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

Ahmad S. Elhajomar, Complainant v. City and County of Honolulu, a Municipality; and State of Hawaii, Respondents; 8 U.S.C. § 1324b Proceeding; Case No. 89200269.

DECISION AND ORDER

ROBERT B. SCHNEIDER, Administrative Law Judge

DATED: October 4, 1990

SYNOPSIS

This case involves an asylee temporary resident alien who has filed an application to adjust status and a Declaration of Intending Citizenship. He applied for an unskilled labor position with the City and County of Honolulu. The City and County of Honolulu, in reliance on a state statute which limits public employment to citizens and permanent resident aliens, refused to accept Complainant's application for employment. I concluded that the state statute in question, Hawaii Rev. Stat. 78-1(c), was a ``law'' within the exception clause of section 1324b(a)(2)(C) of Title 8 of the United States Code. I also concluded that I did not have the authority to rule on the constitutionality of the state statute. Respondent State of Hawaii was dismissed from the case. Respondent City and County of Hawaii is not liable for an unfair immigration-related employment practice under section 1324b.

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Appearances: **HENRY R. LOBDELL**, Esquire For Complainant
J. RODNEY VEARY, Esquire For Respondent City and County of Honolulu
GARY HYNDS, Esquire For Respondent State of Hawaii

Before: **ROBERT B. SCHNEIDER** Administrative Law Judge

DECISION AND ORDER

Procedural History

This proceeding was initiated on June 12, 1989, when a Complainant was filed by Complainant as a private right of action pursuant to section 1324b(d)(2) of Title 8 of the United States Code. It was a one-count Complaint, alleging unfair immigration-related employment practices against the City and County of Honolulu.

Complainant originally filed a written charge with the Office of Special Counsel on November 15, 1988. The Office of Special Counsel (hereinafter referred to as ``OSC'') issued a letter to Complainant on June 12, 1989, indicating that it had determined that ``there is no reasonable cause to believe that an unfair immigration-related employment practice occurred.'' OSC's disposition letter further advised Complainant of his private right of action which was effectuated by the filing of the Complaint on June 12, 1989.

Thereafter, on or about June 30, 1989, Complainant filed its first amended complaint. The amended Complaint was charged in two counts, and joined another party, the state of Hawaii.

On or about February 15, 1990, Complainant filed a Motion for Leave to Amend the Complaint a second time. This motion was granted on March 23, 1990.

On March 19, 1990, Respondent State of Hawaii filed a Motion to Dismiss the Second Amended Complaint. On March 26, 1990, I issued an Order Withholding Ruling on Respondent State of Hawaii's Motion to Dismiss. That Motion is still pending.

Also on March 26, 1990, I issued an Order Denying Complainant's Motion for Summary Decision as filed on February 15, 1990.

A hearing in this case was held in Honolulu on April 9-11, 1990. Thereafter, representative post-hearing legal memorandums were filed with this office proposing findings of fact and conclusions of law.

Statement of Relevant Facts

The Complainant is proceeding in this case under a private right of action. The Complainant's name is Ahmad S. Elhajomar.

Mr. Elhajomar, native and citizen of Lebanon, entered the United States on May 23, 1983, on a visitor visa. (Tr. 47) He was later granted political asylum, and was allowed to remain in this country due to this favorable exercise of discretion by the Attorney General. (Tr. 47-8; Exhibit C-2 Refugee Travel Document) In his status as a temporary resident alien asylee, Mr. Elhajomar also received authorization to be employed in the United States. (Tr. 49; Exhibit C-4 Enclosures to Travel Documents; Exhibit C-3 Enclosure to Travel Documents) Mr. Elhajomar has applied for permanent residency in the United States, and is waiting for the INS to rule on his application. (Tr. at 64) On October 20, 1988, Mr. Elhajomar filed a Declaration of Intending Citizen. (Tr. 62; Exhibit C-5)

Mr. Elhajomar moved from Michigan to Hawaii in early September of 1988. (Tr. 53) Upon arriving in Hawaii, Mr. Elhajomar registered with the State Employment Office on September 28, 1988. This state agency referred Mr. Elhajomar to the City and County of Honolulu's office. (Tr. 82-6; Exhibit 18 ``Job Service Hawaii'')

He applied for employment at many places, including the City and County of Honolulu. (Tr. 54) On October 19, 1988, he completed an ``Unskilled Labor Registration'' application for the employment office of the City of Honolulu. (Tr. 54-5; Exhibit C-1 Unskilled Labor Registration Application) On the application, he indicated that he was willing to 1) accept any of the listed jobs; 2) desired permanent employment; and 3) was willing to accept employment

in any of the listed locations. (Tr. 56) The positions he was applying for offered salaries of $1300 to $1552 per month. (Tr. 88-9; see, 214, Exhibit C-10)

When Mr. Elhajomar turned in his application, he explained that he did not have a green card, but that he was authorized to work in the United States on account of his having been granted political asylum. He gave his application for employment to Lois Enomoto (Tr. 58).

Lois Enomoto is a Recruitment Specialist for the City and County of Honolulu, Department of Civil Service. (Tr. 135) Ms. Enomoto handles employment applications for city jobs. (Tr. 136) Prior to October 1, 1988, Ms. Enomoto received training by an INS investigation officer regarding how to review citizenship status of applicants. (Tr.136-7) Ms. Enomoto was kept updated on the requirements of IRCA by receiving copies of the Federal Register. (Tr. 137-8).

On October 19, 1988, Mr. Elhajomar presented Ms. Enomoto with an application for unskilled labor registration and his refugee documents. (Tr. 143-5; Exhibits C-1, 2, 3, 4) Ms. Enomoto reviewed the travel documents to verify permanent resident alien status in order to comply with a state statute that requires applicants to be citizens, nationals, or permanent residents. (Tr. 146-7) It appeared to Ms. Enomoto that Mr. Elhajomar did not meet the requirements, but that he would be eligible for employment in the private sector. (Tr 148) Ms. Enomoto did notice that Mr. Elhajomar's documents were stamped ``employment authorized.'' (Tr. 148) Ms. Enomoto suggested Mr. Elhajomar check with the INS to clarify his status. (Tr. 148) Ms. Enomoto wrote a memo concerning this initial conversation. (Tr. 150-1; Exhibit 12)

After Mr. Elhajomar left the office on October 19, Ms. Enomoto called the INS and spoke with an INS Examiner in order to clarify the travel document with respect to the state statute. (Tr. 152; 156) This INS Examiner told Ms. Enomoto to ask Mr. Elhajomar whether he had filed an I-485 application for permanent resident alien status; whether he went for an interview with the Michigan INS and, if so, that he should have received an I-181 adjustment of status form. (Tr. 157-8)

Thereafter, Ms. Enomoto spoke with an attorney for the INS to see if Mr. Elhajomar fell within any of the exceptions, (Tr. 232-3) According to the testimony of Ms. Enomoto, the INS trial attorney told her that the exception clause of section 1324b(a)(2)(C) applied to all state, federal, and city law. (Tr. 233)

After applying at the city/county office on October 19, 1988, Mr. Elhajomar went to the INS on the 19th & 20th and then returned

to the Civil Service Office of Honolulu and spoke again with Lois Enomoto. (Tr. 120-1)

On October 20, 1988, Mr. Elhajomar spoke to Ms. Enomoto about his citizenship status and his eligibility to work for the city/county office. (Tr. 121; 122-3) Ms. Enomoto gave Mr. Elhajomar instructions concerning what he needed to do in order to obtain employment with the City and County of Honolulu. (Tr. 71; Exhibit C-13)

But for the Hawaii Revised Statute 78-1, Ms. Enomoto would have accepted Mr. Elhajomar's application for processing. (Tr. 228-9) As a city civil servant, Ms. Enomoto felt that this statute mandated that she follow this law as it pertains to government employees for both the city and the county. (Tr. 229-32)

Since Mr. Elhajomar had filed a Complaint on October 20, 1988, the INS office would not give Ms. Enomoto their opinion of the situation. (Tr. 234-6) Ms. Enomoto thus told Mr. Elhajomar that his status could not be determined until the Complaint was resolved. (Tr. 236) However, Mr. Elhajomar's application was not rejected. (Tr. 236-7)

The notations, which were handwritten by Ms. Enomoto at the end of her memo dated October 21 (Exhibit C-12), indicated that Mr. Elhajomar's application was neither accepted nor rejected; that they needed a clarification of his immigration status and that investigation was under way regarding the Complaint Mr. Elhajomar filed. (Tr. 325-6) Although Ms. Enomoto had received enough clarification of his immigration status to know that Mr. Elhajomar was an ``intending citizen,'' she was not satisfied with it and did not process Mr. Elhajomar's application because she felt Mr. Elhajomar did not fit within the statutory requirements of the Hawaii Rev. Stat. 78-1. (Tr. 326) However, she did know he was an intending citizen. (Tr. 326)

Ms. Enomoto stated that the application for unskilled labor jobs are good for six months. (Tr. 216) Ms. Enomoto could not state when Mr. Elhajomar would have been employed if his application had been readily processed. (Tr. 216) There were, however, openings when Mr. Elhajomar made application; he was qualified for the unskilled positions he applied for; and other unskilled laborers were hired after Mr. Elhajomar's application was not processed. (Tr. 216-7)

Thereafter, Mr. Elhajomar worked for Thrifty Auto Carriers for seven days, October 25, 1988, until November 1, 1988, when he was injured in a job-related accident. (Tr. 87; 96) Mr. Elhajomar has not yet been authorized by a physician to go back to work. (Tr. 97) He receives workman's compensation and no-fault insurance. (Tr. 99-100; Exhibits C-20, 21, 22, 23, 24) He is unaware of any other

benefits (i.e., medical benefits, sick leave, vacation) he may have had at Thrifty besides his pay (Tr. 101-2).

Questions Presented and Respective Legal Positions of Parties

This case presents issues of first impression under section 102 of the Immigration Reform and Control Act (IRCA), as codified at 8 U.S.C. § 1324b.

One threshold question is whether Respondent State of Hawaii is a proper party to this proceeding. Respondent State of Hawaii contends that it is not a proper party because it is not an ``employer'' within the meaning of IRCA. In contrast, Complainant contends that the State of Hawaii is properly included because it ``controlled access'' to Complainant's employment opportunities.

The first substantive issue is whether a state statute is a ``law'' within the meaning of IRCA's specified exceptions to prohibitions against unfair immigration-related employment practices. See, § 1324b(a)(2)(C). Assuming, arguendo, that a state statute is a ``law'' within the meaning of IRCA's excepting language, the second issue is whether I have the authority to rule on whether Hawaii Rev. Stat. section 78-1(c) is a constitutionally valid ``law.''

The respective positions of the parties on these issues predictably differs. Complainant argues that the word ``law'' in section 1324b(a)(2)(C) applies only to federal law. Complainant reaches this conclusion by relying on a traditional canon of statutory construction which reasons that the use of the word ``law'' does not contain a qualifier that section 1324b(a)(2)(C) provides for in a ``Federal, State, or local government contract,'' etc. Complainant appears to be arguing that since this use of the word ``law'' is not similarly differentiated in the initial clauses of the exception section, then it must be read to mean only federal law.

Respondent City of Hawaii does not appear to take a clear advocate's position on the above-specified issues but contents that it acted in ``good faith'' in what it views as a ``Catch-22'' situation.

Providing the most substantive argument on these issues, the Hawaii State Attorney General's office argues that the Hawaii state statute section 78-1(c) is a ``law'' within the meaning of the excepting language in section 1324b(a)(2)(C). Respondent State of Hawaii argues that if ``law'' meant only federal law, the phrase ``federal law'' would have been used in the IRCA statutory language. The Attorney General further states that:

> If the statute allows state and local governments to have valid provisions in their contracts requiring employees to be citizens or permanent resident aliens, then it is safe to assume that the statute was also intended to allow a state or local government to pass a statute requiring employees to be citizens or permanent resident aliens. See, `Respondent State's Post-Hearing Memorandum,' at 6.

Respondent State of Hawaii supports its argument that the word ``law'' in section 1324b(a)(2)(C) includes a state statute with reference to legislative history. Id. In addition, the Hawaii State Attorney General argues that there is neither statutory authority or case law precedent for an administrative law judge to declare a state statute unconstitutional. Id., at 2.

Legal Analysis

1. Respondent State of Hawaii is dismissed from this proceeding because there is not a sufficient connection to the Complainant's employment opportunities

On August 14, 1990, following the hearing in this case, Respondent State of Hawaii renewed its Motion that it should be dismissed as a party in this proceeding.

Respondent State of Hawaii contends that it should be dismissed from the suit because it was not an ``employer'' within the meaning intended by section 1324b. In support of its position, the State argues that ``there is not an employer-employee relation between the Board and (plaintiff). Haddock v. Board of Dental Examiners of Cal., 777 F.2d 462 (9th Cir. 1985).''

In contrast, Complainant argues that Respondent State of Hawaii should be ``deemed'' an ``employer'' on the grounds that it promulgated the state law, Hawaii Rev. Stat. § 78-1(c)[1] which ``had control over access ELHAJOMAR may have had to positions offered by HONOLULU, citing, Naismith v. Professional Golfers Association, 85 F.R.D. 552 (1979).''

In my view, however, the State of Hawaii is not an entity that refused to hire Complainant, nor do I view the State as having had in any way an ``employment relationship'' with him. See, Mitchell v. Frank R. Howard Memorial Hospital, 47 EPD 38237 (9th Cir. 1988); Lutcher v. Musicians' Union Local 47, 633 F.2d 880 (9th Cir. 1980), 24 EPD 31402.

Though Complainant did not cite to a Ninth Circuit case, the Ninth Circuit does recognize that an analogous Title VII plaintiff ``need not aver the existence of a protected employment relationship with the defendant, but rather could state a claim under Title VII by averring that a defendant's actions interfered `with an individual's employment opportunities with another employer.' Mitch-

[1] Hawaii Rev. Stat. section 78-1(c) provides that:
All employees in the service of the government of the state or in the service of any country or municipal subdivision of the state shall be citizens, nationals, or permanent resident aliens in the United States and residents of the State at the time of their application for employment.

ell v. Frank Howard Memorial Hospital, supra, citing, Lutcher, 633 F.2d at 883 n.3.[2]

The Mitchell case, however, relying on Lutcher, limits the extension of Title VII coverage to defendants who, though not actually employing the aggrieved party nevertheless ``interfere'' with that individual's employment ``opportunities'' to situations wherein there is ``some connection with an employment relationship for Title VII provisions to apply.'' Id. The exact parameters of what is meant by ``some connection'' with the ``employment relationship'' is not articulated by the Ninth Circuit.

It is my intention to adopt this analogous Title VII reasoning and apply it to my efforts in analyzing section 1324b IRCA decisions. In other words, it is my current view that a person or entity may be charged in a section 1324b proceeding, even though that person or entity did not actually hire, or recruit or refer for a fee, and was not even in a position to actually hire, recruit or refer for a fee, if it can be shown that such person or entity ``interfered with an individual's employment opportunities with another employer,'' Id.

My reason for extending, through interpretation, the meaning of the literal language which identifies parties chargeable under section 1324b is not only to articulate additional grounds of congruence between section 1324b IRCA cases and Title VII cases but also to permit, in appropriate situations, a theory of liability which might further protect the kind of person for whom section 1324b was enacted from unfair immigration-related employment practices in the form of actionable interference with their employment opportunities on account of their citizenship status or national origin. Establishing analytically the potential of such a theory of recovery does not, however, make clear what the anticipated factual parameters of actionable interference with a protected individual's employment opportunities might be, and I certainly leave such a problematic for case by case development. It should be noted, however, and I intend on applying it herein, that I am of the view, consistent

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[2]This Ninth Circuit view is consistent with the positions of other circuits. See, e.g., Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973); Spirit v. Teacher's Insurance and Annuity Ass'n, 475 F.2d 1298, 1308 (S.D.N.Y. 1979); Vanguard Justice Society, Inc. v. Hughes, 471 F. Supp. 670, 694-95; Puntolillo v. New Hampshire Racing Commission, 375 F. Supp. 1089 (D.N.H. 1974).

As well, stated in Vanugard Justice, the rationale of Sibley, Puntolillo, and Curran indicate that the term ``employer,'' as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an ``employer'' of an aggrieved individual as that term has generally been defined at common law.'' 471 F. Supp. 670, 694-95 (emphasis added).

with the reasonable qualifier specified in Mitchell, that ``there must be some connection with an employment relationship'' for IRCA protections to apply in situations of alleged ``interference'' with the employment opportunities of protected individuals; i.e., intending citizens.

In this regard, as applied here, it is my view that a state statute, passed prior to the enactment of IRCA, is not, per se, the kind of actionable, ``interference with an individual's employment opportunities'' that could be alleged in a section 1324b proceeding, even though that state statute contains binding alienage classifications which are ultimately relied on by another person or entity to preclude consideration of an intending citizen alien's application for employment. Thus, I do not think that Respondent State of Hawaii is a proper party to this proceeding, not for the relatively simplistic reason that the State of Hawaii is not literally the entity that was in a position to hire or recruit or refer for a fee, but because the sole basis in the Complaint for charging the State of Hawaii is the existence of Rev. Stat. 78-1(c), and, as stated, I do not consider this to be a requisite ``connection with the employment relationship'' as analogously set out in Mitchell, supra, and Lutcher, supra.

Accordingly, Respondent State of Hawaii's Motion to Dismiss is granted.

2. A state statute is a ``law'' within the meaning of section 1324b(a)(2)(C) of Title 8 of the United States Code

Secton 1324b(a)(2)(C) of Title 8 of the United States Code provides that:

> Exception.-Paragraph (1) shall not apply to-
>
> (C) discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.

It is clear, to me, from both a ``plain meaning'' statutory interpretation, and from a review of reliable legislative history of specific Congressional intent, that the Hawaii Revised Statute section 78-1(c) is a ``law'' within the meaning of section 1324b(a)(2)(C). In my common sense understanding of ``plain meaning,'' a state statute is a ``law,'' and I am not persuaded by Complainant's semantic arguments that it is not. Moreover, it is unequivocally clear that the ``plain meaning'' of the statute is supported by an interpretation rendered by the legislation's author.

In response to concerns raised by other Congressmen that there may be sensitive areas in which it would be wise to limit the citi-

zenship status of employees, Representative Barney Frank, author of the most key provisions in section 1324b, stated:

> Mr. Chairman, in the first place, if you had requirements that you have to have citizens imposed by some State law or some Federal contract, you would be OK. The amendment makes provisions for that. (Emphasis added) 132 Cong. Rec. H9708 (daily ed. October 9, 1986).

In light of such a clear statement from as reliable a source as the anti-discrimination provision's author, I am not at all persuaded by Complainant's argument that the word ``law'' in section 1324b(a)(2)(C) ``clearly refers to federal law'' because ``if the word `law' was intended by Congress to mean anything other than Federal law, it could have easily been inserted.'' Though not stated as such, Complainant's argument appears to come down to an inverse of the infamous Latin-phrased principle of statutory construction, ejusdem generis-where general words follow a specific enumeration, the general words should be limited to persons or things similarly enumerated. In this case, however, the initial clause of general words in section 1324b(a)(2)(C) precede a distinguishable clause of a more specific enumeration, and, as such, should be read generally. See, generally, Sunstein, ``Interpreting Statues in a Regulatory State,'' 103 Harv. L. Rev. 405, 455 (December 1989).

Accordingly, I reject Complainant's contention that the use of the word ``law'' in the so-called ``exception clause'' in section 1324b(a)(2)(C) does not refer to state statutes. As stated, it is my view that a state statute is a ``law'' and that the exception clause language in section 1324b(a)(2)(C) includes such a ``law''.

3. As An ALJ in the Office of the Chief Administrative Hearing Officer (OCAHO) of the Department of Justice, I do not have the authority to rule on the constitutionality of Hawaii Rev. Stat. 78-1(c)

Complainant specifically put into issue the constitutionality of the Hawaii Rev. Stat. 78-1(c). Complainant did not offer legal argument to support the threshold question of whether or not an ALJ has the authority to decide such a question.

I have previously held that an OCAHO Administrative Law Judge has the authority to rule on the constitutionality of various due process questions such as invocations of the Fifth Amendment, allegations of the Fourth Amendment, and other issues such as selective prosecution/enforcement. See, e.g., United States v. Law Offices of Manulkin, Glaser, and Bennett, OCAHO Case No. 89100307 (October 27, 1989). The reasoning of this decision was premised in large part on a conclusion rendered by the Supreme Court that for certain types of issues, an administrative law judge was the ``func-

tional comparable'' to a district court judge. See, e.g., Butz v. Economu, 438 U.S. 478 (1978). Such reasoning, as applied generally to questions involving issues of procedural due process, is distinguishable from that which is applicable to the issue of an administrative law judge's authority to consider the constitutionality of state statutes.

A long line of United States Supreme Court authority has clearly stated that administrative agencies may not nullify nor otherwise pass upon the constitutionality of a statute. See, e.g., Public Utilities Commission v. Selective Service Board, 393 U.S. 233, 242; Johnson v. Robinson, 415 U.S. 361 368 (1974); Weinberger v. Salfi, 422 U.S. 749, 765 (1975); Moore v. City of East Cleveland, 431 U.S. 494, 526 (1977); cf. Southern Pacific Transp. Co. v. Public Utilities Commission, 18 Cal 3d 308, 556 P.2d 289 (1976); 90 Harv. L. Rev. 1682 (1977); see also, K. Davis, Administrative Law Treatise, v. 4, section 26.6, at 434 (2d ed. 1983).

Of particular concern to me in my analysis of this issue was whether a statute's constitutionality could be challenged without ``exhausting administrative remedies.'' It should be noted that I scrutinized the record in an attempt to decide this case on a non-constitutional ground, and concluded that I could not because it was clear from the written pleadings, and from the hearing that was conducted in Honolulu in April, that but for the Hawaii Revised Statute section 78-1(c), the City and County of Honolulu would have accepted Complainant's application for employment. After concluding that, generally speaking, a state statute is a ``law'' within the meaning of the exception clause language of section 1324b(a)(2)(C), the only remaining question was whether the state statute was a valid ``law.'' Thus, as I see it, a non-constitutional ground for deciding whether or not the state statute was a valid ``law'' within the exception clause was not available. See, Weinberger v. Salfi, 422 U.S. 749 (1975).

In the Salfi case, the Supreme Court found that when the only issue was the constitutionality of the statute, then a Court could decide that issue without requiring exhaustion because the purposes of exhaustion:

> have been served once the Secretary has satisfied himself that the only issue is the constitutionality of the statutory requirement, a matter which is beyond his jurisdiction to determine, and the claim is neither otherwise invalid nor cognizable under a different section of the Act. Once an . . . applicant has presented his or her claim at a sufficiently high level of review to satisfy the Secretary's administrative needs, further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest. Id. at 765-66. (emphasis added)

Thus, after careful deliberation, I conclude that, as a Department of Justice Administrative Law Judge, I do not have the authority to declare a state statute unconstitutional, and should therefore, consistent with the limitations of my role herein, conclude that the statute is ``entitled to a presumption of constitutionality.'' See, e.g., Davies Warehouse Co. v. Bowles, Price Administrator, 321 U.S. 144; 64 S. Ct 474 (1944).[3]

Therefore, as an Executive Branch administrative law judge, I will pass entirely on the question of the constitutionality of the Hawaii state statute, even though reasonable arguments may exist which ultimately could be ``judicially determined.[4]

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[3]In the Davies case, the Court held that:

State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared. Certainly no power to adjudicate constitutional issues is conferred on the Administrator. . . . We think the Administrator will not be remiss in his duties if he assumes the constitutionality of state regulatory statutes, under both state and federal constitutions, in the absence of contrary judicial determination. Id. at 147 (emphasis added).

[4]Though assuredly dicta, I take this opportunity to suggest that it is my view that Hawaii Rev. Stat. 78-1(c) may present constitutional problems. It is at least arguable that it conflicts squarely with the central federal purpose of section 1324b of Title 8 to prohibit unfair immigration-related employment practices against all citizens or intending citizens. It is also arguable that there is no ``compelling'' or even ``rational'' purpose which supports the ``under-inclusive'' classifications based on alienage that Hawaii Rev. Stat. 78-1(c) facially contains. I offer my view on this issue because it might be of some use to the parties and/or to any prospective reviewing court to have at least one suggested, if not definitive, ``administrative interpretation which would assist in resolving the conflict between any such state statutes and the provisions of'' IRCA. See, e.g., Manning v. UAW, 5 EPD 7964 (6th Cir. 1972).

First, as an immigration-related anti-discrimination statute, there are grounds for concluding that ``the extensive exercise of federal power with respect to immigration . . . are understood to preempt virtually all state efforts touching on similar efforts. U.S. Const. art. I, section 10, cl. 3 and section 8, cl. 4; art. VI, cl. 2.'' See, e.g., United States of America v. Cafe Camino Real, Inc., OCAHO Case No. 90100122 (August 28, 1990). While this broad conceptualization as rendered by ALJ Marvin Morse is clearly true as applied to the ``sovereign prerogatives'' of Congress to prescribe the terms and conditions upon which aliens may enter and remain in the United States, it is less clear ``the extent to which individual states can attach other types of `terms and conditions' upon aliens duly admitted and residing within their jurisdiction.'' See, Hull, Without Justice For All: The Constitutional Rights of Aliens, at 39 (1985). Nevertheless, it is my view that the important federal purpose codified in section 1324b and guaranteed to all intending citizens as well as to actual citizens would be corroded if the distinction drawn in Hawaii Rev. Stat. 78-1(c) were to be given deferential priority in an appropriate ``judicial determination.'' State legislated differentiations between intending citizens (who happen to be temporary resident alien asylees with pending applications to adjust status to that of permanent residents), and actual citizens/permanent resident aliens, conflicts

with the elusive goal and vision of establishing, through democratically promulgated ``law,'' equal employment opportunities for ``any individual (other than an unauthorized alien as defined in section 274A(h)(3)) with respect to the hiring . . . of the individual for employment.'' Section 1324b(a)(1); see also, Karst, Belonging to America: Equal Citizenship and the Constitution, at 39 (``If we allow major substantive inequalities to persist . . . equality of opportunity will serve mainly as a comfort to the comfortable, a slogan assuring them that they have earned their favored positions'') (1989). If the preemption doctrine is relevant to issues involving noncitizens because the Constitution vests Congress with exclusive power to make ``a uniform rule of Naturalization,'' such exclusive power should not be impeded by state laws that foreclose even unskilled public employment opportunities to persons who have publicly declared their intention to become citizens of the U.S. Thus, the argument could be made that IRCA, as codified in section 1324b, should preempt Hawaii Rev. Stat. 78-1(c) on the grounds that the state statute conflicts with, or at least impedes, its operation. See, e.g., Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941):

where the federal government, in the exercise of its superior authority in this field (immigration and naturalization), has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsequently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

Alternatively, it is my view that Hawaii Rev. Stat. 78-1(c) may violate the Fourteenth Amendment Equal Protection Clause, because an appropriate ``rational basis'' does not exist for making, at least in the limited context of accepting employment applications for unskilled labor positions with a municipality, an alienage distinction between citizens/permanent resident aliens on the one hand and intending citizen temporary resident aliens on the other. Within the severe space limitations herein, I will only state that it is my firm view that the Hawaii Rev. Stat. 78-1(c) is arguably unconstitutional in that it is not a classification that is ``sufficiently tailored to `persons holding state elective or important non-elective executive, legislative, and judicial positions' or those officers who ``participate directly in the formulation operation or review board public policy' and hence `perform functions that go to the heart of representative government.' '' See, Cabell v. Chavez-Salido, 454 U.S. 432, 27 EPD 32,310, n.7 (1982); and, Sugarman v. Dougell, 314 U.S. 634, 647 (1973). A state statute which effectively precludes an intending citizen resident alien from even applying for an unskilled labor position will not, as I see it, withstand appropriate constitutional analysis because under the Fourteenth Amendment, which applies to and protects all ``persons,'' the state may not condition public employment upon a waiver of a constitutional right nor may a state create imprecise ``under-inclusive'' classifications for the purpose of hiring or firing public employees.

For these suggested reasons, I believe that the Hawaii Rev. Stat. 78-1(c) is constitutionally defective on both preemption and Fourteenth Amendment grounds. It is my further view that, if ``judicially determined'' to be constitutionally defective, the Hawaii Rev. Stat. 78-1(c) could not be a ``law'' within the exception clause of section 1324b(a)(2)(C) because it is not a validly promulgated enactment.

Accordingly, while I may be limited in my actual structural authority, it is certain that the Constitution itself ``demands a continual effort to articulate the authority of our fundamental nature as a people and hence concomitantly to summon us to our powers as co-founders and to our responsibilities, in the full knowledge that how we are able to constitute ourselves is profoundly tied to how we are able to constitute ourselves is profoundly tied to how we are already constituted by our own distinctive history.'' See, Post, ``Theories of Constitutional Interpretation,'' Represen-

4. Respondent City and County of Honolulu is not liable for an unfair immigration-related employment practice because its action was premised on a law that constitutes an exception to IRCA's anti-discrimination prohibitions

Respondent City and County of Honolulu's decision not to accept Complainant's application for employment was based on its required obligation to follow a state statute that falls within the exception language of section 1324b(a)(2)(C).[5] Therefore, the City and County of Honolulu cannot be liable, as charged herein, for an unfair immigration-related employment practice as provided for in section 1324b(a)(1) because all actions taken in connection with Complainant's application for employment were ``otherwise required in order to comply with law'' and therefore constitute a valid exception to the general rule prohibiting discrimination on account of citizenship status. Section 1324b(a)(2)(C).

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) Complainant is an asylee temporary resident alien who initiated this proceeding pursuant to his private right of action after Office of Special Counsel refused his application.

2) Complainant has an application to adjust status to permanent residency pending with the INS and has filed a Declaration of Intending Citizenship on October 20, 1988.

3) Complainant applied for an unskilled labor position with the City and County of Honolulu. On October 21, 1988, his application for employment was not accepted.

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tation, 30, Spring 1990, at 24; see also, Rae, Equalities, at 1 (``Success comes to . . . ideas not when they are justified in brief or speech, but at the moment of their application to life and society.'') (1981).

[5]It should be noted that even if a finding of liability were made herein, courts continue to struggle with the application of a good-faith defense to back-pay liability of employers who rely on state statutes. See, e.g., Alaniz v. California Processors, 785 F.2d 1412, 40 FEP 768 (9th Cir. 1986) (no back pay liability for failure to hire women in jobs requiring heavy lifting when state protective laws in effect); cf. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (``. . . 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 and making persons whole for injuries suffered through past discrimination'').

4) The City and County of Honolulu decided not to accept Complainant's application for employment because it was following Hawaii Rev. Stat. 78-1(c) which limited all state, county, and municipality employment to citizens or permanent resident aliens.

5) The State of Hawaii is not a proper party to this proceeding because it did not hire, recruit or refer for a fee Complainant, nor did it interfere with Complainant's employment opportunities.

6) A state statute, in and of itself, does not constitute state action sufficient to interfere with a prospective employee's employment opportunities.

7) The State of Hawaii is dismissed from this case.

8) A state statute, including Hawaii Rev. Stat. 78-1(c) is a ``law'' within the meaning of section 1324b(a)(2)(C) of Title 8 of the United States Code.

9) Section 1324b does not authorize a Department of Justice Administrative Law Judge to rule on the constitutionality of a state statute.

10) Respondent City and County of Hawaii is not liable for an unfair immigration-related employment practice because its employment decision with respect to Complainant was based on its reliance on Hawaii Rev. Stat. 78-1(c) which is a ``law'' that fits within the exception clause of section 1324b(a)(2)(C).

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. section 1324(i).''

SO ORDERED: This 4th day of October, 1990, at San Diego, California

ROBERT B. SCHNEIDER
Administrative Law Judge