Eleventh Circuit Aug. 20 struck down several sections of H.B. 56, including the law’s employment-related provisions (United States v. Arizona, No. 11-14532 (11th Cir. Aug. 20, 2012); 6 WIR 541, 9/3/12).

Alabama Sept. 10 filed a petition for rehearing en banc regarding the appeals panel’s decision as to some of the affected provisions, although it did not challenge the ruling with respect to the law’s employment provisions (6 WIR 598, 9/17/12).

An SEIU spokeswoman told BNA Sept. 26 that the ruling does not render the union’s NAALC complaint moot because it focuses on the law’s overall impact on workers and labor rights, and the litigation has not yet concluded.

The NAALC complaint is one of several avenues the union has taken to combat Alabama’s immigration law since its enactment in June of 2011 (5 WIR 311, 6/13/11).

In January, SEIU and other members of a coalition of civil and human rights groups and labor organizations urged three foreign auto companies with operations in Alabama to help encourage state legislators to repeal the law (6 WIR 122, 2/20/12). The union Sept. 20 noted that several cars manufactured in Alabama—including Honda and Mercedes Benz models—are sold in Mexico, “making it an important market for these Alabama products.”

SEIU also filed a complaint April 2 with the International Labor Organization’s Committee on Freedom of Association, charging that H.B. 56 violates two ILO conventions by undermining unions’ ability to organize (6 WIR 249, 4/16/12).

**State Laws**

**CRS Report Examines Arizona’s Implications For State Efforts to Enact Immigration Laws**

The U.S. Supreme Court’s decision in Arizona v. United States has “profound implications” for states attempting to enact their own immigration enforcement statutes, making clear that states do not have the kind of latitude that previously was thought, according to a report released Sept. 10 by the Congressional Research Service.

Arizona v. United States, 132 S. Ct. 2492, 115 FEP Cases 353 (2012) (6 WIR 401, 7/9/12), held that certain provisions of Arizona’s S.B. 1070 were preempted by federal law, including those that would make it a misdemeanor for an unauthorized alien to seek or engage in work in the state; make failure to comply with federal alien-registration requirements a misdemeanor; and authorize state and local officers to conduct a warrantless arrest if they believe a probable cause to believe a person has committed a public offense rendering the person removable from the United States.

“In particular, the Court’s decision would suggest that mirroring federal law when imposing criminal penalties upon conduct that could facilitate the presence of...
unauthorized aliens within a jurisdiction does not suffice to avoid preemption,” CRS said.

The report, Arizona v. United States: A Limited Role for States in Immigration Enforcement, said the court’s analysis of congressional intent behind the Immigration Reform and Control Act was particularly relevant to the employment provision of S.B. 1070 that it found preempted.

Whiting Versus Arizona. CRS contrasted the Supreme Court’s treatment of IRCA in Arizona to Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011) (5 WIR 269, 5/30/11), which upheld a separate Arizona statute allowing the state to revoke the business licenses of employers that knowingly hire illegal immigrants and requiring employers in the state to enroll in the E-Verify electronic employment eligibility verification program.

In Whiting, CRS said, the court relied mostly on the language of IRCA itself, whereas in Arizona, the court, “in finding that federal law preempted states from imposing criminal sanctions upon unauthorized aliens who seek employment, looked beyond the text of IRCA (which is silent on the permissibility of such sanctions), and focused heavily upon IRCA’s legislative history.”

The report noted that the different approaches could be the result of the nature of the provisions at issue—the Whiting court found that IRCA expressly permits states to revoke the licenses of businesses that employ undocumented immigrants, whereas IRCA does not speak to whether states can punish undocumented workers.

“In any event, the Arizona ruling suggests that certain immigration-related measures adopted by states might be susceptible to preemption challenge if they are ‘inconsistent with federal policy and objectives,’ even if they focus on matters not specifically addressed by federal law,” the report said.

The report also found that state laws that impose criminal penalties for violations of federal immigration law are subject to preemption challenges, and that certain provisions may be preempted if there is concern over inconsistencies in state and federal enforcement priorities.

In addition, the Arizona court left room for limited state law enforcement as part of states’ inherent authority, as well as potential as-applied challenges to immigration status checks by state and local law enforcement, the report said.

“If Congress disagrees with the Court’s decision, it may amend federal law to reflect its preferences regarding the role that states and localities may play in immigration enforcement, including by expressly authorizing (or barring) state laws like S.B. 1070,” CRS concluded.


In Brief

S.B. 1070’s Employment Provision Enjoined

Following a U.S. Supreme Court decision, the U.S. District Court for the District of Arizona Sept. 18 permanently enjoined an employment provision of Arizona’s S.B. 1070 while at the same time allowing the law’s controversial “show me your papers” provision to go into effect (United States v. Arizona, D. Ariz., No. 2:10-cv-01413, order 9/18/12).

The justices June 25 found several provisions of Arizona’s enforcement-style immigration legislation preempted by federal law, including clauses making it a crime for an unauthorized alien to seek or engage in work, making failure to comply with federal alien registration requirements a crime, and authorizing officers to conduct warrantless arrests if they have probable cause to believe a person has committed a public offense rendering him or her removable from the United States (Arizona v. United States, 132 S. Ct. 2492, 115 FEP Cases 353 (2012); 6 WIR 401, 7/9/12).

Judge Susan R. Bolton Sept. 18 permanently enjoined those provisions, but allowed Arizona to implement the section upheld by the Supreme Court that requires state law enforcement officers to attempt to determine a person’s immigration status “where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.”

In a separate lawsuit challenging that provision on equal protection grounds, Bolton again denied a preliminary injunction as well as an emergency injunction pending appeal to the U.S. Court of Appeals for the Ninth Circuit (Valle del Sol v. Whiting, D. Ariz., No. 2:10-cv-01061, injunction denied 9/19/12).

The Ninth Circuit Sept. 25 denied the emergency injunction as well (C.M. v. Whiting, 9th Cir., No. 12-17046, injunction denied 9/25/12).

IN THIS ISSUE

Listed below are the headlines and page numbers of selected articles in this issue followed by websites providing related information.

USCIS Releases First Round of DACA Data, Says ICE Won't Get Employers' Information (p. 610)
USCIS's FAQs and other information on DACA are available at http://www.uscis.gov/childhoodarrivals.

Electronic Labor Certification Applications To Be Available Through DOL's iCERT Portal (p. 612)

Brookings Report Highlights Programs Aimed at Bolstering Immigrants' Skills (p. 615)
A video and audio recording of the event are available at http://www.brookings.edu/events/2012/09/20-immigrant-skills.

Obama Issues Executive Ban on Contractor Involvement in Human Trafficking Activities (p. 624)

INTERNET SOURCES

Listed below are the addresses of websites consulted by editors and websites for official government information.

U.S. Citizenship and Immigration Services
http://www.uscis.gov/portal/site/uscis

Department of Labor
http://www.dol.gov

Department of Justice
http://www.justice.gov

Federal Register
http://www.federalregister.gov

White House
http://www.whitehouse.gov

Thomas (Congressional legislative information)
http://thomas.loc.gov

U.S. House of Representatives
http://www.house.gov

U.S. Senate
http://www.senate.gov

BLOOMBERG BNA PRODUCTS

Bloomberg BNA publishes other information products for professionals in a variety of electronic formats including the titles listed below.

Daily Labor Report
http://www.bna.com/products/labor/dlr.htm

Construction Labor Report
http://www.bna.com/products/labor/clr.htm

Employment Discrimination Report
http://www.bna.com/products/lit/edr.htm

Government Employee Relations Report
http://www.bna.com/products/labor/gerr.htm

Labor and Employment Law Library
http://www.bna.com/products/labor/lelw.htm

Labor Relations Week

Workplace Law Report
http://www.bna.com/products/labor/wplr.htm

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