October 13, 2016

Submitted Electronically
via https://www.regulations.gov

Hon. Loretta E. Lynch
Attorney General
U.S. Department of Justice

RE; Comment on Proposed Rulemaking entitled "Standards and Procedures for the Enforcement of the Immigration and Nationality Act," 81 Fed. Reg. 53965, with deadline extended, 81 Fed. Reg. 63155.

[CRT Docket No. 130; AG Order No. 3726-2016] RIN 1190—AA71

Dear Attorney General Lynch:

This comment will respond to your Notice of Proposed Rulemaking entitled Standards and Procedures for the Enforcement of the Immigration and Nationality Act, 81 Fed. Reg. 53965 (the proposed rule). I submit this comment on behalf of the Alliance of Business Immigration Lawyer, of which I am a member, and in my capacity as a lawyer who has litigated numerous administrative claims of unfair immigration-related employment practices. The views I express are those of ABIL and me, and do not necessarily reflect the opinions of any other person or entity. [1]

[1] For more information on ABIL, see www.abil.com. ABIL and I thank my colleague, Maura Travers, for her invaluable assistance in researching the legal issues raised by the proposed rule.

ABIL is comprised of 19 of the top U.S. business immigration law firms and practice groups, each led by a prominent member of the U.S. immigration bar. ABIL member firms employ over 250 attorneys (700+ total staff) devoted to business immigration in 25 major U.S. cities, and 25 international destinations. A number of our ABIL members have served as a past President or as members of the Board of Governors of AILA (the American Immigration Lawyers Association), the 11,000-member organization comprised of most U.S. immigration lawyers. Our ABIL lawyers are also immigration law professors at prominent law schools, and have written well regarded immigration treatises and textbooks. ABIL regularly comments on proposed rules and draft agency memoranda.

Introduction. The proposed rule would amend 28 CFR § 44 -- which was codified to enforce § 102 of the Immigration and Control Act of 1986 (IRCA) -- in order to incorporate the statutory text as amended by § 421 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The current rule prohibits certain unfair immigration-related employment practices and designates the Office of Special Counsel for Immigration-Related Unfair Employer Practices (Special Counsel) to investigate complaints.

As explained below, the proposed rule, without adequate or convincing justification, would *inter alia* unlawfully expand the class of individuals protected against citizenship status discrimination to include all non-citizens, and unfairly expand the liability of employers and other respondents alleged to have engaged in unfair immigration-related employment practices. These changes contravene the statutory text and the legislative history of the governing statutes, and would impose unreasonable burdens on employers, even though an employer's actions were not motivated by immigration-related animus or hostility. The proposed rule would also substantially expand the authority of the Special Counsel to investigate allegations of immigration-related unfair employment practices and the time periods within which individuals and the Special Counsel must file complaints against employers with the Office of the Chief Administrative Hearing Officer (OCAHO).

Overly Broad Proposed Definition of Citizenship Status. Proposed 28 CFR § 44.101(c) would provide a new definition of the phrase "citizenship status" found in Immigration and Nationality Act (INA) § 274B [codified at 8 U.S.C. § 1324b] to mean "an individual's status as a U.S. citizen or national, or non-U.S. citizen, including the immigration status of a non-U.S. citizen." By statute, however, the protection against citizenship status discrimination only applies to certain protected individuals, not to all non-citizens. Protected individuals under § 274B include only U.S. citizens, certain lawful permanent residents who are taking timely steps to become U.S. citizens through naturalization, and persons granted classification as refugees, asylees or temporary residents under IRCA's 1986 legalization program (assuming that such temporary residents still exist).

The citizenship-status definition should not be expanded to include all non-citizens but only to persons who are protected individuals under INA § 274B. Thus, the definition must be narrowed so that, as revised, it would expressly exclude the following foreign nationals (1) lawful

permanent residents who have not timely pursued naturalization, (2) applicants for asylum or refugee status, and (3) foreign citizens in the United States, with or without a particular legal status, who are not "protected individuals" under § 274B.

The Department of Justice (DOJ) offers *Kamal-Griffin v. Cahill Gordon & Reindel*, 3 OCAHO no. 568, 1641, 1647 (1993), as justification for the inclusion of all non-citizens in the proposed definition of citizenship status. That decision, however, is inapplicable because the supposed proposition for which the Special Counsel cites the case is *obiter dictum* -- given that the claimant, Ms. Kamal-Griffin, was a U.S. lawful permanent resident. As a result, this case only provides justification for limiting the class of non-citizens to persons who are statutorily protected against citizenship status discrimination, including lawful permanent residents such as that claimant. In *Kamal-Griffin*, the Administrative Law Judge stated:

> IRCA's legislative history makes clear that Congress intended the term "citizenship status" to refer both to alienage and to non-citizen status. The House of Representatives Committee on the Judiciary ("Committee"), recognizing the importance of an authorized individual's right to work, stated its rationale for prohibiting employment discrimination based on citizenship status:
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> > **The Committee does not believe barriers should be placed in the path of permanent residents and other aliens who are authorized to work and who are seeking employment particularly when such aliens have evidenced an intent to become U.S. citizens. It makes no sense to admit immigrants and refugees to this country, require them to work and then allow employers to refuse to hire them because of their immigration (non-citizenship) status.** Since Title VII does not provide any protection against employment discrimination based on alienage or non-citizen status, the Committee is of the view that the instant legislation must do so.[2]
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> H.R. Rep. No. 682, Part 1, 99th Cong., 2d Sess. 70 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5674. (Emphasis added.)

Clearly, then, *Kamal-Griffin* stands for the proposition that only narrowly prescribed categories of non-citizens are eligible to assert citizenship status discrimination, namely, lawful permanent residents, refugees and asylees. Accordingly, the definition of citizenship status should be correspondingly narrowed to exclude non-citizens who are not "protected individuals" under § 274B.

Proposed Elimination of Burden on Special Counsel to Prove Animus or Hostility. Among the most pernicious amendments to the current regulation sought by the DOJ in the proposed rule would hold employers liable for citizenship status discrimination if they treat employees or applicants for employment differently based on their immigration status, regardless of whether there is proof of animus or hostility involved. The proposed rule would amend the discriminatory intent requirement by incorporating the term "discriminate" as the term is allegedly now defined

[2] Notably, 42 U.S.C. § 1981 already prohibits private parties from employment discrimination based on alienage.

in § 274B following enactment of § 421 of IIRIRA in 1996. The proposed rule seeks to clarify that "discrimination means the act of intentionally treating an individual differently, regardless of the explanation for the discrimination, and regardless of whether it is because of animus or hostility."

The Special Counsel's position seems to be that the DOJ must merely prove that the employer intended the natural and foreseeable consequence of its actions and that essentially violations can be found on virtually a strict liability basis. That position is incompatible with the current regulation and the cases interpreting INA § 274B. To establish a violation under applicable case law, the Special Counsel must prove that an employer knowingly and intentionally discriminated on the basis of citizenship status.

The regulations interpreting INA § 274B provide:

> (a)(1) General. It is an unfair immigration-related employment practice for a person or other entity to ***knowingly and intentionally discriminate*** or to engage in a pattern or practice of ***knowing and intentional discrimination*** against any individual (other than an unauthorized alien) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment-
>
> (i) Because of such individual's national origin;
>
> (ii) In the case of a protected individual, as defined in 44.101(c), **because of** such individuals' ***citizenship status***.

28 C.F.R. § 44.200 (emphasis added.) Sections (a)(2) and (a)(3) describe the companion retaliation and documentation abuse provisions, which are defined as "unfair immigration-related employment practices," subject to the same standard. Id.

The cases discussing the statute and regulations make clear that a specific, discriminatory intent must motivate any alleged violation of anti-discrimination provisions of INA § 274B. Instructive is the case of *U.S.A. v. Diversified Technology & Services of Virginia, Inc.*, 9 OCAHO 1095 (2003). In that case, the Special Counsel maintained, just as in the proposed rule, that "intentional discrimination does not require proof that the employer subjectively harbored some special, hostility, toward the protected group, only that the employment decision was premised upon the protected characteristic." *Diversified Technologies*, 9 OCAHO 1095. The Administrative Law Judge (ALJ) rejected that analysis, finding instead that

> The adverse decision ***must be shown to have actually been made by reason of, on account of, or on the basis of the protected characteristic*** . . . . This means at a minimum that there must be a factual basis upon which a rational fact-finder could infer a causal connection; **the nexus cannot be established just by a formulaic assertion that the protected characteristic was the reason**."

Id. at 19. (Emphasis added.) The court also ruled:

> Congress did not intend that all mistakes in the verification process should give rise to penalties under § 1324b either; by amending 1324(b)(a)(6) in the manner it did, Congress has specifically instructed us that errors in carrying out documentary inquiries for purposes of § 1324a compliance ***can now be penalized under § 1324 only where there is a showing that there actually was a discriminatory intent***.

Id. at 21. See also, *Ondina-Mendez v. Sugar Creek Packing Co.*, 9 OCAHO 1085 (2002) (holding that "[t]he addition of the intent requirement means that now an employer may avoid liability if the employer can present persuasive evidence that its request for additional documents, its refusal to accept verification documents that appear genuine on their face, was made for legitimate reasons not attributable to discrimination.")

Given these decisions, the proposed rule should be revised so that the Special Counsel must still present direct evidence of a discriminatory intent, hostility or animus in order to establish a violation of the statutory protection against citizenship status discrimination.

Unjustifiable Expansion of Time Periods for Investigation and Deadlines to File Complaints. Under the current regulations at 28 CFR § 44, an individual or an organization may file a charge with the Special Counsel within 180 days of the alleged occurrence of an immigration-related unfair employment practices. If the Special Counsel receives a charge more than 180 days after the alleged occurrence, the Special Counsel must dismiss the charge with prejudice.

The proposed rule would vastly expand the Special Counsel's investigatory timeframe by granting the Special Counsel discretion to apply the principles of "waiver, estoppel, or equitable tolling" to investigate charges filed beyond the 180-day filing deadline. These expanded "equitable" provisions provide the Special Counsel with immense leeway to obviate the statutory 180-day filing deadline found in INA § 274B.

As provided in § 274B and 28 CFR § 44, the Special Counsel must undertake an investigation of a charge and file a complaint before an administrative law judge (ALJ) within 120 days of receipt of the charge. If the Special Counsel declines to file a complaint, the charging party must file a complaint with an ALJ within 90 days after receipt of the Special Counsel's letter of determination.

Under the proposed rule, however, the Special Counsel will not be bound by the statutory time limits that are applicable to individuals filing private actions. The Special Counsel's authority to file a complaint based on a charge by a complaining party would be subject to the "equitable limits on the filing of a complaint." In other words, the Special Counsel would have up to five years to file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO).

As a practical matter, the elimination of the current deadlines, quite foreseeably, would be extremely burdensome and disruptive to employers who are asked to produce documents for inspection during an investigation -- including Employment Eligibility Verification Forms (Forms I-9) -- up to five years after an alleged occurrence. Under the current U.S. Citizenship

and Immigration Services I-9 regulations, employers are only required to retain Forms I-9 for terminated employees for a maximum of three years after the date of hire or one year after the date of termination, whichever is later.

Even more troubling, the proposed rule would inexplicably eliminate the current 180-day limit within which the Special Counsel may file a complaint alleging an unfair immigration-related employment practice with the OCAHO. In making this proposal, the DOJ does not explain why it is no longer reasonable to continue with the current rule which was found acceptable to the Department in 1987, as shown in the excerpt from the Supplementary Information accompanying the current rule:

> Section 44.304 Special Counsel acting on own initiative.
>
> Section 44.304(b) has been amended in the final rule to limit the period of time in which the Special Counsel. on his or her own initiative. may, investigate and file a complaint of an unfair immigration-related employment practice. **We believe that requiring a complaint to be filed within 180 days of the occurrence of an unfair immigration-related employment practice is a reasonable implementation of the desire of Congress reflected in 8 U.S.C. 1324b(d)(1), (3), to place a time limit on the actions of the Special Counsel.**

52 Fed. Reg. 37402, 37409 (Oct. 6, 1987). (Emphasis added.)

Accordingly, these proposed changes unjustifiably expanding the time periods for investigation and the deadlines to file complaints, should not be adopted. The current rule should stay the same. If in a given case equitable principles ought to be applied to extend these time periods, then the decision to do so should be reposed solely in the discretion of the Administrative Law Judge based on the evidence presented.

Misleading Change of Definition of Charging Party. The proposed rule contains an amended definition of the term “charging party.” It would replace the word “individual” with the term "injured party." The DOJ maintains that the changed term is merely undertaken “in order to simplify the regulatory text.” The definition of charging party should remain as it now is or be clarified to eliminate the impression, even if only subliminally, that an individual filing a claim has been “injured.” Use of the phrase, “injured party,” will then likely appear in every OCAHO published decision where a person files a claim, even in cases where an Administrative Law Judge has dismissed the claim as unproven. The mere assertion of injury is insufficient to be given the designation of “injured party.” This term in the definition should remain the same or be changed to a neutral term, such as “claimant.”

* * *

For these reasons, Attorney General Lynch, you should reject the Special Counsel's proposed changes to the current regulations. The changes reflect the unlawful and unfair placement of the government's finger on the scales of justice. When Congress enacted INA § 274B, and amended it with the enactment of IIRIRA, it could never have been envisioned that the 1996 limitations on the authority of the Special Counsel would be used as justification for a wholesale expansion of governmental power and the regulatory elimination of lawful defenses that employers may assert before an ALJ. The scales of justice are in equipoise. They should remain that way.

Respectfully submitted,
The Alliance of Business Immigration Lawyers

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