OFFICE OF THE GENERAL COUNSEL
Division of Operations Management

MEMORANDUM OM 11-62 June 7, 2011

TO: All Regional Directors, Officers in Charge,
and Resident Officers,

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Updated Procedures in Addressing Immigration Status
Issues that Arise During NLRB Proceedings

This memorandum provides a brief introduction to immigration status issues, and an update regarding how such issues should be addressed during NLRB investigations and proceedings. The NLRA protects all employees covered by the Act regardless of immigration status;[1] however, immigration status issues may affect remedies and occasionally present other practical difficulties for the enforcement of the Act. Supplementing GC 02-06, this memorandum provides further guidance for proceeding when immigration status issues arise during NLRB case handling. It also identifies immigration agencies that have discretion to provide immigration remedies and other assistance to discriminatees or witnesses in Board proceedings. Regions should contact DAGC Peter Sung Ohr in the Division of Operations-Management whenever issues arise that may require assistance from such immigration agencies as further described below.

A. Background

1. Immigration Agencies

Since the organization of the Department of Homeland Security ("DHS") in 2002, primary responsibility for immigration issues has been split between three agencies within DHS:

- United States Citizenship and Immigration Services ("**USCIS**") is responsible for adjudicating immigration benefits, such as visas;
- Immigration and Customs Enforcement ("**ICE**") investigates immigration violations and enforces the law, including the prosecution of removal actions before immigration judges within the Department of Justice;
- Customs and Border Patrol ("**CBP**") is responsible for securing the physical borders and points of entry.

Within the limits of the law, USCIS, ICE, and CBP have discretion to decide whether, when, and how to enforce the law in each particular case coming within their respective jurisdictions. See Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 483-87 (1999). In

[1] Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984); see Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 152 (2002) (expressly reaffirming this principle, though limiting remedies in order to avoid conflict with immigration law).

exercising this discretion, immigration agencies will consider, among other things, "[c]urrent or past cooperation [by the individual] with . . . law enforcement authorities, such as the U.S. Attorneys, the Department of Labor, or National Labor Relations Board, among others." Memorandum, "Exercising Prosecutorial Discretion," Commissioner of Immigration and Naturalization Services Doris Meissner, p. 8 (November 17, 2000); see also Memorandum, "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens," Assistant Secretary of Immigrations and Customs Enforcement John Morton p. 4 (June 30, 2010); OM Memo 97-11 "Relations with Immigration and Naturalization Service (INS) of the U.S. Department of Justice" (February 14, 1997).

2. Immigration Status

Non-citizens[2] may hold one of two general categories of lawful visa status:

- **Immigrant visas** confer status as a Lawful Permanent Resident, colloquially referred to as a "green card." Lawful Permanent Residents generally have work authorization. This status does not expire but can be terminated in a variety of circumstances, including certain criminal convictions.
- **Nonimmigrant visas** are temporary and will expire within a specific defined term. There are many varied types of nonimmigrant visas, most often named after the statutory subsection in the Immigration and Nationality Act ("INA"), which creates each specific type. INA, Pub. L. 82-414, as amended, see 8 U.S.C. § 1101, et seq. For example, the "H-2B visa" refers to the temporary worker visa governed by INA § 101(a)(15)(H)(ii)(b), (see below). The scope and nature of work authorization varies considerably among the nonimmigrant visas:
    - **No work authorization** is provided by many of the most common nonimmigrant visa types, including B-1 visas for business, B-2 visas for tourists and short term visitors covered by the visa waiver program (visitors from, for example, Japan, Czech Republic, Italy, England, etc.).
    - **Limited work authorization** is provided by a number of visas, particularly those obtained through work (rather than family or asylum). Such work authorization is limited to a specific employer; indeed, the visa itself is terminated if the employment relationship ends, and the former employee is then required by law to leave the country. Visas of this sort include H-1 visas for professionals, H-2B visas for nonprofessionals, and L visas for intracompany transferees.
    - **Broader work authorization** that permits working for any employer is provided by some visas, including portions of the term of some student visas, K-1 fiancée visas, and T, U, and S,[3] law enforcement visas (described more fully below).

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[2] "All persons born or naturalized in the United States" are citizens under the Fourteenth Amendment. Citizens generally do not encounter immigration status issues when working in the United States.

[3] The S visa was created in 1994 as a temporary program and made permanent in 2001 require certification by the Attorney General and are capped at 200 visas per year. They are available only for informants against criminal organizations or enterprises. 8 U.S.C. § 1101(a)(15)(S)(i). An additional 50 visas are available where the Secretary of State and the Attorney General provide certification for a reliable informant on terrorist organizations. 8 U.S.C. § 1101(a)(15)(S)(ii); 8 U.S.C. § 1184(k)(1).

Violations of visa terms—either by working when unauthorized or by "overstaying" after the expiration of a visa—can result in loss of visa status and removal from the country. In addition, entering the country without any valid immigration status violates immigration law and can result in removal; such persons are commonly referred to as "**undocumented.**"

B. Procedure for Addressing Immigration Status Issues

As noted, the NLRA protects covered employees regardless of immigration status. Therefore, immigration status (or lack thereof) is generally not relevant either in representation proceedings or at the merits stage of unfair labor practice proceedings. As stated, in GC 02-06, "Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after Hoffman Plastic Compounds, Inc." p. 6:

- Regions generally should presume that employees are lawfully authorized to work. They should refrain from conducting a *sua sponte* immigration investigation and should object to questions concerning the discriminatee's immigration status at the merits stage.
- Regions should investigate the discriminatee's immigration status only after a respondent establishes the existence of a genuine issue [during the remedial stage].
- Regions should conduct an investigation by asking the Union, the charging party and/or the discriminatee to respond to the employer's evidence.

Regions should continue to follow this policy and consult GC 02-06 for additional direction.

Nonetheless, immigration issues are sometimes unavoidably interjected into NLRB proceedings. For example, NLRB discriminatees, witnesses, or voting-eligible employees may be taken into custody by ICE or CBP. In addition, immigration status may be inextricably intertwined with an unfair labor practice, such as where immigration threats or related conduct is the basis of the unfair labor practice allegation. Finally, the issue may be as simple as an employee volunteering information about immigration status or asking the Region for immigration advice or assistance.

Regions should not provide immigration advice. Resolution of these issues is best addressed when employees can obtain immigration advice through their union or from an independent immigration attorney. Regions may refer interested persons to the list of accredited immigration services providers maintained by the Department of Justice and found at http://www.justice.gov/eoir/ra/raroster.htm.[4] Individuals sometimes are mistaken about their immigration status and Regions should not assume that immigration status information volunteered by an unrepresented person is correct.

C. Seeking Assistance from Immigration Agencies Regarding Status Issues

As set forth below, in certain cases where immigration status is of particular significance, the Agency may decide to seek the assistance of one of the three immigration agencies to advance

[4] As a public service, the Region could place copies of the listing of currently recognized organizations and accredited individuals in a binder in a designated area in the Regional office for the public's use.

the effective enforcement of the NLRA. Such agencies might assist in providing visa remedies, deferring immigration actions during the pendency of the NLRB proceeding, and/or releasing individuals from custody or providing access to witnesses in custody. Regions should consult with DAGC Peter Sung Ohr in the Division of Operations-Management when such issues arise.

Regions should also discuss with the Division of Operations-Management cases involving any of the following circumstances: 1) where the status of an individual involved in the case is lost, particularly because of protected concerted activities; 2) where the individual's presence in the country is important to the effectuation of the Act; 3) where NLRB or immigration processes are being abused by the employer; and/or 4) where the employer knew or was willfully ignorant of the employee's lack of status. These circumstances are merely illustrative and there may be others where consulting with the Division of Operations-Management would be prudent.

1. Loss of Status, Particularly Where Status is Lost Because of Protected Concerted Activities

Cases involving lawful immigration status that is illegally stripped from an employee as a direct result of an unfair labor practice are very compelling. For example, as previously noted, an employee holding a nonimmigrant work visa—such as the H or L visas—will be dependent upon continued employment by a specific employer in order to maintain immigration status and legally remain in the country. An employer who fired such an employee in violation of, for example, Section 8(a)(1) or 8(a)(3), also would have unlawfully deprived the employee of visa status. In addition, the investigation, prosecution, and remediation of the unfair labor practice would likely be impeded by the discriminatee's absence from the country. However, remaining in the country to pursue the unfair labor practice could subject the discriminatee to immigration penalties and could complicate remedial considerations—even though the employee had always complied with immigration law and has been illegally deprived of immigration status.

In addition, cases where individuals lost lawful immigration status for any of a variety of other reasons may also require assistance from immigration agencies in order to remain in the country to participate in NLRB proceedings. This category includes those cases where there is simply the expiration of a temporary nonimmigrant visa.

2. Importance of the Individual's Presence in the Country to the Effectuation of the Act

Immigration status issues may interfere with enforcement and effectuation of the NLRA by, for example, impacting the availability of discriminatees and important witnesses during NLRB proceedings. In such cases, it may be appropriate to seek the assistance of immigration agencies.

In addition, particular attention is required where the alleged ULP involves egregious conduct, such as physical coercion, involuntary servitude, blackmail, or violations of other laws. Examples of physical coercion and involuntary servitude may include taking an employee's passport or imposing illegal working conditions. Examples of blackmail may include interfering with protected activity through illegal threats of retaliation such as threats to call immigration authorities or threats to "blacklist" employees. In such cases, additional immigration remedies

may be available, including a law enforcement visa such as the U or T Visa.[5] It is very important that Regions contact the Division of Operations-Management when such issues arise.

T Visas:

The T Visa category was created in 2000 by the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386. This visa is available where the applicant is the victim of "severe forms of trafficking in persons,"[6] and the victim must be present in the United States because of the trafficking. 8 U.S.C. § 1101(a)(15)(T)(i)(II). The victim must have either "complied with any reasonable request for assistance in the investigation or prosecution of acts of such trafficking in persons, or [i]s less than 15 years of age." 8 U.S.C. § 1101(a)(15)(T)(i)(III). Additionally, the victim must also prove "extreme hardship involving unusual and severe harm" if the victim were deported. 8 C.F.R. § 214.11(i) (describing evidentiary standard for extreme hardship). There is also a numerical limit of 5000 T Visas per year.

T Visas last for a term of three years, and automatically include work authorization. 8 C.F.R. § 214.11(l)(4)(work authorization); § 214.11(p)(three year term). Family members of victims can also obtain T Visas; family member T Visas are not subject to the numerical cap. 8 C.F.R. § 214.11(o). T Visas also include a path to becoming a lawful permanent resident. 8 C.F.R. § 214.11(p)(2).

This visa could be applicable in some cases that come before the NLRB. For example, where a discriminatee is brought into the country under false pretenses and confined in sweatshop conditions, a T Visa may be available. However, in most cases, T Visas may not be available either because the individual came to the United States independent of any trafficking, or the circumstances do not rise to the level of severe trafficking required by USCIS.

In those cases where a T Visa may be applicable, the Regional Office should immediately contact DAGC Peter Sung Ohr in the Division of Operations-Management.

U Visa:

Like the T Visa, the U Visa category was created by the Victims of Trafficking and Violence Protection Act. The U Visa is available where the nonimmigrant applicant is the victim of one the following "qualifying crimes" while in the United States:

> rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion;

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[5] Such visas are available to the victims of certain qualifying crimes who are cooperating with law enforcement agencies. 8 U.S.C. § 1101(a)(15)(T) & (U); 8 C.F.R. § 214.14.

[6] Defined as "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery." 8 C.F.R. § 214.11(a).

> manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

8 U.S.C. 1101(a)(15)(U)(iii).

Applicants for U Visas must submit a completed Form I-918, "Petition for U Nonimmigrant Status" to USCIS for consideration, along with a completed and certified Supplement B form completed by an agency responsible "for the detection, investigation, prosecution, conviction, or sentencing of qualifying criminal activity." See 8 C.F.R. § 214.14(c)(2)(i); Instructions for I-918, Supplement B at 2. In completing Supplement B, the agency must certify that the individual submitting the Form I-918 is a victim of certain qualifying criminal activity and is, has been, or is likely to be helpful in the investigation or prosecution of that activity. See 8 C.F.R. § 214.14(c)(2).

USCIS has interpreted this list of U Visa qualifying crimes broadly, and stated in the relevant regulatory documents that this is a list "of general categories of criminal activity. It is also a non-exclusive list. Any similar activity to the activities listed may be a qualifying criminal activity." New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, Interim Final Rule, 72 F.R. 53014, 53018 (September 17, 2007).

If a Regional Office receives a request to complete the Supplemental B form to certify a U Visa application, the Region should immediately contact DAGC Peter Sung Ohr in the Division of Operations-Management. Initially, it will be the Regional Office's responsibility to investigate whether the nonimmigrant applicant has been a victim of a qualifying criminal activity and is being, has been, or is likely to be helpful to the investigation of that activity. The qualifying criminal activity must be related to the meritorious unfair labor practice alleged in the ULP under investigation by the NLRB.

Upon the conclusion of the Regional investigation, the Region should submit a written recommendation to the Division of Operations-Management addressing whether the ULP allegation is related to the qualified criminal activity within the meaning of the U Visa statute and whether the nonimmigrant applicant has demonstrated that he or she has been, is being, or is likely to be helpful to the investigation.

The U Visa should be applicable in a greater number of cases than the T Visa because of the breadth of the crimes which qualify. The list includes a number of crimes that may arise in the workplace, and which also constitute unfair labor practices in some cases, including "peonage; involuntary servitude; . . . unlawful criminal restraint; false imprisonment; blackmail; extortion; . . . felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes."

The remedy provided by the U Visa are substantially similar to those available with the T Visa: a term of generally three or four years (USCIS may extend the term beyond four aggregate years), work authorization, family member visas, and a path to becoming a lawful permanent resident. 8 C.F.R. § 214.14(g), (c)(6), (f), (g)(2), respectively.

3. Abuse of Process: Retaliation Using Immigration Status

Whether or not a T or U Visa may be available to an individual involved in a Board proceeding, Regions should contact the Division of Operations-Management in cases where an employer is taking advantage of immigration status issues in an attempt to abuse the NLRB process and thwart the effective enforcement of the law. Examples of this type of behavior include calling or threatening to call ICE in retaliation for protected concerted activities, citing immigration status as a pretext for unlawful firing, and alluding to immigration status in a menacing or suggestive way during representation or ULP proceedings.[7]

4. Employer Knowledge or Willful Ignorance of Individuals Undocumented Status

Regions should also contact the Division of Operations-Management in cases where a respondent employer commits ULPs against an employee knowing or with willful ignorance of such employee's lack of immigration work authorization. Such employers pose a significant threat to the enforcement of the NLRA because they deliberately take advantage of the employee's lack of status. In most such cases, the employees are aware or suspect that the employer knows of their immigration status, and are thus deterred from exercising their legal rights even where no overt immigration threats are made.

The kind of evidence that demonstrates that an employer knew or was willfully ignorant of the workers' status includes: failure to ask for I-9 documents,[8] complicity in accepting fraudulent I-9 documents, and irregular pay arrangements. Threats to take action based on status or other statements acknowledging employees' status also reflect a knowing or willfully ignorant Employer.[9]

Conclusion

Although Regions should not raise immigration status issues *sua sponte*, in cases where such issues arise, immigration agencies may grant immigration remedies or favorably exercise discretion in order to assist the NLRB in the enforcement of the NLRA. Regions should contact DAGC Peter Sung Ohr in the Division of Operations-Management in all cases where the circumstances arguably justify using these mechanisms.

/s/
R.A.S.

cc: NLRBU
Released to the Public

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[7] Generally, an employer may raise immigration status during remedial ULP proceedings as a defense to back pay and reinstatement. GC 02-06; see Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002); NLRB v. Domsey Trading Corp., __ F.3d __, 10-3356, 2011 WL 563688 (2d Cir. February 18, 2011) ("[W]e find that employers may cross-examine backpay applicants with regard to their immigration status, and leave it to the Board to fashion evidentiary rules consistent with Hoffman.").

[8] Acceptable documents to establish a worker's identity and eligibility to work in the United States.

[9] Seeking such information should be done consistent with the guidelines in GC 02-06.