U.S. Chamber of Commerce

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December 11, 2023

Chief Raechel Horowitz
Immigration Law Division, Office of Policy
Executive Office for Immigration Review
U.S. Department of Justice
5107 Leesburg Pike
Suite 1800
Fall Church, VA 22041

Re: Interim Final Rule, U.S. Department of Justice; Office of the Chief Administrative Hearing Officer, Review Procedures (88 Fed. Reg. 70,586-70,591, October 12, 2023)

Dear Chief Horowitz:

The U.S. Chamber of Commerce submits the following comments on the above-referenced interim final rule ("IFR" or "rule"). The Chamber appreciates the importance of enforcing the law with respect to unfair immigration-related employment practices, as the prevention of unlawful discrimination is a very important public policy goal. However, the specific framework that was devised by Congress decades ago in the Immigration and Nationality Act ("INA") suffers from a significant constitutional defect that cannot be cured by DOJ's attempt to promulgate this regulatory band-aid. The IFR is incompatible with the text of the INA. The only federal entity with the ability to fix this problem is Congress. We urge DOJ to withdraw this IFR and work with Congress and stakeholders to effectively address this problem in a manner that properly balances the interests of businesses and workers alike.

For the past 34 years, decisions of an administrative law judge ("ALJ") under the Office of the Chief Administrative Hearing Officer ("OCAHO") on unfair immigration-related employment practices arising under INA § 274B were not reviewable by the U.S. Attorney General under INA § 274B.[1] When one examines the statutory text and legislative history of § 274B, it is easy to understand why this state of affairs came to be. The statute does not provide any administrative review authority for the Attorney General for § 274B claims and DOJ's regulations did not provide an administrative

[1] See 54 Fed. Reg. 48593 (Nov. 24, 1989), where 28 CFR § 68.51 provided no administrative review process for unfair immigration-related employment practices claims under INA § 274B.

appeals process for employers subject to these claims until the publication of this IFR a mere two months ago.

Further evidence of Congress' desire to preclude administrative appeals can be seen in the broader construction of the INA and its relation to similar enforcement provisions that were enacted around the same time as § 274B. INA § 274B is sandwiched between INA § 274A, which is concerned with the unlawful employment of aliens, and § 274C, which governs how document fraud will be dealt with by the federal government. Both of these sections provide companies that have allegedly violated those laws with the ability to appeal to senior executive branch officials for review of agency decisions entered against them.[2] The lack of any administrative review procedures for claims arising under INA § 274B would lend credence to the idea that Congress' omission here was intentional.

More importantly, the legislative history behind the Immigration Reform and Control Act provides additional evidence showing that this was Congress' intent. The congressional report language shows that INA § 274B did not provide an administrative review framework for unfair immigration-related employment practices cases because Congress wanted "faster and more certain" judicial review of these cases.[3]

This structure runs afoul of the requirements of the U.S. Constitution's Appointments Clause because the OCAHO ALJs are inferior officers of the federal government who are not being properly supervised in their issuance of final decisions in unfair immigration-related employment practices cases. The Appointments Clause provides that the President must appoint all "principal officers" of the federal government with the advice and consent of the U.S. Senate.[4] It also allows Congress to vest the appointment of other officers in the President, the courts of law, or the heads of departments.[5] Pursuant to this provision in the U.S. Constitution, Congress has generally allowed the head of a federal department to appoint "inferior officers" so long as they are "directed and supervised" by the "principal officer."[6]

In *U.S. v. Arthrex, Inc.,* the U.S. Supreme Court found that in order for a principal federal officer to direct and supervise inferior officers, he or she must be able to review the decisions of inferior officers to comply with the Appointments Clause. The text of INA § 274B does not provide for the Attorney General to review the

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[2] See INA §§ 274A(e)(7) and 274C(d)(4), both of which are sections containing similar language and both sections contain the same heading of "Administrative Appellate Review." 8 U.S.C. § 1324a(e)(7), 8 U.S.C § 1324c(d)(4).
[3] See H.R. Rep. No. 99-682(II) (1986), as reprinted in 1986 U.S.C.C.A.N. 5757, 5762, 1986 WL 31591, at*14; see also *id.* at *13 (the stated goal was to provide the "faster and more certain determination of rights" of those impacted in cases arising under INA § 274B.)
[4] U.S. Const. Art.II, § 2, cl. 2.
[5] *Id.*
[6] See *U.S. v Arthrex, Inc.*, 141 S. Ct. 1970, 1979-1980 (2021). See also *Edmond v. U.S.*, 520 U.S. 651, 660-662 (1997).

decisions of OCAHO ALJs in cases involving unfair immigration-related employment practices. Under *Arthrex's* reasoning, this administrative review scheme under INA § 274B is unlawful because the final administrative decisions on unfair immigration related employment practices are those decisions made by the OCAHO ALJs. Their ability to render final administrative decisions where an aggrieved party does not have an opportunity to pursue an appeal within DOJ is incompatible with the ALJs appointment as an inferior officer of the federal government.[7] Under the INA, the only avenue for a company to appeal a matter involving an unfair immigration-related employment practice is before an appropriate United States Circuit Court of Appeals.[8]

The underlying constitutional problem with the statutory text carries over into the unlawfulness of the IFR itself because the IFR's text clearly conflicts with the plain language of the statute. The INA only allows interested parties facing allegations of committing unfair immigration related employment practices to appeal their cases to a U.S. Circuit Court of Appeals.[9] By contrast, the IFR creates a referral process whereby the U.S. Attorney General may review all OCAHO ALJ final orders,[10] even though the IFR explicitly states that a company has no right to seek or request an administrative review of their case.[11]

Regardless of how vastly suboptimal this new administrative review construct is viewed by American businesses, the statutory text and the IFR contradict one another and they cannot legally coexist. The statutory text, along with its constitutional shortcomings, govern these matters. DOJ cannot rectify this problem by claiming authorities that Congress declined to provide it when it created these provisions in the INA, [12] as doing so would be tantamount to the executive branch rewriting this section of the statute.

As stated above, the Chamber greatly appreciates the serious issues at play regarding the prevention of discrimination based upon one's national origin or citizenship status. However, important public policy concerns alone cannot justify the implementation of ultra vires and constitutionally suspect regulations to uphold unsound legislative constructs. While we urge DOJ to withdraw this problematic IFR, the Chamber is committed to working with DOJ, Congress, and other interested stakeholders representing a multitude of interests to solve this problem in a manner that not only upholds our constitutional values, but also provides clarity and certainty for all interested stakeholders.

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[7] See *U.S. v Arthrex, Inc*, at 1985 (2021).
[8] INA § 274B(i)(1); 8 USC §1324b(i)(1).
[9] *Id.*
[10] See 28 CFR § 68.55, 88 Fed. Reg. at 70591 (Oct. 12, 2023).
[11] See *Id.*, at 70589 (Oct. 12, 2023).
[12] See *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 473 (2001).

Thank you for considering our views.

Sincerely,

Jonathan Baselice
Vice President, Immigration Policy
U.S. Chamber of Commerce