# Appendix A

**Applicability of Employer Sanctions to Alien Detainees**

Genco Op. No. 92-8 (INS), 1992 WL 1369347

U.S. Department of Justice

Immigration and Naturalization Service

General Counsel's Office

Legal Opinion: The Applicability of Employer Sanctions to Alien Detainees Performing Work in INS Detention Facilities

**G. H. Kleinknecht, Associate Commissioner, Enforcement**

February 26, 1992

## I. QUESTION PRESENTED

***1** Does work performed by alien detainees in a detention facility operated by or contracted through the Immigration and Naturalization Service (INS or the Service) subject the Service to the employer sanctions provisions of the Immigration and Nationality Act (the Act)?[1]

## II. SUMMARY CONCLUSION

No. Alien detainees who perform work for the INS while in INS custody in a contract or Service detention facility are not considered "employees" for purposes of employer sanctions.

## III. LEGAL ANALYSIS

Background. On April 22, 1988, the Office of General Counsel opined to the Field Advisory Committee that inmates who perform duties in federal and state penal institutions are not subject to the employer sanctions provisions as set forth in § 274A of the Act.[2] At that time the issue of work performed by alien detainees in INS operated or controlled detention facilities was not addressed. This supplemental memorandum is therefore provided.

Analysis. In 1988, we determined that inmates who perform duties pursuant to prison work programs and receive gratuity for so doing are not subject to employer sanctions provisions as set forth in § 274A of the Act because no employer/employee relationship is ever formed. Inmates may be required to participate in an institutional work program, and for that participation receive remuneration. Work performed is for the purpose of rehabilitation and institutional maintenance, not compensation. Therefore, an inmate who participates in a work program in a state or federal facility is not doing so "for wages or other remuneration" and is not therefore an "employee" as defined by 8 C.F.R. § 274a.1(f). Likewise, the facility does not engage an inmate's services "for wages or other remuneration" and cannot be an employer as defined by 8 C.F.R § 274a.1(g).

Similarly, an alien detained in an INS facility does not meet the definition of "employee", nor does the INS meet the definition of "employer." A detainee performs work for institution maintenance, not compensation. The allowance paid to a detainee for work performed is specifically provided for by 8 U.S.C. § 1555(d) and currently limited by Congress to $1 per day.[3] This payment does not constitute an appointment of the detainee to the position of a federal employee.[4] The allowance is not subject to the provisions of the Fair Labor Standards Act (FLSA).[5]

Further, the specific Congressional intent behind the passage of the employer sanctions provision of the Act was to deter illegal immigration by removing the lure of employment. Work performed by alien detainees is incident to their detention. Therefore, this is certainly not the type of employment to which Congress referred as creating a magnet for illegal aliens.

***2** Therefore, we conclude that the work performed by alien detainees in INS custody does not fall within the purview of the employer sanctions provisions.

/s/ GROVER JOSEPH REES III

General Counsel

**Attachment**

| Footnotes | |
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| 1 | 8 U.S.C. 1324a. |
| 2 | Office of General Counsel Legal Opinion, entitled "Form I-9 Requirements: Inmates Employed Within Federal and State Institutions," dated April 27, 1988. |
| 3 | FY 1978 Appropriation Act, P. L. 95-86, 91 Stat. 426(August 2, 1977). |
| 4 | Alvarado-Guevara et al. v. INS, No. 90-1476, (Fed. Cir. Jan.6, 1992). Although this case is not citable as precedent, the Court held that detainees lacked proper appointment to be considered employees of the Service. |
| 5 | 29 U.S.C. §§ 201 et seq. |

Genco Op. No. 92-8 (INS), 1992 WL 1369347

# Appendix B

**CO-243 DOD Request for Alien Labor**

Genco Op. No. 92-63 (INS), 1992 WL 1369402

U.S. Department of Justice

Immigration and Naturalization Service

General Counsel's Office

Legal Opinion Your CO 243-C Memorandum of November 15, 1991; DOD Request for Alien Labor

**Joan C. Higgins, Assistant Commissioner, CODDP**

November 13, 1992

## I. QUESTION

***1** In the subject memorandum, you request a Legal Opinion concerning the following question:

> May aliens held in Service custody at the El Centro Service Processing Center perform general labor, under Service supervision, at the El Centro Naval Air Facility?

## II. SUMMARY CONCLUSION

These aliens may perform general labor at the Naval Air Facility, so long as performance of the labor is voluntary, the labor is not unduly hazardous, and the aliens remain in Service custody.

## III. ANALYSIS

This request originated with Captain Comer at the El Centro Naval Air Facility (NAF). Under Captain Comer's proposal, aliens in Service custody at the El Centro Service Processing Center (SPC) would be engaged in general labor in order to refurbish recreational and training facilities at the NAF. Memorandum from Nathan C. Davis, OIC, El Centro, to Kim Porter, Deputy ADDD&D, San Diego (October 17, 1991). The projects are similar to those at the SPC for which these aliens are commonly engaged. Id. The Service has access to the NAF facilities which the aliens will be refurbishing, and will compensate the aliens for their labor, as provided by 8 U.S.C. 1555(d). Id.

The law expressly provides the Service with authority to use appropriated funds to compensate aliens for labor performed while in Service custody. 8 U.S.C. 1555(d). The statute provides that the rate of pay is to be fixed in each fiscal year's appropriations act. Id. Congress set the rate at $1.00 per day in the 1978 and 1979 appropriations. Department of Justice Appropriations Act, 1979, Pub. L. No. 95-431, 92 Stat. 1021, 1027 (1978); Department of Justice Appropriations Act, 1978, Pub. L. No. 95-86, 91 Stat. 419, 426 (1977). It appears that Congress discontinued this practice for Fiscal Year 1980. Department of Justice Appropriations Act, 1980, Pub. L. No. 96-68, 93 Stat. 416, 420 (1979). For example, Congress set no compensation rate for labor performed during the FY 1992. Department of Justice Appropriations Act, 1992, Pub. L. No. 102-140, 105 Stat. 782, 791 (1991).

This failure to set the rate of compensation, however, does not abrogate Service authority to pay aliens for labor performed while in Service custody. The Department of Justice Appropriations Authorization Act, 1979, Pub. L. No. 96-132, 2 (10), 93 Stat. 1040, 1042 (1979), gives the Service authority comparable to the authority in 8 U.S.C. 1555(d). Unlike Section 1555(d), however, Section 2(10) does not require Congress to set the rate of compensation for each fiscal year. 93 Stat. at 1042. Congress has continued Section 2(10) in effect for fiscal year 1992. Pub. L. No. 102-140, 102(a), 105 Stat. at 791. Thus, the Service retains authority to expend appropriated funds to pay aliens for labor performed while in custody.

***2** We do not believe that the fact that the aliens will perform the labor at the NAF, rather than at the SPC, makes Captain Comer's proposal improper. As noted, the SPC has access to the facilities at the NAF which the projects will improve. The Service will share in the benefit of the aliens' labor. The aliens already perform similar types of labor at the SPC itself; they will remain at all times in Service custody. The labor, therefore, appears to be within the authority of 8 U.S.C. 1555(d) and of Section 2(10).

/s/ Paul W. Virtue for GROVER JOSEPH REES III
General Counsel

Genco Op. No. 92-63 (INS), 1992 WL 1369402

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