

MEMORANDUM TO: Mayor and City Council  
VIA: David B. Humpton, City Manager *DP*  
FROM: Cathy G. Borten, City Attorney *CB*  
DATE: November 10, 2005  
SUBJECT: Legal Issues Surrounding Day Laborer Center

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It is my understanding that a question arose during the October 26 work session as to whether or not the operation of a day laborer center is a legal activity. This memorandum will respond to that inquiry.

The legality of a day laborer center was addressed by the Office of the County Attorney for Montgomery County when questions arose during the establishment of the County's center in Wheaton. A copy of the memorandum generated by the County Attorney is attached for your review. The County's opinion is relevant because it is the County that would be contracting for the operation of a proposed center in the City. The memorandum concludes that, particularly since the contract between the County and CASA to operate the center "does not require either party to hire unauthorized aliens and no employment relationship is created between either the County or CASA and the individuals served at the center," the center did not run afoul of the relevant federal immigration laws. Additionally, the obligation for verifying immigration status under federal law rests with the employer because neither the County nor CASA is hiring undocumented workers.

I concur with the County Attorney's opinion on this issue and, assuming that any center located in the City would be operated pursuant to a contract similar to the contract for the Wheaton center, I find it applicable to the center proposed to be established in the City. In addition, it should be noted that the County Attorney's memorandum provides an analysis from the standpoint of the entity entering the contract to operate the center. The City's involvement is much more peripheral in that the City is not a party to the contract for the operation of the center. Thus, the City is not involved in the hiring of workers, undocumented or otherwise, and no employment relationship is created between the City and any workers.

A related concern has been raised regarding whether the City aids or abets illegal activity by allowing a day laborer center that potentially involves undocumented workers. Initially, if the County's operation of the center as proposed does not violate the federal immigration laws as discussed above, then the City's peripheral involvement neither aids nor abets a violation of those laws. In addition to the provisions of the federal law analyzed in the Montgomery County memo, the Herndon lawsuit cites provisions of the federal immigration law that relate to the bringing in or harboring of certain aliens, and

the aiding and abetting thereof, in support of the first cause of action alleging that: “Defendant’s approval of the Permit establishing the Day Laborer Site, for the express purpose of facilitating employment of persons not legally present in the United States contravenes federal law...” Complaint, Count I. I have reviewed those portions of the law and find that the County’s operation of a center in the City as proposed thus far does not appear to amount to any of the activities proscribed by that law.<sup>1</sup> The City’s facilitation of a center within the City, therefore, should not amount to the aiding or abetting of any of those proscribed activities.

A parallel question of legality is whether the proposed center complies with the City’s Zoning Ordinance. Assuming the proposed center is modeled after similar employment centers open to the general public, the use may constitute a “public” use under the City’s Zoning Ordinance. For example, it has been proposed that the type of employment center under discussion would be operated either directly by Montgomery County or through its designated agent, CASA. If such a center were open for the use and benefit of the general public, it might be considered a public use. *See*, Zoning Ordinance, §24-1.<sup>2</sup> The Zoning Ordinance lists as permitted in all zones either “public uses” or “publicly owned or operated buildings or uses.” However, any plan for such a center would require a use and occupancy permit (§24-178) and approval of a site development plan (§24-168). The site development plan would presumably be subject to full Planning Commission review, including whether the use as proposed meets the requirements for establishing such a use under the Zoning Ordinance (*i.e.*, §24-170, §24-171). The Commission would have the ability to approve or deny an application for a center use based on the applicant’s ability or inability to meet those requirements.

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<sup>1</sup> Additionally, while the center has been proposed to address a community problem that currently exists (*i.e.* the unsupervised congregation of day laborers) and its potential ramifications, there is no evidence at this point to suggest that the proposed center has the “*express purpose of facilitating employment for persons not legally present in the United States....*” (emphasis added).

<sup>2</sup> “*Public.* Any use or structure which is open for the use and benefit of the general public and is operated by a city, county, state or national government or an agent designated by such government to operate such use or structure.” §24-1.



## OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan  
County Executive

Charles W. Thompson, Jr.  
County Attorney

MEMORANDUM

May 20, 2005

To: Parker Hamilton  
Assistant Chief Administrative Officer

Via: Marc P. Hansen, Chief *Marc Hansen*  
General Counsel Division

From: Anne T. Windle *Anne T. Windle*  
Associate County Attorney

Subj: Legality of County's provision of services to individuals regardless of immigration status

This office has been asked two questions: 1) whether the County's provision of employment and training services through a contractor to low income, multi-cultural individuals violates immigration law, and if so, what the penalty would be; and 2) whether the County's provision of employment and other services, such as mental health and child care to the same population, either directly or through a contractor, would violate any law, and if so, what the penalty would be.

Summary of Opinion

We have identified only two statutes that could potentially impact on the County's existing and proposed day labor centers. Both statutes are found in Federal law regulating immigration matters. These statutes are found at 8 USC § 1324a and 8 USC § 1621. The County's Contract with CASA to provide employment and other services to low-income multi-cultural individuals does not violate 8 USC § 1324a, unlawful employment of aliens. Similarly, the County's provision of employment and other services, whether directly or via contractor, does not violate 8 USC § 1621, unqualified aliens not eligible for State or local public benefits.

Factual and Legal Context

These questions arose in the context of the County's plan to open a second day labor center in Wheaton. A citizen has threatened legal action against the County for using public funds to facilitate the employment of illegal aliens. The County currently operates a day labor center under a contract ("Contract") with Central American Solidarity and Assistance of

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Maryland, Inc. ("CASA") to provide employment and other services to low-income multi-cultural individuals at the East Silver Spring Employment and Training Center.<sup>1</sup>

Under the Contract, CASA must:

1. Assess each participant's skill level in order to make referrals to job training and other employment programs as appropriate.
2. Place participants with local employers for permanent, full time job openings as well as day labor work.
3. Follow-up with both employers and participants to improve job retention.
4. Publicize Employment and Training Center services; develop and expand relationships with employers to increase number of employers regularly seeking workers from the Center.
5. Develop and maintain a structured process for the orderly pick-up of program participants by employers.
6. Provide pre-employment/life skills training to help participants learn how to search for and obtain employment.
7. Provide opportunities for workers to learn skills such as carpentry, wallpapering, etc. either by providing classes on site or by enrolling participants in classes sponsored by other training groups.

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<sup>1</sup> Although the Contract's Scope of Services section refers to providing services for multi-cultural residents, the Background section states, "The County requires the provision of employment and training services to low-income Hispanic persons." The County's General Conditions of Contract between County and Contractor provides, "The contractor assures the County that, in accordance with applicable law, it does not, and agrees that it will not, discriminate in any manner on the basis of race, color, religious creed, ancestry, national origin, age, sex, marital status, disability, or sexual orientation." Reading these provisions together, we do not believe the contract permits CASA to refuse to provide services to an individual because the individual is not Hispanic. Future CASA contracts should be written so as to eliminate any ambiguity concerning this issue.

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8. Provide English language instruction for participants by coordinating with existing ESOL training resources and by developing a program of classes at the Employment and Training Center.
9. Provide referrals for support services, including child care, transportation, health and mental health care which are necessary to obtain and maintain employment.
10. Operate legal services program to assist workers with employment related issues, including wages disputes; advise and assist workers in obtaining work permits; refer individuals to other resources for assistance with non employment related legal issues.

The County plans for the Wheaton center to provide employment services (items 1 through 5, above) on contract with CASA but is considering whether to provide other services (items 6 through 10, above) directly using existing County resources.

The only potentially relevant law we have found is Federal law – specifically 8 USC 1324a and 8 USC 1621. Under 8 USC §1324a, certain persons or entities are prohibited from hiring or recruiting or referring for a fee undocumented aliens, and requires an employer to verify an individual's immigration status. Under 8 USC §1621, unqualified aliens are ineligible for most State or local public benefits, with some limited exceptions, unless State law affirmatively grants eligibility to unqualified aliens. This opinion analyzes whether the County's contract with CASA violates 8 USC § 1324a, and whether the County's provision of employment and other services, whether directly or through a contractor, violates 8 USC § 1621.

### Analysis

#### 8 USC § 1324a. Unlawful Employment of Aliens

Under 8 USC § 1324a(a):

- (1) 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 . . .** with respect to such employment, or
  - (B) (i) to hire for employment in the United States an individual without complying with the requirements of [the employment verification system] or (ii) if the person or

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entity is an agricultural association, agricultural employer, or farm labor contractor . . . , to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of [the employment verification system].<sup>2</sup>

Emphasis added.

There are several key terms that have been given statutory definitions. These are:

1. "Unauthorized alien" means, with respect to employment, that the alien is not either lawfully admitted for permanent residency, or authorized to be so employed. 8 CFR § 274a.1(a) and 8 CFR § 1274a.1(a).
2. "Hire" means the actual commencement of employment of an employee for wages or other remuneration. 8 CFR § 274a.1c and 8 CFR § 1274a.1c.
3. "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. 8 CFR § 274a.1(g) and 8 CFR § 1274a.1(g).
4. "Recruit for a fee" means the act of soliciting a person, directly or indirectly, and referring that person to another with the intent of obtaining employment for that person, for remuneration whether on a retainer or contingency basis. 8 CFR § 274a.1(e) and 8 CFR § 1274a.1(e).
5. "Refer for a fee" means the act of sending or directing a person or transmitting documentation or information to another, directly or indirectly, with the intent of obtaining employment in the United States for such person, for remuneration whether on a retainer or contingency basis. 8 CFR § 274a.1(d) and 8 CFR § 1274a.1(d).

The employment verification system requires certain employers to complete the Employment Eligibility Verification I-9 Form. 8 CFR § 274a.2(a) and 8 CFR § 1274a.2(a). The employer or other entity hiring, recruiting or referring an individual for a fee must ensure the

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<sup>2</sup> For purposes of 8 USC § 1324a, the Code of Federal Regulations defines the terms used: Department of Homeland Security (Immigration and Naturalization)—Control of employment of aliens, 8 CFR § 1274a.1, Executive Office for Immigration Review, Department of Justice—Control of employment of aliens, 8 CFR § 1274a.1.

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individual completes the "Employee Information and Verification" section of the I-9 at the time of hire, or commencement of work. The employer also must examine documents provided by the individual to verify identity and employment eligibility. The employer must complete the "Employer Review and Verification" section of the I-9 within three business days of when employment begins. 8 CFR § 274a.2(b) and 8 CFR § 1274a.2(b). In the case of individuals hired for less than three days, the I-9 form must be completed at the time the individual is hired. 8 CFR § 274a.2(b)(iii) and 8 CFR § 1274a.2(b)(iii).

There are both civil and criminal penalties for violating 8 USC § 1324a. Employers found to have hired or to be continuing to employ unauthorized aliens may be ordered to cease and desist from such activity and are subject to civil penalties from not less than \$250 and not more than \$2,000 for each unauthorized alien on the first offence, not less than \$2,000 and not more than \$5,000 for each unauthorized alien on the second offence, and not less than \$3,000 and not more than \$10,000 for each unauthorized alien on subsequent offences. 8 CFR § 274a.10(b) and 8 CFR § 1274a.10(b). Employers who are convicted of having engaged in a pattern or practice of knowingly hiring or continuing to employ unauthorized aliens may face fines of up to \$3,000 per employee and/or 6 months imprisonment. 8 CFR § 274a.10(a) and 8 CFR § 1274a.10(a).

The CASA Contract does not require the County or CASA to hire unauthorized aliens and no employment relationship is created between either the County or CASA and the individuals served by the center. In fact, the opposite is true because, in fact, the contract requires CASA to assist clients in obtaining work permits if necessary.<sup>3</sup> Neither the County nor CASA, within the context of the contract, has an obligation to verify immigration status under 8 USC § 1324a(a)(1)(B)(i). And neither the County nor CASA would violate 8 USC § 1324a(a)(1)(A), because the contract does not contemplate the hiring of unauthorized aliens.

Similarly, neither the County nor CASA has an obligation to verify immigration status under 8 USC § 1324a(a)(1)(B)(ii). Arguably, CASA both refers and recruits individuals since the Contract requires CASA to place individuals with local employers for both permanent and day labor work and to publicize Employment and Training Center Services. However, CASA does not charge participants a fee for these services. Whether CASA receives a fee for providing these services through its contract with the County is a closer question, but ultimately irrelevant.

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<sup>3</sup>This opinion is based on the premiss that CASA will not refer for employment any individual knowing that the individual is an unauthorized alien. If that were to occur, CASA may face liability under 8 USC § 1324a if CASA were seen as referring an unauthorized alien for a fee. Our opinion does not reach that issue nor should our opinion be read as expressing any opinion about the activity of CASA except as an agent of the County in carrying out the work of the Contract.

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Neither the County nor CASA is an agricultural association, agricultural employer, or farm labor contractor, so both are not required to verify immigration status when recruiting or referring an individual for employment for a fee.

8 USC § 1621. Unqualified Aliens Ineligible for Certain State and Local Public Benefits

Under 8 USC § 1621(a), unqualified aliens are ineligible for most State or local public benefits. A public benefit is defined as:

[A] grant, contract, loan, professional license or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government and any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.

8 USC 1621(c).

Under 8 USC § 1621(b), there are some exceptions to this general rule of ineligibility for benefits. These are: 1) assistance for health care services and items necessary for treatment of an emergency medical condition and not related to an organ transplant procedure; 2) short-term, non-cash emergency disaster relief; public health assistance for immunizations and for testing and treatment of symptoms of communicable diseases; and 3) programs, services, and assistance specified by the U.S. Attorney General which: a) deliver in-kind services provided by public or private nonprofit agencies; b) do not condition the provision, amount or cost of assistance on income or resources; and c) are necessary for the protection of life or safety.

In 2001, the Attorney General issued AG Order No. 2303-2001, Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation. 66 FR 3613. First, the Order finds that 8 USC § 1621 does not preclude unauthorized aliens from receiving police, fire, ambulance, transportation (including paratransit), sanitation, or other regular, widely available services. The Order then identifies programs, services and assistance that deliver in-kind services provided by public or private nonprofit agencies, do not condition the provision, amount or cost of assistance on income or resources

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and are necessary for the protection of life or safety, making unauthorized aliens eligible for them. These are:

- (a) Crisis counseling and intervention programs, services and assistance relating to child protection, adult protective services, violence and abuse prevention, victims of domestic violence or other criminal activity, or treatment of mental illness or substance abuse;
- (b) Short-term shelter or housing assistance for the homeless, for victims of domestic violence, or for runaway, abused or abandoned children;
- (c) Programs, services or assistance to help individuals during periods of heat, cold, or other adverse weather conditions;
- (d) Soup kitchens, community food banks, senior nutrition programs such as meals on wheel, and other such community nutritional services for persons requiring special assistance;
- (e) Medical and public health services (including treatment and prevention of diseases and injuries) and mental health, disability or substance abuse assistance necessary to protect life or safety;
- (f) Activities designed to protect the life and safety of workers, children and youths, or community residents; and
- (g) Any other programs, services, or assistance necessary for the protection of life or safety.

66 CFR 3613.

Under 8 USC § 1621, a State may provide that an unqualified alien is eligible for any State or local public benefit for which the individual would otherwise be ineligible under 8 USC § 1621 by enacting a State law after the date of the enactment of the Act (August 22, 1996) which affirmatively provides for such eligibility. To date, Maryland has not passed such a law.

To the extent that the Contract calls for CASA to provide a safe place for day workers to be picked up by employers, this service seems to be exempted by the AG's Order, activities designed to protect the life or safety of workers or community residents. Similarly, support services such as child care, health and mental health services and transportation, as long as they

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are provided to protect life or safety, and there is not a means test for eligibility, also appear to be exempted by the AG's Order, regardless of whether they are provided by the County, CASA or another contractor.

Other services provided under the CASA contract, such as employment and training services, legal services, and English language instruction, are not specifically exempted by the AG's Order, nor do they seem to meet all three prongs of the test for exemption: in-kind services delivered at the community level, either through public or private non-profit agencies; no means test for eligibility; and are for the protection of life or safety. These services appear to fail at least the last prong.

In any event, 8 USCA § 1621 does not provide for a verification system to establish the immigration status of an individual who applies for a State or local public benefit.<sup>4</sup> Therefore, 8 USC § 1621 imposes no obligation on the County to check immigration status. As long as the County provides programs and services targeted at groups such as low income multi-cultural individuals and not unqualified aliens, the County is not in violation of 8 USC § 1621.

Further, 8 USC § 1621 does not provide for a penalty for an unqualified alien who applies for or receives a State or local public benefit or for a State or local government that provides such public benefits to unqualified aliens.

#### Conclusion

The County neither hires, recruits or refers for a fee individuals for employment, nor does the County require CASA to do so under the Contract. Therefore, 8 USC § 1324a(a) does not apply to the County and the County is not required to comply with the employment verification system required by 8 USC § 1324a(b).

Nonetheless, it may be advisable to make clear to CASA clients that neither the County nor CASA are their employers. The city of Alexandria, Virginia operates a job link service which provides space and computer time for individuals to secure employment. Alexandria had concerns similar to the ones addressed in this memo about violating 8 USC § 1324a. To ensure that job bank users were aware of the law, the job bank has posted signs in its facility notifying users that upon employment, they and their employer will be required to complete I-9 verifying their identity and employment eligibility. The County may wish, in the next CASA contract or by amendment, to require CASA to post such a notice.

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<sup>4</sup> Although rules were proposed in 1998 concerning verification of eligibility for public benefits, the rules were never adopted. In any event, those rules would have been discretionary, not mandatory, as to their use by State and local governments.

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The County does not target programs or services specifically to undocumented aliens and is not required to verify the immigration status of applicants for such programs and services. Therefore, the County is not in violation of 8 USC § 1621.

If you wish to discuss this opinion, please feel free to contact me at (240) 777-6746.

cc: Charles W. Thompson, Jr.  
Jerry Pasternak, Special Assistant to the County Executive  
Natalie Cantor, Director, Wheaton Regional Service Center  
Cathy Mathews, Director, Up-County Regional Service Center  
Michael Faden, Senior Legislative Attorney

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