CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

SPACE X'S CONSTITUTIONAL CHALLENGE MAY NIX DOJ'S ABILITY TO BRING DISCRIMINATION CLAIMS AGAINST EMPLOYERS UNDER SECTION 274B OF THE IMMIGRATION AND NATIONALITY ACT, INCLUDING IN THE LABOR CERTIFICATION CONTEXT

Posted on November 21, 2023 by Cyrus Mehta

By Cyrus D. Mehta and Kaitlyn Box*

On November 9, 2023, the Department of Justice (DOJ) settled a dispute with Apple concerning allegations that Apple's recruitment practices under the Department of Labor's (DOL) foreign labor certification program - known as Program Electronic Review Management (PERM) - had discriminated against certain U.S. workers. Specifically, the DOJ alleged that Apple did not advertise PERM jobs on its own website, although it did this as a standard practice for other job openings. Additionally, Apple required applications for PERM job openings to send in paper applications by postal mail, despite permitting online applications for other open positions. Finally, the investigation found that "Apple did not consider certain applications for PERM positions from Apple employees if those applications were submitted electronically, as opposed to paper applications submitted through the mail". The DOJ asserted that these practices cumulatively resulted in Apple receiving few or no applications from U.S. workers for PERM positions. Apple agreed to a settlement that requires it to "pay $6.75 million in civil penalties and establish an $18.25 million back pay fund for eligible discrimination victims". Moreover, the settlement agreement specifies that the company must ensure that its PERM recruitment practices more closely match its standard recruitment practices in future.

In 2021, the DOJ and DOL reached similar settlement agreements with Facebook over issues with its own PERM recruitment practices. The agencies

allegedly discovered through audit of Facebook's pending PERM applications that the company "routinely reserved jobs for temporary visa holders through the PERM process" through practices designed to deter potentially qualified U.S. workers from applying in violation of INA § 274B(a)(1)(A). Specifically, Facebook allegedly required "applications to be submitted by mail only; refused to consider U.S. workers who applied to the positions; and hired only temporary visa holders". Pursuant to its settlement agreement with the DOJ, Facebook was required to "pay a civil penalty of $4.75 million to the United States, pay up to $9.5 million to eligible victims of Facebook's alleged discrimination, and train its employees on the anti-discrimination requirements of the INA", as well as "conduct more expansive advertising and recruitment for its job opportunities for all PERM positions, accept electronic resumes or applications from all U.S. workers who apply, and take other steps to ensure that its recruitment for PERM positions closely matches its standard recruitment practices". Facebook's settlement agreement with the DOL will require it to conduct additional notice and recruitment for U.S. workers, and consent to ongoing audits of its PERM applications. We discussed the Facebook settlement in detail in a previous blog.

In our previous blog, we noted that the Facebook settlement seemingly imposed a requirement that employees go above and beyond the PERM regulations when conducting recruitment to ensure that its PERM recruitment practices mirror the way it advertises regular job openings. Because DOL regulations require employers to carry out highly specific recruitment practices, some of which may be quite outdated, such as placing print advertisements in two Sunday newspapers, it may be difficult for employers to both mirror their normal recruitment practices and adhere to the regulatory requirements when conducting PERM recruitment. We noted that these conflicting requirements could prompt some employers to stop sponsoring foreign national workers for permanent residence altogether. Although the penalties paid by Apple and Facebook may be small change to such large companies, similar fines could ruin smaller employers, potentially deterring them from attempting to file PERM applications at all.

Because Apple and Facebook both chose to settle, it is unclear what the outcome of these cases might have been if the companies had chosen to challenge the agencies' allegations. Both Apple and Facebook complied with the DOL regulations regarding recruitment for US workers under the PERM

program. They may have been able to win if they did not cop for settlements. Despite the settlement, Apple did not agree with DOJ's allegations in its lawsuit. "Apple contests the accusation, according to the agreement, and says that it believes it was following the appropriate Department of Labor regulations," reported CNBC. "Apple also contests that any failures were the result of inadvertent errors and not discrimination, according to the agreement."

In September 2023, the DOJ sued SpaceX for discriminating against refugees and asylees in its hiring and recruitment practices. As stated in a DOJ press release, the agency alleged that "n job postings and public statements over several years, SpaceX wrongly claimed that under federal regulations known as 'export control laws,' SpaceX could hire only U.S. citizens and lawful permanent residents, sometimes referred to as 'green card holders'". Specifically, the company allegedly "...discouraged asylees and refugees from applying for open positions, through public announcements, job applications and other online recruiting communications that excluded asylees and refugees, ...failed to fairly consider applications submitted by asylees and refugees, ...refused to hire qualified asylee and refugee applicants and repeatedly rejected asylee and refugee applicants because of their citizenship status, and ...hired only U.S. citizens and lawful permanent residents, from September 2018 to September 2020". The suit alleged that SpaceX disregarded the fact that refugees and asylees are treated the same as U.S. citizens and lawful permanent residents for export control purposes, and are similarly permitted to access export-controlled technology after they are hired. SpaceX filed a complaint arguing that the DOJ's complaint is unconstitutional because the Attorney General, despite appointing Office of the Chief Administrative Hearing Officer (OCAHO) Administrative Law Judges (ALJs), does not review their decisions. This constitutes a violation of the Appointments Clause, which requires a department head like the Attorney General to "direct and supervise" the "inferior officers" he appoints. Judge Rolando Olvera of the U.S. District Court for the Southern District of Texas agreed with SpaceX's contention and granted a preliminary injunction in the case. *See SpaceX v. Carol Bell*, Civil Action No. 1:23-cv-00137 (Nov. 8, 2023). According to Judge Olvera's order, IER will not be able to cure this defect as "ased on § 1324b's plain language, broader context and legislative history, it is clear the decisions of OCAHO ALJ's are not subject to the Attorney's General review." INA § 274B(g)(1) requires an ALJ to issue "an order, which shall be final unless appealed as provided under subsection (i)."

INA § 274B(i) provides that the avenue for an aggrieved party to "seek review of such order" lies exclusively "in the United States court of appeals" 60 days after the entry of such an order." According to Judge Olvera, "t does not affirmatively provide for the Attorney General to review OCAHO ALJ decisions."

SpaceX's countersuit may provide a pathway for other employers whose hiring and recruitment practices under the foreign labor certification program are called into questions by the DOJ,, and wish to assert a constitutional challenge if they are investigated for unlawful discriminatory practices during the labor certification process. Indeed, based on *SpaceX v. Bell*, employers may be able to pose an Appointments-Clause challenge to any IER lawsuit or investigation under INA § 274B sealing IER's ability to bring any discrimination claim. As stated by Cyrus Mehta in a recent Forbes article, the best practice for employers in light of these cases is to "hew as closely as possible to their non-PERM recruitment practices", while also ensuring compliance with the DOL's PERM regulations. Thus, an employer who normally advertises for open positions that are submitted by email should not require applicants for PERM positions to send their applications only by postal mail. When an employer normally advertises open positions on its website, it may be prudent for the employer to do the same for PERM positions, rather than advertising only in print newspapers. At the same time, employers must comply with the DOL regulations' dictate of advertising in two Sunday print newspapers, even though they do not normally advertise other open positions in newspapers.

Under the foreign labor certification program, it is impossible for employers to completely mirror the recruitment with their real-world recruitment. Employers are also required to only test the labor market before filing the PERM. If there is a qualified US worker, the employer is not required to hire them and is only precluded from filing the labor certification application. The DOL invented the recruitment procedures out of whole cloth in its regulations at 69 FR 77325-77421 (Dec. 27, 2004). INA § 212(a)(5), from which labor certification springs, only requires the DOL to determine the unavailability of qualified workers for the position and did not impose such an artificial labor market test. On the other hand, the IER under INA § 274B has a different mandate and can potentially charge employers who conduct recruitment under the foreign labor certification program for discriminatory practices even if they follow the PERM regulations. The Appointments-Clause challenge by Space X if not overturned by the Fifth Circuit or Supreme Court could provide a pathway for

other employers to fend off investigations and lawsuits by the IER when they conduct recruitment under the foreign labor certification program.

*Kaitlyn Box is a Senior Associate at Cyrus D. Mehta & Partners PLLC.