

# UNDOCUMENTED ENTREPRENEURS: ARE BUSINESS OWNERS “EMPLOYEES” UNDER THE IMMIGRATION LAWS?

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## INTRODUCTION

It's a classic story. Unable to secure a green card, an ambitious noncitizen enters without inspection. Or, a student overstays her student visa. After a few years, she starts a business, be it designing websites,<sup>1</sup> cleaning offices, or putting up drywall. She likely provides services to the business herself, writing html code, managing employees, or swinging a hammer. Everyday experience informs us that many thousands of businesses like these exist—headed by people whose immigration status makes them ineligible to work in the United States.<sup>2</sup> By one scholar's estimate, as many as eight to ten percent of undocumented immigrants own businesses.<sup>3</sup> Although none of the literature on immigrant entrepreneurship distinguishes between business owners on the basis of eligibility to work in the United States,<sup>4</sup> it

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1. The Pew Hispanic Center estimates that fully twenty percent of the computer hardware engineers working in the U.S. are unauthorized migrants. PEW HISPANIC CTR., *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.* 12 (2006).

2. See ALEJANDRO PORTES & RUBÉN RUMBAUT, *IMMIGRANT AMERICA: A PORTRAIT* 30–31 (3d ed. 2006) (commenting that many unauthorized immigrants start businesses).

3. Julia Boorstin, *Illegal Entrepreneurs; Maria Has No U.S. Visa, and Jose's Expires Soon. Yet, They Own a Profitable California Factory, Pay Taxes, and Create Jobs*, CNNMoney, July 1, 2005, available at [http://money.cnn.com/magazines/fsb/fsb\\_archive/2005/07/01/8265279/index.htm](http://money.cnn.com/magazines/fsb/fsb_archive/2005/07/01/8265279/index.htm) (quoting Professor Harry Pachon).

4. See, e.g., KAUFFMAN FOUND., *THE KAUFFMAN INDEX OF ENTREPRENEURIAL ACTIVITY, 1997–2007* 4, 6 (2008) (“For immigrants, 460 out of one hundred thousand start a business each month, compared to 270 native-born.”). It is understandable that authors have not inquired into immigration status; it may undermine participation in the study. One sociologist who studies undocumented maids remarked that because employing an unauthorized worker is illegal, the maids and their employers “tend to shun interviews.” CHAD RICHARDSON, *BATOS, BOLILLOS, POCHOS & PELADOS: CLASS CULTURE ON THE SOUTH TEXAS BORDER* 70 (1999).

indicates that immigrants are almost twice as likely to start businesses as native-born Americans. Empirical evidence and exact numbers are scarce, but immigrants without work authorization likely make up a substantial proportion of the total.

Not all immigrant-owned businesses follow traditional business models. “Worker centers” and advocates of economic development have long helped to create small, worker-owned businesses as a way of creating jobs and increasing wages.<sup>5</sup> CleanHome, for instance, is a worker-owned housecleaning service, created by a worker center almost a decade ago.<sup>6</sup> Members are assigned jobs based on participation in the co-op’s activities, are paid an hourly wage by their clients, and contribute roughly ten percent of their income to pay for the co-op’s overhead. In other businesses nonprofits have helped to start, owners are paid through dividends on shares of stock (the “cooperative corporation” model), or a percentage of the monthly profit tied to the number of hours they work (the “cooperative LLC” model).<sup>7</sup> What they have in common is the risk that some of their owners are undocumented immigrants. Many nonprofits do not ask the immigration status of the people they serve. In fact, some nonprofits work almost entirely with undocumented clients.<sup>8</sup>

According to the Immigration and Nationality Act (INA), anyone who is in the United States without authorization is deportable.<sup>9</sup> But, with a resident population of over eleven million undocumented immigrants, seven million of whom are in the workforce,<sup>10</sup> it is clear that not everyone who is deportable gets deported. In fact, apart from imposing “unauthorized” status, federal law does not disturb many of the benefits and protections lawful residents receive. For instance, federal law does not bar states from admitting undocumented immigrants to

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5. See, e.g., Scott L. Cummings, *Developing Cooperatives As a Job Creation Strategy for Low-Income Workers*, 25 N.Y.U. REV. L. & SOC. CHANGE 181, 183–84 (1999) (advocating worker co-ops as a job creation strategy); JANICE FINE, WORKER CENTERS 118–19 (2006) (describing worker co-ops started by worker centers).

6. CleanHome is a fictional business based on an actual housecleaning co-op started by a worker center. Understandably, its owners asked not to be identified in this article.

7. Cummings, *supra* note 5, at 202, 206–07.

8. FINE, *supra* note 5, at 119.

9. INA § 237(a)(1)(B), 8 U.S.C.A. § 1227(a)(1)(B) (2005) (“Any alien who is present in the United States in violation of this Act or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 221(i) is deportable.”).

10. PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 1, 10 (2006).

state universities,<sup>11</sup> or arguably from including them in workers' compensation programs.<sup>12</sup> It does not bar undocumented immigrants from opening bank accounts,<sup>13</sup> and states may not prohibit them from signing contracts.<sup>14</sup> Because unlawful presence is not the end of the story, this Note examines a different question: do people without work authorization violate the immigration laws by owning businesses? Being undocumented no doubt impacts a person's access to credit, insurance, and other fundamental business requirements;<sup>15</sup> nevertheless, such barriers have not proven to be insurmountable.

The Immigration Reform and Control Act of 1986 (IRCA or "the Act")<sup>16</sup> poses a more threatening obstacle.<sup>17</sup> Employers who hire unauthorized aliens for employment are subject to fines, asset forfeitures, and in the case of repeated violations, criminal arrest. It appears that no undocumented immigrant has ever been sanctioned for running a business. Thus, the question of whether IRCA bars people unauthorized to work in the United States from owning businesses has never been litigated. However, enforcement of IRCA has increased exponentially in the last few years,<sup>18</sup> and it may only be a matter of time before small business owners or CleanHome's owner-housecleaners attract the attention of Immigration and Customs Enforcement (ICE).

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11. Letter from Sheriff Jim Pendergraft, Executive Director, Office of State and Local Coordination, U.S. Immigration and Customs Enforcement, to Thomas J. Ziko, Special Deputy Attorney General, North Carolina Department of Justice (July 9, 2008) (on file with *New York University Journal of Legislation & Public Policy*).

12. See, e.g., *Amoah v. Mallah Mgmt., LLC*, 2008 NY slip op. 8228 at \*3 (N.Y. App. Div. Oct. 30, 2008).

13. In fact, several major banks have begun marketing bank accounts and home mortgages to undocumented immigrants. Steve Bergsman, *Banks are Quietly Wooing Undocumented Immigrants*, U.S. BANKER, June 2005, [http://www.americanbanker.com/usb\\_article.html?id=200506011E5WNPZN](http://www.americanbanker.com/usb_article.html?id=200506011E5WNPZN).

14. See *Lozano v. Hazleton*, 496 F. Supp. 2d 477, 548 (M.D. Pa. 2007) (finding that 42 U.S.C. § 1981, which protects the right of "all persons" to enter contracts, prohibited the city of Hazleton from preventing undocumented immigrants from signing leases).

15. This Note will not take up these stumbling blocks to the ownership of businesses by those unauthorized to work in the United States.

16. Immigration Reform and Control Act of 1986, 8 U.S.C.A. §§ 1324a–1324b (2008).

17. This Note will not examine whether end users of undocumented immigrants' services—clients—could be sanctioned under IRCA. In employment law circles, there is currently a heated debate over whether such clients can become joint employers of the people who provide those services. For example, if a person cleans houses, do the owners become her employers for FLSA, tax, or worker compensation purposes? Whether the end users of services could be sanctioned under IRCA using these theories could be an article topic of its own.

18. See *infra* Part I.

The possibility weighs on the minds of business owners and the lawyers at nonprofits that help create worker-owned businesses.

Whether IRCA prohibits individuals from owning a business depends on whether owners are “hired for employment,” which is not simple to determine. CleanHome’s housecleaners, for instance, earn an hourly wage and are assigned jobs as if they were employees, but they also own the company and decide how to run it. A silent partner who runs a grocery store with her cousins may provide only the capital.<sup>19</sup> Does she run afoul of IRCA by receiving distributions or dividends from the business? If not, does she become an employee if she performs some small increment of work for the business, say by posting an ad for the store in the newspaper? What if she starts filling in at the registers on busy days?

In addition to the risks for the business, if an individual is “employed” for purposes of IRCA, her position will be weakened in future immigration proceedings. Many sections of the INA—including those on relief from removal, inadmissibility, and naturalization—explicitly carve out a role for the immigration judge’s discretion.<sup>20</sup> Property and business ties generally weigh in favor of a positive exercise of discretion, while violation of the immigration laws weighs against.<sup>21</sup> Also, a history of unauthorized employment, as defined by IRCA, can disqualify a noncitizen from a very desirable form of relief: adjustment of her status to a person admitted for permanent residence.<sup>22</sup> Owning a business, meanwhile, can often weigh in her favor. In *Matter of Gonzalez Recinas*, the Board of Immigration Appeals (BIA or “the Board”) cancelled the removal of a woman who was an “unauthorized alien” for the purposes of IRCA,<sup>23</sup> finding that removal would cause the requisite “exceptional and extremely unusual hardship” to her citizen children.<sup>24</sup> The fact that the respondent owned a business which

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19. See Jin-Kyung Yoo, *Utilization of Social Networks for Immigrant Entrepreneurship: A Case Study of Korean Immigrants in the Atlanta Area*, 10 INT. R. OF SOCIOLOGY 247, 359 (2000) (finding that family networks are a “crucial financial resource” to first generation Korean immigrants).

20. INA § 240A(b)(1), 8 U.S.C.A. § 1229b(a)–(b) (“The Attorney General *may* cancel removal”) (emphasis added); § 212(g) (“The Attorney General may, in his discretion, waive the application of [several grounds of inadmissibility]”). Similarly, the INA requires that an IJ determine that an applicant for naturalization is “attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.” INA § 316(a)(3), 8 U.S.C.A. § 1427(a)(3).

21. *Matter of C-V-T*, 22 I. & N. Dec. 7, 11 (1998).

22. INA § 245(c)(8), 8 U.S.C.A. § 1255(c)(8).

23. The woman had entered with a nonimmigrant visa and stayed longer than authorized. *Matter of Gonzalez Recinas*, 23 I. & N. Dec. 467, 468 (2002).

24. *Id.* at 470.

supported her children was of great importance to the Board, which emphasized that as a single mother, she was unlikely to find a comparably stable source of income in Mexico.<sup>25</sup>

In sum, whether IRCA prohibits undocumented immigrants from owning businesses has tremendous consequences, both for the business (which may be sanctioned) and the owner (who may be disadvantaged in future immigration proceedings). This Note argues that IRCA does not bar undocumented immigrants from owning businesses. It also contends that Congress should clarify that this is the case. It is debatable whether IRCA has accomplished its goals of eliminating the “magnet” of jobs and keeping undocumented immigrants from taking jobs that would otherwise go to American citizens.<sup>26</sup> Regardless of whether this is true, preventing undocumented immigrants, many of whom have been in the country for years, from owning businesses serves neither goal. If anything, such businesses create jobs and stimulate the American economy.<sup>27</sup> In fact, to achieve the greatest benefits to the American economy, undocumented business owners should be encouraged to pay taxes, pay into workers’ compensation insurance, and follow employment regulations. They are less likely to do so if their main focus is not on compliance, but on attempting to fly under the radar.

In Part I of this Note, I give a brief background on IRCA. In Part II, I argue that IRCA creates a very narrow prohibition, one which does not apply to business owners. In Part III, I consider federal employment law—which I contend will be used to interpret IRCA—concluding that decisions in other contexts support non-coverage of owners under IRCA. I also consider employment cases where owners have been found to be employees, arguing that in these cases, courts responded to special statutory concerns which dictate that owners could be employees in the given context. In Part IV, I argue that Congress, which is currently deadlocked over comprehensive immigration reform, should take the small but sensible step of clarifying that IRCA does not bar unauthorized immigrants from owning businesses.

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25. *Id.* at 471.

26. *See, e.g.*, Michael Wishnie, *Prohibiting the Employment of Unauthorized Aliens: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 195.

27. *See infra* Part III.A.

## I.

THE IMMIGRATION REFORM AND CONTROL ACT  
OF 1986 (IRCA)<sup>28</sup>

IRCA created a scheme of sanctions to discourage employers from hiring people not authorized to work in the United States. Cases brought under IRCA are adjudicated before a group of administrative law judges within the Executive Office of Immigration Review.<sup>29</sup> Under the statute, the decision of the administrative law judge becomes the final agency decision unless modified by the Attorney General or an officer to whom the Attorney General delegates review authority.<sup>30</sup> The Attorney General created the Office of the Chief Administrative Hearing Officer (OCAHO) by regulation to fill this role.<sup>31</sup> Any person or entity sanctioned under IRCA may petition the appropriate Court of Appeals for review,<sup>32</sup> regardless of whether she has requested that OCAHO review the administrative law judge's order.<sup>33</sup>

IRCA establishes two requirements to prevent employers from hiring "unauthorized aliens."<sup>34</sup> First, the Act makes it unlawful for an employer to "hire for employment" anyone not authorized to work in

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28. Like several acts before and after it, IRCA amended the Immigration and Nationality Act (INA), adding itself to the fabric of the country's nationality laws. Throughout this Note, I cite to IRCA using INA section numbers. Understandably, courts typically cite to the *United States Code*. However, the codification scheme has been described as "eccentric and unpredictable," with the result that "[s]pecialists in the field almost religiously employ the INA section numbers and are not always familiar with references to the U.S. Code enumeration." THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY*, at xiii (6th ed. 2008).

29. INA § 274A(e)(3), 8 U.S.C.A. § 1324a(E)(3) (2008); INA § 274C(d)(2), 8 U.S.C.A. § 1324c(D)(2) (2008).

30. INA § 274A(e)(7), 8 U.S.C.A. § 1324a(E)(7); INA § 274C(d)(4), 8 U.S.C.A. § 1324c(D)(4).

31. See 8 C.F.R. § 68 (2007) (setting out rules of practice and procedure for adjudication of cases arising under IRCA). For an overview of OCAHO and the adjudication process see the OCAHO website, [http://www.usdoj.gov/eoir/OcahoMain/ocaho\\_sibpage.htm](http://www.usdoj.gov/eoir/OcahoMain/ocaho_sibpage.htm). The webpage also lists the roughly 1,100 OCAHO precedent decisions a litigant may cite in IRCA adjudication. OCAHO requests that litigants use a citation format which includes the reference number of the case cited. It would read, for example, "1 OCAHO no. 12, 745, 750 (1991)" to refer to a case appearing in the first volume of bound precedent decisions, carrying reference number 12, and starting on page 745. The pincite is to page 750.

32. INA § 274A(e)(8), 8 U.S.C.A. § 1324a(E)(8); INA § 274C(d)(5), 8 U.S.C.A. § 1324c(D)(5).

33. 28 C.F.R. § 68.56 (2007).

34. Federal law defines "unauthorized aliens" as anyone who "is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General." INA § 274A(h)(3), 8 U.S.C.A. § 1324A(h)(3).

the United States.<sup>35</sup> The Act leaves the terms “hire” and “employment” undefined,<sup>36</sup> and the Department of Homeland Security regulations<sup>37</sup> offer little guidance.<sup>38</sup>

Second, IRCA requires employers to verify that new hires are not unauthorized aliens by examining documents which establish both their identity and work authority.<sup>39</sup> A United States passport establishes both identity and work authority, as does a resident alien card.<sup>40</sup> Certain documents, such as a Social Security card, establish work authorization, and may be used in conjunction with proof of identification, such as a driver’s license or state-issued identification.<sup>41</sup> The employer must attest that she has verified that the employee is not an unauthorized alien.<sup>42</sup>

An employer who does not comply with the attestation requirement may be fined between \$110 and \$1100 for each employee “untested.”<sup>43</sup> An employer found to have knowingly hired unauthorized aliens is subject to a cease and desist order and fines as high as \$3200

35. INA § 274A(a)1–2, 8 U.S.C.A. § 1324a(A)1–2. The relevant part of the prohibition reads:

“(a) Making employment of unauthorized aliens unlawful.

(1) In general. It is unlawful for a person or other entity—

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment

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(2) Continuing employment. It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.”

36. See 8 U.S.C. § 1101 (defining terms used in Title VIII of the *United States Code*).

37. The DHS regulatory definitions are legally binding on OCAHO. See *Wrangler’s Country Cafe, Inc.*, 1 OCAHO no. 138, 929, 932 (1991) (noting that the definition of employer “was written as a ‘legislative rule’ under a delegation of rulemaking authority to an administrative agency rather than as an ‘interpretive rule’ giving agency guidance on the meaning of a statute”), *aff’d sub nom.* *Steiben v. INS*, 932 F.2d 1225, 1228 (8th Cir. 1991).

38. The regulations state cryptically that “[t]he term hire means the actual commencement of employment of an employee for wages or other remuneration.” 8 C.F.R. § 274a.1(c) (2007). Similarly, “[t]he term employment means any service or labor performed by an employee for an employer within the United States.” 8 C.F.R. § 274a.1(h) (2007).

39. INA § 274A(b)(1)(A), 8 U.S.C.A. § 1324a(b)(1)(A).

40. INA § 274A(b)(1)(A)–(B), 8 U.S.C.A. § 1324a(b)(1)(A)–(B).

41. *Id.*

42. The employer’s approval is recorded on a Form I-9. 8 C.F.R. § 274a.2(a)(2) (2007).

43. 8 C.F.R. § 274a.10(b)(2) (2007).

per unauthorized employee.<sup>44</sup> The maximum fine rises to \$6500 per employee on the second offense and \$16,000 thereafter.<sup>45</sup> An employer who engages in a pattern or practice of violations is subject to criminal fines of \$3000 per employee and six months imprisonment.<sup>46</sup>

Clearly, these penalties could add up quickly for a business that employs multiple undocumented immigrants. For ten undocumented employees, the fines could reach \$43,000 on the first offense and dramatically more thereafter.<sup>47</sup> Furthermore, the Eighth Circuit and OCAHO have held that IRCA's monetary penalties may also be imposed directly on the agent who does the hiring,<sup>48</sup> which is especially worrisome to nonprofits that create businesses to benefit the sort of low-wage workers who could be devastated by such a fine.

It appears that businesses owned by undocumented immigrants have yet to be subjected to these sanctions. Accordingly, OCAHO has not been asked to determine whether the owners are employees for the purposes of IRCA. However, OCAHO may need to decide the question soon, given the tremendous surge in enforcement in 2006 and 2007. Concerned that employers see the small risk of fines as a "cost of doing business," ICE has dramatically increased its efforts, seeking large criminal fines and civil judgments instead of smaller administrative fines.<sup>49</sup> In the first three quarters of fiscal year 2007, these criminal fines, restitutions, and civil judgments were more than fifteen times greater than the administrative fines collected in 2001 through 2005 *combined*.<sup>50</sup> Criminal arrests reached 863, up from 25 in FY 2002.<sup>51</sup> In 2006, the Assistant Secretary of the Homeland Security Department wrote an op-ed for *USA Today*, laying out the already increasing number of criminal arrests. She concluded with a chilling warning: "And to cynics: expect more."<sup>52</sup>

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44. 8 C.F.R. § 274a.10(b)(1).

45. 8 C.F.R. § 274a.10(b)(1)(ii)(B)–(C).

46. 8 C.F.R. § 274a.10(a).

47. This figure includes the fines for both failing to meet the attestation requirement and knowingly hiring unauthorized aliens.

48. *Wrangler's Country Cafe, Inc.*, 1 OCAHO no. 138, 929, 935 (1991), *aff'd sub nom. Steiben v. INS*, 932 F. 2d 1225, 1228 (8th Cir. 1991).

49. ICE Fact Sheet: Worksite Enforcement (2007), [http://www.ice.gov/pi/news/fact\\_sheets/worksite.htm](http://www.ice.gov/pi/news/fact_sheets/worksite.htm).

50. *Id.*

51. *Id.*

52. Julie Myers, *Expect More Arrests*, USA TODAY, Apr. 26, 2006, at A12, *available at* [http://www.usatoday.com/news/opinion/editorials/2006-04-25-oppose-immigration\\_x.htm](http://www.usatoday.com/news/opinion/editorials/2006-04-25-oppose-immigration_x.htm).

## II.

IRCA'S NARROW PROHIBITION AGAINST EMPLOYING  
UNAUTHORIZED ALIENS

IRCA makes no mention of investors. It does not say undocumented immigrants may not own stock in an American company, become silent partners, or even working owners. It only prohibits "hiring for employment." On its face, IRCA seems to create a very narrow prohibition. The legal background against which the statute was enacted adds weight to this interpretation.

When IRCA was passed, employers faced no sanction under federal law for knowingly hiring undocumented immigrants.<sup>53</sup> In fact, the "Texas Proviso" protected an employer's ability to hire undocumented immigrants, providing that "for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."<sup>54</sup> IRCA repealed the Texas Proviso and created a set of sanctions for employers who did hire unauthorized aliens. It said nothing about unauthorized immigrants owning businesses or investments. There is no discussion in the committee reports or floor debate about undocumented immigrants owning businesses. Instead, the focus was on low-skill workers.<sup>55</sup> It would be odd if Congress intended a statute it created against

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53. CHARLES GORDON ET AL., 1-7 IMMIGRATION LAW AND PROCEDURE 7.01[1] (2007).

54. 8 U.S.C. § 1324(a)(4) (1982). I will not consider whether permitting an unauthorized immigrant to buy into a business or helping one to create a business constitutes harboring under the current harboring provisions, INA § 274. Initially, it would seem that it does not. See GORDON, *supra* note 53, at 7.05[5] n. 46 (noting that, while some early cases after the repeal of the Texas Proviso held mere employment to constitute harboring, more recent cases have indicated that it is not, and that the INS General Counsel has testified that the agency would not pursue harboring charges for mere knowing employment). In an often-cited case, the Second Circuit wrote that "we are persuaded by the language and background of the revision of the statute that the term was intended to encompass conduct tending *substantially to facilitate* an alien's 'remaining in the United States illegally,' provided, of course, the person charged has knowledge of the alien's unlawful status." *United States v. Lopez*, 521 F.2d 437, 440-41 (1975) (emphasis added) (upholding a harboring conviction against an individual who had arranged sham marriages, housing, transportation, and employment for people who had recently crossed the border without inspection). The Fifth Circuit adopted the substantial facilitation requirement, but went further, writing that "[i]mplicit in the wording 'harbor, shield, or conceal,' is the connotation that something is being hidden from detection . . ." *United States v. Varkonyi*, 645 F.2d 453, 459, 456 (5th Cir. 1981). Whether a particular court finds harboring only where there is an attempt to hide someone from detection, these cases suggest that mere employment or business activities are not sufficient.

55. S. COMM. ON THE JUDICIARY, IMMIGRATION REFORM AND CONTROL ACT OF 1985, S. REP. NO. 99-132, at 3 (1985) [hereinafter S. REP. NO. 99-132] ("In an earlier time, the Nation could welcome millions of new-comers, many of whom brought few

this background to limit business ownership, an activity it does not by its terms address. Instead, it seems clear that Congress only intended IRCA to end the practice of hiring undocumented immigrants.

Several other aspects of IRCA's text and legislative history also support a narrow reading of the employment prohibition.

#### A. *The Purposes of IRCA*

Two purposes of the statute support a narrow reading of the prohibition. Both become clear when reading the statute and its legislative history. Congress meant to create a system of sanctions without burdening American businesses too severely. Congress also intended to deal fairly with the large population of undocumented immigrants in the country, many of whom had arrived several years before, put down roots, and become community members.

The text of the statute and the regulations clearly reflect an effort to limit the burden on American employers. Perhaps most significantly, the statute required the Comptroller General to issue a yearly report on, among other things, whether implementation had created an "unnecessary regulatory burden" on employers.<sup>56</sup> Several provisions in the statute (as well as the implementing regulations) help lighten this regulatory burden.

For one, an employer who complies in good faith with the verification requirements has an affirmative defense against charges for hiring unauthorized aliens.<sup>57</sup> The employer need only verify that a document "reasonably appears on its face to be genuine,"<sup>58</sup> which sets the bar quite low. In one case, the Ninth Circuit found that an employer had met his burden even though the false social security card he was presented misspelled the name of the employee.<sup>59</sup> The employer did not examine the back of a social security card or compare it to sample cards in the INS handbook.<sup>60</sup> Congress, the Ninth Circuit explained, "carefully crafted section 1324a to limit the burden and the

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skills, but did bring a willingness to work hard. In a smaller America with a simpler, labor-intensive economy and a labor shortage, that was often quite enough—that, plus their intense drive to become Americans. Immigrants can still greatly benefit America, but they should be limited to an appropriate number and selected within that number on the basis of immediate family and reunification and skills which would truly serve the interest of a highly developed nation."); see also *infra* note 71 and accompanying text describing concern over the "starvation wages" immigrant workers were willing to accept.

56. INA § 274A(j)(1)(C).

57. INA § 274A(a)(3); 8 U.S.C.A. § 1324(a)(3) (2008).

58. INA § 274A(b)(1)(A)(ii); 8 U.S.C.A. § 1324(b)(1)(A)(ii).

59. *Collins Food Int'l v. INS*, 948 F.2d 549, 553–54 (9th Cir. 1991).

60. *Id.*

*risk placed on employers.*”<sup>61</sup> An employer is also entitled to this defense if workers are referred by a state employment agency and the agency certifies that it has checked the employee’s documents.<sup>62</sup> Employers may not use subcontractors or other forms of subterfuge to engage the labor of workers they know are unauthorized aliens,<sup>63</sup> but in some situations where collective bargaining agreements are in place, an employer who is a member of an association may rely on verification performed by another member.<sup>64</sup>

Furthermore, several groups of workers are explicitly carved out of the definitions of employee and employment, reflecting Congress’s intention to limit the scope of the burden. The first group is casual domestic workers: “[E]mployment does not include casual employment by individuals who provide domestic service in a private home that is sporadic, irregular, or intermittent.”<sup>65</sup> The purpose of this exception is clear. Private individuals who hire for intermittent work would find it cumbersome to comply with the paperwork requirements. It seems overly harsh to sanction an individual for failing to vet her nanny. The second group is independent contractors: “The term employee means an individual who provides services or labor for an employer for wages or other remuneration *but does not mean* independent contractors as defined in paragraph (j).”<sup>66</sup> This provision clearly intends to shield employers from having to vet each individual worker who performs services on their premises or on their behalf, a requirement that would multiply the business’s responsibilities and liability under IRCA.

Likewise, the regulatory provisions on use of labor through contract indicate an intention not to make employers responsible for every worker who provides services for them. They sanction only employers who use the arrangement as a subterfuge to obtain the labor of a noncitizen the employer knows is unauthorized:

For purposes of this section, a person or other entity who uses a contract, subcontract, or exchange, entered into, renegotiated, or extended after the date of the enactment of this section, to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect

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61. *Id.* at 554 (emphasis added); *see also* Huyen Pham, The Private Enforcement of Immigration Laws, GEO. L.J. 777, 806–07 (2008) (noting provisions Congress included in IRCA to overcome opposition from the business community).

62. INA § 274A(a)(5); 8 U.S.C.A. § 1324(a)(5).

63. INA § 274A(a)(4); 8 U.S.C.A. § 1324(a)(4).

64. INA § 274A(a)(6); 8 U.S.C.A. § 1324(a)(6).

65. 8 C.F.R. § 274a.1(h) (2008).

66. 8 C.F.R. § 274a.1(f) (emphasis added).

to performing such labor, shall be considered to have hired the alien for employment in the United States in violation of paragraph (1)(A).<sup>67</sup>

It follows that if an employer, through a contract, subcontract, or exchange, unknowingly obtains the labor of an unauthorized immigrant, she may not be sanctioned. This provision—which seems similar in purpose to the regulation removing independent contractors from the definition of employee—also appears to exempt employers from the paperwork requirement when they contract with outside workers.

Taken together, these provisions suggest that the prohibition is written narrowly not because Congress and DHS thought it would be stretched to fit every arrangement, but because IRCA is not meant to be too cumbersome for American businesses and casual employers. The Ninth Circuit in *Collins* endorsed this reading.<sup>68</sup> Because IRCA was engineered not to be overly burdensome, it would be a mistake to read additional groups of workers and businesses into its prohibition. In fact, doing so would not only be burdensome for businesses owned (in part or in whole) by undocumented immigrants. It would be devastating. Facing fines, seizure of property, and increased risk of deportation,<sup>69</sup> business owners would be forced to choose between shutting down and taking tremendous risks just by continuing to operate.

The most persuasive argument against this narrow reading of the prohibition requires reading the legislative history with blinders on, to see IRCA as a one dimensional statute, concerned only with enforcement. Read with the right set of blinders, the legislative history supports a broad prohibition, consistent with an enforcement-only interpretation of IRCA. When IRCA was passed, there was a sense that undocumented immigration had mushroomed into a major national problem. The Senate Committee on the Judiciary wrote that “[i]mmigration to the United States is ‘out of control’ and it is perceived that way at all levels of government and by the American people—indeed by people all over the world.”<sup>70</sup> The House Committee on the Judiciary quoted testimony by the NAACP that undocumented immigrants were forcing African-Americans out of jobs because they

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67. INA § 274A(a)(4); 8 U.S.C.A. § 1324(a)(4).

68. See *supra* note 59 and accompanying text.

69. See *supra* Introduction and Part I.

70. S. REP. NO. 99-132, *supra* note 55, at 3.

were willing to accept “starvation wages.”<sup>71</sup> The year IRCA passed, the INS estimated it would apprehend 1.8 million undocumented aliens.<sup>72</sup> Both the House and Senate committee reports indicate that one purpose of the Act was to reduce this number by removing the “magnet of jobs.”<sup>73</sup> One might argue that such a purpose requires a broad prohibition.<sup>74</sup> Even if they cannot be hired to work in the United States, undocumented immigrants may still be drawn by the possibility of starting their own businesses—especially the sort of low-capital businesses nonprofits are helping to create. The magnet still exists if each employee need only print business cards and call himself a sole proprietor.

However, this argument is unpersuasive for two reasons. First, more entrepreneurship arguably creates more jobs for American workers, not fewer. In fact, job creation is a primary objective of nonprofits that facilitate microfinance and the formation of worker co-ops.<sup>75</sup> When the NAACP testified that undocumented immigrants depress pay by accepting starvation wages, the immigrants it had in mind were most likely desperate workers, not enterprising business owners.

Second, this argument relies on a one-dimensional view of Congress’s purpose in enacting IRCA.<sup>76</sup> In fact, IRCA had two purposes. As explained above, IRCA struck a balance between discouraging the employment of undocumented immigrants and not overburdening em-

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71. H. COMM. ON THE JUDICIARY, IMMIGRATION CONTROL AND LEGALIZATION AMENDMENTS ACT OF 1986, H.R. REP. NO. 99-682, at 47 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5651 [hereinafter H.R. REP. NO. 99-682].

72. *Id.*

73. *Id.* at 45; *Wrangler’s Country Cafe, Inc.*, 1 OCAHO no. 138, 929, 930 (1991), *aff’d sub nom.* *Steiben v. INS*, 932 F.2d 1225, 1228 (8th Cir. 1991); *see also* S. REP. NO. 99-132, at 1.

74. Alternatively, one might argue that IRCA is a remedial statute, so the prohibition should be read broadly to “suppress the evil and advance the remedy.” *See, e.g., Westinghouse Elec. Corp., v. Pacific Gas & Elec. Co.*, 326 F.2d 575 (9th Cir. 1964).

75. *Cummings*, *supra* note 5, at 184–85.

76. It also misrepresents how simple it is to turn employees into independent contractors. The regulations set forth guidelines on when a worker is an independent contractor rather than an employee; it requires more than business cards. 8 C.F.R. § 274a.1(j) (requiring consideration of such factors as whether the individual has an opportunity for profit or loss, works for a number of clients at the same time, or invests in the facilities for work). Furthermore, the Act itself indicates that an employer who uses a “contract, subcontract, or exchange” as subterfuge to hire an alien she knows is unauthorized “shall be considered to have hired the alien for employment.” INA § 274A(a)(4); 8 U.S.C.A. § 1324(a)(4). Workers who are actual employees may not escape IRCA by claiming to be independent contractors, even under a narrow reading of the prohibition.

ployers.<sup>77</sup> Congress also understood that enforcement-only was not a humane or effective way<sup>78</sup> to deal with a resident population of four million<sup>79</sup> undocumented people.

Congress was concerned that national unity and prosperity would suffer if the millions of undocumented immigrants already in the country were forced to remain permanent outsiders.<sup>80</sup> The Senate Committee on the Judiciary speculated that “[i]f immigration is continued at a high level, yet a substantial portion of these new persons and their descendants do not assimilate into the society, they have the potential to create in America a measure of the same social, political, and economic problems which exist in the countries from which they have chosen to depart.”<sup>81</sup> Toward this end, IRCA offered amnesty to undocumented immigrants already in the country, ultimately allowing nearly 1.7 million people to be naturalized.<sup>82</sup> By granting citizenship, Congress sought to bring them into the “public culture of certain shared values, beliefs, and customs which make us distinctly ‘Americans.’”<sup>83</sup>

Congress also recognized the humanitarian problems associated with having a large population of people afraid to contact law enforcement officials for fear that they would be deported. A group of people reluctant to call the police or file a complaint in housing court could be exploited by landlords, employers, and criminals.<sup>84</sup> Undocumented

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77. Professor Michael Wishnie writes that the U.S. Chamber of Commerce originally opposed sanctions, but eventually gave “qualified support” for the “grand compromise” of amnesty in exchange for sanctions. Wishnie, *supra* note 26, at 196.

78. H.R. REP. NO. 99-682, *supra* note 71, at 49 (“[I]ntensifying interior enforcement or attempting mass deportations would be both costly, ineffective, and inconsistent with our immigrant heritage.”).

79. Jeffrey S. Passell, *Unauthorized Migrants: Numbers and Characteristics*, PEW HISPANIC CENTER BACKGROUND BRIEFING PREPARED FOR TASK FORCE ON IMMIGRATION AND AMERICA’S FUTURE, June 14, 2005, at 10, <http://pewhispanic.org/reports/report.php?ReportID=46>.

80. S. REP. NO. 99-132, *supra* note 55, at 7 (“If immigration is continued at a high level, yet a substantial portion of these new persons and their descendants do not assimilate into the society, they have the potential to create in America a measure of the same social, political, and economic problems which exist in the countries from which they have chosen to depart. Furthermore, if language and cultural separatism rise above a certain level, the unity and political stability of the Nation will—in time—be seriously diminished.”).

81. *Id.*

82. INA § 245A, 8 U.S.C.A. § 1324(a) (adjusting the status of people who had entered the country before January 1, 1982); See IMMIGRATION & NATURALIZATION SERV., IMMIGRATION REFORM AND CONTROL ACT: REPORT ON THE LEGALIZED ALIEN POPULATION (1992).

83. S. REP. NO. 99-132, *supra* note 55, at 7.

84. H. REP. NO. 99-682, *supra* note 71, at 49.

immigrants had come to the United States partly as a result of the government's failure to enforce the immigration laws.<sup>85</sup> Once they settled in the U.S., many had created social networks and families that included U.S. citizens.<sup>86</sup> They contributed to the American economy and paid taxes.<sup>87</sup> Yet, because of their immigration status, many were afraid to report crimes and seek medical care.<sup>88</sup> IRCA was also designed to remedy this marginalization.

Thus, reading IRCA as a single-minded statute, focused solely on preventing the employment of unauthorized immigrants is a mistake. Congress sought to prevent employment of unauthorized immigrants without creating too heavy a burden for businesses and to deal fairly with the population of settled immigrants already in the country. A narrow understanding of the prohibition leaves employer sanctions in place while supporting Congress's other priorities.

### B. *The Ordinary Meaning of Employment*

The terms "hire" and "employment" as used by the regulations also indicate a relationship between employee and business entirely distinct from the relationship between business and owner. An owner receives a share of profits, which vary with a business's bottom line. An employee provides services or labor in exchange for fixed wages or other remuneration.

A recent Supreme Court decision, *Lopez v. Gonzalez*,<sup>89</sup> counsels a common sense approach to interpreting the INA. In *Lopez*, the issue was the meaning of the term "aggravated felony," and specifically whether drug possession, categorized as a felony under state law, can constitute an aggravated felony although considered only a misdemeanor under federal law. The Court concluded that it could not: "Congress can define an aggravated felony of illicit trafficking in an unexpected way. But Congress would need to tell us so, and there are good reasons to think it was doing no such thing here."<sup>90</sup> Similarly, Congress could have defined the term "hire for employment" in an unorthodox way, but chose not to. Thus, a common sense interpretation is appropriate.

In the case of IRCA, the regulations frame employment as the exchange of labor or services for wages or remuneration. They define

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85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Lopez v. Gonzalez*, 549 U.S. 47 (2006) (8-1 decision).

90. *Id.* at 54-55.

“hire” as “the actual commencement of employment of an employee for wages or other remuneration,”<sup>91</sup> and “employment” as “any service or labor performed by an employee for an employer within the United States.”<sup>92</sup> They do not define the terms “wage” or “other remuneration.”

*Webster’s Third International Dictionary*<sup>93</sup> defines a wage as “[a] pledge or payment of usually monetary remuneration by an employer especially for labor or services usually according to contract and on an hourly, daily, or piecework basis.”<sup>94</sup> It defines remunerate as “to pay an equivalent for (as a service, loss, expense).”<sup>95</sup> In common usage, wages and other remuneration have a fixed, *quid pro quo* quality. If a wage-earning employee works five hours, she receives an equivalent: five hours worth of wages. The only OCAHO precedent case to dig into the meaning of “other remuneration” supports this understanding. In *Dittman*, OCAHO determined that an employment relationship existed even though the owner of a restaurant and recreational vehicle park did not pay her worker an hourly wage. Instead, she paid him what she called the “wage value” of his work product.<sup>96</sup> OCAHO concluded that this was “other remuneration,” making him an employee.<sup>97</sup> His pay was tied to the services he rendered, though he was paid piece rate instead of by the hour.

An owner does not work on this basis. For instance, the traditional “no compensation rule” requires that partners “do not receive payment for services rendered to their firms. Under this norm, partners are compensated for their services through the division of profits equally among the partners.”<sup>98</sup> Thus, if family members operate a corner store as a partnership, each partner helping to run the business, they receive a portion of the profits, not wages or remuneration, in exchange for services they render.

Profits vary with a business’s bottom line. Consider, for instance, a sole proprietorship described in an article on CNN.com. José (not his real name) owns a Southern California garment factory with

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91. 8 C.F.R. § 274a.1(c).

92. 8 C.F.R. § 274a.1(h).

93. OCAHO has used *Webster’s* to determine, among other things, the meaning of “other remuneration” in ordinary usage. *Dittman*, 1 OCAHO no. 195, 1289, 1292 (1990).

94. WEBSTER’S THIRD INTERNATIONAL DICTIONARY 2568–69 (1993).

95. *Id.* at 1921.

96. *Dittman*, 1 OCAHO at 1292.

97. *Id.*

98. Robert W. Hillman, *The Evolving Status of Partners*, 40 WAKE FOREST L. REV. 793, 809–10 (2005).

25 employees and \$650,000 in annual sales.<sup>99</sup> He started the business while an undocumented immigrant, and he currently has tenuous legal status through the Temporary Legal Status (TPS) extended to Hondurans after Hurricane Mitch.<sup>100</sup> Although José provides daily services to his business as a manager, he is not paid a wage for his time. Instead, he receives the profits of the business, which could double or even disappear completely from one year to another. One would not say that José works for a wage. As an owner, he manages his business and works to increase its profits.

While the sole proprietorship and partnership models seem distinct from the exchange of services for wages or remuneration the regulations contemplate, CleanHome's cooperative model blurs the line.<sup>101</sup> On the one hand, CleanHome claims to pay a wage: twenty dollars per hour, minus overhead costs. On the other hand, CleanHome may use the term "wage" because it was created for workers familiar with being paid by the hour. In reality, the arrangement is like any other ownership situation. The owners receive their share of the company's profits, with overhead costs subtracted out.<sup>102</sup> If they make a decision that increases their overhead (such as hiring a bookkeeper), or if the company is sued, overhead will go up and profits will go down. Although the co-op uses the term "wage," its owners are essentially still compensated with profits: the twenty dollars per hour the clients pay minus the costs of running the business. If a lawsuit or other event increases overhead enough, the owners will earn nothing at all, like any other owner.

### C. Employers Are Not Employees

Another important question is whether a worker can be both an owner and an employee. If the answer is yes, OCAHO could completely skirt analysis of the meaning of employment by declaring that every worker is an employee, including owners. While this approach might not sweep in silent partners and mere investors, it would include the many working owners who contribute services to their businesses.

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99. Boorstin, *supra* note 3.

100. *Id.*

101. Another method of remuneration that blurs the line is paying employees partly with stock options. Stock options gain value if the business does well, so they do tie total compensation to the profits of the business. Still, it is unlikely that stock options transform employees into owners. See the discussion of the importance of control in determining whether a worker who owns part of a business can be an employee, Part III.B *infra*.

102. Interestingly, CleanHome's workers are paid by their clients and pay their share of the overhead directly to the business.

The regulations seem to suggest that a person may not be both employee and employer, but they are vague. They define employment as “any service or labor performed by an employee *for* an employer within the United States,”<sup>103</sup> an arrangement which seems to require both an employee to provide the services and an employer to receive them. The definitions of employee and employer support this reading. “The term employer means a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration.”<sup>104</sup> The essence of being an employer is engaging the services of employees. “Employee means an individual who provides services or labor for an employer for wages or other remuneration.”<sup>105</sup> The essence of being an employee is providing services to an employer. It seems counterintuitive that a person could be on both sides of this equation at once. Of course, counterintuitive is not the same as impossible. I examine the question in more detail below,<sup>106</sup> as federal courts have long debated whether owners of a company may be its employees under various employment-related statutes. The approaches they developed provide a much clearer answer than the Act and regulations.

### III.

#### WORKER-OWNERS UNDER EMPLOYMENT LAW

##### A. *OCAHO Borrows from Employment Law*

Although OCAHO has not examined this particular edge of the employment relationship, one can predict how it will go about the task by observing how it delineated another outer edge: the distinction between employees and independent contractors. In 1992, the Immigration and Naturalization Service filed a complaint against a commercial fisherman named Richard Bakovic, claiming that he had failed to file verification forms (Forms I-9) for his “crewpersons.”<sup>107</sup> Bakovic responded that his crewpersons were independent contractors, and thus not employees.<sup>108</sup> OCAHO held that the crewmembers were employees, combining the regulatory definition of an independent contractor

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103. 8 C.F.R. § 274a.1(h) (emphasis added).

104. 8 C.F.R. § 274a.1(g).

105. 8 C.F.R. § 274a.1(f).

106. *See infra* Part III.

107. Bakovic, 3 OCAHO no. 482, 853, 853–54 (1993).

108. *Id.*; *see also* 8 C.F.R. § 274a.1(f) (carving independent contractors out of the definition of an “employee” under IRCA).

with factors developed in federal employment cases.<sup>109</sup> OCAHO has used this mix-and-match approach in other independent contractor cases as well.<sup>110</sup>

By doing so, it may have worn ruts into the definition of employment under IRCA. Confronting a question not fully answered by the statute or regulations, OCAHO turned to federal common law for guidance. Faced with another question about the limits of the employment relationship, it will likely consult federal employment law again.

One might contend that OCAHO must approach the owner/employee question differently than it approached the independent contractor/employee question. The regulations define the terms “employee,” “employer,” “employment,” and “independent contractor.”<sup>111</sup> Yet, only the definition of independent contractor explicitly contemplates that OCAHO will use factors not listed: “factors to be considered in that determination *include, but are not limited to* . . . .”<sup>112</sup> Also, OCAHO has reasoned that “since the seven enumerated IRCA factors appear to be generally patterned after common law indicia, other common law factors not listed by the IRCA regulation also may be applicable in determining the presence of independent contractor status in IRCA cases.”<sup>113</sup>

On the other hand, nothing in the other definitions indicates that OCAHO may not borrow from federal common law. In fact, OCAHO’s willingness to use employment law to define an edge of the employment relationship may make it more willing to do so in the future. One case in particular supports this prediction. Asked to determine whether a worker paid per-job instead of per-hour was still an employee, OCAHO cited the Fair Labor Standards Act to bolster its conclusion that he was.<sup>114</sup> OCAHO’s approach suggests that it has

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109. Bakovic, 3 OCAHO at 858 (listing non-regulatory factors such as the level of skill involved in the work, whether workers receive benefits such as annual leave, and local and industry practice).

110. Mr. Z. Enter., 1 OCAHO no. 288, 1869, 1909 (1991) (“In addition to the statutory definitions, the common law test for distinguishing between employee and independent contractor adopted by the Ninth Circuit is instructive.”); Robles, 2 OCAHO no. 309, 62, 71 (1991) (“Courts have often held that workers’ ability to independently perform ‘routine work’ is not indicative of nonemployee status.” (citing *Mitchell v. John R. Crowley & Bro., Inc.*, 292 F.2d 105, 108 (5th Cir. 1961))).

111. See 8 C.F.R. § 274a.1 (defining terms used in IRCA).

112. 8 C.F.R. 274a.1(j) (emphasis added).

113. Robles, 2 OCAHO at 70.

114. Dittman, 1 OCAHO no. 195, 1289, 1292 (1990). After concluding that the worker was an employee because he received “other remuneration” for his services, OCAHO added that, “[i]n addition, reference to analogous case law regarding definitional conclusions of what constitutes an employer-employee relationship also supports a finding that Mr. Ramirez-Talamantes was an ‘employee.’ For example, it has

grown accustomed to using federal common law to define the edges of the employment relationship. If asked to determine whether owners are employees, it will likely do so again.

### B. *Owners as Employees in Employment Law*

In the employment discrimination context, the leading case on when owners are considered employees is *Clackamas Gastroenterology Associates v. Wells*.<sup>115</sup> At issue in *Clackamas* was whether the doctor-shareholders of a medical practice organized as a professional corporation were its employees under the Americans with Disabilities Act (ADA). The circuits had split as to whether shareholders in a professional corporation could be employees. The Eighth Circuit focused on how much of the corporation shareholders owned, as well as their ability to control and manage it.<sup>116</sup> The Second and Ninth Circuits held that shareholders are employees *per se*, focusing on the fact that they are not partners.<sup>117</sup>

The plaintiff in *Clackamas* brought suit for discrimination after being fired from her job as a bookkeeper for the gastroenterology clinic.<sup>118</sup> Because the ADA applies only to employers with fifteen or more employees, the central issue before the Court was whether the doctor-shareholders should be counted toward the fifteen-employee minimum.<sup>119</sup> Notably, the fact that owners provided services to the clinic did not make them employees, suggesting that there is no bright line between investors and owners who participate in running a business. Instead, the Court undertook a more detailed analysis.

It first noted that the definition of “employee” in the ADA is “completely circular and explains nothing.”<sup>120</sup> The Court then turned to the common law for guidance, writing that “as *Darden* reminds us, congressional silence often reflects an expectation that courts will look

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been held that where one person suffers or permits another to work for him, an employment relationship results . . . .” *Id.*

115. 538 U.S. 440 (2003).

116. *See* *Devine v. Stone, Leyton & Gershman, P. C.*, 100 F.3d 78, 81 (8th Cir. 1996); *see also* *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177, 1178 n.2 (7th Cir. 1984) (endorsing the use of an “economic realities” test).

117. *See* *Wells v. Clackamas Gastroenterology Assocs.*, 271 F.3d 903, 905 (9th Cir. 2001), *rev’d sub nom.* *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440 (2003); *Hyland v. New Haven Radiology Assocs., P.C.*, 794 F.2d 793, 798 (2d Cir. 1986) (holding that shareholders are employees *per se*).

118. *Clackamas*, 538 U.S. at 442.

119. *Id.* at 441–42.

120. *Id.* at 444 (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992)). Like many employment statutes, the ADA simply defines “employee” as “an individual employed by an employer.” 42 U.S.C. § 12111.

to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning at common law.”<sup>121</sup> Rejecting a formal analysis based on job titles,<sup>122</sup> the Court wrote that “the common-law element of control is the principal guidepost that should be followed in this case.”<sup>123</sup> The Court then adopted six factors from the *EEOC Compliance Manual* to help determine “whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization’s control:”<sup>124</sup>

“Whether the organization can hire or fire the individual or set the rules and regulations of the individual’s work

“Whether and, if so, to what extent the organization supervises the individual’s work

“Whether the individual reports to someone higher in the organization

“Whether and, if so, to what extent the individual is able to influence the organization

“Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts

“Whether the individual shares in the profits, losses, and liabilities of the organization.”<sup>125</sup>

Remanding the case for further proceedings, the Court warned that these factors are not exhaustive, and that the determination cannot be made by a “shorthand formula or magic phrase.”<sup>126</sup>

The impact of *Clackamas* has been quite broad. The Court was interpreting the ADA, but it implied that the new standard it was creating was to apply to all federal antidiscrimination statutes.<sup>127</sup> While

121. *Clackamas*, 538 U.S. at 447 (citation omitted).

122. *Id.* at 450 (“The mere fact that a person has a particular title—such as partner, director, or vice president—should not necessarily be used to determine whether he or she is an employee or a proprietor.”).

123. *Id.* at 448.

124. *Id.* at 449.

125. *Id.* at 449–50 (quoting EQUAL OPPORTUNITY COMM’N, COMPLIANCE MANUAL § 605:0009 (2000)).

126. *Id.* at 450 n.10 (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992) (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968))).

127. *Id.* at 444 (“The disagreement in the Circuits is not confined to the particulars of the ADA. For example, the Seventh Circuit’s decision in *EEOC v. Dowd & Dowd, Ltd.* concerned Title VII, and the Second Circuit’s opinion in *Hyland v. New Haven Radiology Associates, P.C.* involved the ADEA. See also *Devine v. Stone, Leyton & Gershman, P.C.* (Title VII case).”) (internal citations omitted). Lower courts have followed the suggestion. See, e.g., *Rodal v. Anesthesia Group of Onondaga*, 369 F.3d 113, 123 (2d Cir. 2004) (*Clackamas* sets the standard for all federal antidiscrimination statutes); *Ziegler v. Anesthesia Assocs. of Lancaster, LTD.*, 74 Fed. Appx. 197, 199 (3d Cir. 2003) (the *Clackamas* test is applicable in Title VII cases).

the Supreme Court discussed only shareholders in a professional corporation, other federal courts have applied the test to determine whether particular owners were employees of their partnerships, corporations, and close corporations.<sup>128</sup> In sum, *Clackamas* creates a standard under all federal antidiscrimination laws to determine whether owners of a business have too much control to be considered employees. The *Restatement (Third) of Employment Law* summarizes the inquiry after *Clackamas*:

“Unless otherwise provided by law, an individual is not an employee of an employer if the individual either owns all of the enterprise or owns some other interest in the enterprise that provides the individual with ownership control over all or a substantial part of the enterprise.”<sup>129</sup>

Whether an owner is an employee under *Clackamas* is a functional determination: “The mere fact that a person has a particular title—such as partner, director, or vice president—should not necessarily be used to determine whether he or she is an employee or a proprietor.”<sup>130</sup>

The *Clackamas* Court noted that “there are partnerships that include hundreds of members, some of whom may well qualify as ‘employees’ because control is concentrated in a small number of managing partners.”<sup>131</sup> The pre-*Clackamas* cases examining such partnerships still offer insight into how courts will evaluate large partnerships or co-ops. In *EEOC v. Sidley Austin Brown & Wood*, Judge Posner considered such a sprawling partnership and examined how several of the factors later incorporated into the *Clackamas* test might

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128. *De Jesus v. LTT Card Servs.*, 474 F.3d 16 (1st Cir. 2007) (close corporation); *Solon v. Kaplan*, 398 F.3d 629 (7th Cir. 2005) (partnership); *Walls v. Avpro, Inc.*, No. Civ. JFM-04-3042, 2005 WL 855931 (D. Md. 2005) (corporation); Ann C. McGinley, *Functionality or Formalism? Partners and Shareholders as “Employees” Under the Anti-Discrimination Laws*, 57 S.M.U. L. REV. 3, 5 (2004) (After *Clackamas*, “partners of general and limited partnerships and shareholders, members, or directors of professional corporations should all be treated alike, using the same standards.”); Stephanie Greene, *Who Counts? The United States Supreme Court Cites “Control” as the Key to Distinguishing Employers from Employees Under the Federal Employment Discrimination Laws*, 2003 COLUM. BUS. L. REV. 761, 780 (2003) (“The Court’s decision makes it clear that neither the form of business organization nor an individual’s title determines coverage under the statutes.”).

129. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.03 (Council Draft No. 2, Sept. 27, 2007).

130. *Clackamas*, 538 U.S. at 450; accord McGinley, *supra* note 128, at 5 (“*Clackamas* holds that the function of the individual within the enterprise, rather than the form of the organization or the title accorded the individual, should govern.”).

131. *Clackamas*, 538 U.S. at 446.

adapt to a business with many partners.<sup>132</sup> Sidley Austin had 500 partners, with an unelected, 36-member executive committee holding most of the control.<sup>133</sup> Because of the procedural posture of the case, Judge Posner declined to determine whether the partners were employees,<sup>134</sup> but noted that even though they had served on committees which helped run the company, the executive committee appointed them, much like the committees many corporations fill with non-owner employees.<sup>135</sup> Similarly, the partners owned part of the business's capital (averaging \$400,000 each),<sup>136</sup> but many employees own stock in their employer while remaining employees.<sup>137</sup> While partners had the authority to hire, fire, and set compensation for their subordinates, this power was delegated by the executive committee, which retained the right to set the partners' compensation, promote, demote, or fire them.<sup>138</sup> The most "partneresque" aspect of the plaintiff partners' role was their liability for the firm's debts, but it is not clear to Judge Posner whether "this is enough to pin the partner tail on the donkey."<sup>139</sup>

*Sidley Austin* suggests that courts will look below the surface to determine whether owners control the business or whether it controls them.<sup>140</sup> Do owners decide central issues in how the business is run, or are such decisions out of their hands? When they hire or fire staff, do they act only with borrowed authority? Do they have a right to sit on managerial committees, or do they serve at the pleasure of some central authority? They may own a share of the business, but do they set their own pay, and can they be removed?

The fact that there are a large number of owners does not necessarily mean that they lack control. In *Ziegler v. Anesthesia Assocs. of Lancaster*, the Third Circuit, applying *Clackamas*, upheld a determination that the doctor-shareholders of a large anesthesiology practice were not employees even though there were nineteen of them (exclud-

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132. *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002) (requiring defendant law firm to comply with an EEOC subpoena so the trial court could determine whether plaintiff partners were employees).

133. *Id.* at 702–03.

134. *Id.* at 707.

135. *Id.* at 703.

136. *Id.* at 699.

137. *Id.* at 703.

138. *Id.* at 699.

139. *Id.* at 703.

140. Courts have continued to cite *Sidley Austin* after *Clackamas* when determining whether partners are employees. See, e.g., *Smith v. Castaways Family Diner*, 453 F.3d 971, 978 (7th Cir. 2006).

ing non-shareholding doctors and staff).<sup>141</sup> Each shareholder in the practice had an equal vote in making outside contracts, hiring and firing staff, and making offers of partnership.<sup>142</sup> Compensation was tied only to profits, not to any evaluation of a shareholder's work.<sup>143</sup> Each shareholder maintained a sufficient level of control even though the practice was quite large.

If OCAHO follows *Clackamas*, it will make a functional determination of whether or not the owner at issue is an employee using this searching, common law test. Controlling owners will not be found to be employees. The easy case is the sole proprietor or sole shareholder, who is clearly exempted.<sup>144</sup> She directs the business, may hire and fire other employees, and may not herself be fired. *Ziegler* indicates that many part-owners are not employees either.<sup>145</sup>

It is also permissible for the business to have some control over the owner. In *Agee v. Grunert*, the District Court for the District of Vermont concluded that a doctor-shareholder in a professional corporation was not an employee even though his contract allowed the medical practice to determine if he had become disabled, and to place him on involuntary leave if he did not cooperate in the determination.<sup>146</sup> If the fact that a business can place an owner on involuntary leave is not dispositive of employee status, lesser forms of control should not be either. Standing alone, the business's ability to cap an owner's number of hours or set other workplace rules should not make that owner an employee.

Taking this case law together, it is difficult to say for certain whether CleanHome's worker-owners are employees because the co-op seems to have a great deal of control over them. Once they join, CleanHome trains them, sets what they charge customers, and assigns cleaning jobs. Whether an owner works part or full time depends on the amount of work the co-op assigns, not the number of customers she retains. On the other hand, these rules are all made by committees in which each owner participates, and each owner performs her work as she sees fit, with no centralized supervision. The Operating Agree-

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141. *Ziegler v. Anesthesia Assocs. of Lancaster, Ltd.*, 74 Fed. Appx. 197, 199 (3d Cir. 2003).

142. *Id.* at 200.

143. *Id.*

144. *See, e.g., Fitzgibbons v. Putnam Dental Assocs.*, 368 F. Supp. 2d 339, 343 (S.D.N.Y. 2005) (concluding that the sole shareholder of a medical practice who exercises complete control over it is not an employee).

145. *Ziegler*, 74 Fed. Appx. at 201.

146. *Agee v. Grunert*, 349 F. Supp. 2d 838, 841 (D. Vt. 2004).

ment specifically states that the owners are not employees, and they may be removed only by a unanimous vote of the other owners.

Given the independence and level of control CleanHome's owners have over the business, it seems likely that they are not employees under *Clackamas*. Further, because owners pay for the company's overhead, they do share in the profits and losses of the business. However, two aspects of the business particularly weigh toward a finding that they are employees. First, because the business is organized as an LLC, its owners (or members, as they are referred to in most LLCs) are not liable for its losses, as the partners in *Sidley Austin* were.<sup>147</sup> At most, they stand to lose their investment in the enterprise. Second, the co-op has a six-month training program for new employees, during which they work under the direct supervision of the experienced members and can be fired at any time. Trainees are encouraged to attend committee meetings, but attendance is not required, and they may not vote. Because trainees are much more closely controlled by the co-op and exercise far less control over it, OCAHO may distinguish them from the other owners, finding them to be employees.

Whether CleanHome's owners are employees under *Clackamas* depends on how OCAHO weighs these factors. The fact that they call themselves owners is not sufficient,<sup>148</sup> nor is the fact that they own part of the company.<sup>149</sup> The ultimate question under *Clackamas* is "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control."<sup>150</sup>

### C. *Exceptions to the Clackamas Rule*

One might contend that *Clackamas* notwithstanding, the Supreme Court has held that owners can be both employer and employee under several employment statutes, and OCAHO will come to the same conclusion. In *Yates v. Hendon*,<sup>151</sup> the Court held that a sole owner and president of a professional corporation (who would clearly

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147. Judge Easterbrook found liability for the enterprise's debts particularly revealing in *Sidley Austin*. *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 708-09 (7th Cir. 2002) (Easterbrook, J., concurring) ("[I]t makes both linguistic and economic sense to say that someone who is liable without limit for the debts of an organization is an entrepreneur (a principal) rather than an 'employee' (an agent).").

148. *See supra* note 122.

149. *Sidley Austin*, 315 F.3d at 699 (not dispositive that partners had capital accounts averaging \$400,000 with the firm).

150. *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 449 (2003).

151. *Yates v. Hendon*, 541 U.S. 1 (2004).

not be an employee under *Clackamas*)<sup>152</sup> could also be a participant in its pension plan under ERISA. Justice Ginsburg, who had dissented in *Clackamas*, wrote that unlike the antidiscrimination statutes, ERISA allowed an owner to “wear both hats.”<sup>153</sup> Similarly, in *Goldberg v. Whitaker House Cooperative*, the Court held that the owners of a worker co-op were employees for the purposes of FLSA.<sup>154</sup>

Both of these cases differ from the rule laid down in *Clackamas*, but both respond to specific statutory concerns. *Yates*, decided only a year after *Clackamas*, took a different approach because it found that “ERISA’s text contains multiple indications that Congress intended working owners to qualify as plan participants. Because these indications combine to provide ‘specific guidance,’ there is no cause in this case to resort to common law.”<sup>155</sup> Such specific guidance does not exist in IRCA. The Court bolstered its reading by reference to the purposes of ERISA: “Congress’ aim is advanced by our reading of the text. The working employer’s opportunity personally to participate and gain ERISA coverage serves as an incentive to the creation of plans that will benefit employer and nonowner employees alike.”<sup>156</sup>

Similarly, in *Goldberg* the Supreme Court wrote in dicta that “[t]here is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship.”<sup>157</sup> However, the *Goldberg* Court was swayed by the legislative history of FLSA, which made it clear that “homeworkers,”<sup>158</sup> such as those who made up the cooperative, were to be covered. Soon after FLSA was passed, the House rejected a bill exempting many homeworkers from FLSA. When FLSA was amended in 1949, the House passed a version of the amendments which exempted many homeworkers. The conference report rejected this change, and explicitly strengthened the language giving the Administrator the power to regulate homework.<sup>159</sup> Persuaded by Congress’ clear intention to cover homeworkers, the Court concluded that “[w]e think we would be remiss, in light of this history, if

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152. See *supra* note 130.

153. *Yates*, 541 U.S. at 17.

154. *Goldberg v. Whitaker House Cooperative*, 366 U.S. 28, 32 (1961).

155. *Yates*, 541 U.S. at 12 (internal citations omitted). In particular, the Court reasoned that “Title I’s provisions involving loans to plan participants, by explicit inclusion or exclusion, assume that working owners—shareholder-employees, partners, and sole proprietors—may participate in ERISA-qualified benefit plans.” *Id.* at 15.

156. *Id.* at 16–17.

157. *Goldberg*, 366 U.S. at 32.

158. The Court used the term “homeworkers” to refer to employees who worked from home.

159. *Id.* at 31.

we construed the Act loosely so as to permit this homework to be done in ways not permissible under the Regulations.”<sup>160</sup>

The specific statutory concerns the Supreme Court responded to in *Yates* and *Goldberg* do not exist in IRCA. The text of the statute does not provide the sort of “specific guidance” that ERISA does. Other sections of the statute do not make reference to unauthorized immigrants owning businesses or investments. Similarly, the multiple purposes of IRCA do not provide the sort of specific guidance as ERISA’s purpose does. Treating owners as employees would serve IRCA’s purpose to eliminate the “magnet of jobs,” but would undermine its goal not to impose an excessive regulatory burden on businesses. Nor does IRCA’s legislative history provide specific guidance. Immigrant business owners were not mentioned in the floor debate or committee reports. Accordingly, no special statutory concerns, expressed in the text or purpose of the statute, or contained in the legislative history compel OCAHO to read IRCA so broadly.

One might claim that in light of *Dittman*, where OCAHO borrowed a definition of the employment relationship from the FLSA context, OCAHO will refer to FLSA again for guidance instead of *Clackamas*. However, OCAHO has acknowledged that analogies to FLSA are a poor logical fit, given its broad reading of the employment relationship,<sup>161</sup> which does not require the employer to expressly hire the employee.<sup>162</sup> The employer need only have knowledge and give consent.<sup>163</sup> IRCA, meanwhile, specifically bars hiring unauthorized immigrants,<sup>164</sup> making FLSA’s “suffer or permit to work” standard inappropriately broad. As OCAHO noted, if it were to follow FLSA’s “suffer or permit to work” definition of the employment relationship, it would impermissibly broaden the scope of the statute.<sup>165</sup> *Dittman* was decided thirteen years before the Court defined the term employee under the antidiscrimination laws and two years before the

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160. *Id.* Justice Whittaker, who was not moved by the legislative history, argued that “[f]or the Act to apply, the cooperative must in a fair sense ‘employ’ its ‘members.’” *Id.* at 34 (Whittaker, J., dissenting). His call for a more functional determination of whether a worker is an employee foreshadowed the default rule for antidiscrimination statutes the Supreme Court adopted in *Clackamas*. See *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 450 (2003).

161. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (declining to apply the FLSA definition of “employ” in an ERISA context, on the grounds that FLSA “defines the verb ‘employ’ expansively to mean ‘suffer or permit to work’”).

162. *Dittman*, 1 OCAHO no. 195, 1289, 1292 (1990) (citing *Walling v. Jacksonville Terminal Co.*, 148 F.2d 768 (5th Cir. 1945)).

163. *Id.* (citing *Fox v. Summit King Mines, Ltd.*, 143 F.2d 926 (9th Cir. 1944)).

164. INA § 274A(a)(1)(A), 8 U.S.C.A. § 1324a(a)(1)(A).

165. See *Dittman*, 1 OCAHO at 1292.

Court did so for ERISA.<sup>166</sup> FLSA provided the only available standard. Now that there is a standard based on the common law concept of agency—which OCAHO has already referred to when defining the employment relationship—rather than the peculiar language and history of FLSA, OCAHO is likely to use it.

Finally, one might argue that *Clackamas* is inapt because it analyzed a traditional business structure, whereas many of the businesses noncitizens start are nontraditional in some way. CleanHome, for instance, is a worker co-op. It acts as an extension of a worker center's mission, holding leadership trainings and sending its members to workshops.<sup>167</sup> However, professional corporations were a new creation at the time of *Clackamas*, and the Court did not allow itself to be distracted by their exotic structure, musing that “[p]erhaps the Court of Appeals’ and the parties’ failure to look to the common law for guidance in this case stems from the fact that we are dealing with a new type of business entity that has no exact precedent in the common law.”<sup>168</sup> Similarly, although enterprises like CleanHome are new, courts should not allow themselves to be distracted by its leadership trainings or affiliation with a nonprofit organization. The proper standard in determining whether a worker is an employee or an employer should be the common law “right of control” test.

#### IV.

##### THE NEED FOR LEGISLATIVE ACTION

I have argued throughout this Note that IRCA's employer sanctions do not prevent unauthorized immigrants from owning businesses. However, as the issue has never been litigated, there is no way to be certain. In this section, I will argue that Congress should clarify that the prohibition does not apply to business owners. As it wrangles over comprehensive immigration reform—a process that could take years to complete—this narrow proposal is one that could quiet anxieties and bolster all immigrant-owned businesses.

In the past few years, a surge in anti-immigrant legislation and enforcement by state and local governments has created a great deal of apprehension in immigrant communities.<sup>169</sup> In 2006, the city of Ha-

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166. *Clackamas*, 538 U.S. 440 (decided in 2003); *Darden*, 503 U.S. 318 (decided in 1992).

167. *Id.*

168. *Clackamas*, 538 U.S. at 447.

169. For an overview of recent legislation on illegal immigration, see Daniel C. Vock, *With Feds Stuck, States Take On Illegal Immigration*, STATELINE.ORG, Dec. 13, 2007, <http://www.stateline.org/live/details/story?contentId=264483>.

zleton, Pennsylvania passed a number of anti-illegal immigration proposals, including additional employer sanctions and an ordinance that would have prevented landlords from renting to “illegal immigrants.”<sup>170</sup> The state of Arizona passed a law to revoke the business licenses of employers who hire unauthorized immigrants.<sup>171</sup> Arizona sheriff Joe Arpaio and his 3000-person “posse” continue to terrorize the immigrant community of Maricopa County with their unapologetic, jaw-dropping, harsh tactics.<sup>172</sup> In addition to these state efforts, of course, the federal government has exponentially increased its own enforcement in the last few years, with giant workplace raids often making headlines.<sup>173</sup> According to the Pew Hispanic Center, as a result of the enforcement efforts and media coverage of the immigration debate, anxiety is running high among foreign-born Hispanics, who constitute nearly half of the foreign-born residents of the United States.<sup>174</sup> The effects are not confined to individuals without legal status. In fact, sixty-seven percent of all foreign-born Hispanics worry that they, a friend, or family member could be deported, while seventy-two percent believe the recent debate over immigration has negatively impacted them.<sup>175</sup> This level of anxiety threatens to undermine the important roles immigrant entrepreneurs, both with and without work authorization, play in innovation.

A recent study found that the foreign-born are almost twice as likely as native-born citizens to start businesses.<sup>176</sup> Their role in the tech sector is particularly difficult to overstate. Google Co-Founder Sergey Brin, Netgear founder Patrick Lo, and Sun Microsystems co-founders Andreas von Bechtolsheim and Vinod Khosla, among others,

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170. See generally *Lozano v. Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (permanently enjoining enforcement of the statute).

171. Fair and Legal Employment Act, ARIZ. REV. STAT. ANN. §§ 23-211–214 (1995 & Supp. 2007).

172. See, e.g., Editorial, *Immigration, Outsourced*, NYTIMES.COM, Apr. 19, 2008, <http://www.nytimes.com/2008/04/09/opinion/09wed1.html> (quoting Mr. Arpaio: “Do you think I’m going to report to the federal government? I don’t report to them.”).

173. See *supra* Part I; see also, e.g., Julia Preston, *After Iowa Raid, Immigrants Fuel Labor Inquiries*, NYTIMES.COM, July 27, 2008 (describing a raid on a kosher meatpacking plant that resulted in 389 immigrants being detained), revised on July 28, 2008 and Aug. 3, 2008. Recently, even going to the hospital carries the risk of being reported to immigration authorities. Deborah Sontag, *Immigrants Facing Deportation by U.S. Hospitals*, NYTIMES.COM, Aug. 3, 2008, <http://www.nytimes.com/2008/08/03/us/03deport.html?hp>.

174. PEW HISPANIC CTR., STATISTICAL PORTRAIT OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES, 2006, Table 6: Population by Nativity, Race, and Ethnicity: 2006 (2008), <http://pewhispanic.org/files/factsheets/foreignborn2006/Table-6.pdf>.

175. PEW HISPANIC CTR., 2007 NATIONAL SURVEY OF LATINOS: AS IMMIGRATION DEBATE HEATS UP, HISPANICS FEEL A CHILL 3–4 (2007).

176. See PORTES & RUMBAUT, *supra* note 2.

are all first generation immigrants.<sup>177</sup> The businesses immigrants start—in the technological sector and elsewhere—create jobs and pay taxes, forming an important part of the American economy. The current anti-immigrant climate threatens to chill such entrepreneurial activity. Innovators will be afraid to start businesses with people lacking work authorization or at risk of losing it. Students, whose innovation led to the creation of several tech sector giants, such as Google, Yahoo!, and Facebook,<sup>178</sup> will be discouraged from creating start-ups if they lack work authorization or authorization to work off campus. Families will be unable to start businesses for fear of letting relatives with shaky immigration status become part-owners.<sup>179</sup>

The level of anxiety will also undermine the role immigrant-owned businesses play within immigrant communities. For one, they create stepping-stone jobs for newcomers who need to make a living but have yet to learn English. Where other businesses may discriminate against new immigrants, they often prefer to hire co-ethnic employees.<sup>180</sup> Studies have also revealed that many new arrivals work at immigrant-owned businesses before starting their own, with established businesses operating as “training systems for the acquisition of the requisite business skills by newcomers.”<sup>181</sup> This effect is particularly visible outside of ethnic enclaves when one visits certain franchise chains. One scholar studying the Dunkin’ Donuts franchise as a vehicle to prosperity for South Asian immigrants noted that ninety-five percent of the Dunkin’ Donuts in the Chicago area are owned by Indian and Pakistani immigrants, and that ninety percent in California are owned by Cambodians.<sup>182</sup> She explained that owners groom talented managers and often lend them money to start their own franchises.<sup>183</sup> Significantly, she found that business ownership was

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177. Mary Crane, *Out of China*, FORBES.COM, May 29, 2007, [http://www.forbes.com/2007/05/21/outsourcing-entrepreneurs-immigrants-oped-cx\\_mc\\_0522entrepreneurs.html](http://www.forbes.com/2007/05/21/outsourcing-entrepreneurs-immigrants-oped-cx_mc_0522entrepreneurs.html); *In Pictures: Famous Immigrant Entrepreneurs*, FORBES.COM, May 29, 2007, [http://www.forbes.com/2007/05/21/outsourcing-entrepreneurs-immigrants-oped-cx\\_mc\\_0522entrepreneurs\\_slide\\_2.html](http://www.forbes.com/2007/05/21/outsourcing-entrepreneurs-immigrants-oped-cx_mc_0522entrepreneurs_slide_2.html).

178. Company Overview, <http://www.google.com/intl/en/corporate/index.html> (last visited Oct. 2, 2008); Press Release, Yahoo!, The History of Yahoo! - How It All Started, <http://docs.yahoo.com/info/misc/history.html> (last visited Oct. 2, 2008); Sarah Phillips, *A Brief History of Facebook*, GUARDIAN.CO.UK, July 25, 2007, <http://www.guardian.co.uk/technology/2007/jul/25/media.newmedia>.

179. See Jin-Kyung Yoo, *supra* note 19, at 359 (finding that family networks are a “crucial financial resource” to first generation Korean immigrants).

180. PORTES & RUMBAUT, *supra* note 2, at 81.

181. *Id.* at 96.

182. Padma Ranganawamy, *South Asians in Dunkin’ Donuts: Development in the Franchise Industry*, 33 J. ETHNIC & MIGRATION STUD. 671, 672 (2007).

183. *Id.* at 676.

particularly valuable for Indian women, who were unable to own businesses in their home countries.<sup>184</sup>

It would also seem unfair to enforce the employer sanctions against business owners, given how immigration policy plays out for unskilled workers, who often enter the country first and seek legalization second. José's case, described above,<sup>185</sup> provides one example. He started his garment business when he lacked legal status, which he later earned under the Temporary Protected Status program. Similarly, Inocencio Suárez (not his real name) began to work with a lawyer to legalize his status after entering without authorization and building a successful landscaping business.<sup>186</sup> José and Inocencio's stories are not surprising, given that the undocumented population grows at roughly 500,000 yearly,<sup>187</sup> yet the INA limits the number of employment-based visas available to unskilled "other immigrants" to 10,000<sup>188</sup> per year (a number effectively cut in half by later legislation<sup>189</sup>). In 1986, explaining its decision to incorporate an amnesty provision into IRCA, Congress recognized that the government's failure to properly enforce immigration policies was partly to blame for the large population of undocumented immigrants.<sup>190</sup> The same is true today, with the immigration laws making it more feasible for unskilled workers to enter without authorization or overstay a visa in hopes of later achieving legal status than to apply for a visa before entering.

Certainly, the American economy is highly reliant on undocumented workers. Scholars disagree as to whether undocumented immigrants contribute more through taxes than they receive in public services, often diverging by billions of dollars in their conclusions.<sup>191</sup> I do not intend to wade into that debate, but two recent events are telling. In the wake of Hurricane Katrina, the reconstruction effort was so reliant on the labor of undocumented immigrants that the Department of Homeland Security suspended enforcement of employer

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184. *Id.* at 672.

185. *See supra* notes 99-100 and accompanying text.

186. PORTES & RUMBAUT, *supra* note 2, at 366.

187. PEW HISPANIC CTR., *supra* note 1, at i.

188. INA § 203(b)(3)(A)(iii)(B), 8 U.S.C.A. § 1153(b)(3)(A)(iii)(B) (2005).

189. Nicaraguan Adjustment and Central American Relief Act—Technical Corrections of 1997, P.L. 105-139, 111 Stat. 2644 § 1(e) (codified as amended in scattered sections of 8 U.S.C.A.) (temporarily reallocating 5000 of the "other worker" visas to another category).

190. H.R. REP. NO. 99-682, *supra* note 71, at 49.

191. PORTES & RUMBAUT, *supra* note 2, at 364 (construing JAMES D. SMITH & BARRY EDMONSTON, *THE IMMIGRATION DEBATE: STUDIES ON THE ECONOMIC, DEMOGRAPHIC, AND FISCAL IMPACTS OF IMMIGRATION* (1998)).

sanctions against the construction industry in the affected area.<sup>192</sup> Even more recently, a company that had erected a fourteen-mile section of security fence along the U.S.-Mexico border made headlines when it was fined for hiring unauthorized workers.<sup>193</sup> When a company, hired by the federal government to help keep undocumented immigrants out, employs undocumented immigrants, it is undeniable that they are an important part of the American workforce.

Given that many people enter or stay in the country without authorization in hopes of earning it later and are extremely important to the American economy, a broad definition of employment would be particularly unfair. While waiting for legal status, many have put down roots, opened businesses, and started families. It would discourage them from leaving low-paying jobs<sup>194</sup> for fear of drawing sanctions they could otherwise avoid, and make the path to a visa or naturalization steeper by defining their business ownership as “unauthorized employment.”<sup>195</sup>

One might argue that clarifying IRCA as I suggest would send the message to people who would flout the immigration laws that they need only start businesses when they arrive to escape the consequences of their acts. Such critics overestimate the impact of my proposal. Anyone in the country without authorization can be deported and barred from future entry, arguably a punishment far more severe than financial sanctions for a person who has made her home in the United States. It also takes time to become established enough in a country to run a business. New arrivals would be hard-pressed to avoid the bar on employment by making business ownership their first job. The greatest impact of the change would be on immigrants who have been in the country for so long that they have become part of their communities. Business owners are among the people most deserving of accommodation when Congress agrees on comprehensive reform. The gravamen of their unlawful entry is attenuated by the passage of time and their contributions to the country.

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192. Press Release, Department of Homeland Security, Notice Regarding I-9 Documentation Requirements for Hiring Hurricane Victims (Sept. 6, 2005), [http://www.dhs.gov/xnews/releases/press\\_release\\_0735.shtm](http://www.dhs.gov/xnews/releases/press_release_0735.shtm); Gregory Rodríguez, *REBUILDING: La Nueva Orleans; Latino Immigrants, Many of Them Here Illegally, Will Rebuild the Gulf Coast—And Stay There*, L.A. TIMES, Sept. 15, 2005 at M1.

193. *\$5 Million Fine for Hiring Illegal Immigrants*, NYTIMES.COM, Dec. 15, 2006, available at <http://www.nytimes.com/2006/12/15/us/15hiring.html>.

194. PORTES & RUMBAUT, *supra* note 2, at 81 (controlling for factors such as education and work experience, immigrants who work for others earn significantly less than those who own established businesses).

195. See *supra* Introduction.

At a time when comprehensive reform of the American immigration system seems inevitable, what I am proposing is quite small. With Congress deadlocked over comprehensive reform, clarifying IRCA is a sensible step it can take now to support immigrant-owned businesses and ambitious, long-term residents still waiting for broader change.

#### CONCLUSION

IRCA prohibits hiring unauthorized aliens for employment; nevertheless, this prohibition is a narrow one, likely applying to employees in the everyday sense of the word: the people who provide services in return for wages or other remuneration. The prohibition does not prevent an undocumented immigrant from owning a business or providing services to it. OCAHO has referred to employment law in the past to determine whether certain workers were employees under IRCA. It is likely to do so again. *Clackamas* and the *Restatement (Third) of Employment Law* indicate that for the purposes of antidiscrimination law, a controlling owner is not an employee. There are exceptions to this rule in other employment law contexts, but only when there are special statutory concerns which require that a person can be an “employee” despite owning and controlling a business. Thus, under FLSA and ERISA, a controlling owner can be an employee because the statute indicates she can. Nothing in IRCA compels such a counter-intuitive outcome.

As Congress debates comprehensive reforms to the immigration laws, it should clarify that “hire for employment” does not refer to business owners. It is a small, sensible step, which would protect immigrant-owned businesses and recognize the contributions of ambitious, long-term residents to the economy and the nation as a whole.

