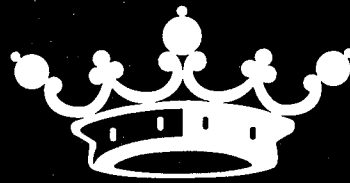


INSIDE THE MINDS™

# NAVIGATING GOVERNMENT IMMIGRATION ISSUES

LEADING IMMIGRATION AND REFUGEE RESETTLEMENT  
EXPERTS ON ADDRESSING EMPLOYMENT, EDUCATION,  
AND HEALTH CARE ISSUES FOR IMMIGRANTS



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Patrick Shen, Office of Special Counsel for Immigration-Related Unfair Employment Practices  
José A. Olivieri, Michael Best & Friedrich  
Richard Chacón, Massachusetts Office for Refugees and Immigrants  
Edwin B. Silverman, Illinois Department of Human Services  
Norman Levine, New Mexico Human Services Department  
James R. Edwards Jr., The MITA Group  
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*Refuge Program Coordinator, Texas Health and Human Services Commission*

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Refugee work is very complex and no single organization can possibly master all of its disciplines. The partnership between public and private entities is key to the development of the program in this more complex era.

I believe it is important to always remember that the refugee is ultimately making the changes in their life, and as such, their voice must be heard. We provide the information and perhaps some guidance, but ultimately we must have respect for those individuals and walk with them on their journey. Hope with them, encourage them to move forward, and believe in them. Refugees have changed my life with their strength, courage, and perseverance in overcoming enormous odds. Certainly some of these individuals have been the most resilient and extraordinary people I have ever encountered.

*Caitiona Lyons, a native of Ireland, began her work in the area of refugee and immigration programs many years ago and is privileged to be working for the U.S. refugee program. She is currently the refugee program coordinator for the State of Texas, Health and Human Services Commission. Prior to this, she worked in the government relations department within the Texas Department of Human Services as an immigration specialist. She has extensive work experience in the nonprofit sector, including the direction of a refugee resettlement program in Austin for USSCB.*

*Ms. Lyons has a master's in human services administration from St. Edward's University and is a licensed social worker. She is currently serving on the State Bar of Texas Immigration Affairs committee and is on the Board for the Institute for Social and Economic Development. She served in the capacity of secretary for SCORR for two terms before being elected to the office of president for the State Coordinator's of Refugee Resettlement association in 2004. In June 2006, Ms. Lyons was awarded Outstanding American by Choice by the U.S. Citizenship and Immigration Services for her work with immigrants and refugees in Texas.*

**Dedication:** Dedicated to all of those involved with providing assistance for refugees and to the strength and courage of refugees worldwide.

# The History and Functions of the Office of Special Counsel for Immigration-Related Employment Discrimination

Patrick Shen

*Former Special Counsel*

U.S. Dept of Justice, Civil Rights Division, Office  
of Special Counsel for Immigration-Related Unfair  
Employment Practices



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## Introduction

The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), a component of the Justice Department's Civil Rights Division, was created through the Immigration Reform and Control Act of 1986 (IRCA).<sup>1</sup> By imposing penalties on *employers* for hiring unauthorized workers, IRCA introduced a new approach to immigration policy during an era of heightened national concern over immigration issues.<sup>2</sup> OSC's mission was to enforce IRCA's new anti-discrimination provisions to be codified in the Immigration and Nationality Act (INA), providing an important counterbalance to newly introduced employer sanction laws.<sup>3</sup>

Prior to 1986, under federal immigration laws, only undocumented workers were liable for any penalties for unauthorized work.<sup>4</sup> Employers had no legal liability for hiring undocumented workers.<sup>5</sup> Among the many new requirements stemming from IRCA was the employer's duty to verify the work eligibility of new employees.<sup>6</sup> Specifically, after being hired, an employee must present documentation as proof of identity and employment eligibility to the employer, who then is required to verify the authenticity of the documentation and record this information on Form I-9.<sup>7</sup> The duty of an employer is only to make a good-faith determination as to whether the documentation appears genuine on its face and relates to the employee.<sup>8</sup>

Because of this new verification requirement, some members of Congress were concerned that employers might deny jobs to legal workers who

<sup>1</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986) (partially codified in scattered sections of 8 U.S.C.).

<sup>2</sup> See, e.g., Pear, Robert, *Close Vote Tense: Landmark Measure Goes to a Conference with Senate Members*, N.Y. Times, June 21, 1984, at A1; Bhagwati, Jagdish, Editorial, *Control Immigration at the Border*, Wall St. J., February 1, 1985, at 22 (for examples of national concern over immigration issues around the time of IRCA's passage).

<sup>3</sup> 8 U.S.C. § 1324b.

<sup>4</sup> Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1524).

<sup>5</sup> *Id.*

<sup>6</sup> 8 U.S.C. § 1324a(b).

<sup>7</sup> *Id.*

<sup>8</sup> 8 U.S.C. § 1324a(b)(1)(A)(ii).

looked or sounded "foreign" for fear (or purported fear) of inadvertently hiring unauthorized workers.<sup>9</sup> Representative Augustus Freeman Hawkins (D-Calif.) stated that, "bigotry and discrimination are alive and well in America ... And despite the laudable purpose behind this bill, there are those in this Nation who would use this measure as a pretext to deny employment to U.S. citizens and aliens lawfully residing here and by right, simply because they look or sound foreign."<sup>10</sup> Because of these misgivings about possible unintended consequences of the new requirements, Congress added an amendment to IRCA prohibiting discriminatory employment practices based upon citizenship status or national origin, as well as prohibiting the practice of over-documentation or "document abuse."<sup>11</sup> That same amendment created OSC to enforce these anti-discrimination provisions.<sup>12</sup> These concerns were substantiated in a Government Accounting Office (now the Government Accountability Office)(GAO) study in 1990, in which the GAO reported that, while it was difficult to determine whether discrimination was a direct result of IRCA, about 10 percent of employers began one or more discriminatory practices because of the changes to the law.<sup>13</sup> The study also found that persons of Hispanic and Asian origin suffered higher levels of discrimination, and that about 9 percent of employers said that they only hired U.S.-born persons, or did not hire persons with temporary work eligibility documents.<sup>14</sup>

More than twenty years later, as we face another wave of public anxiety about immigration enforcement and policy, OSC continues to play an important role alongside the Department of Homeland Security (DHS) in balancing the dual goals of establishing that all workers are authorized for employment, and protecting lawful workers from discrimination.

<sup>9</sup> 130 Cong. Rec., 15882 (1984), statement of Rep. William Blaine Richardson (D-NM): "[An] employer would not want to take a chance on hiring me because I am Hispanic and dark complexioned. The burden of proof would be on me to certify that I am a real American citizen with an identity card. This is how discrimination works. The perception would weigh against Americans of Hispanic origin that are not fair haired."

<sup>10</sup> 130 Cong. Rec., 15910 (1984), statement of Representative Augustus Freeman Hawkins (D-Calif.).

<sup>11</sup> 8 U.S.C. § 1324b.

<sup>12</sup> 8 U.S.C. § 1324b(c).

<sup>13</sup> U.S. General Accounting Office, *Immigration Reform: Employer Sanctions and the*

*Question of Discrimination*, Report to the Congress, GAO/GGD-90-62, March 1990, p.

48.

<sup>14</sup> *Id.*

## OSC Functions and Jurisdiction

The anti-discriminatory provisions of INA protect U.S. citizens and certain work-authorized individuals from employment discrimination based upon citizenship status or national origin.<sup>15</sup> The law also protects all work-authorized individuals from discriminatory documentary practices relating to the employment eligibility verification process, and from retaliation against those who take action against employers who discriminate.<sup>16</sup>

### Prohibited Practices

Four types of conduct constitute prohibited unfair immigration-related employment practices under IRCA: citizenship status discrimination, national origin discrimination, document abuse, and retaliation.<sup>17</sup> OSC has jurisdiction over these four types of unlawful conduct.<sup>18</sup>

#### 1. *Citizenship Status Discrimination*

The law prohibits discrimination based on citizenship or immigration status with respect to hiring, firing, and recruitment or referral for a fee by employers with four or more employees.<sup>19</sup> The law specifically protects U.S. citizens, recent permanent residents who applied for citizenship within six months of eligibility, temporary residents, asylees, and refugees.<sup>20</sup>

This means that, unless mandated by law or federal contract, employers may not limit hiring to U.S. citizens or any particular immigration status, so long as the job applicants are authorized to work in the United States.<sup>21</sup> Language such as "U.S. Citizens only" or "H-1B only" may be discriminatory on its face, and would constitute a violation of the law.<sup>22</sup> Moreover, OSC has consistently treated preference for undocumented

<sup>15</sup> 8 U.S.C. § 1324b(a)(1).

<sup>16</sup> 8 U.S.C. § 1324b(5)-(6).

<sup>17</sup> 8 U.S.C. § 1324b; 28 C.F.R. § 44.200.

<sup>18</sup> 8 U.S.C. § 1324b(c).

<sup>19</sup> 8 U.S.C. § 1324b(a)(1)(B).

<sup>20</sup> 8 U.S.C. § 1324b(a)(3).

<sup>21</sup> 8 U.S.C. § 1324b(a)(2)(C).

<sup>22</sup> *Id.*

workers over legal U.S. workers to be a violation of citizenship status discrimination as well as a violation of immigration laws.<sup>23</sup>

#### 2. *National Origin Discrimination*

The law also prohibits national origin discrimination with respect to hiring, firing, and recruitment or referral for a fee by employers with between four and fourteen employees.<sup>24</sup> Specifically, employers may not treat individuals differently because of their place of birth, country of origin, ancestry, native language, accent or because they are perceived as looking or sounding "foreign."<sup>25</sup> IRCA's additional provisions prohibiting national origin discrimination serve as a complement to the previously existing Title VII protections, ensuring that all work-authorized individuals are afforded equal protection from discrimination.<sup>26</sup>

Under Title VII of the Civil Rights Act of 1964, the U.S. Equal Employment Opportunity Commission (EEOC) has jurisdiction over larger employers that commit national origin discrimination.<sup>27</sup> A Memorandum of Understanding between OSC and EEOC provides that the agencies shall refer any charges to the other that appear to fall under the other's jurisdiction, and that charges filed with one agency will be considered equivalent to having filed with the other for purposes of satisfying the statutory time limits.<sup>28</sup>

<sup>23</sup> See, e.g., *Iron Workers Local 455 et al. v. Lake Construction & Development Corp.*, 7 OCAHO No. 964, 1997 WL 1122231, 53 (September 12, 1997) (finding that Respondent had engaged in discrimination on the basis of citizenship status by preferring to employ an undocumented alien over qualified U.S. citizens).

<sup>24</sup> 8 U.S.C. § 1324b(a)(1)(A).

<sup>25</sup> See *Kanaji v. Children's Hosp. of Philadelphia*, 276 F.Supp.2d 399, 403 (E.D.Pa., 2003) (noting that "[i]n order to have a claim of national origin discrimination under Title VII, it is not necessary to show that the alleged discriminator knew the particular national origin group to which the complainant belonged . . . [I]t is enough to show that the complainant was treated differently because of his or her foreign accent, appearance or physical characteristics."<sup>7</sup>)

<sup>26</sup> 8 U.S.C. § 1324b(a)(1)(A); See also, *Cornellu Currua v. U.S. Water Conservation Lab.*, 3 OCAHO No. 459, 1992 WL 535615, 1 (September 24, 1992) (noting that "[t]he legislative history of IRCA makes clear that the new prohibitions against national origin and citizenship status discrimination were enacted because Title VII remedies were considered insufficient."<sup>7</sup>)

<sup>27</sup> 42 U.S.C. § 2000e.

<sup>28</sup> Office of Special Counsel for Immigration-Related Unfair Employment Practices; Coordination of Functions; Memorandum of Understanding, 63 Fed. Reg. 5518, 5519 (Feb. 3, 1998) (describing procedures for the referral of charges and the appointment of respective agents for the purpose of allowing charging parties to satisfy statutory time limits).

## 3. Document Abuse

During the employment eligibility verification Form I-9 process, an employer may not demand additional or different documents as evidence of an employee's identity and employment eligibility if the documents that the employee presents appear to be reasonably genuine on their face and relate to that employee.<sup>29</sup> The employee is only required to present documents that are deemed acceptable by the government and listed in Form I-9's instructions.<sup>30</sup> The employee must be given the choice of which documents to provide, and the employer should avoid asking for specific documents or requesting any additional documents if those provided are sufficient to establish identity and employment authorization.<sup>31</sup> An employer who knowingly and intentionally treats workers differently during the I-9 process, because of actual or perceived national origin or citizenship status, such as on the basis of an accent or "foreign" appearance, is committing document abuse in violation of federal law.<sup>32</sup>

A 1996 amendment to the statute, and subsequent case law, has established that document abuse is not a *per se* violation, but must be coupled with discriminatory intent.<sup>33</sup> The current statute states that the refusal of documents or request for additional documents violates the law "if made for the purpose or with the intent of discriminating against an individual."<sup>34</sup> A 2003 case emphasizes that "[i]f there is one thing that is crystal clear from the amending language, it is that document abuse can no longer be treated as a strict liability offense. While pre-amendment cases may have held that a showing of discrimination is not required in order to establish liability for document abuse, this principle no longer applies."<sup>35</sup>

<sup>29</sup> 8 U.S.C. § 1324b(a)(6).

<sup>30</sup> 8 U.S.C. § 1324b(1)(A)(ii).

<sup>31</sup> See *United States of America v. Diversified Technology & Service of Virginia, Inc.*, 9 OCAHO No. 1095, 2003 WL 21130616, 22 (April 15, 2003) (stating that "the choice of which documents to present should be the employee's choice, not the employer's").

<sup>32</sup> 8 U.S.C. § 1324b(a)(6).

<sup>33</sup> *Id.*; See also, *Diversified Technology*, WL 21130616, 14 (April 15, 2003) (holding that document abuse was no longer a strict liability offense).

<sup>34</sup> 8 U.S.C. § 1324b(a)(6).

<sup>35</sup> *Diversified Technology*, WL 21130616, 14 (April 15, 2003).

## 4. Retaliation

Finally, the law prohibits any intimidation, threats, coercion or retaliation of any kind against a person who intends to file or has filed an OSC charge or complaint, or testified, assisted or participated in an OSC investigation or proceeding.<sup>36</sup> This provision is "designed to protect any individual — that is, not just an employee, and not just a 'protected individual' under § 1324b ... from intimidation, coercion, or retaliation because the person participated in any manner in an investigation or proceeding under § 1324b."<sup>37</sup> The anti-retaliatory provisions play an important role in maintaining the integrity and effectiveness of OSC investigations by ensuring that individuals are not threatened or punished for providing information to OSC. A strict interpretation of this prohibition would include undocumented workers among the class of persons who have standing to bring a retaliation charge against an employer. However, since it is impossible for undocumented workers to claim relief such as back pay or reinstatement, OSC rarely receives charges from undocumented workers alleging retaliation.<sup>38</sup>

## Filing Charges With OSC

Workers, or persons filing on their behalf, must file charges with OSC within 180 days of the alleged act of discrimination.<sup>39</sup> Charges may be filed in any language as OSC has the capacity to translate them into English. Once a charge is filed, OSC will investigate the claim.<sup>40</sup>

Typically, an attorney or investigator will interview injured parties, employers, and witnesses, as well as review documents.<sup>41</sup> After 120 days from receipt of the charge, if OSC is unable to make a determination, or dismisses the charge, OSC will notify the parties.<sup>42</sup> At that point, the charging party may file his own complaint before an administrative law

<sup>36</sup> 8 U.S.C. § 1324b(a)(5).

<sup>37</sup> *United States of America v. Hotel Maritima Washington Corporation*, 6 OCAHO No. 846, 1996 WL 280768, 4 (March 15, 1996).

<sup>38</sup> See, e.g., *Hoffman Plastic Compounds Inc. v. N.L.R.B.*, 535 U.S. 137, 138 (U.S., 2002) (holding that undocumented workers are ineligible for back pay).

<sup>39</sup> 8 U.S.C. § 1324b(d)(3); 28 CFR § 44.200.

<sup>40</sup> 8 U.S.C. § 1324b(d)(1).

<sup>41</sup> 28 CFR § 44.302.

<sup>42</sup> 8 U.S.C. § 1324b(d)(1); 28 CFR § 44.303.

judge.<sup>43</sup> The charging party must file his complaint within the following ninety days.<sup>44</sup> Where OSC has not yet made a determination regarding the charge, it may continue to investigate during this additional ninety-day period, and, where it finds reasonable cause to believe discrimination occurred, may also file a complaint against the employer before the administrative law judge, or seek to intervene in a complaint filed by the charging party.<sup>45</sup>

In the event that an aggrieved worker is not certain whether to file the complaint with OSC or EEOC, the worker may file a complaint with either OSC or EEOC, and the agency with the appropriate jurisdiction (sometimes both agencies) will handle the matter.<sup>46</sup>

## Remedies

There are a number of remedies that may result from an investigation pursuant to 8 U.S.C. § 1324b. Injured parties may receive back pay for wages lost due to discrimination, and may also receive reinstatement or hire to a position.<sup>47</sup> Violating employers may be subject to civil penalties, which will increase in amount for repeat offenders.<sup>48</sup> OSC may also seek injunctive relief to end discriminatory practices and ensure that employers comply with anti-discriminatory regulations in the future. For example, OSC has enjoined successfully the placement of job postings that seek only workers with a particular visa status. In other instances, OSC has been able to require corporate human resources departments to conduct in-house training and institute best practices to avoid discrimination in the future.<sup>49</sup>

## OSC's Successes

<sup>43</sup> 8 U.S.C. § 1324b(d)(2); 28 CFR § 44.303(c).

<sup>44</sup> *Id.*

<sup>45</sup> 28 CFR § 44.303(d)-(e) (stating that "The Special Counsel may seek to intervene at any time in any proceeding brought by a charging party before an administrative law judge.");

<sup>46</sup> Memorandum of Understanding, 63 Fed. Reg. 5518, 5519 (Feb. 3, 1998) (describing how EEOC and OSC may refer charges to one another).

<sup>47</sup> 8 U.S.C. § 1324b(g)(2)(B); *See also, e.g., Jones v. De Wit Nursing Home*, 1 OCAHO 189, 1990 WL 511979, 16 (June 29, 1990) (awarding back pay and reinstatement to employee terminated because of citizenship status).

<sup>48</sup> 8 U.S.C. § 1324b(g)(2)(B)(iv)(D)-(III).

<sup>49</sup> *See, e.g., Martinez v. Ray's Bar-B-Que*, 9 OCAHO 1120, 2005 WL 4911366, 5 (Dec. 19, 2005) (ordering that a violating employer comply with § 1324b and post notices advertising employees of their rights).

In FY2007, OSC successfully resolved almost 300 employment disputes. OSC considers a charge to be successfully resolved once a legal worker receives satisfactory compensation. Satisfactory compensation may consist of hiring or reinstatement to a job, full restoration of lost wages, or both. These successful resolutions occur through the settlement process, which means that the workers receive relief quickly and without the unnecessary delay of litigation.

## Making Information Available to the Public

OSC prefers to educate employers and employees about their rights and obligations *before* violations occur, rather than to take remedial or punitive steps afterwards. For this reason, a significant part of OSC's mission is to make information available to the public, and to be a continuing resource to the members of the public who genuinely want to follow the law. Moreover, reducing instances of misunderstandings allows OSC to focus its enforcement resources on willful violators who intentionally discriminate against legal workers in the United States. Specifically, OSC has several ongoing programs to provide information to the public.

### 1. Public Education

OSC conducts an outreach and education program aimed at helping employers and employees understand their rights and obligations under the INA's anti-discrimination and employer sanction provisions. Each year, OSC awards grants to organizations across the country to conduct public education campaigns about OSC's mission and the anti-discrimination laws enacted through IRCA. The program is open to public service groups, faith-based organizations, associations, and other groups providing information services to employers and/or potential victims of immigration-related employment discrimination. In 2008, OSC awarded grants that ranged from \$40,000 to \$100,000 to eleven organizations serving communities throughout the United States. Additionally, OSC's staff has provided information in many public forums, such as seminars and conferences sponsored by public interest groups, trade associations, or educational institutions. OSC also tries to accommodate requests for speakers at events with fifty or more participants.

## 2. OSC Hotlines

Additionally, OSC operates employer and employee hotlines to address questions and resolve problems quickly. Each call is handled by either an attorney or an investigator. In FY2007, OSC received nearly 30,000 inquiries through the employer and employee hotlines. This "early intervention" program is a successful and cost-effective means of resolving workplace problems before employees file charges. Through the hotlines, OSC's staff resolves questions concerning proper employment eligibility verification procedures, and attempts to ensure that legal workers do not lose their jobs because of a misunderstanding of the law. Frequently, OSC staff is able to resolve potential immigration-related employment disputes within hours, rather than weeks or months, and without costly litigation. Employers benefit from the program because it saves them time and money. Workers benefit from it because it keeps them on the job.

## 3. Partnerships

OSC, in partnership with the EEOC, has participated in workshops for employers throughout the United States to increase understanding of employer sanctions and protections against discrimination. In addition, to increase accessibility to its services and resources OSC has signed and/or reinvigorated memoranda of understanding with numerous state and local human rights agencies, where individuals can now obtain information about OSC and file charges of immigration-related employment discrimination. These agreements permit individuals who file a timely charge of discrimination with an OSC memorandum-of-understanding partner to have their charge also considered by OSC, if it falls within OSC's jurisdiction.

## Conclusion

As public awareness of worksite enforcement continues to grow, it is imperative that employers and employees alike understand and adhere to their rights and obligations under the anti-discrimination provisions of the INA. Employees who suspect that their legal right to work in the United States has been compromised because of discrimination, as well as employers who want to understand better their obligations under the law

with respect to anti-discrimination provisions of IRCA, should call the OSC's hotlines for information or intervention. OSC will continue to utilize both enforcement measures and outreach education to ensure that all legal workers remain free from unlawful discrimination.

*Patrick Shen was confirmed unanimously by the United States Senate on October 4, 2007 to be special counsel for Immigration-Related Unfair Employment Practices in the Justice Department's Civil Rights Division. Previous to this appointment, Mr. Shen was director of Government Relations at Fragomen, Del Rey, Bernsen & Looney LLP. He began his legal career through the Attorney General's Honor Program, and has served in the Justice Department in the capacities of law clerk for the United States Immigration Court, Assistant District Counsel for the former Immigration and Naturalization Service's New York District, Special Assistant U.S. Attorney in the Eastern District of New York, and trial attorney in the Office of Immigration Litigation of the Civil Division. In addition, Mr. Shen was chief immigration counsel for the Senate Judiciary Committee during the 108<sup>th</sup> Congress, and director of Policy and Planning of U.S. Immigration and Customs Enforcement in the Homeland Security Department.*

*Prior to attending and graduating from Brigham Young University Law School, Mr. Shen was a sports reporter in Taiwan. He now resides with his wife and two children in Maryland, where he is a certified emergency medical technician and a volunteer with his local fire department.*

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**Note:** *Author is writing in his personal capacity.*