To Know or Not to Know: Immigration, Constructive Knowledge, and the Diligence That's Due

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Education is an admirable thing, but it is well to remember from time to time that nothing that is worth knowing can be taught. Oscar Wilde

Lawyers who practice immigration law face puzzles both philosophical and practical. Among the most perplexing is the challenge of grappling with the concept of knowledge. This obstacle -- one that we must inevitably try to surmount -- relates not merely to legal knowledge or book learning; rather, it deals with the time-honored principle that, in law, knowledge may be either actual or constructive.

What is actual knowledge?

Actual knowledge is the easier to grasp. Philosophers argue that there are countless forms of actual knowledge, and sometimes assert that, in an epistemological sense, nothing can ever be "known."[1] For present purposes, however, the author will accept Plato's definition. To Plato, actual knowledge is "justified true belief."[2]

What is constructive knowledge?

A simple definition of constructive knowledge is "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person."[3] But as with many aspects of immigration law, nothing is that straightforward.

Constructive knowledge, for immigration purposes, is a thornier proposition. It arises in several contexts:

- In the Form I-9 (Employment Eligibility Verification) regulations of U.S. Citizenship and Immigration Services (USCIS), the component of the Department of Homeland Security that addresses when and how statutory penalties for crossing the knowledge line are triggered;
- In the completion of the "Preparer's Declaration," found at the end of every petition or application forms requesting immigration benefits;
- In various versions of the proposed EB-5 "integrity" bills under consideration in the Senate and House of Representatives, which would require a cast of participants "involved" in the direct and indirect job-creation eligibility criteria required to satisfy this "green-card through investment program," including persons associated with regional centers, new commercial enterprises, job creating entities, and their respective agents and attorneys, to certify, after a due diligence investigation, that

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[1] Epistemology, the study of knowledge, has fascinated argumentative thinkers for millennia. See generally, Ichikawa, Jonathan Jenkins and Steup, Matthias, "The Analysis of Knowledge", The Stanford Encyclopedia of Philosophy (Winter 2016 Edition), Edward N. Zalta (ed.), accessible at https://plato.stanford.edu/archives/win2016/entries/knowledge-analysis/ (all hyperlinks last accessed on January 18, 2017).

[2] *Id.*

[3] *Black's Law Dictionary* (10th ed. 2014), definition of "constructive knowledge."

the representations contained in documentation submitted to investors and USCIS are true and in compliance with the securities laws;[4]

- In determining whether the five-year statute of limitations[5] for the crime of illegal reentry after an order of deportation, removal, exclusion, or denial of admission, [6] has begun to run from the time a defendant is "found" in the U.S., the government either must have known or, with the "exercise of diligence typical of law enforcement authorities," could have discovered the illegality of the defendant's presence;[7] and
- In determining whether an applicant seeking legalization under the Immigration Reform and Control Act had violated immigration status where the violation was "known to the government," and therefore established legalization eligibility, the required knowledge could be imputed to the legacy agency, the Immigration and Naturalization Service (INS), under the principle of constructive knowledge.[8]

The duty to certify, after a due diligence investigation, that a fact is true may not at first blush seem to encompass the principle of constructive knowledge; but it does. The obvious penalty of failing to conduct a due-diligence investigation dovetails with the "you should have known" imputation underlying constructive knowledge.

Although the principle of constructive knowledge has been interpreted in several judicial decisions, discussed below, it is nowhere expressly defined in the Immigration and Nationality Act (INA), and is defined in only one USCIS special-purpose immigration regulation. USCIS interprets the term, constructive knowledge, in the context of an employer's dual obligation to satisfy the employment-eligibility-verification requirements of INA § 274A[9] and its own Form I-9 regulations. The agency defines constructive knowledge as "knowledge which may fairly be inferred through notice of certain

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[4] See, e.g., the ''American Job Creation and Investment Promotion Reform Act of 2016'' *H. R. 5992*, 114th Congress, which would create a newly added Section 203(b)(5)(L) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5), introduced in the House of Representatives on September 12, 2016 (accessible at https://www.congress.gov/114/bills/hr5992/BILLS-114hr5992ih.pdf), and the "American Job Creation and Investment Promotion Reform Act of 2015," *S. 1501*, 114th Congress, introduced in the Senate on June 3, 2015 (accord, except that the provision would create a newly added Section 203(b)(5)(I) of the Immigration and Nationality Act (accessible at https://www.congress.gov/114/bills/s1501/BILLS-114s1501is.pdf).

[5] See 18 U.S.C. §3282.

[6] See 8 U.S.C. §1326.

[7] See *U.S. v. Mendez-Santana,* 615 F. Supp. 2d 624 (E.D. Mich., 2009)(citing and summarizing cases from various federal circuit courts).

[8] See *Immigrant Assistance Project, LA County v. I.N.S.*, 306 F. 3d 842, 53 Fed. R. Serv. 3d 970 (CA9, 2002) where the circuit court upheld injunctive relief and allowed legalization applicants could establish the "known to the government requirement" in two situations, viz., where foreign nationals admitted to the U.S. either as (1) nonimmigrants who failed to submit statutorily-required periodic address reports to INS, or (2) F-1 students who failed to maintain a full course of study. In the former situation, INS had previously reviewed address reports to identity status violators, but ceased the practice. In the latter fact pattern, where designated school officials reported, as required by statute, that certain students had violated status in ceasing to attend classes or taking fewer courses than minimally required.

[9] In short, these duties entail the obligation to (a) verify employment eligibility in the United States, and (b) refrain from employing, or continuing to employ, an individual, or recruiting an individual for a fee, whom the employer knows is an unauthorized alien.

facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition."[10]

As can be seen, USCIS's constructive-knowledge definition and examples in the regulation extend beyond the traditional legal definition (knowledge which "one using reasonable care or diligence should have"). The agency would impute knowledge by an employer's mere failing to notice "information available" or by "recklessly and wantonly disregarding the legal consequences" of permitting a prohibited action.

The federal courts, however, have limited the term for purposes of verifying employment-eligibility. Several courts interpreting INA § 274A have adopted a definition of constructive knowledge which originated in *United States v. Jewell*, 532 F. 2d 697, 698 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976), a case involving conviction for the crime of possession of a controlled substance, prohibited by 21 U.S.C. § 841(a)(1).

The leading § 274A case adopting this definition is *Aramark Facility v. Service Employees, Local 1877*, 530 F. 3d 817 (9CA, 2008). *Aramark* reviewed and distinguished earlier cases which involved a finding of constructive knowledge based on notice from the INS that certain employees had engaged in unauthorized employment.[11] Recognizing that the employment verification requirements of INA § 274A must be balanced against the protections of individuals from unlawful, immigration-related

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[10] See 8 CFR § 274a(1)(l)(1). This regulation also offers the following illustrative, but not exhaustive, examples:

> Constructive knowledge may include, but is not limited to, situations where an employer:
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> (i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;
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> (ii) **Has information available to it that would indicate that the alien is not authorized to work**, such as Labor Certification and/or an Application for Prospective Employer; or
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> (iii) **Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force** or to act on its behalf. (Emphasis added.)

The next subsection, however, 8 CFR § 274a(1)(l)(2), limits the application of constructive knowledge to except from its scope certain behavior that would constitute immigration-related employment discrimination:

> Knowledge that an employee is unauthorized may not be inferred from an employee's foreign appearance or accent. Nothing in this definition should be interpreted as permitting an employer to request more or different documents than are required under section 274(b) of the [INA] or to refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual.

[11] See *Mester Mfg. Co. v. INS*, 879 F. 2d 561 (9CA, 1989), and *New El Rey Sausage Co. v. INS*, 925 F. 2d 1153 (9CA, 1991). *Cf., Collins Foods Intern., Inc. v. INS*, 948 F. 2d 549 (9CA, 1991) (no constructive-knowledge finding where no law or regulation required an employer to "compare the back of a Social Security card with the example in the INS handbook . . . falls far short of the "willful blindness" found in *Mester* and *New El Rey Sausage*).

employment discrimination found in INA § 274B,[12] the *Aramark* court limited the application of the constructive-knowledge principle, stating:

> IRCA . . . is delicately balanced to serve the goal of preventing unauthorized alien employment while avoiding discrimination against citizens and authorized aliens. The doctrine of constructive knowledge has great potential to upset that balance, and it should not be expansively applied. The statute prohibits the hiring of an alien "knowing the alien is an unauthorized alien . . . with respect to such employment." 8 U.S.C. § 1324a(a)(1)(A) . . . When the scope of liability is expanded by the doctrine of constructive knowledge, the employer is subject to penalties for a range of undefined acts that may result in knowledge being imputed to him . . . To preserve Congress' intent in passing the employer sanctions provisions of IRCA, then, the doctrine of constructive knowledge must be sparingly applied.

This sparing application led the court in *Aramark* to conclude that an employer lacked constructive knowledge of unauthorized employment where the Social Security Administration (SSA) issued a "no-match" letter covering several employees. The Ninth Circuit made this finding, however, in a situation in which the employer gave the employees less than a week to provide acceptable evidence of identity and employment authorization.

It remains to be seen, however, whether constructive knowledge would be found if the employer accorded them an unlimited amount of time but took no follow-up action. Even though there may be legitimate reasons for a discrepancy between the employer's records and those of SSA, a failure by the employer to bring the inquiry to a conclusion might very well be viewed, as the Ninth Circuit articulated in *Jewell*, as "'a mental state in which the defendant is aware that the fact in question is highly probable but consciously avoids enlightenment,' or 'the defendant evidenced willful blindness.'"[13]

Another outcome yet unknown would be if constructive knowledge is applied to the situation in which the employer receives a report of a no-match discrepancy from a private party, say, a pension fund administrator, rather than a government agency. Nonetheless, prudent employers will likely investigate the reason for the discrepancy and reach a conclusion one way or the other to avoid the imputation of knowledge of unauthorized employment, assuming that a reasonable investigation would in fact have proven that the employee(s) lacked employment authorization.

What is due diligence?

Reasonable care, or due diligence, can come in many definitional flavors, as *West's Encyclopedia of American Law*[14] explains:

> Diligence
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> *Vigilant activity; attentiveness; or care, of which there are infinite shades, from the slightest momentary thought to the most vigilant anxiety. Attentive and persistent in doing a thing;*

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[12] INA §§ 274A and 274B came into law simultaneously with the enactment of the Immigration Reform and Control Act (IRCA), Pub.L. 99–603, 100 Stat. 3445, enacted November 6, 1986, also known as the Simpson–Mazzoli Act.

[13] *Collins Foods Intern., Inc., supra*, fn 11, at 566.

[14] See definition of diligence, *West's Encyclopedia of American Law*, Edition 2 (The Gale Group Inc., 2008), accessible at: http://legal-dictionary.thefreedictionary.com/diligence.

> *steadily applied; active; sedulous; laborious; unremitting; untiring. The attention and care required of a person in a given situation; the opposite of [n]egligence.*
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> There may be a high degree of diligence, a common degree of diligence, and a slight degree of diligence, with their corresponding degrees of negligence. Common or ordinary diligence is that degree of diligence which persons generally exercise in respect to their own concerns; high or great diligence is, of course, extraordinary diligence, or that which very prudent persons take of their own concerns; and low or slight diligence is that which persons of less than common prudence, or indeed of any prudence at all, take of their own concerns.
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> *Special diligence* is the skill that a good businessperson exercises in his or her specialty. It is more highly regarded than ordinary diligence or the diligence of a nonspecialist in a given set of circumstances. (Italics in original.)

Due diligence, thus, will vary with the situation, and the particular statute, regulation or legal principle under consideration, as stated in *Lawrence v. Lynch*, 826 F. 3d 198 (4CA, 2016):

> The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence. The inquiry is fact-intensive and case-specific, requiring a court to assess the reasonableness of petitioner's actions in the context of his or her particular circumstances. But this individualized inquiry has limits. As we have cautioned, the use of equitable tolling must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. We cannot loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation. (Citations and internal quote marks omitted.)

In *Lynch*, the Fourth Circuit declined to apply equitable tolling and extend the 90-day statutory deadline for filing a motion to reopen an order of removal – despite the urging of several immigrant rights groups – by claiming that the moving party, who had been deported to Jamaica and encountered obstacles to communicating with counsel, had failed to exercise "reasonable diligence."

For securities and immigration law purposes, however, the quantum of diligence legally due is likely to require special and exacting thoroughness. If pending proposals under the EB-5 program become law, involved parties would be required to certify the accuracy of representations made after a due diligence investigation.

The Securities and Exchange Commission has outlined the contours of "due diligence" and the resulting harm to investors that can be caused by an incomplete investigation thusly:

> The standards of disclosure imposed by the Securities Act require that the essential characteristics of a security be clearly understandable. We have previously noted that **a registration statement**, which contains all the facts necessary for the sophisticated investor who has the time and training to make an independent analysis of the information furnished **may**, nevertheless, **be misleading to investors who are unable to ferret out the significant facts from the complexity and detail of disclosures** dispersed among the numerous portions of the prospectus**. It is particularly important in connection with an offering such as is here proposed where there is only a limited record of earnings, where management is inexperienced, where the underwriter is new to the business, and where the proposed enterprise is subject to special risk**, that **these speculative features of the offering be made**

> **plainly evident to readers of the prospectus.** In other cases we have held that the statutory standards require that the speculative risk features of the registrant's business and securities be set forth in prominent and summary fashion at one place in in the early part of the prospectus under an appropriate heading (emphasis added).[15]
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As can be seen, lawyers face daunting challenges when trying to determine the meaning of abstruse concepts such as constructive knowledge and due diligence. Regrettably, attorneys practicing immigration law probably are among the most daunted, because this specialty area is extremely complex and often incomprehensible to many courts, lawyers, and the USCIS itself, not to mention the lay public:

> Whatever guidance the **[immigration] regulations** furnished to those cognoscenti familiar with procedures, this court . . . finds that they yield up meaning only grudgingly and that morsels of comprehension must be pried from mollusks of jargon. They **should be so written as to be comprehensible by intelligent laymen and unspecialized lawyers without the aid of both lexicon and inner-circle guide.** *Kwon v. INS*, 646 F. 2d 909, 919 (5CA, 1981). (Emphasis added.)

In the final analysis, Oscar Wilde is correct that "nothing that is worth knowing can be taught." Immigration lawyers thus are no doubt discomfited in the knowledge that unteachable and thus unknowable subjects like constructive knowledge and due diligence can never be fully grasped; they only may be observed from a distance through the opaque looking glass of case-by-case analysis in the light of the hard-to-discern purpose behind the promulgated laws and regulations at issue. In disheartening moments like these, therefore, it is best to recall Theodore Roosevelt's sage advice: "Far better is it to dare mighty things, to win glorious triumphs, even though checkered by failure . . . than to rank with those poor spirits who neither enjoy nor suffer much, because they live in a gray twilight that knows not victory nor defeat."

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[15] *In re The Richmond Corporation*, Sec. Act Release 4584 (Feb. 27, 1963), a case involving a public company. See also FINRA Regulatory Notice 10-22, Obligations of Broker-Dealers to Conduct Reasonable Investigations Into Regulation D Offerings (April 10, 2010), a 12-page outline of detailed steps for a broker-dealer to take to satisfy the reasonable-investigation requirement for a private offering, such as the typical EB-5 investment opportunity (accessible at http://www.finra.org/sites/default/files/NoticeDocument/p121304.pdf).