UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

In Re Investigation of Maria Carmen Valdivia-Sanchez

United States of America, Complainant v. Lasa Marketing Firms, a California Partnership; Lasa II, a California Business and Successor to Lasa Marketing Firms; Javier Sapien, an Individual, d/b/a Sapien Enterprises and Lasa Marketing Firms, and Cecil Lampkins, an Individual, d/b/a Lasa Marketing Firms, Respondent; 8 U.S.C. § 1324b Proceeding; Case No. 88200061.

AMENDED DECISION AND ORDER

I. Introduction:

On November 6, 1986, this country embarked upon a new course in its ongoing effort to live with the complicated legacies of being the world's preeminent ``nation of nations.'' Our long history of ambivalent receptiveness toward immigrants is reflected in the complexities of the 1986 Immigration Reform and Control Act (``IRCA'').

At its core, IRCA set out provisions for three significant departures from traditional immigration law and policy. First, and least ambivalently, IRCA provided for the ``amnesty'' of persons who had been living in a previously ``undocumented'' and legally unrecognized status.[1]Amnesty, or legalization, permitted those who met certain carefully established criteria, to ``adjust status'' to ``temporary residence,'' and ultimately, if they met all the requirements, to acquire full citizenship. See, 8 U.S.C. § 1255a. Second, IRCA established, on a more experimental basis, a controversial program of ``sanctions'' against employers who hired, or continued to employ, persons unauthorized to work in the United States. See, 8 U.S.C. § 1324a. Third, and largely as a result of the consensus to under-

[1]For a sensitive discussion of the ongoing tensions and ambiguities of the amnesty provisions of IRCA, see, Bosniak, ``Exclusion and Membership: The Dual Identity of the Undocumented Worked Under United States Law,'' 1988 Wis. L. Rev. 955 (1988).

take the socio-legal experiment of employer sanctions, Congress structured into IRCA substantive and procedural protections to control ``unfair immigration-related employment practices.'' See, 8 U.S.C. § 1324b.

The following decision and order interprets and applies the law of this third cornerstone of IRCA. Without any doubt, there has been substantial and ongoing public and private concern that the effort to implement an across-the-board employer sanctions program could potentially result in ``unfair immigration-related employment practices'' and wide-spread discrimination against persons who, though clearly authorized to reside and work in the United States, nevertheless appear, physically or linguistically, ``foreign.''[2]

What is unique about IRCA is that, in addition to underscoring a traditional recognition to prohibit unlawful discrimination on ac-

[2]It is hardly possible to reflect here the range or tenor of concerned voices that contributed to the public deliberation of perspectives that ultimately became aggregated into the statutory language of the so-called ``Frank Amendment'' as codified at 8 U.S.C. § 1324b. One source that reflects the depth of these concerns is the legislative history found in the House Report No. 99-682(I):

> Numerous witnesses over the past three Congresses have expressed their deep concern that the imposition of employer sanctions will cause extensive employment discrimination against Hispanic-Americans and other minority group members. These witnesses are genuinely concerned that employers, faced with the possibility of civil and criminal penalties, will be extremely reluctant to hire persons because of their linguistic or physical characteristics.
>
> Representative Robert Garcia testified that `as a shorthand for a fair identification process, employers would turn away those who appear `foreign' whether by name, race, or accent. (Joint Hearing Before the House Subcommittee on Immigration Refugees and International Law and the Senate Subcommittee on Immigration and Refugee Policy, Anti-Discrimination Provision of H.R. 3080, Serial No. 35, p. 111;) . . . every effort must be taken to minimize the potentiality of discrimination.' H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 68.
>
> Further examination of the legislative history indicates that it was the consensus of Congress that wholesale employment discrimination would not necessarily result from the enactment of employer sanctions provisions. Nevertheless, the careful structuring into the law of uniform verification procedures for all new hires, as well as the extensive monitoring and reporting on the discrimination issue by the General Accounting Office, indicates the caution with which Congress embarked upon IRCA. See also, Institute for Public Representation, Georgetown University Law Center, `Discriminatory Effects of Employer Sanctions Programs Under Consideration by the Select Commission on Immigration and Refugee Policy,' in Appendix E to the Staff Report of the Select Commission on Immigration and Refugee Policy Papers on Illegal Migration to the United States (1981); Scaperlanda, `The Paradox of Title: Discrimination within the Anti-Discrimination Provisions of the Immigration Reform and Control Act of 1986,' 1988 Wis. L. Rev. 1043 (1988); Welin, `The Effect of Employer Sanctions on Employment Discrimination and Illegal Immigration,' 9 Bost. Coll. Third World L.J. 249 (1989).

count of national origin, section 1324b for the first time addresses the issue of unlawful discrimination on account of alienage or citizenship status. Prior to the enactment of IRCA, the most judiciably developed source of protection provided to aliens against unlawful discrimination was found in case law interpreting and applying Title VII of the Civil Rights Act of 1964.

Title VII provides protection to individuals from discrimination based on race, religion, color, sex or national origin. The prohibition covers private employers of 15 or more persons. In a landmark case interpreting a Title VII case involving a Hispanic woman who was refused employment for a job on account of her alienage, the Supreme Court observed that:

> Title VII protects all individuals from unlawful discrimination whether or not they are citizens of the United States . . . certainly it would be unlawful for an employer to discriminate against aliens because of race, color, religion, sex, or national origin--for example, by hiring aliens of Anglo-Saxon background but refusing to hire those of Mexican or Spanish ancestory. See, Espinosa v. Farah Mfg., 414 U.S. 86, at 95 (1973).

Despite the recognition that Title VII protects aliens from discrimination on account of national origin, the Farah Court held that ``nothing in [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage.'' Id, 414 U.S. at 95.

It was because of this gap in the law's protective capabilities that Congress enacted section 1324b to further enhance the traditional public policy of equal citizenship.[3]

As stated in the legislative history of IRCA, ``(i)t 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.'' See, H.R. Rept. No. 682 99th Cong. 2d Sess. pt. 1, at 70.

It is precisely this kind of question that I have to decide in the case before me. Accordingly, pursuant to the authority granted me in the statute and implementing regulations, the following decision and order reviews Complainant's allegation that Respondent violated section 1324b when it refused to refer her for employment because of her citizenship status. See, 8 U.S.C. § 1324b(g); see also, 28 C.F.R. § 68.51.

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[3] ``The idea of equal citizenship focuses on those inequalities that are particularly likely to stigmatize, to demoralize, to impair effective participation in society, or to put the matter more positively, on `the needs that must be met if we are to stand to one another as fellow citizens.' '' See, Karst, Belonging to America, Yale Univ. Press (1989); and Walzer, Spheres of Justice: A Defense of Pluralism and Equality, Basic Books (1983).

II. Procedural History:

Ms. Valdivia-Sanchez, the complaining party, filed a charge against Respondent with the Office of Special Counsel (``OSC'') on November 10, 1987. Her charge was not received by OSC until December 22, 1987.

After reviewing Ms. Valdivia's application, OSC filed a Complaint on her behalf with this office on July 12, 1988. A Notice of Hearing was issued by OCAHO on July 18, 1988.

On November 7, 1988, Complainant filed a Motion for Partial Default Judgment for failure to timely answer the allegations contained in the Complaint. On November 17, 1988, I issued a Preliminary Order to Stay, and thereby permitted pro se Respondent additional time to file an Answer which, on November 28, 1988, it did. Accordingly, on December 5, 1988, I denied Complainant's Motion for Partial Default Judgment.

On January 27, 1989, Respondent filed a ``Motion to Dismiss'' arguing that Complainant had not provided Respondent with any documents to prove that she was authorized to work at the time she applied for work with Lasa Marketing. Upon closer examination, I viewed Respondent's Motion to be a pro se request to Compel Discovery, and denied its ``Motion to Dismiss Complaint'' as premature. See, ``Order Denying Respondent's Motion to Dismiss Complaint,'' February 2, 1989.

After extensive efforts to complete discovery, Complainant filed a Motion for Summary Decision on March 20, 1989. On April 5, 1989, I denied Complainant's Motion for Summary Decision on the grounds that there was, in my view, a genuine issue of material fact with respect to the telephonic communication that was transacted between Complainant and Respondent's representative on about November 5, 1987.

On April 10, 1989, a hearing on the merits of this case was held in San Diego, California.

Complainant filed a post-hearing brief with proposed findings of fact and conclusions of law on June 16, 1989.

After deliberation, I issued, on August 10, 1989, and August 31, 1989, separate orders directing legal argument.

On October 4, 1989, Complainant filed a ``Post-Brief Memorandum.''

Respondent filed no post-hearing pleadings with this office.

On November 27, 1989, I issued a Decision and Order in this case.

On December 13, 1989, Complainant filed a Motion to Amend the Decision and Order.

On March 14, 1990, I granted Complainant's Motion to Amend and stated therein that I would issue this Amended Decision and Order.

III. Statement of Facts:

In order to understand fully the facts in this case, it is first necessary to identify properly the parties.

Ms. Valdivia first entered the United States in 1974 as an alien without legal immigration status to reside in the United States. On August 7, 1987, Ms. Valdivia filed an application to legalize her status under the terms of IRCA. See, 8 U.S.C. § 1255a. She was granted an adjustment in her status to an alien lawfully admitted for temporary residence on January 12, 1988, effective from the original filing date of August 7, 1987. Thus, as of November 5, 1987, Ms. Valdivia was a temporary resident alien of the United States because she had met all the criteria of the amnesty program of IRCA. Moreover, both parties stipulated that Ms. Valdivia was an ``intending citizen.''

Respondent, Mr. Lampkins, was in partnership with a man named Sapien and doing business as LASA Marketing Firms in July and November 1987. See, Exhibit C-21, Nos. 6 and 7. LASA Marketing Firms was in the business of recruiting and referring for a fee for both employment and training in November 1987 and, at that time, employed more than four employees. See, Exhibit C-20, Nos. 12 and 13. The parties stipulated that Mr. Lampkins, d.b.a. LASA II, is the successor entity to LASA Marketing Firms. See, Exhibit C-20, No. 1.

Mr. Lampkins testified that his responsibilities at LASA included reviewing and evaluating the applications for employment referral.

Two communicational encounters between Ms. Valdivia and Respondent are at the center of deciding this case.

(1) The Events of July 1987:

On or about July 7, 1987, Ms. Valdivia saw an advertisement in the Spanish language newspaper La Opinion. The advertisement stated that clerks, secretaries, cashiers and stockroom people were needed and that no experience was required. Ms. Valdivia went directly to the office listed in the advertisement. The office listed was LASA Marketing firms.

At LASA, Ms. Valdivia filled out an employment application form. The LASA employment application requested Ms. Valdivia's citizenship status, and Ms. Valdivia wrote on the application form that she was born outside the United States.

After Ms. Valdivia completed the application, she presented it to a LASA employee, named Mr. Martinez, who asked her, in Span-

ish, if she had her ``papers'' or work authorization. Upon request, Ms. Valdivia presented to Mr. Martinez her driver's license, social security card, and two letters indicating that she intended to apply for legalization through a church, or qualified designated entity.

Both parties testified that Mr. Martinez took these documents to Mr. Lampkins who was, at the time, sitting in a back office. Mr. Lampkins reviewed Ms. Valdivia's application, along with her driver's license, social security card and the two letters. Mr. Lampkins told Mr. Martinez to ask Ms. Valdivia if she had further documentation. Mr. Lampkins testified that he did not specify what further documentation he wanted from Ms. Valdivia.

Ms. Valdivia testified that she told Mr. Martinez that she did not have further documentation and that, as a result, she was rejected for employment referral. Mr. Lampkins testified that he made the decision to reject Ms. Valdivia because he had determined that she ``needed more papers.''

Ms. Valdivia was not referred by LASA Marketing Firms in July 1987.

(2) The Events of November 1987

On or about November 5, 1987, Ms. Valdivia again spotted an advertisement for a part-time position as a cashier for Annex Drugs and telephoned the LASA office concerning employment referral. Ms. Valdivia spoke with a LASA employee named Patricia Bryant and their entire conversation was in Spanish.

Ms. Valdivia told Ms. Bryant that she already had an application on file with LASA. Ms. Valdivia asked Ms. Bryant if they were still hiring for the position at Annex Drugs, and Ms. Bryant stated stated that they were interviewing people on Monday.

Ms. Bryant told Ms. Valdivia that she would need her ``papeles'' for the interview. Ms. Valdivia understood this to mean that she would need her ``green card'' or her alien registration card.

Ms. Valdivia testified that she told Ms. Bryant that she no longer had the ``letters'' that she had shown in July because she now had work authorization from the Immigration and Naturalization Service for employment in the United States. Ms. Valdivia further testified that she told Ms. Bryant that she had obtained this work authorization as part of her legalization in the United States. Ms. Valdivia specifically described her work authorization card as issued by the INS on Form I-668A. See, Exhibit C-1. She testified that she felt more confident of her eligibility to work because ``Immigration had given me this card.''

Ms. Valdivia further testified that in response to her having described her work authorization card, Ms. Bryant said that that

kind of work authorization was not enough proof of her work authorization and was not acceptable to LASA.

In contrast, Mr. Lampkins testified that he was told that ``the woman had no additional documentation'' and that it was for this reason that he did not refer her. He also testified that he completely trusted Ms. Bryant to ask Ms. Valdivia if she had more papers proving her eligibility to work in the United States.

After the telephone conversation of November 5, 1987, Ms. Valdivia had no further communications with Respondent. Ms. Valdivia was not referred to Annex Drugs, or any other employer; because, in the evaluation of Respondent, she did not present LASA with additional work authorization documentation.

IV. Legal Analysis:

As stated, IRCA initiated a new source of protection from discrimination in American society. 8 U.S.C. § 1324b. Section 1324b(a) prohibits ``unfair immigration-related employment practices'' that involve discrimination based on national origin or citizenship status. The general rule provides that:

> It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien as defined in section 1324a(h)(3)) with respect to the hiring, or recruiting or referral for a fee, of the individual for employment . . . .
>
> (A) because of such individual's national origin, or
>
> (B) in the case of a citizen or intending citizen (as defined in paragraph (3)), because of such person's citizenship status.
>
> 8 U.S.C. § 1324b(a)(1)

The statutory language of IRCA does not, in itself, contain any working definition of ``discrimination,'' nor does it indicate by what evidentiary allocation of proof Congress intended these cases to be decided. Moreover, the currently operative regulations governing the ``judicial administration'' of cases involving unfair immigration-related employment practices also do not define discrimination or specifically indicate the exact nature or allocation of evidentiary proof required to demonstrate a ``prohibited practice.'' 8 C.F.R. Part 44,200(a). Accordingly, I intend to look, at the outset, to sources of traditional employment discrimination law for suggested approaches to resolving complaints of unfair immigration-related employment practices brought under IRCA.

A. Definitions and Burdens of Proof

For all the ink that has been spilled in the effort, employment discrimination law remains an analytic mud slide. At the outset, a

proper analysis calls for a discussion of definitions and burdens of proof.

1. Definitions

While Title VII specifies provisions regarding unlawful employmnent practices and uses the term ``discriminate,'' nowhere in the statute is there an explicit definition of that crucial term. Instead, what has emerged in the interpretation of the law is an ad hoc approach to the definition of discrimination. See, Sullivan, Zimmerman, and Richards, Federal Statutory Law of Employment Discrimination, at 3-15 (1980).

The root of the word ``discrimination'' is a group of Latin words: discernere, discrimen, discriminare (later also discrimination). The common meaning is to divide, to segregate; in addition, the meaning includes, to distinguish, to judge, to decide. See, T. Ramm, ``Origin and History of the Term Discrimination,'' Discrimination in Employment, The Comparative Labor Law Group, at 17 (1978).

In English usage, the word ``discrimination'' has two meanings. In the first and neutral sense of the word, to discriminate means to make or observe a difference or a distinction. Discrimination is also used, however, in a second, more pejorative sense, to mean an unfair difference in the legal, social or economic treatment of persons. Id. These two uses of the word ``discrimination'' might be usefully distinguished and abbreviated by referring to them as discrimination ``between'' and discrimination ``against.'' See, The International Encyclopedia (Grolier ed.), Vol. VI, at 42 (1965) (which defines ``discrimination between'' to mean ``the process of making subtle distinctions by the skillful application of relevant standards'' and ``discrimination against'' to imply ``the inability to make such distinction because of the use of irrelevant standards'').

It is necessary to distinguish between these two types of discrimination because it is essential, in a society of competing interests, to scrutinize everyday decisions to discriminate ``between'' various options in order to determine if they are based on illegitimate motives to discriminate ``against,'' i.e. is there a ``legitimate non-discriminatory reason'' for the decision that is made. See, infra.[4]

[4]It should also be noted that certain international organizations have attempted to define ``discrimination'' in usefully protective ways that could potentially assist in the effort to resolve national anti-discrimination problems. For example, a potentially helpful definition of discrimination can be found in a number of Conventions and Recommendations adopted by the International Labour Organization. Specifically, the Convention No. 111 and the Recommendation No. 111, both of which were adopted in 1958 and deal with discrimination in employment and occupation, define discrimination as:

2. Burdens of Proof

It is, at this point, firmly established that claims of unfair immigration-related employment practices brought under IRCA must be proven according to a disparate treatment theory of discrimination as distinguished from a disparate impact theory.[5]

To establish discrimination under a disparate treatment standard, an IRCA claimant must show that the employer knowingly and intentionally treated her/him less favorably than others based on unlawful criteria such as national origin or citizenship status. See, 28 C.F.R. § 44.200(a). The United States Supreme Court explained what was required in a disparate treatment case in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S. Ct. 1843 (1977). There, the Court stated that:

> `Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can be inferred from the mere fact of differences in treatment.

Teamsters, at 1854 n.15.

Case law interpretations of parallel Title VII prohibitions reveal two modes of proving a disparate treatment case. One mode permits a showing of direct evidence of discriminatory intent. The second mode permits a showing of discriminatory intent by means of indirect or circumstantial evidence.

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any distinction, exclusion of preference (based on one of the grounds which these instruments enumerate) which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

It is interesting to note that the definition given in the 1958 instruments covers both situations in which equality of opportunity is ``nullified'' and those--more difficult to identify--where it is only ``impaired.'' See, Rossilin, ``ILO Standards and Actions for the Elimination of Discrimination and the Promotion of Equality of Opportunity in Employment,'' 14 Bulletin of Comparative Labour Relations 19 (1985).

[5]As is well-known at this point, the origins of this view that § 1324b claims can only be proved under a disparate treatment theory of discrimination lie in President Reagan's statement accompanying his signing of the bill. According to the President, section 1324a requires proof that the respondent intended to discriminate against the complainant because of his national origin or citizenship. See, ``Presidents' Statement on Signing S.1200 Into Law,'' 22 Weekly Comp. Pres. Doc. 1534, 1535 (November 6, 1986), reprinted in Interpreter Releases, Vol. 63, No. 44, November 10, 1986, pp. 1036-39; see also, ``Standards of Proof in Section 274B of the Immigration Reform and Control Act of 1986,'' 41 Vanderbilt Law. Rev. 1323 (1988); but Cf., Gardner & Wimmer, ``Presidential Signing Statement Power,'' 24 Harv. J. on Leg. 351 (1987).

Distinguishing between circumstantial and direct evidence remains a necessary and pervasively difficult practice in all areas of the law.[6]

As applied to employment discrimination cases, this general distinction between circumstantial and direct evidence has been utilized by the Supreme Court in its discussion of the important issue of burden of proof in disparate treatment cases. See, e.g., TWA v. Thurston, 469 U.S. 111, 121, 105 S. Ct. 613, 621-22, (1985) (``The McDonnell Douglas test is inapplicable where the injured party presents direct evidence of discrimination.'').

In Thurston, the Court held that a company policy which restricted the transfer of 60 year-old airline pilots was discriminatory on its face and therefore constituted direct evidence of discriminatory intent. Since there was direct evidence of discriminatory intent, the Court held that there was no need to apply the traditional analytic ``minuet'' as established in McDonnell Douglas and progeny to determine whether a complainant has sustained their burden of proof. See, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP 965 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP 113 (1981).

According to this analytic ``minuet,'' the basic allocation and order of proof of disparate treatment cases presenting indirect evidence requires that the complainant:

> (1) establish a prima facie case;
>
> (2) the employer must then articulate a legitimate, non-discriminatory reason for its actions;
>
> (3) and, finally, the complainant must prove that this proffered reason is a pretext for intentional discrimination.

This approach, though a most useful framework, is not, in light of subsequent Supreme Court decisions, to be applied mechanistically. See, United States Postal Service Board of Governers v. Aikens, 460 U.S. 411 (1983); see also, Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984); see also, Schlei & Grossman, Em-

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[6]For example, one court has said that:

> Circumstantial evidence is that which establishes the fact to be proved only through inference based on human experience that a certain circumstance is usually present when another certain circumstance or set of circumstances is present. Direct evidence establishes the fact to be proved without the necessity for such inference. See, Radomsky v. United States, 180 F.2d 781, 783 (9th Cir. 1950).

Moreover, as one commentator has added, the only inference that is needed to prove a case by direct evidence is that the witness (or document) is credible. See, Edwards, ``Direct Evidence of Discriminatory Intent and the Burden of Proof: An Analysis and Critique,'' 43 Wash. & Lee L. Rev. 1 (1986).

ployment Discrimination Law, 2nd Ed., and, Five-Year Supplement, ed. By Cathcart & Ashe (1989).

In Aikens, the Supreme Court held that consideration of the McDonnell Douglas and Burdine analytic framework should not cause courts to lose sight of the ultimate issue: whether the complainant sustained the burden of proving that the respondent intentionally discriminated against him/her.

> But when the defendant fails to persuade the district court to dismiss for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for plaintiff's rejection, the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII.
>
> At this stage, the McDonnell Douglas-Burdine presumption `drops from the case' and the factual inquiry proceeds to a new level of specificity. . . . See, Aikens, supra, at 714-15.[7]

Having discussed generally the framework of evidentiary analysis as derived from Title VII case law, I turn the analysis to whether an IRCA Complainant has met its burden of proof in showing that Respondent knowingly and intentionally discriminated against Complainant.[8]

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[7]Though I do not believe that it specifically applies to the case at bar, it is important to note that recent decisions regarding ``mixed motive'' cases will certainly affect subsequent attempts to analyze issues of burden of proof in employment discrimination cases. See e.g., Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989). In Price Waterhouse, the Supreme Court recently decided a case in which the Court for the first time clearly imposed the burden of proof on employers. In a 6-3 decision, the Supreme Court agreed with the lower courts' conclusions that the defendant accounting firm bore the burden of proof. In reaching this conclusion, the Court accepted the lower courts' findings that the employer, in rejecting the plaintiff for partnership, had relied on both illegitimate (sexual stereotyping) and legitimate (deficient interpersonal skills) motives in making its employment decision. In such ``mixed-motive'' cases, the Supreme Court held, the employer must prove by ``preponderant evidence'' (not clear and convincing as found by the lower courts) that the ``legitimate reason standing alone would have induced it to make the decision.'' Id.; see also, Adams v. Frank, --F. Supp.--, 49 FEP 1276 (E.D. Va. 1989) (In the first district court decision interpreting Price Waterhouse, the Virginia Court found that the mixed-motive standard of proof does not replace the traditional proof framework for disparate treatment cases and does not apply until a showing is made by preponderant evidence that illegitimate motives played some part of the decision); and, Smith v. Firestone Tire & Rubber, Co., -- F.2d --, 49 FEP 1730 (7th Cir. 1989) (Court refused to apply burden-shifting framework of Price Waterhouse where the plaintiff had offered statements by management officials which were ``inferential evidence of racial prejudice'' and not substantial enough to warrant shifting the burden of proof to the employer.).

[8]Transposing Title VII jurisprudence to questions arising in an IRCA context remains an ongoing process of interpretive discovery for all parties. As Judge Morse has stated, it is clear that precedent governing Title VII and the Age Discrimination in Employment Act is helpful in interpreting IRCA's provisions. See, United States

B. Threshold Legal Issues as Stipulated to by Parties:

Before proceeding with an analysis of the legal arguments on the ultimate issue of liability, however, I want to succinctly recapitulate and summarize the preliminary legal issues which the parties agreed to prior to the hearing.

The parties stipulated that:

1. Complainant is an intending citizen and thus protected from citizenship status discrimination. See, Trial Exhibit C-22, Nos. 2, 3, 4, 5, 6, and 7; see also, Mesa Airlines, supra, n. 8, (wherein Judge Morse thoroughly discussed the issue of ``intending citizen'');

2. Complainant filed a timely charge of discrimination; See, 8 U.S.C. § 1324b(d)(3) and 28 C.F.R. § 44.300(b); and

General. It is an unfair immigration-related employment practice for a person or other entity to knowingly and intentionally discriminate or engage in a pattern of practice of knowing and intentional discrimination . . . . Id. (emphasis added)

3. Respondent is properly identified as Cecil Lampkins, d.b.a. LASA II, a California business and ``successor entity'' to ``LASA Marketing Firms,'' which was a partnership between Cecil Lampkins and Javier Sapien. As the ``successor entity'' to ``LASA Marketing Firms,'' Mr. Lampkins is individually responsible for any liability found against LASA Marketing Firms. See, Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975) (wherein the Ninth Circuit adopted the principle that successor liability applied to redress an individual victim of discrimination); see also, Bates v. Pacific Maritime Association, 744 F.2d 705 (9th Cir. 1984); Equal Employment Opportunity Commission v. Macmillan Bloedel Containers, 503 F.2d 1086 (6th Cir. 1974). In view of this stipulation, liability in this proceeding is limited to Mr. Lampkins in his individual capacity and to LASA II, the successor entity to LASA Marketing Services. In this regard, the charges against all other parties named in the Complaint are, on the basis of the stipulation, dismissed. Thus, the sole Respondent in this case is, notwithstanding the misleading caption of the Complaint, Cecil Lampkins, an individual, d/b/a LASA II, a California business and successor to LASA Marketing Firms; and,

4. Respondent is a covered entity under § 1324b of IRCA because:

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v. Mesa Airlines, OCAHO Case Nos. 88200001 and 88200002 (ALJ Morse, July 24, 1989). Such precedent is not, however, conclusive, and may be quite limited insofar as the Department of Justice regulations in cases involving unfair immigration-related employment practices identifies a ``prohibited practice'' in a way that goes beyond the traditional statutory and interpretive case law for Title VII complaints. See, 28 C.F.R. part 44.200(a):

(a) it is a recruitment or referral for a fee entity which employed more than four employees;

(b) none of the exceptions found in § 1324b(a) (2) are available to Respondent.

Having reviewed these key threshold stipulations, I turn to an analysis of the ultimate issue of whether Respondent discriminated against Ms. Valdivia by refusing to refer her for employment in November of 1987.

C. Respondent Discriminated Against Ms. Valdivia When It Rejected Her Application and Refused to Refer Her for Employment

As stated above, an alternative way of framing the ultimate issue in Title VII employment discrimination cases can be stated in the following way:

> In other words is the `employer . . . treating some people less favorably than others because of their race, color, religion, sex or national origin.' Furnco Construction Corp. v. Waters, 438 U.S. 567, 577, 98 S. Ct. 2942, 2949 (1978), quoting, Teamsters v. United States, 431 U.S. 324, 335, n. 15, (1977). Aikens, supra, at 715.

Complainant, as represented by Office of Special Counsel, argues that both direct and circumstantial evidence in this case demonstrate that Respondent violated section 1324b by treating Ms. Valdivia less favorably than others on account of her citizenship status.

1. Complainant's Direct Evidence Argument[9]

The heart of Complainant's direct evidence argument is grounded in the testimony of Respondent in the person of Mr. Lampkins. Mr. Lampkins testified:

> Q. [Office of Special Counsel]: Who were you asking work authorization from?
>
> A. [Mr. Lampkins]: From applicants who came in who--Ms. Valdivia filled out her application in Spanish. I don't know whether she said that to you or not, and on that application it asks are you a U.S. citizen or do you have legal entry into the United States, or are you able to work. she marked the third one.
>
> Q. That she was able to work?
>
> A. No, she was not. She had--she was trying to get legal. She was not legal.
>
> Q. So you--you knew that she was trying to gain--obtain legal legal status?

[9]At least one commentator has stated that the significance of proving a discrimination case with direct evidence is that:

> The plaintiff's proof by means of direct evidence of discrimination does not merely fulfill his burden of showing a prima facie case; it suffices to make his entire case and throws the burden on the defendant of proving, at least by a preponderance of the evidence, that it would have rejected the plaintiff even in the absence of discrimination. See, Larson, Employment Discrimination, § 50. 62, at 10-68.

A. Well, I don't know anything. I know she filled out an application.

Q. OK. If someone filled out the box and checked U.S. citizen, isn't it true that you wouldn't check their work authorization?

A. Of course not if they're a U.S. citizen.

Q. OK. If someone checked that they were an alien but had work authorization you would check their work authorization?

A. Right, we'd have to see--it has to be documented somehow. See, Tr. 115/21-116/19.

Complainant presses its direct evidence argument most specifically on Mr. Lampkins' testimony that, on behalf of LASA, he did not check the work authorization of U.S. citizens, but that he did check the work authorization of aliens. I agree with Complainant that the totality of the record shows that Mr. Lampkins, as authoritative decision-maker for LASA, intentionally treated alien employment applicants differently from citizen employment applicants.[10]In effect, Mr. Lampkins' testimony shows that he had, on behalf of LASA, a policy of differentiating between citizens and aliens in such a way that resulted in, or could result in, discrimination against individuals on a prohibited basis, i.e., citizenship status. Cf. e.g., TWA v. Thurston, supra. Simply stated, in its differential requests for work authorization undertaken while reviewing employment referral applications, Respondent treated individuals differently for reasons that are now, under IRCA, prohibited.

IRCA, as presently applicable through the implementing regulations of the Department of Justice, however, requires a show of proof beyond that specified in traditional Title VII jurisprudence. In this regard, I am not of the view that the record demonstrates that there is ``direct'' evidence that Respondent, in the person of Mr. Lampkins, intentionally and knowingly discriminated against Ms. Valdivia on November 5, 1987. Rather, it is my view, that there has not been a sufficient showing that Respondent, understanding what IRCA required with respect to the referral for a fee of an individual authorized for employment in the United States,

[10]Mr. Lampkins testified about LASA's work authorization requirements in several different, but non-contradictory ways. Cf. Tr. 115/21-116/19 and Tr. 159/14-160/11; see also, ``Affidavit in Support of Motion for Summary Decision,'' by Kirk Flagg, to which a portion of Mr. Lampkins' Deposition was attached, pages 68-69. Though the difficulties of fact-finding in situations involving pro se parties cannot be under-emphasized, it is my view that the record is devoid of any indication that Respondent did not understand the questions asked or did not answer in a way that reflected what the operational policies of LASA actually were.

proceeded nevertheless to knowingly and intentionally discriminate against Complainant.[11]

The record is quite clear that Mr. Lampkins, as LASA's manager in charge of reviewing each employment referral application, was not ``familiar'' with even the most general concepts of IRCA.

> [Judge Schneider]: . . . in connection with your duties and responsibilities did you have at that time some familiarity with your responsibilities under the Immigration Act of 1986 with respect to it being illegal to refer persons . . . who were illegally in this country who were not work authorized? Were you familiar with that concept . . . ?
>
> [Mr. Lampkins]: Your Honor, I was--I was not familiar through anything I read. I was familiar with the climate.
>
> [Judge Schneider]: . . . You hadn't been instructed by INS as to what your duties and responsibilities--
>
> [Mr. Lampkins]: No, sir.
>
> [Judge Schneider]: Nor had you read any booklets on your responsibilities, is that correct?
>
> [Mr. Lampkins]: No, sir.
>
> See, Tr. 138[12]

Evidence of a respondent's vague awareness merely of IRCA's ``climate,'' while inexcusable as a defense to a charge of liability arising under sections 1324a or 1324b, is not enough, in my view, to support a conclusion that there is direct evidence of ``knowing'' and intentional discrimination. Complainant failed to show, in support

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[11]While it is not inconceivable that I could find direct evidence of discrimination based on imputed knowledge, I do not think that such an application is warranted in the present case because, at the point in time at which this present cause of action is based (less than a year after the initiation of the effective enforcement date), the law was very new and confusing to many employment decision-makers, especially with respect to the proper understanding and use of immigration-related employment documents in determining the employment eligibility of prospective employees. See also, footnote 13, infra. While such confusion is not, ultimately, an excuse or defense to prohibited acts of discrimination, it must, in my view, nevertheless be seen in a more ``circumstantial'' context than is permitted by a mechanistic application of a direct evidence test.

[12]See also, Tr. at 170-171:

Mr. Flagg (OSC representative): Mr. Lampkins, you were asking for this work authorization for purposes of IRCA . . . .

Mr. Lampkins: Not necessarily to just satisfy IRCA, but to--make sure that they were not illegal in Los Angeles in hiring people who were not documented.

Mr. Flagg: You were having more requirements than IRCA does?

Mr. Lampkins: Probably less.

Mr. Flagg: But if someone met the IRCA requirements of proving work authorization that would be acceptable to you?

Mr. Lampkins: Well, I'm not really totally familiar with IRCA's regulations anyway Counselor, so I really can't--. Id.

of its direct evidence argument, that Respondent not only knew the citizenship status of Ms. Valdivia (as an applicant for adjustment of status to a temporary resident alien pursuant to the amnesty provisions of IRCA[13]), but that Respondent also knew the significance of her temporary resident alien applicant status, i.e. that she was authorized to be employed in the United States, and nevertheless proceeded, on the basis of what was known, to intentionally discriminate against her.

It is my view that Complainant did not make such a showing, and I therefore remain unpersuaded by its direct evidence argument that Respondent knowingly and intentionally discriminated against Ms. Valdivia.[14]

2. Complainant's Circumstantial Evidence Argument

Although not, as discussed above, strictly necessary to meeting its burden of proof in support of its circumstantial evidence argument, it should be noted that Complainant demonstrated, and Respondent did not dispute, all of the elements of a traditional prima facie case. See, McDonnell Douglas, supra.[15]

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[13]It is yet another technical idiosyncrasy of our characteristically hyper-technical immigration laws that, on November 5, 1987, Ms. Valdivia was, de facto, a section 245A amnesty applicant but that, subsequent to INS granting her legalization application in January 1988, effective from the date of filing on August 1987, she was, de jure, a temporary resident alien beginning August 1987. The real issue, however, is not whether Ms. Valdivia was a de facto applicant or a de jure temporary resident alien at the time that she called LASA on or about November 5, 1987, but that, under either legal characterization, she was clearly authorized for employment in the United States pursuant to the authority of her INS-issued I-668A Employment Authorization Card, as issued on October 9, 1987.

[14]Numerous non-governmental reports have recently expressed concern that employers are still not making employment decisions in a way that reflects a knowledgeable understanding of their obligations under the anti-discrimination provisions of IRCA. See, e.g., MALDEF/ACLU, The Human Costs of Employer Sanctions, November, 1989; U.S. Comm'n on Civil Rights, ``The Immigration Reform and Control Act: `Assessing the Evaluation Process' '' (1989); City of New York Comm'n on Human Rights, ``Tarnishing the Golden Door: A Report on the Widespread Discrimination Against Immigrants and Persons Perceived as Immigrants Which Has Resulted from the Immigration Reform and Control Act of 1986'' (1989). In addition, Congress has indicated, in currently pending legislation, that it views the education of employers to be an ongoing need, and has, toward that end, allocated $1 million to Office of Special Counsel to ``inform employers of their obligations and job applicants of their rights'' under IRCA. See, H.R. Conf. Rep. No. 299, 101st Cong., 1st Sess. 33 (1989).

[15]First, there is no dispute that Ms. Valdivia was a member of a protected class, i.e. an intending citizen. Second, she applied and was qualified for the unskilled cashier job. Third, despite her qualifications, she was not considered for referral for the job. Fourth, Mr. Lampkins testified that LASA referred U.S. citizens and permanent resident aliens for employment subsequent to Ms. Valdivia's rejection. See, Tr. 113/8-13; see also, Exhibit C-20 #15.

Since Respondent has, however, admitted that LASA treated applicants for referral differently based on their citizenship status, citizenship status discrimination need not be presumed in this case. Tr. at 116.

Accordingly, the key question now becomes, as I see it, whether Respondent met its burden of production to articulate a legitimate non-discriminatory reason for making its employment decision not to consider further Ms. Valdivia's application for referral. See, Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S. Ct. 1089, 1094 (1981).

It is well-established that the ``burden of production'' as distinguished from the ``burden of persuasion'' is relatively light. Therefore, Respondent need not persuade me that it was actually motivated by the proffered reason: ``It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against plaintiff.'' Id., at 254-55; see also, Williams v. Edward Apfels Coffee Co., 792 F.2d 1482 (9th Cir. 1986) (employer's evidence must raise genuine issue of fact as to whether it discriminated against plaintiff); Curry v. Oklahoma Gas & Electric Co., 730 F.2d 598 (10th Cir. 1984); George v. Farmer's Elec. Coop., 715 F.2d 175 (5th Cir. 1983).

The employer must, however, articulate the actual reason for the challenged employment decision and courts have continued to require that, under Burdine, the Respondent articulate its nondiscriminatory reason for the challenged action with requisite specificity. See, Schlei & Grossman, Employment Discrimination Law, supra, Five Year Cumulative Supplement, at 480-81, citing, e.g., Miles v. M.N.C. Corp, 750 F.2d 867 (11th Cir. 1985) (vague, subjective reasons ``do not allow a reasonable opportunity for rebuttal''); White v. Vathally, 732 F.2d 1037, 1040 (1st Cir 1984), cert. den., 469 U.S. 933 (1984) (employer's explanation must be clear and specific rather than passing reference to some deficiency in qualifications of plaintiff).

In the case at bar, Mr. Lampkins testified to a sequence of communicational encounters between LASA and Ms. Valdivia that served as his reason for making the employment decision that he did, i.e. in his view, she did not present adequate work authorization.

Mr. Lampkins testified that in July 1987, Ms. Valdivia came into LASA's office, and filled out an application for employment referral. Tr. at 145/19-20. It is un-disputed that at that time she also physically presented her driver's license, her social security card and two letters from churches (serving as ``qualified designated entities'' under the legalization program) that had initiated her legal-

ization application.[16]Though he did not personally respond to Ms. Valdivia, Mr. Lampkins testified that:

> [Mr. Lampkins]: I said tell her that we need more--more documentation. See if she has any more documentation.
>
> [Judge Schneider]: Did you specify what you wanted from her?
>
> [Mr. Lampkins]: No, sir, I didn't.
>
> [Judge Schneider]: So . . . did he (a LASA agent) ask you what you wanted?
>
> [Mr. Lampkins]: No, sir, he didn't. We--we really didn't know what was legal other than--the letters from Immigration that had the Department of Immigration on them, those were valid letters. We knew that. Tr. at 145-146.

As a result of his obviously not understanding the nature and kind of documentation that were proper indicia of authorization to be employed in the United States, Mr. Lampkins, on behalf of LASA, formally rejected Ms. Valdivia's application for employment referral in July 1987. Tr. at 147.

Thereafter, the application was placed in a ``rejection file to be contacted later.'' Tr. at 148. Mr. Lampkins testified that his office re-contacted Ms. Valdivia in late July or early August of 1987, asked her if she had any additional documentation to evince eligibility to work in the United States, and was told that ``she was working and she didn't need a job.'' Tr. at 149.

The next communicational contact between Mr. Lampkins and Ms. Valdivia was the crucial telephone call on November 5, 1987. At no point in time during this call did Mr. Lampkins speak directly to Ms. Valdivia. All of Ms. Valdivia's representations as made in that phone call were communicated, in translation from Spanish to English, through a bilingual receptionist named Patricia Bryant. Regrettably, despite efforts by all parties, Ms. Bryant was unavailable to testify at hearing or to offer any kind of affidavit.

Mr. Lampkins testified that when Ms. Valdivia called, Ms. Bryant brought him her file. He testified that accompanying the file was a ``take-in sheet'' which said that Ms. Valdivia was not eligible for employment, because she did not have proper documentation to evince eligibility to work in the United States. Tr. at 157. As a result, Mr. Lampkins told Ms. Bryant to ask Ms. Valdivia if she had any more ``papers.'' Id.

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[16]Though not developed during this proceeding, and essentially irrelevant for the purpose of determining liability for a cause of action based most proximately on the communicational encounters of November 1987, it nevertheless appears to me that Ms. Valdivia was in fact, in July 1987, a so-called ``special rule'' alien and authorized to work ``without presenting an employer or recruiter or referrer for a fee with documentary evidence of work authorization''. See, 8 C.F.R. § 274a.11.

Ms. Valdivia testified that Ms. Bryant told her that she could not refer her because she did not have ``papeles,'' or ``papers.'' Tr. at 52. She testified that ``in the Hispanic community papers is what we refer to as the green card.'' Tr. at 53. She emphatically testified that she ``told her (Ms. Bryant) that I had been given a work authorization card that I had been given through the amnesty program. And she (Ms. Bryant) answered, `I'm sorry, but that kind of--that kind of documentation is not acceptable to the company.' '' Tr. at 48; see also, at 43.[17]

A close reading and analysis of this regrettably anemic part of the record convinces me that Respondent has not met its relatively light burden of production to demonstrate a legitimate non-discriminatory reason for the employment decision it made with respect to Ms. Valdivia. In a manner that may or may not be related to his decision to proceed in this matter without the assistance of an attorney, and without access to company records that were apparently taken by a former employee/partner, and without the availability of a witness (Ms. Bryant) who might have clarified some of the details of the communicational encounters that occurred on November 5, 1987, between her and Ms. Valdivia, I nevertheless find that Respondent has not raised, with requisite specificity, a genuine issue of fact indicating a legitimate non-discriminatory reason for his employment decision with respect to Ms. Valdivia. See, Burdine, supra; and, Williams v. Edward Apfels Coffee Co., supra.

Respondent's only articulated reason for refusing to refer, or even consider for referral, Ms. Valdivia is that, in the view of Mr. Lampkins, she failed to provide proof of her work authorization. In

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[17] ``[Ms. Valdivia]: Yes. I said I had this card. When I called her I said I had this card because I felt a little more sure of this one because Immigration had given me this card. She answered me that this type of documentation was not acceptable to the company.''

Mr. Lampkins did not dispute that Ms. Valdivia told his agent that she possessed an I-668A work authorization card from INS, but that, as far as he knows, his agent never mentioned it. Tr. at 158. Also, it is important to note that Respondent was not completing I-9 Employment Eligibility Verification Forms on either its own employees or on the individuals that it referred for employment. Tr. at 55. The importance of complying with IRCA's record-keeping/verification provisions cannot be underestimated. The GAO, for example, has found that businesses not fully understanding IRCA's verification requirements were those most likely to discriminate. See, United States General Accounting Office, Immigration Reform: Status of Implementing Employer Sanctions After Second Year (GAO/GGD-89-16)(1988); see also, ACLU/MALDEF: The Human Costs of Employer Sanctions, (1989). It is at least feasible to speculate that if Respondent had understood and been complying with IRCA's I-9 verification and record-keeping procedures, it might not have misunderstood or misconstrued Ms. Valdivia's eligibility to be employed in the United States.

fact, this view, based on an uninformed understanding of what kinds of immigration-related employment documents were required to evince employment authorization in accordance with IRCA, was incorrect, and resulted in Ms. Valdivia being rejected with respect to employment for an illegitimate, statutorily prohibited reason, i.e. disparate treatment on account of citizenship status. In this regard, I find that Respondent has not raised a genuine issue of fact because he failed to act reasonably to acquire even minimal knowledge of the requisite immigration-related employment documents that all persons need, whether citizens or aliens, to evince eligibility to work in the United States, and to bring his employment practices in compliance with the new requirements of IRCA.

As stated above, it is my view that there is no direct evidence in this case of a knowing and intentional act of discrimination based on actual knowledge. I suggest, however, that a proper reading of the presently operative regulation, as found at 28 C.F.R. Part 44.200, should include an interpretation of ``knowingly'' that requires employers, recruiters, and referral agents to exercise reasonable care to acquire knowledge of the legal significance of immigration-related employment documents and to conduct their employment practices in a fair and consistent manner. Cf. United States of America v. New El Rey Sausage Company, Inc. OCAHO Case No. 88100080 (ALJ Schneider, July 7, 1989);[18] cf. also, United States v. Felipe, Inc. OCAHO Case No. 89100151 (ALJ Schneider, October 11, 1989) (defining ``good faith,'' in a context involving a statutory scheme for mitigation of penalty for IRCA record-keeping viola-

[18]In suggesting a constructive knowledge standard for adjudicating a section 1324a employer sanctions case involving an allegation of unauthorized continued employment of aliens ineligible to work in the United States, I held that ``an employer shall be deemed to have constructive knowledge * * * if it can be shown by a preponderance of evidence that the employer was in possession of such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question * * * or to infer, on the basis of reliable warnings, that such officially questioned employees are not * * * authorized to be employed in the United States.'' Id. at 32. Applying this suggested standard of constructive knowledge to an interpretation of the implementing regulations for section 1324b cases, as found at 28 C.F.R. part 44.200, it is my view that the inferential presumption should necessarily shift to inferring that a person who presents work authorization documents that reasonably appear genuine on their face is, whether a legal resident alien or a citizen, authorized to be employed in the United States. Such an inference, in the absence of acquiring knowledge of the legal and factual significance of the tendered documents offered to evince eligibility to work in the United States, is consistent with Congressional intent to ``make clear that there is no requirement that an employer request additional documentation or that an employee produce additional documentation.'' See, H.R. Rep. No. 99-682, pt. 1, at 62, 1986 U.S. Cong. & Ad. News, at 5666; see also, New El Rey, supra, at 23, n.9.

tions, as a showing of an ``honest intention to exercise reasonable care and diligence to ascertain what IRCA requires and to act in accordance with it.'' Id. at 9).

Though not grossly unreasonable in light of the smoggy ``climate'' of confusion that accompanied the initiation of IRCA into the varied landscape of American employment decision-making, I nevertheless find that Respondent failed to exercise reasonable care to acquire some minimally functional knowledge of the legal significance of immigration-related employment documents, and to conduct his employment referral operations in a fair and consistent manner. Short of acquiring such knowledge, Respondent should have, at the very least, in my view, made some more specific inquiry into the nature of the documents that Ms. Valdivia actually possessed and not summarily dismissed her effort to apply for employment referral without in any way considering her representations that she was authorized to be employed in the United States. Thus, while I find that it is not necessarily unreasonable that, less than a year after IRCA's enactment, Respondent would be somewhat confused by the number and kinds of immigration-related employment documents necessary to evince work authorization, I do find it unreasonable that Respondent refused to acknowledge, in any way, the prima facie genuineness of the documents that Ms. Valdivia actually presented in July 1987,[19] and attempted to present in November 1987,[20] or to infer, in the absence of some

[19]Mr. Lampkins acknowledges that in July 1987, Ms. Valdivia presented LASA with a facially valid driver's license and a facially valid social security card. No testimony suggests that these documents did not reasonably appear on their face to be genuine. In this regard, the driver's license and the social security card established, in a prima facie manner, Ms. Valdivia's identity and work authorization sufficient for section 1324a and for the Form I-9 work verification procedures. See, 8 U.S.C. § 1324a(b)(1) and 8 C.F.R. § 274a.2(b)(v). As was strongly argued by Complainant, Respondent, at that point had seen all the work authorization proof it needed to see from Ms. Valdivia.

[20]As stated above, in November 1987, Ms. Valdivia testified that she told Respondent, through an agent, that she had additional proof of her authorization to work in the United States in the form of her recently-issued I-668A work authorization card from INS. Though not strictly corroborated by any other evidence in the case, I have no trouble in believing her testimony on this important point, because: 1) she had received the official card on October 9, 1987; and 2) it is entirely reasonable to expect that a person who for years has lived in fear of the INS would gladly assert that INS had recognized her eligibility to work in the United States with a formal card. See, Tr. at 43. What did initially trouble me, however, about the communicational encounter that took place on November 5, 1987, is that it was entirely telephonic and took place at what was technically a pre-application stage of employment inquiry. As well-argued by Complainant, however, the Ninth Circuit has ruled numerous times that Title VII prohibits pre-application rejections by employers

good reason to suspect the validity of her documents, that she was, at the very least, entitled to be considered with respect to[21] authorized employment in the United States.

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based on a prohibited basis. See e.g., Ostroff v. Employment Exchange, Inc., 683 F.2d 302 (9th Cir. 1982). In a case not dissimilar to the case at bar, the plaintiff in Ostroff brought a Title VII sex discrimination suit against an employment referral company for its refusal to refer her to a job for which she had telephoned and inquired. Ms. Ostroff was discouraged from applying for the job and was told that the job had been filled when it had not. Subsequently, her husband called and he was invited to apply for the job. The Ninth Circuit held that Ms. Ostroff had met her burden of proof in showing unlawful sex discrimination under Title VII. See also, Nanty v. Barrows Co., 660 F.2d 1327 (9th Cir. 1981). Even if a pre-application telephonic rejection were not prohibited under Title VII, it is my current view that such a rejection should be carefully analyzed under the arguably broader language of section 1324b(a). See, n.21, infra.

[21]I have emphasized the words ``with respect to'' because they are at the linguistic heart of the statute's protective prohibition against an ``unfair immigration-related employment practice.'' See, § 1324b(a). When compared to the operative language of Title VII, it is my view that section 1324b(a) should be broadly construed to include the whole pre-employment process and not just an actual refusal to hire or recruit. Title VII, on its face, prohibits `'an employment agency to fail or refuse to refer'' an individual for employment based upon a prohibited basis. See, 42 U.S.C. § 2000e-2(b) (emphasis added). IRCA, on its face, states that it is an ``unfair immigration-related employment practice * * * to discriminate 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 * * *'' 8 U.S.C. § 1324b(a). Interpreting this choice of public language in a broadly protective and remedial way is consistent with the intent of Congress to avoid additional and unnecessary barriers or hurdles for those individuals legally residing in this country:

The Committee does not believe barriers should be placed in the path of * * * resident aliens who are authorized to work and who are seeking employment * * * See, H.R. Rep. No. 99-682, 99th Cong., 2d Sess., pt.1 at 70.(1986); see also, H.R. Rep. No. 99-682, 99th Cong., 2d Sess., pt. 2 at 12. (1986) and 132 Cong. Rec. H9770 (1986) (statement of Rep. Fish).

Accordingly, I intend to interpret and apply § 1324b(a) in a way that considers broadly the totality of the circumstances of the employment process, and to scrutinize each employment decision within that process for unfair immigration-related employment practices. In this regard, I intend my analysis to be guided in part by the distinction, mentioned above, between the ``nullification'' of employment opportunities and, what I will incorporate by reference as being the substantial impairment of such opportunities for reasons prohibited by section 1324b(a). See, Footnote 4, supra, citing, International Labour Organization, Convention 111 and Recommendation 111 (1958). Thus, as applied to the case at bar, it is my view that even if I did not find that Respondent actually failed or refused to refer Ms. Valdivia for employment, I would nevertheless find that the active discouragement, based solely on citizenship status, of her attempt to apply for the cashier position was a substantial impairment of her protected right to be considered with respect to such employment, and therefore constituted an ``unfair immigration-related employment practice'' within the prohibited purview of section 1324b(a). See also, Karst, Belonging to America, supra, (``Validation of a claim of equal citizenship is not merely important

Instead as a result of his tenacious but confused understanding, Respondent's policy to treat citizen employment referral applicants differently from alien employment referral applicants led directly, if unwittingly, to an employment decision not to refer, or even consider for referral, an IRCA-legalized temporary resident alien authorized for employment in the United States Respondent's employment decision is exactly the kind of unfair immigration-related employment practice, and Ms. Valdivia is exactly the kind of person that Congress sought to protect in enacting section 1324b. See, H.R. Rept. No. 682 99th Cong. 2d Sess, pt. 1, at 70 (``(i)t makes no sense to admit immigrants . . . to this country, require them to work and then allow employers to refuse to hire them because of their immigration (non-citizenship) status'').

Accordingly, I find and determine by a preponderance of the evidence, that Respondent is liable because Mr. Lampkins had reason to know that Ms. Valdivia was authorized to be employed in the United States, and his requiring that she produce additional employment authorization beyond what she had already presented constituted an unfair immigration-related employment practice in violation of section 1324b. His failure to reasonably attempt to acquire knowledge of relevant immigration-related employment documents resulted in his knowingly and intentionally discriminating, for an illegitimate reason, against an intending citizen who, at the very least, is entitled to participate in the considerations accorded to a common membership in the aspirational promise of equal opportunity for all who ``belong,'' however recently, to America.[22]

V. Remedies:

Having determined by a preponderance of the evidence that Respondent has engaged in an unfair immigration-related employment practice, I turn now to fashioning an appropriate remedy consistent with statutory directive. See, § 1324b(g).

First, it is clear from the face of the statute that, having found a violation of section 1324b, it is mandatory to order Respondent to

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to the individual claimant. It also forms part of the social cement that makes the nation possible.'' Id. at 10.).

[22]``In a longer view . . . our national history can be seen as one enlargement of the national community after another with each new addition embracing a group of people previously seen as permanent outsiders. Our semiofficial national ideology, reflecting this experience, proclaims that America includes all Americans. Most of us, seeking worthy individual identities in our identification with the nation, want to believe in this platitude. For decision-makers who want to promote policies that offer inclusion to our marginalized citizens, this widely shared need to believe in the promise of America is a considerable . . . asset.'' See, Karst, Belonging to America, supra, at 172.

``cease and desist from such unfair immigration-related employment practice.'' See, § 1324b(g)(2)(A).

The statute also provides, however, for a range of discretionary remedial options. See, § 1324b(g)(B).

Complainant argues that a finding of liability requires an award of back pay. Complainant contends, without clear substantiation, that ``had LASA not discriminated against Ms. Valdivia, she would be working a part-time job with Annex Drugs today. Ms. Valdivia is entitled to the pay that she would have received for the work at Annex Drugs as her award of back pay.''

In support of its position, Complainant argues that ``back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy by making persons whole for injuries suffered through past discrimination.'' See, Albermarle Paper Company v. Moody, 422 U.S. 405, 421, 95 S. Ct. 2362, 2373 (1975); see also, Jauregui v. City of Glendale, 852 F.2d 1128, 1137 (9th Cir. 1988); Fadhl v. City and County of San Francisco, 741 F.2d 1163, 1167 (9th Cir. 1984).

For reasons that are not inconsistent with the legal authority cited to by Complainant, I intend to deny the request for back pay in this particular case.

I am denying back pay in this case, somewhat reluctantly, but equitably, in the exercise of discretion. See, Lorilland Div., of Loew's Theaters, Inc. v. Pons, 434 U.S. 575, 584 n.13; 98 S. Ct. 866, 55 L.Ed 2d. 40 (1977). The statute governing these proceedings clearly indicates that an award of back pay is discretionary. See, section 1324b(g)(2)(B)(iii); see also, e.g., Kaplan v. Int'l Alliance of Theatrical, Etc., 525 F.2d 1354 (9th Cir. 1975).

I am fully aware of the sound public policy presumption in favor of granting compensatory back pay awards to victims of prohibited discrimination; and that, for good reason, discretion to deny back wages is extremely limited. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975); and, E.E.O.C. v. Hacienda Hotel, 881 F.2d 1504, 1516 (9th Cir. 1989) (``Whether district court properly awarded back pay to undocumented workers who were discharged in violation of Title VII . . . is a question of law reviewable de novo by this court.''); see also, Cathcart & Ashe, Five year Cumulative Supplement to Schlei & Grossman's Employment Discrimination Law, at 526, 527 (1989).

In this case of first impression before me, however, neither of the parties made a through factual or legal record on the issue of appropriate remedies in the event of a finding of liability.

It is clear, as Complainant urges in its post-Decision memorandum, that the law in the Ninth Circuit places the burden of proof on the employer/discriminator to show whether an employee/discriminatee mitigated damages sufficient to reduce an amount of back pay award in those instances wherein the court has exercised its discretion to award back pay. See, e.g., Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978) (The discriminatee has, as the injured party, the traditional duty to mitigate damages; the burden of proving failure to mitigate, however, is on the respondent discriminator).

Such a question, however, is beside the point in this case, because it presumes that a judge has decided to award back pay in the first place and, in attempting to consider the proper amount of back pay, is trying to determine whether to reduce such an amount proportional to evidentiary proof of mitigation of damages.

In the case at bar, however, I am deciding not to award back pay for several reasons. One of the reasons for denying back pay in this case is my discretionary conclusion that Ms. Valdivia, in effect, admitted that she failed to meet her traditional duty to mitigate damages. See, Sangster v. United Airlines, Inc., 633 F.2d 864 (9th Cir. 1980) (plaintiff was not entitled to back pay since she did not meet her duty to mitigate damages); see also, Cathcart & Ashe, supra, at 527. I view as problematic Ms. Valdivia's admission that she did not make any effort to try and obtain substitute employment. See, Sangster, supra, (``We conclude that (plaintiff) did not meet her duty to mitigate damages, and that denial of back pay under the circumstances would not frustrate Title VII's remedial purposes.'') (cites omitted).

Applying the reasoning of Sangster to the case at bar, I find that Ms. Valdivia testified that she felt discouraged from looking for more work after Respondent's agent told her that LASA did not accept a form I-668A as proper indicia of work authorization. Tr. at 198-99. While I do not in any way wish to question the sincerity of Ms. Valdivia's feelings of discouragement in attempting to seek a part-time job in addition to her full-time employment, I simply do not think that, without a showing of some further effort to procure another type of similar part-time unskilled cashier job, that she met her traditional duty to mitigate damages. See, Sangster, supra. At the very least, such mitigation might have included here attempting to present in person her I-668A, rather than her relying exclusively on a telephonic assertion of her authorization to be employed in the United States. Though I am appreciative of the emotional stress that may have accompanied Ms. Valdivia's being refused a referral by Respondent, I do not view such a refusal, based

on a few minute's of telephonic conversation, to constitute an excuse not to try again to obtain her goals of ``getting ahead'' by seeking more actively the same or similar type of part-time, unskilled job that she sought through Respondent, and attempting thereby to meet her traditional duty to mitigate damages.[23]

Thus, analogizing to Title VII case law in the Ninth Circuit, a major discretionary reason for my decision to deny back pay in this particular case is that I do not think that it is the fairest disposition to award back pay in a situation in which an unrepresented referral agent mistakenly misapplied a complex statute less than a year after its enactment, cf. e.g., Alaniz v. California Processors, Inc., 785 F.2d 1412 (9th Cir. 1986) (refusal to award back pay to claimants denied work because of employer's ``good faith'' reliance on statute was justified by hardship that would result to employer if it was forced to pay claims arising from such practices subsequently declared invalid), and wherein the victim of the ``international,'' but unwitting act of discrimination admits that she made no effort to mitigate damages. See, Sangster, supra.[24]

Finally, I do not think that a decision to deny back pay in this particular instance will in any way ``frustrate the central statutory purposes of eradicating discrimination'' of the kind that Congress sought to prohibit in section 1324b of IRCA. Cf. Albemarle, supra. In my view, we all have a great deal of technically legal and socially educational work to do on behalf of both employers and employ-

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[23]On February 13, 1990, this office received and filed an officially translated copy of a letter from Ms. Valdivia, essentially requesting monetary compensation as a result of a finding of liability in this case. I read Ms. Valdivia's letter; but, consistent with the regulations governing these proceedings, I do not intend on considering it to be admissible ``evidence,'' because the evidentiary record in this case has been closed; and, I do not view Ms. Valdivia's letter as evincing ``new and material evidence'' which was ``not available prior to the closing of the record.'' See, 28 C.F.R. § 68.47(c); See also, NLRB v. Don Burgess Construction Corp., 596 F.2d 378, 389 (9th Cir. 1979), citing NLRB v. West Coast Casket Co., 469 F.2d 871, 873 (9th Cir. 1972) (it is movant's burden to show the materiality of the proferred evidence and why it was not introduced at the hearing).

[24]Moreover, while it is true that Respondent has the burden of proof to show that it would not have referred Ms. Valdivia even it if had not discriminated against her, it is not unambiguously clear that such a burden of proof extends to a referral agent's showing that the suggested employer (in this case Annex Drugs) would have actually hired the referee (in this case, obviously, Ms. Valdivia) or that the literal statutory language of the back pay remedy (hire, with or without back pay'') necessarily applies to referral agents. See, § 1324b(g). Complainant, as represented by OSC, fails to address this issue and seems to ignore or lump together these arguably distinguishable burdens when it asks me to ``clarify'' that the ``burden to show that an injured party would not have been hired in spite of the prohibited discrimination is on the respondent's (emphasis added). Hopefully, this issue will be ``clarified'' by subsequent argument and decision-making.

ees before we can begin to fashion appropriate remedies that clarify the obligations of potential discriminators and support the rights of potential discriminatees. Until IRCA, as a whole, begins to congeal with sufficient articulable clarity, the potential ``frustration of central statutory purposes of eradicating discrimination'' should be looked for in sources other than unsubstantiated claims to back pay.

Accordingly, I intend to deny Complainant's request for a remedy that includes back pay.

With respect to the remaining discretionary provisions contained in section 1324b(g), I intend to order the following:

1. To the extent that Respondent, in the person of Mr. Cecil Lampkins, and as an entity in the form of LASA II, continues to exist as an operational business, I hereby require that he and/or it comply with the requirements of section 1324a(b) with respect to all individuals hired (or recruited or referred for employment for a fee) during a period of up to three years from the date of this Decision and Order. See, § 1324b(g)(2)(B)(i);

2. To the extent that Respondent, in the person of Mr. Cecil Lampkins, and as an entity in the form of LASA II, continues to exist as an operational business, I hereby require that he and/or it retain for the three years mentioned in sub-section 1, supra, the name and address of each individual who applies, in person or in writing, for hiring for an existing position, or for recruiting or referring for a fee, for employment in the United States. See, § 1324b(g)(2)(B)(ii).

3. I hereby require that Mr. Cecil Lampkins pay a civil monetary penalty of $500.00 to the United States Treasury on account of having knowingly and intentionally discriminated against Ms. Valdivia in violation of section 1324b(a). See, § 1324b(g)(2)(B)(iv)(I).

VI. Ultimate Findings:

I have considered the pleadings, testimony, evidence, memoranda, briefs, arguments, and proposed findings of fact and conclusions of law submitted by the parties. All motions and all requests not previously disposed of are denied. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact, and conclusions of law:

(1) That, the Office of Special Counsel for Immigration Related Unfair Employment Practices is charged with investigating charges filed under IRCA and prosecuting violations of the anti-discrimination provisions of IRCA. 8 U.S.C. § 1324b(c)(2).

(2) That, this action is brought by the Special Counsel on behalf of Ms. Maria Carmen Valdivia-Sanchez to enforce the anti-discrimi-

nation provisions of IRCA. The Office of the Chief Adminstrative Hearing Officer has exclusive jurisdiction to hear cases brought pursuant to the anti-discrimination provisions of IRCA. 8 U.S.C. § 1324b(e).

(3) That, Ms. Valdivia is an intending citizen as defined by IRCA and, as such, she is a) protected from citizenship status discrimination, 8 U.S.C. § 1324b(a)(1)(A); and, b) she filed a timely charge with the Office of Special Counsel.

(4) That, Respondent, Mr. Cecil Lampkins, d.b.a LASA II, a California business, is the successor entity to an earlier partnership called LASA Marketing Firms as established by and between Mr. Lampkins and Javier Sapien. As the successor entity, Mr. Lampkins and LASA II are liable for any judgment entered against LASA Marketing Firms for any employment decisions made on or about November 5, 1987.

(5) That, all charges against Javier Sapien and LASA Marketing Services as named in the Complaint are dismissed because of the stipulations entered into between Complainant and Mr. Lampkins, d/b/a LASA II, a California business and successor entity to LASA Marketing Services.

(6) That, on or about August 7, 1987, Ms. Valdivia filed an application for adjustment of status to a temporary resident alien under IRCA, and that this adjustment was granted on January 12, 1988, effective as of the date of filing.

(7) That, on or about October 9, 1987, Ms. Valdivia received from the INS a Form I-668A Employment Authorization Card evincing her eligibility to be employed in the United States during the pendancy of her legalization application for adjustment of status to a temporary resident alien.

(8) That, on or about November 5, 1987, Ms. Valdivia telephoned the LASA office to apply for employment referral regarding an advertised, unskilled cashier job. Ms. Valdivia spoke, in Spanish, with a LASA employee named Patricia Bryant.

(9) That, Ms. Valdivia told Ms. Bryant that she already had an application on file with LASA because she had applied for referral to another job in July 1987, and was incorrectly rejected on account of not having, in addition to a valid driver's license and valid social security card, proper work authorization to be employed in the United States.

(10) That, on or about November 5, 1987, Ms. Valdivia told LASA that she had work authorization to be employed in the United States in addition to what she had presented in July 1987. Ms. Valdivia described her INS Form I-668A Employment Authorization Card to Ms. Bryant.

(11) That, Ms. Bryant, after consulting with Ms. Lampkins, told Ms. Valdivia that the I-668A Employment Authorization Card was not sufficient proof of her work authorization, and that it was not acceptable to LASA.

(12) That, Mr. Lampkins, on behalf of LASA, made the decision not to refer Ms. Valdivia for employment in November 1987.

(13) That, Ms. Valdivia was not referred for employment because LASA incorrectly informed her that her I-668A employment authorization card was not valid proof of her eligibility to be employed in the United States.

(14) That, Respondent did not have a knowledgeable understanding of the nature and kinds of immigration-related employment documents necessary to evince employment authorization in the United States and was not complying in any way with the verification and record-keeping provisions of section 1324a.

(15) That, Complainant failed to prove, by direct evidence, that Respondent understood that 1) Ms. Valdivia was an applicant for temporary resident alien status and, 2) her I-668A Employment Authorization Card represented her eligibility to be employed in the United States and, on the basis of what it knew, proceeded to knowingly and intentionally discriminate against her.

(16) That, wherein Respondent admitted that LASA treated applicants for employment referral differently on account of citizenship status, Complainant need not make a prima facie showing of employment discrimination.

(17) That, Respondent failed to meet its burden of production to show a legitimate non-discriminatory reason for making the employment decision not to refer Ms. Valdivia.

(18) That, to meet its burden of production, a respondent must raise, with reasonable specificity, a genuine issue of fact as to whether it discriminated against a person authorized to be employed in the United States.

(19) That, Respondent did not raise a genuine issue of fact as to whether it discriminated against Ms. Valdivia because it did not exercise reasonable care to acquire knowledge of the legal significance of immigration-related employment documents and to conduct its employment practices in a fair and consistent manner.

(20) That, Respondent's failure to exercise reasonable care to acquire knowledge of relevant immigration-related employment documents resulted in its promulgating and applying a business policy to treat United States citizen employment referral applicants differently from alien employment referral applicants.

(21) That, Respondent's discriminatory business policy resulted in its decision not to refer, or even consider for referral, Ms. Valdivia,

a person who had validly applied for adjustment of status to a temporary resident alien and was, on the basis of that application, authorized for employment in the United States as evidenced by her receipt of the I-668A Employment Authorization Card.

(22) That, based upon a preponderance of the evidence, I determine that by refusing to refer Ms. Valdivia, or even consider her application for employment referral, LASA knowingly and intentionally discriminated against her on account of citizenship status in violation of IRCA. 8 U.S.C. § 1324b(a); and 28 C.F.R. Part 44.200(a).

(23) That, in remedy for said violation, Respondent shall:

(a) Cease and desist from the unfair immigration-related employment practice found in this case;

(b) Comply with the requirements of 8 U.S.C. section 1324a(b) during a period of three years from the date of this final decision and order, during which its shall retain the name and address of each individual who applies, in person or in writing, for employment referral in and through LASA, or any other similar business or successor entity established by Mr. Cecil Lampkins in the United States.;

(c) Pay to the United States a civil money penalty in the sum of $500.00.

(24) That, the remedy of awarding back pay in instances of violations of section 1324b is discretionary. Section 1324b(g)(2)(B)(iii).

(25) While the burden of proving failure to mitigate damages is on the discriminator in considering the proper amount of an award of back pay, an admission by the victim of discrimination that she made no effort to mitigate damages shall constitute a valid consideration in the exercise of discretion to deny an award of back pay.

(26) That, as a matter of discretion, I find that Ms. Valdivia is not entitled to back pay.

(27) That, pursuant to 8 U.S.C. § 1324b(g)(1), this final decision and order is the final administrative order in this proceeding and ``. . . shall be final unless appealed to a United States Court of Appeals in accordance with 8 U.S.C. § 1324(i).''

SO ORDERED: This 14th day of March, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge