

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

June 30, 2010

THE PROGRAMMERS GUILD, INC.,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	OCAHO Case No. 09B00019
	)	
VALUE CONSULTING,	)	
Respondent.	)	
_____	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

The Programmers Guild, Inc., a professional organization, filed a complaint in which it alleged that Value Consulting violated the nondiscrimination provisions of the Immigration and Nationality Act, 8 U.S.C. § 1324b (2006), by engaging in discriminatory recruitment. Before the answer was filed, the Guild filed its first amended complaint, which made allegations that Value Consulting, which it described upon information and belief as a corporation with its principal place of business at 44189 Paget Ter., Ashburn, Va. 20147,<sup>1</sup> engaged in a pattern of discriminatory recruitment by publishing a series of discriminatory on line advertisements between August 5, 2005 and January 31, 2009. The address provided for the respondent in the initial complaint was 44075 Pipeline Plaza, Suite 110, Ashburn, Va. 20147.

Value Consulting, Inc. filed a verified answer denying the material allegations and raising various affirmative defenses. Discovery has been completed, and the Guild filed a motion for summary decision. No response was made to the motion.

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<sup>1</sup> While it is not entirely clear from the record, this may be the residence address for Ashish Sawhney.

The record reflects that the complainant filed a charge with the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) on March 3, 2009. The respondent named in that charge was also Value Consulting, and the address given in the charge was 44075 Pipeline Plaza, Suite 110, Ashburn, Virginia 20147. In response to a question as to where the discrimination actually occurred, the complainant identified the location as WWW.DICE.COM. On July 1, 2009, OSC sent the Guild a letter authorizing it to file a complaint within 90 days of its receipt of the letter. The complaint in this matter was filed on July 20, 2009.

## II. EVIDENCE CONSIDERED

Materials accompanying the Guild's motion included Complainants Exhibits C-1 through C-13, consisting of on-line job announcements with dates ranging from August 5, 2005 to January 31, 2009; Exhibit C-14) USCIS statistics showing the number of new H-1B visas awarded in FY 2009; C-15) complainant's interrogatories and respondent's responses (16 pages); C-16) excerpts from I-129 applications for H-1B visas by Value Consulting, Inc. (9 pages); C-17) affidavit of Programmers' Guild President Kim Berry (2 pages); and C-18) an excerpt from a Congressional Research Service Report, "Science and Technology Policymaking: A Primer" (3 pages). Some of the advertisements seek applicants with H-1B visa status, while others offer to assist applicants either in obtaining that status, or in filling UK/Canada work permits.

In addition to the materials submitted with the motion, I have also considered the record as a whole, including the pleadings and attachments thereto. Attachments to the answer reflect that in addition to those accompanying the Guild's motion, other job announcements were also posted on-line that sought as applicants "only citizens and green card holders, not accepting H-1B," "US citizens, green card holders, and H-1B," or "H-1B is OK but prefer to have green cards and even US citizens may apply," "US citizens, green card holders and H-1B holders," and some that contained no mention of any specific citizenship or immigration status.

## III. BACKGROUND INFORMATION

Complainant Programmers Guild is a professional advocacy organization of computer programmers incorporated in New Jersey. Its President is Kim Berry. Value Consulting, Inc. is a wholly owned subsidiary of Value Consulting India, a Mumbai-based company. It is undisputed that Value Consulting India, not Value Consulting, Inc., is the entity responsible for posting the on-line advertisements which are the subject of this action. Although the complaint was served upon Value Consulting, Inc. and the answer was made by Ashish Sawhney, a representative thereof, subsequent correspondence received in response to mailings directed to Value Consulting, Inc. at the Pipeline Plaza address in Ashburn, Va. was returned to this office.

Correspondence addressed to that office by the complainant was also returned. The explanation provided was that those leased premises belonged to Value Consulting, LLC, that only Value Consulting, LLC operated at that address, and that while the company had in the past lent its address to other entities as a mail forwarding address, it would no longer do so.

Responses made to Programmers Guild's discovery requests suggest that Value Consulting India posted the on line ads using the names of overseas franchises such as Value Consulting, Inc., Value Consulting Ltd, and Value Consulting Hong Kong, as accommodation addresses, with or without the knowledge of the franchise owners, and that it used many different addresses for what it called "perception management" purposes. In the United States, for example, several different addresses were used, and telephone calls were handled through voice over IP phones with a US number that was answered in India. The number (703) 636-0056 thus actually would ring in India, not in Virginia, and faxes sent to (703) 991-4552 would come to the India office. Resumes in response to the ads were received through Outlook on desktops in India.

#### IV. THE INSTANT MOTION

Programmers Guild's motion seeks summary decision holding Value Consulting, Inc. liable for the acts of its parent corporation, Value Consulting, India in posting the internet ads. It identifies two issues it says are in need of resolution: 1) Does the placement of the advertisements requesting applicants with specific visa status constitute an unfair immigration-related employment practice under 8 U.S.C. § 1324b? and 2) Does a U.S. subsidiary have liability for discriminatory advertisement placed by its parent company when the subsidiary is listed as the contact in the advertisements and would do the hiring in response to such advertisements?

The Guild makes no argument that Value Consulting, India is itself within the jurisdictional reach of this forum. *Cf. Graduate Mgmt. Admission Council v. Raju*, 241 F. Supp. 2d 589, 594-96 (E.D. Va. 2003) (discussing internet activity as a basis for asserting personal jurisdiction over foreign defendant located in India). Rather, the motion asserts instead that the nature of the relationship between the two entities is such that Value Consulting, Inc., the subsidiary, should be held vicariously responsible for the ads placed by its parent Indian corporation. In a variation on the traditional doctrine of respondent superior, under which the parent may be liable for acts of the subsidiary, the Guild proceeds under a more novel theory of respondent inferior, where the subsidiary is instead held liable for the acts of the parent. No legal authority was cited in support of this proposition.

#### V. LEGAL AUTHORITY CONSIDERED

The statute governing this proceeding provides that no complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the filing of the charge with the Office of Special Counsel. 8 U.S.C. § 1324b(d)(3). Filing a timely OSC

charge is thus a condition precedent to the filing of a private action with OCAHO. *Aguirre v. KDI Am. Prods., Inc.*, 6 OCAHO no. 882, 632, 644 (1996);<sup>2</sup> *Bozoghlanian v. Raytheon Co. Electromagnetic Sys. Div.*, 4 OCAHO no. 660, 602, 609 (1994). “A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed.” *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977).

Under Virginia law, a showing that one corporation is owned by another, even where the two share common officers, is not a sufficient justification for a court to disregard their separate corporate structure. *Richfood, Inc. v. Jennings*, 499 S.E. 2d 272, 276 (Va. 1998) (citing cases). As a general rule of law, a subsidiary corporation is not ordinarily liable for the acts of its parent nor is a parent corporation ordinarily liable for acts of its subsidiaries. *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). Principles of corporate separateness may not apply under circumstances where it is demonstrated that one corporation exercises such dominion and control over the other to the point where they constitute, in reality, the same corporation. *Id.* at 63. Proof of control by one corporation over the internal business operations and affairs of the other is required, *Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 346 (5th Cir. 2004), and it is the complaining party’s burden to provide adequate factual evidence to support a finding of control, *Freudensprung v. Offshore Tech. Servs., Inc.*, 186 F. Supp. 2d 716, 723-24 (S.D. Tex. 2002), *aff’d*, 379 F.3d 327 (5th Cir. 2004).

Whether an agency relationship exists under Virginia law, unless shown by undisputed facts or by unambiguous written documents, is a question to be resolved by examination of the surrounding facts and circumstances as well as the conduct of the parties. *See generally Acordia of Va. Ins. Agency v. Genito Glenn, LP*, 560 S.E. 2d 246, 250 (Va. 2002).

## VI. DISCUSSION AND ANALYSIS

Because the Guild filed the OSC charge underlying this matter on March 3, 2009, it appears that events occurring prior to September 4, 2008 cannot be included within the scope of the

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<sup>2</sup> Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database “FIM-OCAHO” or on the website at (<http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#Published>).

complaint. Complainant's exhibits C-1, C-3, C-4, C-12, and C-13 are accordingly disregarded as being dated outside the 180 day period prior to the filing of the charge. The only exhibits considered therefore are exhibits C-2, and C-5 through C-11, all of which are dated in January, 2009. Although the Guild's first amended complaint asserts that "equitable tolling applies to the actions cited in this complaint," it offers no facts, cites no case law, and makes no argument as to why equitable tolling should apply. The assertion appears therefore to have been waived. OCAHO case law has in any event limited the application of equitable tolling to unrepresented parties, and to extraordinary circumstances, *see, e.g., Sabol v. N. Mich. Univ.*, 9 OCAHO no. 1107, 5 (2004); *Halim v. Accu-Labs Research, Inc.*, 3 OCAHO no. 474, 765, 780-84 (1992), neither of which conditions is apparent here.

The Guild does not select or articulate any one particular theory with specificity, nor does it cite to statutory, regulatory, or case law authority in support of any specific theory. Rather, it says,

There are three possible legal forms for such a recruitment relationship: concerted effort between Value Consulting and Value India; Value Consulting is acting as Value India's agent as a destination for applications and recruitment; or Value India is acting as Value Consulting's agent for the purpose of placing advertising. Ex. C-15, pp. 8-10. The facts do not establish which of these three relationships exists. However, all three produce the same result: Value Consulting is liable for unlawful advertising posted from India. Restat 3d of Agency, §§ 7.01, 7.03.

The Guild is correct in its assertion that "the facts do not establish which of three relationships exists." The facts, for that matter, do not establish that any of these three relationships exist because it takes more than conclusory allegations to show that a subsidiary is liable for the acts of its foreign parent corporation, or to establish an agency relationship between the two. Under Virginia law, a plaintiff has the burden of convincing a court to disregard the corporate form, *Perpetual Real Estate Servs., Inc. v. Michaelson Props. Inc.*, 974 F.2d 545, 548 (4th Cir. 1992), and an agency relationship may not be established simply by proffering a conclusion in the absence of supporting facts or law. *Acordia*, 560 S.E. 2d at 250.

The general rule is that the corporate form is not lightly to be disregarded. *S. States Coop., Inc. v. Dailey*, 930, 280 S.E. 2d 821, 827 (W.Va. 1981). Apart from whatever affiliation is inherent in any parent-sibling corporate relation, the Guild makes no showing that either corporation is so organized and controlled as to be a mere adjunct, instrumentality, or alter ego of the other, nor does it show facts sufficient to demonstrate that the corporations are an integrated enterprise. *See Hukill v. Auto Care, Inc.*, 192 F.3d 437, 442-44 (4th Cir. 1999). It does not argue, for example, that the corporations have common management, have centralized control of labor relations, or have interrelation between their operations, nor does it address the degree of financial control. *Id.* It does not address whether the companies mingle funds and assets, use the same workforce and business offices, or have common shareholder or board meetings, nor does it show facts to suggest that either corporation supervises the daily operations or influences the

decisions of the other. There is no evidence to support a conclusion that Value Consulting, Inc. had sufficient control over the activities of Value Consulting, India to warrant disregard of their separate corporate personalities.

The Guild does not show, discuss, or even assert the kinds of facts or circumstances required to establish an agency relationship. While it asserts that Value Consulting, Inc. “served as the contact point for responses to those advertisements and the mechanism through which Value India could conduct hiring within the U.S.,” the Guild does not show any facts suggesting that Value India actually ever did any hiring in the United States, with or without the assistance of Value Consulting, Inc., or that the latter did anything more on the parent’s behalf than to provide an address, if that.

More importantly, the Guild has offered no facts to rebut the assertion in the verified answer that at the time in question Value Consulting, Inc. had only three employees. Although responses to the complainants first interrogatories indicate that Value Consulting, Inc. had four to five employees in 2010, attachments to the answer reflect that at the time relevant to this case, its only employees were Ashish Sawhney, his wife Anjali Sawhney, and Tamushree Govind, and at least one of whom was employed only part time. The governing statute provides that a person or entity that employs three or fewer employees is not subject to the requirements of 8 U.S.C. § 1324b(a)(1). *See* 8 U.S.C. § 1324b(a)(2)(A). While early OCAHO cases treated the number of employees as a jurisdictional issue, *see, e.g., Zarazinski v. Anglo Fabrics Co., Inc.*, 4 OCAHO No. 638, 428, 439-40 (1994), that has not been the case since *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 504 (2006). The number of employees is simply one more of the elements of the plaintiff’s cause of action on the merits that the complainant has failed to show.

## CONCLUSION

The Guild’s motion will be denied. It has not alleged or shown that there is no genuine issue of material fact. It has not been alleged or shown that the Guild is entitled to judgment as a matter of law. Despite a full opportunity to engage in discovery, the Guild has failed to establish a prima facie case and has offered no evidence even to establish that Value Consulting, Inc. is an employer within the meaning of 8 U.S.C. § 1324b.

## VII. FINDINGS AND CONCLUSIONS

### A. Findings of Fact

1. Complainant Programmers Guild is a professional advocacy organization of computer programmers incorporated in New Jersey.
2. Value Consulting, Inc. is a wholly owned subsidiary of a Mumbai-based company, Value

Consulting, India.

3. On March 3, 2009 Programmers Guild filed a charge with the Office of Special Counsel for Unfair Immigration-Related Employment Practices.
4. On July 1, 2009 the Office of Special Counsel for Unfair Immigration-Related Employment Practices sent the Guild a letter authorizing it to file a complaint within 90 days of its receipt of the letter.
5. The complaint in this matter was filed on July 20, 2009.
6. At all times relevant to this proceeding, Value Consulting, Inc. had three or fewer employees.

B. Conclusions of Law

1. All conditions precedent to the institution of the complaint in this matter have been satisfied.
2. Entities and persons who employ three or fewer employees are exempt from coverage under 8 U.S.C. § 1324b(1) (2006). *See* 8 U.S.C. § 1324b (2)(A).
3. Value Consulting, Inc. is not a person or entity within the meaning of 8 U.S.C. § 1324b(1).

The complaint must be dismissed.

ORDER

The complaint is dismissed. Because Value Consulting, Inc. is not represented by counsel, it is not entitled to have attorney's fees assessed against the Programmers Guild.

SO ORDERED.

Dated and entered this 30th day of June, 2010.

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Ellen K. Thomas  
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1) (2006), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(I), any person aggrieved by such Order files a timely petition for review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order