

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

March 9, 1992

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. 1324b Proceeding
) OCAHO Case No. 90200336
NORTHWEST AIRLINES, INC.,)
Respondent.)
_____)

ORDER GRANTING COMPLAINANT'S MOTION OR
LEAVE TO FILE AN AMENDED COMPLAINT

On July 3, 1991, complainant filed a Motion for Leave to File an Amended Complaint, in which it stated that, pursuant to 28 C.F.R. §68.9(e), an amended complaint is in order based on the revisions to 8 U.S.C. §1324b effected by the Immigration Act of 1990, by the discovery of new material facts, by the addition of Count IV to the initial complaint, and by the necessity to effect various technical revisions to the initial complaint.

That regulation provides that a complaint can be amended if the moving party can establish that the Court's determination of the merits will be facilitated by the amendments contained in the amended complaint, and that the rights of the parties will not be prejudiced.

On September 25, 1991, respondent filed a Memorandum in Opposition to Complainant's Motion for Leave to File an Amended Complaint. In its memorandum, respondent argues that the amendments reflecting the Immigration Act of 1990's new statutory approach to protected aliens would not facilitate the determination of the merits, that the addition of paragraph 6 to complainant's request for relief would not facilitate the court's determination of the merits, and that the determination of the merits

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would not be facilitated by the addition of paragraph 7 to complainant's request for relief.

More specifically, respondent argues that complainant's amendments reflect the Immigration Act of 1990's changes to the definition of who is protected by §1324b, and it argues that those amendments seek to apply §1324b's definitional language retroactively to acts occurring prior to the enactment of the new definition.

Respondent further urges that these amendments will not facilitate the Court's determination of the merits because the retroactive application of §533 of the Immigration Act of 1990 presents a difficult constitutional issue under the Due Process Clause of the Fifth Amendment.

An identical dispute arose in United States v. Harris Ranch Beef Company, OCAHO Case No. 90200307 (April 22, 1991) (Order and Summary of Pre-Hearing Telephone Conference). The complainant therein filed a Motion to Amend Complaint, in which it sought to incorporate in its complaint the changes which had been made by §533(a) of the Immigration Act of 1990. The respondent in that proceeding filed an Opposition to Motion to Amend, in which it argued that the complainant's motion should be denied for several reasons. Included in those reasons was the same argument which this respondent asserts namely, that since §535 of the Immigration Act of 1990 only became effective in November of 1990 and was not retroactive, it would violate the constitutional prohibition against ex post facto laws to apply §535 to conduct which occurred prior to November of 1990.

The Administrative Law Judge in that proceeding granted the complainant's Motion to Amend Complaint, pointing out the pertinent procedural regulations, as well as the Federal Rules of Civil Procedure reflect a generally liberal policy in the area of amending pleadings.

The undersigned agrees. The applicable procedural regulation, 28 C.F.R. §68.9(e), provides, in pertinent part, that

If and whenever a determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints and other pleadings at any time prior to the issuance of the Administrative Law Judge's final order based on the complaint.....The Administrative Law Judge may, upon reasonable notice and such terms as are just, permit

supplemental pleadings setting forth transactions, occurrences, or events which have happened or new law promulgated since the date of the pleadings and which are relevant to any of the issues involved.

The undersigned concludes that complainant's Amended Complaint contains language which will facilitate the determination of this controversy, and which will not unduly prejudice respondent.

Accordingly, complainant's Motion for Leave to File an Amended Complaint is hereby granted. Respondent has 35 days within which to file its responsive pleading.

JOSEPH E. MCGUIRE
Administrative Law Judge