AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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Submitted via: www.regulations.gov

Re: Standards and Procedures for the Enforcement of the Immigration and Nationality Act, Docket No. CRT 130; RIN 1190-AA71
81 Fed. Reg. 53965 (Aug. 15, 2016)

Dear Mr. Ruisanchez:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the Department of Justice proposed rule "Standards and Procedures for the Enforcement of the Immigration and Nationality Act," published in the Federal Register on August 15, 2016.

AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. Since 1946, our mission has included the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on this proposed rule and believe that our members' collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

Our comments focus primarily on the proposed revisions to the definition of "discriminate" and the meaning of "for the purpose or with the intent of discriminating against an individual in violation of paragraph (1)."[1] We also offer comments on the proposed revision that would affect the time limitation within which OSC must file a complaint.[2]

[1] Proposed 28 CFR §44.101(e) and (g).
[2] Proposed 28 CFR §44.303(d).

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The Attorney General (AG) and the Office of Special Counsel (OSC) Lack the Statutory Authority to Promulgate a Substantive Rule Interpreting the Burdens and Standards of Proof Relating to Claims of Document Abuse Under INA §274B.

The proposed rule should be withdrawn because it is *ultra vires* to the rule making authority and functions vested in the AG and OSC by Congress. As revised by the Immigration Reform, Accountability and Security Enhancement Act of 2002 (IRASEA), INA §103(g)(1) limits the authorities and functions of the AG under the INA and all other laws relating to the immigration and naturalization of aliens to those "exercised by the Executive Office for Immigration Review [EOIR], or by the Attorney General with respect to [EOIR], on the day before the effective date of the [IRASEA]." Thus, under the plain language of INA §103(g)(1), the AG may promulgate substantive rules with respect to functions exercised by or in relation to EOIR, but has no authority to issue such rules with regard to the interpretation and enforcement of the immigration-related anti-discrimination provisions of INA §274B.

Further, INA §274B contains no provision permitting either the AG or OSC to interpret the Act or to regulate standards governing the order and burden of proof to be applied by administrative law judges (ALJs) and the courts for the purpose of evaluating claims of citizenship or national origin discrimination, or document abuse. Instead, under INA §274B, the AG's sole authority is the designation of ALJs with special training related to employment discrimination to conduct hearings and render final agency decisions on discrimination complaints filed under §274B.[3] The powers and duties of OSC are likewise expressly limited to the following functions:

(1) The investigation of charges of discrimination within a prescribed time period to determine whether or not there is reasonable cause to believe that the charge is true and whether or not to bring a complaint with respect to the charge before an administrative law judge for hearing and determination;

(2) The authority to initiate an investigation respecting unfair immigration-related employment practices and, based on such an investigation, whether to file a complaint before an administrative law judge for hearing and determination, subject to the specified 180-day claims-liability limitations period; and

(3) Shared authority to petition the applicable federal district court for the enforcement of the order of the administrative law judge.[4]

Consistent with these limited powers and functions, in the almost 30-year period following the enactment of IRCA, neither the AG nor the OSC has issued substantive regulations interpreting the standards and burdens of proof applicable to §274B charges of discrimination, including the time periods following initial enactment, the passage of the Immigration Reform Act of 1990 (adding the document abuse discrimination provision), and passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (amending the document abuse provision to include an intent requirement). To the contrary, the AG and the OSC have only

[3] INA §274B(e)(2).
[4] INA §274B(c)(2), (d), and (j)(1).

issued procedural rules that track the statutory language governing the filing of charges for investigation by OSC, the time period for filing complaints with OCAHO, and the authority of the OSC to petition for enforcement of final agency orders.[5]

In refraining for 30 years from issuing rules regarding the burden and standard of proof governing claims of discrimination under INA §274B, the AG and the OSC have implicitly recognized that these adjudicative functions lie exclusively with OCAHO administrative law judges, with whom Congress had vested the authority to issue final orders of the U.S. Department of Justice without further review.[6] The original jurisdiction vested in OCAHO can be compared to the original jurisdiction vested in the district courts to hear and decide claims under analogous federal discrimination statutes such as Title VII of the Civil Rights Act of 1964. By contrast, decisions rendered by OCAHO ALJs under the employer sanctions (INA §274A) and document fraud (INA §274C) provisions are subject to multiple layers of administrative review prior to becoming final agency orders.[7]

For the foregoing reasons, we respectfully submit that the AG and the OSC lack the legislative authority to issue a substantive rule interpreting the burdens and standards of proof relating to claims of document abuse discrimination under INA §274B. Accordingly, the proposed rule should be withdrawn.

The NPRM Impermissibly Seeks to Overturn the Final ALJ Order in *Diversified Technology & Services of Virginia, Inc.*

As explained above, under INA §274B, Congress vested original jurisdiction in OCAHO ALJs to interpret and apply the Act and to issue final agency decisions without interference and without further administrative review within OCAHO, EOIR, or the Justice Department. In 2003, in *U.S. v. Diversified Technology & Services of VA*, ALJ Ellen Thomas issued a lengthy decision rejecting OSC's contention that requiring non-citizens to produce more or different documents than U.S. citizens, *vel non*, constitutes a *per se* violation of §274B without regard to any non-discriminatory reason articulated by an employer in response to the charge.[8]

In *Diversified Technology*, OSC had filed a four count complaint: Counts I and II alleged that the employer had engaged in acts of document abuse and citizenship discrimination against a particular individual, a refugee; Counts III and IV alleged that the employer had also engaged in a pattern and practice of document abuse and citizenship discrimination against other non-citizen applicants for employment. The case was decided at the summary judgment stage based upon a stipulation to undisputed facts. In ruling on the motion, the court first laid out the order and standards of proof governing the disposition of employment discrimination claims. With respect to the individual disparate treatment claims premised on document abuse and citizenship

[5] *See*, e.g., Order No. 1225–87, 52 Fed. Reg. 37409, Oct. 6, 1987, *as amended by* Order No. 1520-91, 56 FR 40249, Aug. 14, 1991; Order No. 1807-93, 58 FR 59948, Nov. 12, 1993.
[6] *See* 28 CFR §68.52(d) and 68.57.
[7] *See* 28 CFR §§68.53, 68.54 and 68.55 (providing for review of interlocutory orders by the Chief Administrative Hearing Officer (CAHO), and for the referral and review of the final orders of ALJs and the CAHO).
[8] 9 OCAHO No.1095 (Apr. 15, 2003).

discrimination, the court observed that a complainant may prove his or her case by direct or circumstantial evidence.

Controlling Fourth Circuit precedent cited by the court defined "direct evidence" as evidence which on its face shows discriminatory intent. A complainant who presents sufficiently direct evidence of discrimination may qualify for a more advantageous standard of proof which requires the defendant to show that the same decision would have been made in the absence of discrimination, or to establish some other affirmative defense. Because direct evidence is rare in employment discrimination cases, the customary method of proving intentional discrimination through circumstantial evidence was established by the Supreme Court in *McDonnell Douglas Corp. v. Green*,[9] and further elaborated upon in *Reeves v. Sanderson Plumbing Prods., Inc.*;[10] *Saint Mary's Honor Ctr. v. Hicks*;[11] and *Texas Dep't of Cmty. Affairs v. Burdine*.[12] Under the "shifting burdens" analysis, the plaintiff must to first establish a *prima facie* case of discrimination. If they are successful, the defendant then has the opportunity to articulate a legitimate, nondiscriminatory reason for the challenged action. If the defendant is able to do so, the inference of discrimination raised by the *prima facie* case disappears, and the plaintiff then must prove, by a preponderance of the evidence, that the defendant's articulated reason is not true and that the defendant engaged in intentional discrimination.

Judge Thomas observed that prior to the 1996 amendment of INA §274B(a)(6), document abuse was conclusively established by showing that the employer requested a work-authorized individual to produce documents for the purpose of satisfying INA §274A(b), and that either 1) the request was for more or different documents than the section requires; or 2) the employer refused to honor documents that reasonably appear to be genuine and to relate to the individual. As such, a *prima facie* showing of document abuse was sufficient to establish liability without regard to discriminatory intent or actual injury. By inserting an intent requirement in the definition of document abuse, Judge Thomas noted that the 1996 amendment must be read to require proof that the employer intended to discriminate based on citizenship status:

> *If there is one thing that is crystal clear from the amending language, it is that document abuse can no longer be treated as a strict liability offense. While pre-amendment cases may have held that a showing of discrimination is not required in order to establish liability for document abuse, this principle no longer applies. I conclude, therefore, that the facts in a document abuse case must now be examined in the same manner and with the same approach as is taken in any other intentional discrimination case. That is to say, where a case rests on direct evidence, the employer may overcome that evidence only by establishing an affirmative defense. Tovar v. United States Postal Service, 1 OCAHO no. 269, 1720, 1726 (1990), aff'd in part & rev'd in part, 3 F.3d 1271 (9th Cir. 1993). Where a case rests on circumstantial evidence however, the employer must be afforded the opportunity to respond to a prima facie showing by proffering a legitimate nondiscriminatory reason for the employment practice complained of. Whether a request*

[9] 411 U.S. 792 (1973).
[10] 530 U.S. 133, 142-43 (2000).
[11] 509 U.S. 502, 510-11 (1993).
[12] 450 U.S. 248, 252-53 (1981).

for or rejection of documents can be found to discriminate will thus ordinarily depend upon the reason the request is made.[13]

Thus, rather than automatically shifting the burden to the employer to establish it did not intend to discriminate, Judge Thomas restated the finding that "the respective burdens of proof and production in a post-amendment document abuse case must now be allocated in the same manner as they are in cases arising under INA Section 274B(a)(1)," i.e., in the absence of direct evidence of discrimination, "a prima facie document abuse case may serve to raise an inference of discrimination, but once the employer responds by proffering a nondiscriminatory reason, any inference of discrimination is dissipated, and the complainant must show, as in any other disparate treatment case, that the employer's reasons are unworthy of credence or are otherwise a pretext for discrimination."[14]

In *Diversified Technology*, OSC argued that the *McDonnell Douglas* circumstantial evidence standard did not apply because the employer's rejection of the complainant's I-94 card without an accompanying passport constituted direct evidence of discrimination. Judge Thomas rejected this, noting that the employer's conduct was devoid of malicious intent and did not satisfy the direct evidence standard established by the federal courts. Notably, the court observed that following OSC's reasoning to its logical conclusion would result in a liability finding that "whenever an employer rejects or requests any INS-issued document, the rejection or request would automatically by definition be based on the person's citizenship status, foreclosing any inquiry into the actual facts or the employer's real reason for rejecting or requesting the document."[15] The court ruled that drawing such an inference would conflict with *Hazen Paper Co. v. Biggins*,[16] which holds that prohibited disparate treatment must be based on the actual protected characteristic, not on some other analytically distinct factor, even though the other factor may be empirically correlated with the protected characteristic. Correlation cannot be confused with causation. To prevail, the complainant must still demonstrate that citizenship status itself influenced the adverse employment action under attack.[17]

As the foregoing discussion demonstrates, the *Diversified Technologies* holding directly contradicts the definition of unlawful discrimination contained in the proposed rule wherein the AG and the OSC seek to eliminate the requirement that a complainant prove by a preponderance of the evidence that the disputed employment action was undertaken because of the complainant's citizenship status or national origin. As proposed, a complainant would never have to prove intent to discriminate based on a protected status. This is inconsistent with the plain language of INA §274B(a)(6), as amended, and as definitively interpreted by ALJ Thomas in *Diversified Technologies*.

In justifying the proposed definition of unlawful Section 274B discrimination as "any action which treats protected individuals differently in the document verification, hire and termination process without regard to the employer's explanation or non-discriminatory intent," the AG and

[13] 9 OCAHO No.1095 at 18.
[14] *Id*. at 20 (4th Cir. citation omitted).
[15] *Id*. at 22.
[16] 507 U.S. 604, 608-09 (1993).
[17] 9 OCAHO No.1095 at 23.

OSC cite similar language in Judge Thomas's 2014 decision in *United States v. Life Generations Healthcare, LLC d/b/a Generations Healthcare*.[18] In so doing, the AG and the OSC suggest that Judge Thomas intended to reverse her earlier decision in *Diversified Technologies*. This is incorrect and unfounded. If Judge Thomas had intended to reverse *Diversified Technologies*, she would have stated so clearly and definitively. No such pronouncement can be found in *Life Generations*. Indeed, in *Arizona Family Health Partnership,*[19] an opinion which was issued subsequent to *Life Generations,* Judge Thomas reiterated the *McDonnell Douglas* shifting burdens standard as controlling.

Respectfully, the AG and the OSC have quoted Judge Thomas out of context to support the proposed definition of unlawful discrimination for §274B purposes. In *Life Generations,* Judge Thomas applied the evidentiary framework for pattern or practice cases of disparate treatment first set out in *International Brotherhood of Teamsters v. United States*.[20] Under the *Teamsters* framework, to establish a *prima facie* case at the liability stage, the complainants must present evidence showing that the employer regularly and purposefully treated a disfavored group less favorably than the preferred group as a standard operating procedure. If this is satisfied, the burden of production then shifts to the employer to defeat the *prima facie* showing of a pattern or practice by demonstrating that the complainant's proof is either inaccurate or insignificant, or by providing a non-discriminatory reason for its actions.

Applying this standard, Judge Thomas held that the OSC had satisfied its *prima facie* burden by demonstrating through an expert report and testimony the existence of statistically significant differences between the rate at which non-citizens were required to produce List A documents before and after the employer changed its I-9 verification practices, and by credible anecdotal evidence establishing that work-authorized foreign-born applicants at the pre-screening and verification stages were required to produce more and different documents than U.S. citizens. On review of the employer's evidence, Judge Thomas held that the employer failed to overcome the presumption of discrimination established by OSC's prima facie pattern and practice case. Once liability is established under the *Teamsters* model, the case proceeds to the damages phase during which individual class members must prove the nature and extent of their damages caused by the unlawful discrimination.

The AG and the OSC have intentionally and impermissibly substituted a complainant's burden of proof at the liability stage of a *Teamsters* pattern or practice case model (where intent to discriminate is inferred if the complainant adduces evidence of a statistically significant difference in how the employer treats citizens versus non-citizens, for example) for a complainant's burden under the *McDonnell Douglas* circumstantial evidence/disparate treatment model (where a complainant bears the ultimate burden of proving that the employer's explanation for the difference in treatment is pretextual and that the real reason was intentional discrimination based on the complainant's protected status). The AG and the OSC have no legal authority for promulgating such a standard of proof and the proposal to enact such a standard is clearly inconsistent with the plain language of the statute and the history and interpretation of the

[18] 11 OCAHO No. 1227 (Sept. 2014)
[19] 11 OCAHO No. 1254 (June 2015).
[20] 431 U.S. 324, 335-36 (1977).

Act by OCAHO, in whom Congress has vested exclusive and final authority to interpret the Act and adjudicate claims of discrimination, subject solely to federal appellate review.

By Defining "Discriminate" as Simply "Differentiate," the NPRM Departs from the Accepted Legal Meaning of the Term in a Way that Diminishes the Significance of the 1996 Amendment.

The NPRM defines "discriminate," as used in INA §274B(a)(6), as "the act of intentionally treating an individual differently from other individuals, regardless of the explanation for the differential treatment, and regardless of the whether such treatment is because of animus or hostility."[21] Essentially, this definition reduces the meaning of "discriminate" to the traditional plain English meaning of the term—in a word, "differentiate." However, the legal meaning of "discriminate," which is also incorporated into the plain English definition, involves unfair or bad treatment, not just different treatment. Indeed, the first definition of "discrimination" in the current version of Merriam-Webster Dictionary is "the practice of unfairly treating a person or group of people differently from other people or groups of people."[22] The Cambridge English Dictionary defines "discrimination" as "the treatment of a person or particular group of people differently, in a way that is worse than the way people are usually treated."[23] The Equal Employment Opportunity Commission, the DOJ agency charged with enforcing Title VII, likewise defines national origin discrimination as "treating people (applicants or employees) unfavorably."

The mere differentiation between two groups, "regardless of the explanation," is not enough. Not only does this have the potential to penalize employers that should be protected under the 1996 amendment, the proposed definition of discrimination may effectively dilute the legitimate goal of identifying and punishing those employers who have in fact engaged in abusive and discriminatory behavior. The creation of an environment where innocent behavior is swept up in the enforcement apparatus diminishes the capacity of the system to target those who truly deserve it.

By Imposing an Unduly Broad Definition of "Discriminate," the NPRM Shifts the Focus from Education to Enforcement and Penalizes Employers that the 1996 Amendment Intended to Protect.

The proposed rules miss an important opportunity to address a central issue in the document abuse provisions: that many well-meaning employers do not fully understand the rules and – without intent to harm or disfavor any individual or group, and in an attempt to properly comply with the law—ask for more or different documents than are required under the law. In addition, as a result of the complex legalese on Form I-9, employers find it difficult to avoid helping employees when it comes time to select documentation, but fail to understand that the help provided, even when it does not harm the employee, could easily fall into the category of "intentional discrimination" under the proposed rules. The following are a few examples that

[21] Proposed 28 CFR §44.101(e).
[22] *See* http://www.merriam-webster.com/dictionary/discrimination.
[23] *See* http://dictionary.cambridge.org/us/dictionary/english/discrimination.

demonstrate how the proposed definition would penalize employers which the IIRIRA amendments intended to protect.

- An employer has recently sponsored a group of H-2B workers from Mexico. Concerned that the workers may read the Form I-9 List of Acceptable Documents and present restricted Social Security cards, Mexican birth certificates, or visa stamps, instead of the required unexpired passports and I-94 card, the employer may create a sample I-9 showing those documents under List A, or it may provide a script to managers, suggesting that they explain that "most of the newly-arrived workers from Mexico present their passports and I-94 cards to complete this form." This assistance is only provided to Mexican workers, and is only provided because they are in H-2B status.[24] Despite the fact that no harm befell the workers, the fact is that they were treated differently in the I-9 process. Under the proposed regulations, this type of differentiation that is done to ease the orientation process and results in no harm could result in fines and other penalties.

- Employee checks the box in Section 1 of the I-9 Form indicating that he is a Lawful Permanent Resident (LPR). The employer then says, "Oh, I see you are a permanent resident. Do you have your green card for completion of Section 2?" In this case, the employer did not intend to treat the individual in an unfavorable way. In fact, had the individual come back and said, "I don't have a green card on me; can I give you a driver's license and social security card?," the employer would have happily accepted those documents. But, according to OSC, the distinction between what was said to an LPR and what would be said to someone else (perhaps a U.S. citizen) demonstrates an intent to discriminate.[25] We would think that this is exactly the type of unintentional H.R. mistake that the amendments in 1996 intended to address.

- A new factory worker walks into orientation with a new H.R. Associate. The employee says "I don't know what I am supposed to write or what I am supposed to give you." The H.R. Associate, meaning to be helpful, says "Let's see if I can help you get through this. Are you a U.S. Citizen? If you were born in the United States, just give me a passport to make it easy. If you don't have one, if you have a driver's license and social security card you can give that to me too. If you weren't born in the United States show me what you have, and I will help you figure out how to fill this out." In this case, the H.R. Associate was trying to help the new employee complete the I-9 and had no intention of turning the person away based on what the new employee gave him. This is not the type of intentional document abuse that the statue intended to penalize.

In fact, there are a number of situations in which the practicality of the verification process requires employers to treat members of different groups differently, even where there is no intent to do harm. USCIS recognized this when it created the proposed "enhanced" Form I-9, which

[24] Here, as in many H-2B scenarios, the protected national origin and the unprotected immigration status cannot be completely separated, as all of the H-2B workers involved in a particular petition are often from the same country.
[25] OSC has in the past taken the position that the fact that E-Verify reports a disproportionately high number of permanent resident cards presented is cause to investigate an employer for document abuse, even when there may be very legitimate reasons for this statistical anomaly.

provides a different List A drop down menu when an individual indicates that he or she is an LPR than that which is provided to an employee who checks that he or she is a U.S. citizen. It first lists the documents that an LPR would likely hold, with the U.S. Passport and less relevant documents further down the list. Under the proposed rules, this difference, while intended to be helpful, intentionally treats LPRs differently from U.S. citizens and raises the question as to whether all employers who use the new I-9 form (if implemented in its current state) would potentially be liable for intentional discrimination.

Further, it is unclear what policy objective is achieved by this expanded definition, other than to make it much easier for the government to charge law-abiding employers with discrimination, sullying the employers' reputations and requiring them to submit to extensive discovery and attorney fees. The government would be better served by focusing its resources on education and on investigating employers that actually disfavor members of protected groups rather than seeking to broaden the definition of "discrimination" and target employers that seek to help members of protected groups.

The Ability of OSC to Wait up to Five Years to Issue a Complaint Does Not Allow Employers to Achieve Closure and Move on with Their Businesses.

Under proposed 28 CFR §44.303(d), while a private charging party must file a complaint with OCAHO within 90 days, OSC can continue to investigate and/or file a complaint well beyond this. According to the preamble, the only limitations on OSC are the standard "equitable limits" and the five year statutory limit for bringing actions to impose civil penalties. We are concerned that this puts employers in the position of having to potentially wait years to know whether a claim will be pursued. This uncertainty can make it very difficult to continue business planning and—especially in the case of small employers—to set aside appropriate financial reserves to deal with litigating and possibly paying fines as a result of such an action.

Respectfully Submitted,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION