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I. Chichoni Convinces Federal Court to Dismiss Florida University Professor's Immigration Claims of Forced Labor

Working with EpsteinBeckerGreen ("EBG") litigators, Hector Chichoni, the head of the firm's Southeastern Immigration Practice, convinced the U.S. District Court for the Southern District of Florida to dismiss a lawsuit brought by Professor Gerardo Alvarado. Professor Alvarado claimed that the Universidad Carlos Albizu ("University"), a Puerto Rican university, engaged in forced labor by refusing to raise his salary when it increased his duties while sponsoring him for permanent residence. *Alvarado v. Universidad Carlos Albizu*, No. 10-220722 (S.D. Fla. Aug. 25, 2010).

Professor Alvarado signed a three-year contract to work as an associate director and assistant

professor in the business administration program at the University's campus in Miami, Florida. The University sponsored Professor Alvarado for an H-1B nonimmigrant visa to allow him to perform this work. In 2008, however, Professor Alvarado asked the University to sponsor him for permanent residence so that he could fulfill the terms of his contract. The University agreed but, later that year, assigned the professor to perform additional responsibilities as director of recruitment and admissions with no salary increase. When he pressed for a raise, the University refused and warned Professor Alvarado that it was paying for his permanent residence process but would stop if he continued to ask for additional compensation. Professor Alvarado then sued the University, alleging that it violated 18 U.S.C. Section 1589(a)(3) and (4) of the Trafficking Victims Protection Act ("TVPA").

Hector Chichoni worked with the EBG litigation team to explain the fallacies in Professor Alvarado's immigration claim and to convince Judge Paul C. Huck to dismiss the claim. In his decision, Judge Huck noted that, regardless of the University's actions, it did not act in the coercive manner that is required to state a claim under the TVPA. In this regard, the court indicated that Section 1589(3) of the TVPA prohibits a "*misuse* or threatened *misuse* of law or the legal process," not the proper exercise of legal rights that has a coercive effect. "The plain language [of Section 1589] states that a law or legal process is abused if it is used or threatened to be used for which it was not designed or to exert pressure on another person," the opinion said. In reviewing the undisputed facts of the case, Judge Huck found that the University acted lawfully and, thus, did not violate the TVPA.

At Chichoni's urging, Judge Huck also dismissed the Professor Alvarado's claims under Section 1589(4) of the TVPA. In this regard, the court noted that the professor's claims were at odds with the stated purposes of the TVPA, which is limited to preventing human trafficking. The court concluded that the University was not trafficking; Professor Alvarado earned a "healthy salary, and enjoyed the same freedoms and rights of employment as any other alien resident." In addition, the court noted that Professor Alvarado's contract allowed him to leave his job after giving 30 days' notice and that he could seek new employment or leave the United States if the University fired him. The court pointed out that the stated purpose of Section 1589(4) was to prevent the modern slave trade in persons, particularly women and children … ." Professor Alvarado's case, by contrast, was like that of "every other United States worker who has been asked to take over responsibilities not explicitly mentioned in his job description."

II. ICE Reports Record Worksite Enforcement Activity

The Department of Homeland Security's Immigration Customs Enforcement ("ICE") recently reported that 2010 will be a record year for worksite enforcement activity and that this type of enforcement action will increase until comprehensive immigration reform can be achieved. By September 30, 2010 (the end of this fiscal year), ICE will have secured final orders to collect over $5 million in fines – more than five times the fines secured in 2009. This resulted from over 2,000 worksite inspections – more than the 1,444 inspections conducted during fiscal 2009.

At the same time, ICE indicated that it is prepared to issue next week over 500 new Notices of Intent to Fine ("NOFs") to employers throughout the country. This would be comparable

to the total number of NOFs that ICE issued for the entire 2008 fiscal year! These actions by ICE underscore the continued need for employers to manage their worksite enforcement risks to avoid the substantial fines and related consequences that can result for significant Form I-9 violations.

III. Kentucky Consular Center Conducts Unannounced Telephonic Contacts of Employers that Have Secured Approved Nonimmigrant Visa Petitions

The U.S. Department of State ("DOS") has confirmed that its Kentucky Processing Center ("KCC") has started conducting investigations of employers that secure approved nonimmigrant visa petitions to confirm that these employers exist and that the facts supporting the approvals are accurate. When the U.S. Citizenship and Immigration Services ("USCIS") approves a nonimmigrant petition, such as an H-1B or L-1B nonimmigrant petition, a copy of the petition package and approval is sent to the KCC to support visa issuance. In the past, the KCC simply used these materials to confirm the approval when the employee applied for a visa at an American embassy or consulate abroad.

As part of the federal government's increased enforcement activities in the immigration area, the KCC has hired 15 contractors to make unannounced calls to the sponsoring employers to verify information in the nonimmigrant petition. These calls should occur shortly after the USCIS approves the petition. As we previously reported, the USCIS has hired contractors to conduct similar unannounced site visits with respect to approved H-1B and L-1 petitions due to reports by the Government Accounting Office that suggested significant fraud in these programs. Employers now need to have protocols in place to confirm the accuracy of the USCIS filing, verify the identity of the caller who is seeking to secure information about the employer's petition, have a witness (preferably counsel) participate in the call and vouch for what occurred, and have complete copies of the petition available for reference during the call. If the contractor seeks information that is not readily available or that the employer representative does not know, it is important not to "guess"; the representative simply should ask the contractor for time to secure the necessary information and call back.

If the USCIS site visits are any guide, it is extremely important for sponsoring employers to respond accurately and promptly to these inquiries. Where discrepancies have developed in the USCIS program, the government has revoked the nonimmigrant petitions and acted to prohibit the sponsored employee from reentering the United States after foreign travel. Employers should develop protocols to respond to KCC inquiries so that problems do not inadvertently develop in connection with this aspect of the government's increased enforcement activities.

IV. Old Version of Puerto Rican Birth Certificate Not Valid for Form I-9 Verification

On September 9, 2010, the USCIS announced that, starting on October 1, 2010, employers no longer will be able to accept for Form I-9 purposes Puerto Rican birth certificates that were issued prior to July 1, 2010.

There have been persistent security problems with Puerto Rican birth certificates. One of the

largest categories of fraudulent documents involves these certificates. In response to legal requirements in the United States, the Vital Statistics Office of the Commonwealth of Puerto Rico started issuing more secure certified copies of birth certificates to U.S. citizens born in Puerto Rico on July 1, 2010. Beginning on October 1, 2010, employers will only be able to accept certified copies of Puerto Rican birth certificates issued after July 1, 2010, for Form I-9 verification.

These changes do not apply retroactively. Employers that may have accepted older versions of Puerto Rican birth certificates do not have to re-verify those documents, unless they have a reasonable suspicion that they are fraudulent or do not relate to the person who submitted them for Form I-9 verification. Indeed, the USCIS has indicated that it would constitute an "Unfair Immigration Employment-Related Practice" to re-verify Puerto Rican birth certificates issued prior to July 1, 2010, without any basis for questioning their authenticity.

Please note that federal contractors, who are required to use E-Verify, are subject to special Form I-9 rules that, in certain circumstances, permit the Form I-9 re-verification of existing employees. Therefore, the USCIS announced that, "[w]hile those contractors may update existing I-9 forms, an employer must not ask an employee to present a new certified copy of a Puerto Rico birth certificate if the employee presented a certified copy of a birth certificate issued in Puerto Rico before July 1, 2010, that was valid and acceptable for the Form I-9 at the time it was presented."

V. Third Circuit Rejects Hazelton, Pennsylvania's Local Immigration Ordinance

On September 9, 2010, the U.S. Court of Appeals for the Third Circuit affirmed a lower court's decision to enjoin enforcement of the Hazelton Illegal Immigration Relief Act Ordinance ("IIRAO"), which sought to regulate the employment and housing opportunities for illegal aliens. *Lozano v. Hazelton*, No. 07-3531 (3d Cir. Sept. 9, 2010). The City of Hazelton, Pennsylvania, adopted the IIRAO in response to what the City felt was the federal government's failure to enforce the immigration laws. The IIRAO made it unlawful for any business to recruit, hire, or continue to employ an illegal immigrant, and prohibits any person from renting a dwelling to an illegal alien. Speaking for the Court, Chief Judge Theodore A. McKee found that the IIRAO was impliedly preempted by the federal immigration laws and, thus, had to be enjoined.

The IIRAO is the latest in a series of state and local laws designed to regulate the activities of illegal aliens. Recently, the U.S. Supreme Court granted certiorari to review the decision by the U.S. Court of Appeals for the Ninth Circuit upholding an Arizona statute requiring employers to use E-Verify against a similar preemption challenge. *Chicanos por la Causa Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *cert. granted*, 79 U.S.L.W. 3762, No. 09-115 (June 28, 2010). A Supreme Court decision, which is expected next year, should go a long way in providing guidance regarding the permissible role, if any, of state and local governments in immigration enforcement.

VI. Senator Menendez Announces Plan to Introduce Immigration Overhaul Legislation in Senate

On September 15, 2010, Senator Robert Menendez (D-NJ) announced that he would introduce an immigration overhaul bill into the Senate in the coming weeks, and that his bill would include a pathway for legalization for undocumented workers. As we previously noted, Senator Menendez was one of several Senate Democrats to unveil an outline for comprehensive immigration reform in April 2010 that included a plan for biometric Social Security cards, streamlining the process for the admission of legal immigrants, and the creation of a labor market commission to make recommendations about the need for foreign workers.

At the same time, Senate Majority Leader Harry Reid (D-NV) announced that he would add the Development Relief and Education of Minors Act ("Dream Act") as an amendment to the Defense Department's authorization bill ("DDA"). The Dream Act allows undocumented minors to legalize their status if, among other things, they entered the United States prior to age 16 and enter either college or the military. By a vote of 56-43, the Senate failed on September 21, 2010, to approve this and other provisions in the DDA, so the opportunity for prompt passage of the Dream Act is now gone.

VII. DOS Expands Visa Reciprocity Schedule for China

On September 7, 2010, the DOS reciprocity schedule for China was amended. Among other things, the new reciprocity schedule allows for a 12-month multiple entry visa for H nonimmigrant visa applicants. A cable related to this change has been forwarded to diplomatic and consular posts.

VIII. New York's Domestic Bill of Rights

On August 31, 2010, Governor David A. Patterson signed the "Domestic Workers Bill of Rights Act," which added Section 296-b to the New York State Human Rights law. This legislation not only protects domestic workers from unwelcome harassment, but also defines a permissible work day, sets minimum wage and overtime requirements, and makes part-time domestic workers eligible for disability benefits.

Under U.S. immigration laws, certain American citizens and foreign nationals transferred to temporary positions in this country are permitted to bring their foreign domestic or child care workers here with them in B-1 nonimmigrant status. To secure the necessary B-1 nonimmigrant visa for these foreign workers, the employer must satisfy several requirements, including a demonstration to the U.S. consular officer that the proposed employment meets all legal requirements. Those seeking to bring domestic or child care workers into New York will now have to factor this new legislation into their plans.

IX. DOS Issues October 2010 Visa Bulletin

The DOS recently issued its Visa Bulletin for October 2010. This Bulletin determines who can apply for permanent residence and when. The cutoff dates for the Employment-Based Third Preference are as follows: January 8, 2005, for all chargeability, including the Philippines; November 8, 2003, for China; April 22, 2001, for Mexico; and January 15, 2002, for India. The cut-off dates for the Employment–Based Second Preference are as follows: Current for all chargeability, including Mexico and the Philippines; May 22, 2006,

for China; and May 8, 2006, for India. A copy of the current Visa Bulletin and all prior monthly editions is available at: http://travel.state.gov/visa/frvi/bulletin.

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