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

Irma Leticia Sosa, Complainant v. United States Postal Service, et al., Respondents; 8 U.S.C. 1324b Proceeding; Case No. 89200001.

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IRMA LETICIA SOSA, Complainant v. UNITED STATES POSTAL SERVICE, ANTHONY FRANK, Postmaster General, in his official capacity as Chief Executive Officer of the Postal Service; JOSEPH CARAVEO, in his official capacity as Western Regional Director of the Postal Service; DALLAS W. KECK, in his official capacity as General Manager and Postmaster of the City and County of San Francisco; and VIRGINIA JOHNSON, in her official capacity as Supervisor, Employment and Placement, San Francisco Division of the Postal Service, Respondents; 8 U.S.C. 1324b Proceeding; Case No. 89200001.

E. MILTON FROSBURG, Administrative Law Judge

Appearances: FRANCISCO GARCIA-RODRIQUEZ, Esquire, for Complainant

STEPHEN E. ALPERN, Esquire, and

SUZANNE H. MILTON, Esquire, for Respondents

DECISION AND ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY DECISION AND DENYING COMPLAINANT'S CROSS-MOTION FOR SUMMARY DECISION

(December 15, 1989)

I. Introduction:

In 1986, the Immigration and Nationality Act of 1952 (INA or the Act) was amended by the Immigration Reform and Control Act (IRCA), which made significant revisions in national policy with respect to the employment of aliens in the United States. The employer sanctions provisions of IRCA prohibited the hiring, recruiting, or referral for a fee, of aliens not authorized to work in the United States. As a complement to the employer sanctions provisions, IRCA's antidiscrimination provisions prohibited discrimination on the basis of national origin or citizenship status. This policy was set out at Sections 274A and 274B of the Act and Title 8 of the United States Code at Sections 1324a and 1324b.

Included within the individuals sought to be protected by IRCA antidiscrimination legislation were United States citizens, permanent resident aliens, temporary resident aliens, certain refugees and persons granted asylum, and intending citizens. IRCA provided that it was an unfair immigration-related employment practice for an employer to discriminate against an individual, other than an unauthorized alien, with respect to hiring, recruiting, or referral for a fee, because of the individual's national origin or because of the individual's citizenship status.

In 1973, the United States Supreme Court in Espinoza v. Farah Mfg. Co. Inc., 414 U.S. 86 (1973), held that Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sections 2000e et seq., did not cover alienage as distinct from national origin discrimination. The Court held that discrimination based on alienage is not the equivalent of national origin discrimination which, where the jurisdictional requisites are satisfied as to the employer's size, is prohibited by Title VII.

Accordingly, 8 U.S.C. Section 1324b was enacted to create new causes of action arising out of unfair immigration-related employment practices and to broaden ``. . . the Title VII protections against national origin discrimination . . . because of the concern of some members of Congress that people of `foreign appearance' might be made more vulnerable'' to employment discrimination ``by the imposition of [employer] sanctions.'' ``Joint Explanatory Statement of the Committee on Conference,'' Conference Report,

Immigration Reform and Control Act of 1986, H.R. Rep. No. 99-1000, 99th Congress, 2d Session, at 87. (1986).

The new IRCA legislation authorized individuals to file charges of discrimination with the Office of Special Counsel (OSC) and, if OSC did not file a complaint before an Administrative Law Judge (ALJ), it permitted the person making the charge to file a complaint directly before an ALJ. See, 8 U.S.C. Section 1324b(b)(1) and Section 1324b(d)(2).

II. Procedural History:

Consonant with the statute and regulations, on May 31, 1988, Irma Leticia Sosa, by and through her Attorney, Francisco Garcia-Rodriguez, Esq., of the Mexican American Legal Defense and Educational Fund (MALDEF), filed a Complaint with OSC, alleging that the United States Postal Service (USPS), et al., knowingly and intentionally discriminated against Ms. Sosa by refusing to hire her as a Postal Service distribution clerk on the basis of her citizenship status. Complainant Sosa alleged that Respondents' discriminatory policy, custom and practice of refusing to hire for employment within the Postal Service all otherwise qualified noncitizens authorized to work in the United States was an action in violation of 8 U.S.C. Section 1324b, which prohibits discrimination on the basis of national origin or citizenship status.

Based upon its investigation pursuant to 8 U.S.C. Section 1324b(d), OSC determined that it would not file a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). As its reason for declining to file a complaint, OSC stated in a letter to Attorney Garcia-Rodriguez that:

> While IRCA generally prohibits discrimination in hiring on the basis of citizenship status, the regulation issued by the Postal Service falls within the exception created by 8 U.S.C. Section 1324b(a)(2)(C).

The letter from OSC reminded Mr. Garcia-Rodriguez of Complainant's right to file her complaint directly with an ALJ no later than January 3, 1989.

Accordingly, on January 3, 1989, Ms. Sosa, through her attorney of record, filed her private Complaint against USPS, et al., with OCAHO. In her Complaint, Ms. Sosa reiterated the allegations of the original complaint filed with OSC and attached Plaintiff's (Complainant's) Exhibits A through G. On February 8, 1989, OCAHO issued a Notice of Hearing on Complaint Regarding Unfair Immigration-Related Employment Practices, assigning me as the Administrative Law Judge in the case and setting the hearing date and place for June 13, 1989, at Concord, California.

Respondents, through their attorneys, Stephen E. Alpern, Esq., and Suzanne H. Milton, Esq., answered the Complaint on March 15, 1989, specifically admitting or denying each allegation, or stating that Respondents are without sufficient information to form a belief as to the truth of the matter asserted.

Respondents' Answer set forth one affirmative defense, stating that Complainant had failed to state a claim for which relief could be granted because USPS regulations fall within the exception to the nondiscrimination provisions of IRCA found at 5 (sic) U.S.C. Section 1324b(a)(2)(C). See, 8 U.S.C. Section 1324b(a)(2)(C).

On March 23, 1989, I issued an Order directing the parties to begin discovery procedures. On April 25, 1989, Complainant submitted copies of her Request for Admissions, Request for Production of Documents, and Interrogatories Propounded to Respondents.

On May 15, 1989, I issued an Order confirming the prehearing telephonic conference held on May 9, 1989, in which it was determined that, pursuant to 28 C.F.R. Section 68.36, Respondents would file a Motion for Summary Decision and Complainant would file a Cross-Motion for Summary Decision.

On May 26, 1989, Attorney Suzanne H. Milton submitted Respondents' Motion for Summary Decision, along with a Statement of undisputed Material Facts, Supporting Memorandum, declaration of Carol L. Booher, and Respondents' Exhibits 1 through 3. The Motion was made on the basis that there were no material facts in dispute and Respondents were entitled to a summary decision as a matter of law.

On June 14, 1989, the hearing date was continued pending receipt of the motions. On July 6, 1989, pursuant to Joint Letters of Agreement filed by the parties, oral argument on the Motions for Summary Decision was Ordered to be heard in Oakland, California, on August 29, 1989, and a Reply to complainant's proposed Cross-Motion was authorized.

On August 1, 1989, Complainant submitted her Cross-Motion for Summary Decision with Declaration of Complainant and Supporting Memorandum. Complainant argued that Respondents' policy did not meet the standard for exception from the antidiscrimination provisions of IRCA and, moreover, even if the statutory exception were applicable, the arbitrary distinction drawn by Respondents is constitutionally invalid and violative of the Due Process Clause of the Fifth Amendment to the United States Constitution.

On August 11, 1989, Respondents submitted their Reply to Complainant's Cross-Motion, responding that Complainant's arguments are without foundation, that the exception at 8 U.S.C. Section 1324b(a)(2)(C) applies to the regulations of USPS, and that the

Postal Service has the authority to issue its regulations. Additionally, Respondents contended the Administrative Law Judge is without jurisdiction over constitutional claims, or, alternatively, that USPS regulations pass constitutional muster.

III. Statement of Material Facts:

On August 29, 1989, oral argument on this matter was heard on the Motion and Cross-Motion for Summary Decision. The following is a summary of the material facts which were undisputed when oral argument began:

1. Ms. Sosa is a lawful temporary resident and an intending citizen of the United States who applied for an entry-level position with USPS, San Francisco Division.

2. Ms. Sosa passed the written examination for Distribution Clerk in June, 1987, and received a Form 5912-B indicating she was eligible for consideration for that position for two years.

3. Ms. Sosa passed the required dexterity training course and was notified to report for an interview on January 27, 1988. The notification stated that all applicants had to be citizens or have an alien registration receipt card, Form 1-151 or 551.

4. On February 2, 1988, Ms. Sosa had a one-to-one interview with a personnel clerk who, in the course of completing the Form I-9 (a form authorized by the Attorney General to verify employment eligibility pursuant to 8 U.S.C. Section 1324a), informed Ms. Sosa that her temporary resident card was not acceptable for demonstrating eligibility to work for USPS.

5. Ms. Sosa offered her Social Security Card and California Driver's License to complete the Form I-9. The interviewer checked with a supervisor to verify that the temporary resident card was insufficient for employment with USPS.

6. Ms. Sosa requested a written explanation of disqualification and received a letter dated February 10, 1988, from Virginia Johnson, Supervisor of Employment and Placement, articulating the current postal policy of hiring only U.S. citizens, naturalized or born, or permanent resident aliens.

7. Ms. Sosa was denied employment pursuant to the official policy, custom, and practice of, and in accordance with regulations promulgated by, USPS.

8. In 1971, Congress passed the Postal Reorganization Act, 39 U.S.C. Section 101 et seq., creating USPS as an independent establishment of the executive branch of the U.S. government.

9. In 1974, the USPS adopted a policy of including permanent resident aliens as eligible for hire by USPS.

The parties, in their respective motions, agree that there are no material facts in dispute. Accordingly, summary adjudication of this case is appropriate as a matter of law.

IV. Legal Standards for a Motion for Summary Decision

The federal regulations applicable to this proceeding, 28 C.F.R. Section 68.36(c), authorize the Administrative Law Judge to:

> ``enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.''

The Supreme Court has stated that the purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and judicially noticed matter. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986). A material fact is one which controls the outcome of the litigation. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d. 202 (1986).

In the instant case, Complainant makes a broad argument to support its allegation that Respondents engage in unlawful discriminatory practices by hiring permanent residents while refusing to hire similarly situated, work-authorized temporary residents like Complainant, and that such discrimination is not within the purview of the statutory exceptions to the antidiscrimination provisions of IRCA.

Respondents make a narrow argument for USPS regulations falling within the exception to the discrimination provisions of IRCA set out at 8 U.S.C. Section 1324b(a)(2)(C).

Alternatively, Complainant argues that even if the statutory exception applied to USPS, the arbitrary distinction drawn by Respondents is constitutionally invalid and violative of the Due Process Clause of the Fifth Amendment to the United States Constitution.

Respondents contend that the Administrative Law Judge is without jurisdiction over any constitutional claims in this forum, or, alternatively, that the postal regulation passes constitutional muster.

Upon full consideration of the pleadings, affidavits, material obtained during discovery, briefs, exhibits, and oral arguments, I conclude there is no genuine issue as to any material fact and Respondents are entitled to a summary decision as a matter of law.

V. Analysis Supporting Decision to Grant Respondents' Motion

A. Regulatory Language

The relevant statutory language governing exceptions to the prohibition of discrimination based on national origin or citizenship is found in the list of exceptions at 8 U.S.C. Section 1324(a)(2). In Section 1324b(a)(2)(C), Congress provided that the prohibitions at Section 1324b(a)(1) shall not apply to:

> 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.

Respondent's rely on this exception to the prohibition against discrimination on the basis of citizenship. Respondents argue that Ms. Sosa was disqualified for employment because she was not a United States citizen or a permanent resident alien, as required by USPS regulations.

To support its position, Respondents cite current postal regulations, which were in effect at the time of the processing of Ms. Sosa as an applicant for employment, requiring all appointees of USPS, whether for career or noncareer positions, to be citizens of the United States or permanent resident aliens. This policy is articulated in Section 317.31 of the Postal Service's Personnel Handbook P-11, as set out in Postal Bulletin 20980, issued May 2, 1974 (Complainant's Exhibit D), and at Section 312.2 of Personnel Operations Handbook, EL-311, 2/1/89 (Respondents' Exhibit 3). This policy was reaffirmed subsequent to the passage of IRCA (Declaration of Carol L. Booher, May 26, 1989).

In their Motion for Summary Decision, Respondents argue that the USPS regulation, on its face, meets the standard for exception from IRCA. They argue that the passage of the Postal Reorganization Act, 39 U.S.C. Section 101 et seq., granted the Postal Service full authority to establish hiring and personnel policies. See, 39 U.S.C. Section 1001.

Further, Respondents offer the USPS hiring policies, as represented in the Employees Handbook, as the regulations of USPS. This contention is supported by 39 C.F.R. Section 211.2 which states, in pertinent part, that the regulations of the Postal Service consist of:

> (3) Headquarters Circulars, Management Instructions, Regional Instructions, handbooks, delegations of authority, and other regulatory issuances and directives of the Postal Service or the former Post Office Department. Any of the foregoing may be published in the Federal Register and the Code of Federal Regulations.

It therefore appears that the USPS policy of hiring only permanent resident aliens and U.S. citizens, naturalized or born, as articulated in the personnel handbooks of USPS, is a regulation of USPS, an independent establishment of the executive branch of the United States government. Such a regulation appears, on its face, to be the kind of regulation covered by the statutory exceptions in IRCA.

B. Intent of Congress

However, Complainant argues that the discrimination practiced by USPS is not the kind of discrimination Congress intended to permit by the exceptions. Complainant asserts that what Congress had in mind in adopting the exceptions was to allow certain government employers to lawfully require U.S. citizenship. That is, Congress intended to permit a distinction between a citizen on the one hand, and a noncitizen or an alien, on the other, but not between lawfully admitted noncitizens.

In support of its position, Complainant points out that when USPS began in 1971 it had a policy which prohibited the hiring of all noncitizens, and that the policy was modified in 1974 to include the hiring of noncitizen permanent aliens. Complainant claims this change was made under the compulsion of litigation, referring to the then pending Hampton v. Mow Sun Wong, 426 U.S. 88, 96 S.Ct. 1895 (1976), in which the Supreme Court struck down a federal Civil Service Commission (CSC) regulation which limited civil service positions to citizens on the ground that the Commission had exceeded its statutory authority.

The argument is made to show that USPS had, unilaterally, reached the conclusion that it was unlawful for USPS to continue to discriminate against noncitizen permanent residents. Complainant further points out that in 1976, when USPS considered Executive Order 11935, in which President Ford amended the Civil Service Rules in order to make citizenship a requirement for federal employment, USPS determined, on its own, to continue its policy of hiring noncitizen permanent resident aliens.

Therefore, Complainant argues that USPS is now in the position that the Civil Service Commission was in at the time of Hampton, supra, that is, without express authorization from Congress or the President to make discriminatory distinctions on the basis of citizenship status.[1]

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[1]This argument is supported by Hampton where the Court said, ``However, in 1974, without any additional statutory authority or direction, the Postal Service amended its regulation to make all noncitizens who have been accorded permanent

Accordingly, Complainant asks whether, in recognition of the fact that IRCA has created an additional class of noncitizens authorized to work in the U.S., Respondents can lawfully discriminate against one category of noncitizens, namely lawful temporary residents, while permitting employment of permanent resident aliens.

I find that this question goes beyond whether or not the exceptions in IRCA set out at Section 1324b(2) apply to the USPS. The exceptions clearly permit discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order. To determine whether the IRCA exceptions apply, it is necessary only to prove whether USPS regulations are, in fact, law, regulation, or executive order, as listed in Section 1324b(2).

Complainant offers legislative history to show that Congress sought to protect both permanent residents and other noncitizens, especially legalization applicants, against discrimination on the basis of citizenship. The legislative history cited by Complainant also demonstrates that Congress was aware of a need to expand the national origin protection which was then applicable through Title VII of the Civil Rights Act of 1964 to employers of fifteen or more persons. Additionally, the plain language of the statute at Section 1324b(1)(A) and (B) supports that position.

Nonetheless, Congress did insert a list of exceptions to the antidiscrimination protection in the statute, and by its plain meaning, Congress did intend to deny the protection of 1324(b)(1) to some people. I find that USPS has proven that what it calls USPS regulations are, in fact, regulations, and, therefore, included in the exceptions.

For the foregoing reasons, I conclude that Respondent have succeeded in establishing their affirmative defense. Accordingly, I find Respondent's actions are protected by the exceptions to the prohibi-

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resident alien status in the United States eligible for all positions except those at a high executive level or those expressly designated as `sensitive'.'' Hampton, supra, at 97.

In describing the position of the CSC prior to President Ford's Executive Order, the Supreme Court notes, ``That this is in fact the case is demonstrated by the elimination of the citizenship requirement for employment in the Postal Service which took place after this litigation commenced. Pursuant to a broad grant of authority comparable, in its generality and in its absence of any reference to a citizenship requirement, to that applicable to the Civil Service Commission, the Postal Service originally imposed such a requirement and then withdrew it. Neither the establishment nor the withdrawal of the requirement was either mandated or questioned by Congress or the President.'' Id at 112.

tion against discrimination based on citizenship authorized by the statute at 8 U.S.C. Section 1324b(2)(C).

C. Constitutional Questions Presented

As to the substantive constitutional questions presented, whether the USPS regulations where validly promulgated, and whether the regulations meet the substantive Due Process guarantees of the Fifth Amendment of the U.S. Constitution, I find these questions need not be reached in this Summary Decision. I do find, however, that under the IRCA legislation, the Administrative Law Judge does have the authority to rule on procedural due process questions presented.

Temporary resident aliens are admitted to the United States as a result of decisions made by the Congress and the President, and implemented by the INS acting under the Attorney General of the United States. It is conceivable, therefore, that substantive due process would require a decision to distinguish between classes of aliens be made either at a comparable level of government, or if it is to be made by the USPS, that it be justified by reasons which are properly the concern of that agency. See, Hampton, supra, at 116. These are substantive constitutional issues.

Notwithstanding my recommendation made after oral arguments indicating may assumption of jurisdiction regarding constitutional questions, I have determined, after lengthy deliberation, that neither this Summary Decision, nor a hearing before me as an Administrative Law Judge, is the most appropriate forum in which to decide the substantive constitutional questions that may be presented in the instant case.

Complainant has indicated her desire for this court to address the constitutional arguments. Accordingly, I note that on a similar question of an AlJ's power to inquire into the constitutionality of an agency's statute or regulatory underpinnings, the ALJ in an earlier OCAHO case, United States of America v. Big Bear Market, OCAHO Case No. 88100038, March 30, 1989, (Morse, J.) at 31, found it appropriate to quote from an opinion of the District of Columbia Circuit upholding the refusal of the Federal Maritime commission to entertain a constitutional challenge to certain tariffs. See, Plaquemines Port, Harbor and Terminal District v. F.M.C., 838 F.2d 536, (D.C. Cir. 1988). The Court, Bork, J., stated:

> It was entirely correct for the FMC to decline to decide the tonnage clause issue, see, e.g., Motor & Equip. Mfrs. Ass'n v. EPA, 627 F.2d 1095, 1114-15 (D.C. Cir. 1979), on the ground that the federal courts provide more appropriate forums for constitutional claims. NOSA Order, 23 S.R.R. (P & F) at 1372-73. Administrative agencies are entitled to pass on constitutional claims but they are not required to do so merely because their members, like all government personnel, owe alle-

giance to the Constitution. Motor & Equip. Mfrs. Ass'n, 627 F.2d at 1115. But cf. Meredith v. FCC, 809 F. 2d 863 (D.C. Cir. 1987) (where agency itself has cast grave legal doubt on the constitutionality of its own policy, administrative law judge should consider constitutional defense in an enforcement proceeding).

Doubt has been cast in the instant case on the constitutionality of the USPS regulation, not on the constitutionality of the IRCA regulation. Therefore, I am declining to decide the constitutional issues of whether Congress has exceeded its delegational authority and whether USPS has denied Complainant due process in the development of its regulation.

My decision to decline to decide these issues should not preclude the U.S. Court of Appeals from reaching these constitutional issues in a petition for review. See, Plaquemines, supra, at 551.

IV. Findings of Fact, Conclusions of Law, and Order

I have considered the pleadings, memoranda, supporting documents, and oral arguments submitted in support of Respondents' Motion for Summary Decision, Complainant's Cross-Motion for Summary Decision, and Respondents' Reply. 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 findings of fact, and conclusions of law:

1. That Complainant Irma Leticia Sosa is an intending citizen within the meaning of 8 U.S.C. Section 1324b(a)(3).

2. That, in implementation of USPS' announced policy of hiring only U.S. citizens and permanent resident aliens, Ms. Sosa was denied employment because of her citizenship status.

3. That a prima facie case of discrimination was shown by establishing that Ms. Sosa was qualified and applied for employment with USPS and was rejected while USPS continued to hire persons who satisfied its U.S. citizenship or permanent resident alien requirements.

4. That respondents proved by a preponderance of the evidence, that when respondents declined to hire Ms. Sosa for employment at USPS San Francisco Division on the basis of her citizenship status, Respondents were acting lawfully under a regulation which, pursuant to Section 1324b(2), excepted USPS from the prohibition against discrimination on the basis of citizenship status.

5. That, because Respondents' actions are excepted under 8 U.S.C.1324b(a)(2), and because no issue as to any material fact has been shown to exist with respect to Respondents' affirmative defense, I therefore find that respondents did not violate 8 U.S.C. Section 1324b(1).

6. Pursuant to 28 C.F.R. Section 68.51(c)(1)(iv), the Complaint is dismissed and the hearing previously continued indefinitely is hereby cancelled.

7. This Decision and Order is the final decision and order of the Attorney General. Pursuant to 8 U.S.C. 1324b(i) and 28 C.F.R. Section 68.52(b), any person aggrieved by this final Order may, within sixty (60) days after entry of the Order, seek review of the Order in the United States Court of appeals for the circuit in which the violation is alleged to have occurred or in which the respondent resides or transacts business.

IT IS SO ORDERED: This 15th day of December, 1989, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge