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I. Introduction

The H-2A program is one of several federal programs providing U.S. employers with foreign workers when there is a shortage of U.S. citizens available to fill the jobs. What rights should these workers have? Do they deserve the same protections that U.S. law provides to their American counterparts?

In Reyes-Gaona v. N.C. Growers Association, the Fourth Circuit held that a foreign applicant’s claim of discrimination pursuant to the Age Discrimination in Employment Act (ADEA) failed because the claim was extraterritorial in nature and thus not within the ADEA’s scope. In other words, the court held that a foreign national applying from abroad for a position within the United States could not seek the ADEA’s protection.

The implications of this narrow reading to plaintiffs such as Reyes-Gaona are great. The facts of the case are unique in the sense that neither Reyes-Gaona nor the Fourth Circuit itself could surface a case “where the ADEA was interpreted to reach a situation analogous to the case at bar.” Thus, it is important to analyze how the Fourth Circuit came to the conclusion that Reyes-Gaona’s claim was extraterritorial in nature. This note will undertake that analysis. The relevant facts of the case are summarized in Part IIA. Sections B and C examine Reyes-Gaona and its procedural history.

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3 250 F.3d at 866–67.
4 Id. at 864. Of course, the facts are only unique in that such a fact pattern had not been litigated previously. The reality is that most discrimination in hiring goes unnoticed because most applicants are not explicitly told the reason for a denial of employment as was Reyes-Gaona.
5 See infra notes 14–17 and accompanying text.
6 See infra notes 18–38 and accompanying text.
explain the H-2A program,\textsuperscript{7} which motivated Plaintiff to apply for employment. Next, "[s]ince this determination [of extraterritorial scope] is necessarily ‘a matter of statutory construction,’ [one must] begin with the text of the ADEA itself."\textsuperscript{8} Therefore, Section B will look at the language of the ADEA and of Title VII of the Civil Rights Act of 1964.\textsuperscript{9} In Section C, the presumption of extraterritoriality will be addressed.\textsuperscript{10} Finally, Section D of Part III will compare case law both before and after an important amendment to the ADEA.\textsuperscript{11} In Part IV, the background law will be contrasted with the Fourth Circuit’s decision in Reyes-Gaona, questioning whether the test for extraterritoriality has changed in the labor context.\textsuperscript{12} Part IV will ask how, if at all, precedent supports such a change, and what the policy is regarding the federal H-2A program. Finally, this Note will conclude that the test for extraterritoriality in the labor context, in fact, remains unchanged, and thus Reyes-Gaona should have been protected from age discrimination in the hiring process.\textsuperscript{13}

II. Statement of the Case

A. Statement of Fact

The plaintiff is a Mexican national who applied for employment with the N.C. Growers Association (NCGA), a North Carolina corporation that secures seasonal farm labor for agricultural businesses through the federal H-2A temporary foreign agricultural worker program.\textsuperscript{14} Each year, Del-Al & Associates, an agent of NCGA and a U.S. corporation, recruits thousands of H-2A workers for NCGA through its office in Mexico.\textsuperscript{15}

\begin{itemize}
\item \textsuperscript{7} See infra notes 39–45 and accompanying text.
\item \textsuperscript{8} Reyes-Gaona, 250 F.3d at 864.
\item \textsuperscript{9} See infra notes 46–56 and accompanying text.
\item \textsuperscript{10} See infra notes 57–66 and accompanying text.
\item \textsuperscript{11} See infra notes 67–127 and accompanying text.
\item \textsuperscript{12} See infra notes 128–64 and accompanying text.
\item \textsuperscript{13} See infra Part V.
\item \textsuperscript{14} Reyes-Gaona v. N.C. Growers Ass’n, 250 F.3d 861 (4th Cir. 2001), cert. denied, 2001 U.S. LEXIS 10008 (Oct. 29, 2001).
\item \textsuperscript{15} Id. Under the ADEA, the term “employer” includes any agent of a “person...
In May 1998, Del-Al rejected Reyes-Gaona’s application for employment in North Carolina because he was over forty years of age. If the plaintiff had previously been employed by NCGA, the corporation’s policy would have been waived and Reyes-Gaona would have been placed on the list of workers seeking employment. The plaintiff sued both NCGA and Del-Al, claiming that they violated the ADEA by refusing to hire him.

B. The District Court Decision

The district court granted the Defendants’ motions to dismiss under Rule 12(b)(6). There, the court stated that a prima facie case of employment discrimination entailed four elements: A plaintiff must prove that (1) he is a member of the protected class, that is, he is at least forty years old; (2) he was qualified for a job for which the employer was seeking applicants; (3) he was rejected despite his qualifications; and (4) the position remained open and the employer continued to seek or accept applications from persons with his qualifications outside the protected class.

As to element (2), the court stated that in cases where the applicant was a foreign national, Fourth Circuit precedent has held that “being ‘qualified’ for the position is not determined by the applicant’s capacity to perform the job—rather, it is determined by whether the applicant was an alien authorized for employment in the United States at the time in question.” The court found that Reyes-Gaona’s case failed because he was not authorized to work in the United States at the time of his application.

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16 Id. Reyes-Gaona was fifty-five at the time he applied. Reyes-Gaona v. N.C. Growers Ass’n, No. 1:00CV00093, 2000 U.S. Dist. LEXIS 14701, at *1 (M.D.N.C. June 22, 2000).
17 Reyes-Gaona, 250 F.3d at 863.
19 Id. at *4 n.2 (citing Henson v. Liggett Group, Inc., 61 F.3d 270, 274 (4th Cir. 1995)).
20 Id. at *4 (quoting Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 187 (4th Cir. 1999)).
21 Id. at *8.

A petition to import an alien as an H-2A worker . . . may not be approved . . . unless the petitioner has applied to the Secretary of Labor for a certification that
Upon finding the plaintiff unqualified, the district court declined to address Defendants' second argument that there was a strong presumption against extraterritorial application of U.S. laws, applicable here because it was a suit by a foreign national applicant, residing outside of the United States. The Fourth Circuit in Reyes-Gaona addressed the second argument.

C. The Fourth Circuit Decision

The Fourth Circuit determined that the plaintiff, Luis Reyes-Gaona, was not entitled to relief under the ADEA because he was a foreign national, who applied in Mexico for employment in the United States as a temporary farmworker. Such a position would have given him "nonimmigrant" status and, thus, no right to live or work in the United States beyond the temporary employment for a particular employer. The Fourth Circuit ruled that on the facts of the case, a judgment in the plaintiff's favor would require extraterritorial application of the law in a manner that Congress had not authorized in the ADEA. It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" This principle is trumped only by an explicit congressional grant of extraterritoriality.

In conducting a statutory analysis of the ADEA, the court found that prior to 1984, the ADEA was viewed as having no extraterritorial application. The 1984 amendment, the court

(A) there are not sufficient workers who are able, willing, and qualified, . . . and
(B) the employment of the alien in such labor . . . will not adversely affect the
wages and working conditions of workers in the United States similarly
employed.


22 Id. at *9.


24 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c), 1188(i)(2) (1994). Workers must return to their home country at the end of their employment period, which generally must be less than twelve months. 20 C.F.R. § 655.100(c)(2)(iii) (2001).

25 Reyes-Gaona, 250 F.3d at 865.

26 Id. at 864 (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) and Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

27 Id. at 866.
determined, merely gave the statute extraterritorial application in one instance—when a U.S. citizen works for a U.S. corporation abroad.\textsuperscript{28} Thus, the 1984 amendment showed that Congress knew how to give a statute extraterritorial reach when it desired, and thus, Congress did not desire extraterritorial reach to cover the facts of this case.\textsuperscript{29} Because the statute did not explicitly cover foreign nationals who applied from abroad, relief could not be granted.\textsuperscript{30}

The Fourth Circuit gave no weight to the fact that Plaintiff's prospective workplace would have been in North Carolina.\textsuperscript{31} It distinguished \textit{Reyes-Gaona} from a line of cases, referred to as the \textit{Thomas} line of cases, where the circuit courts were in agreement on a workplace test of extraterritoriality.\textsuperscript{32} However, the court stated that these cases

[stand] for the rather unremarkable proposition that before 1984 the ADEA had no extraterritorial application at all—not even for U.S. citizens working abroad for American companies. The fact that some suits were barred because of the international location of the employee's workstation says nothing about whether a foreign national can file suit under the ADEA merely because the proposed workstation is in the United States.\textsuperscript{33}

This deference to the situs of the application was detrimental to Plaintiff's case. Further, the court expressed a concern that if Plaintiff were covered by the ADEA, "such a broad reading of the Act could have staggering consequences for American companies" who would be subject to suit because of the "simple submission of a resume abroad" from "millions of foreign nationals who file an overseas application for U.S. employment."\textsuperscript{34}

Finally, Judge Motz, in a concurrence, said that certain post-1984 authority cited by Reyes-Gaona and the Equal Employment Opportunity Commission (EEOC), as amicus curiae, merely

\begin{itemize}
\item \textsuperscript{28} Id. at 865.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id. at 865–66.
\item \textsuperscript{32} Id. at 864–65. See infra note 67.
\item \textsuperscript{33} Id. at 866.
\item \textsuperscript{34} Id.
\end{itemize}
presented "the reverse situation." That is, their precedent dealt with foreign nationals within the United States applying for positions outside the United States, whereas Reyes-Gaona was a foreign national applying outside for a position inside. "The fact that the ADEA did not apply in those cases does not compel the conclusion that it does apply to this one."

Plaintiff petitioned for a writ of certiorari to the United States Supreme Court, asserting that the Fourth Circuit applied a test for determining extraterritoriality that turned on the place-of-decision for hiring rather than turning on the location of the workplace. Other circuit courts, Plaintiff asserted, have relied on the workplace test in determining whether a claim demands extraterritorial application of the law. Plaintiff's petition for a writ of certiorari to the United States Supreme Court was denied.

III. Background Law

A. The H-2A Federal Program

The H-2A program, given slight mention by the Fourth Circuit, is a federal visa program set out in the Immigration and Nationality Act, which "facilitate[s] the process of U.S. employers going abroad to recruit and hire foreign nationals to work in the United States in temporary seasonal jobs." Other federal programs contained in this Act include H-2B and H-1B programs. The former pertains to non-agricultural workers; the

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35 Id. at 867 (Motz, J., concurring).
36 Id. at 864–65.
37 Id. at 867 (Motz, J., concurring) (emphasis added).
40 Appellant's Petition for a Writ of Certiorari at 18, Reyes-Gaona v. N.C. Growers Ass'n, 250 F.3d 861 (4th Cir. 2001) (No. 00-1963) (on file with the North Carolina Journal of International Law and Commercial Regulation).
latter involves “specialty occupations.”  One cannot enter the country on any of these visas unless there is a shortage of qualified U.S. citizens or lawful permanent resident immigrants to fill the positions. Further, a requirement of these programs is that employment of aliens “will not adversely affect the . . . working conditions of workers in the United States similarly employed.”

B. The ADEA and Title VII of the Civil Rights Act of 1964

1. The ADEA

In an effort “to promote employment of older persons based on their ability rather than age” and “to prohibit arbitrary age discrimination in employment,” Congress enacted the ADEA, making it unlawful for an employer “to fail or refuse to hire or to discharge any individual . . . because of such individual’s age.” An “employee” is defined as “an individual employed by any employer.” The Act was amended in 1984, adding the following language to the definition of “employee”: “The term

43 Specialty occupations require “(A) theoretical and practical application of a body of highly specialized knowledge, and (B) [the] attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent).” 8 U.S.C. §1184(i)(1). See also § 1101(a)(15)(H)(i)(b), 1182(m) (2001) (Requirements for Admission of Nonimmigrant Nurses During Five Year Period), 8 U.S.C.A. § 1182(n) (Labor Condition Application).

44 See supra note 21.


47 § 623(a)(1).

48 § 630(f). Although not applicable in this case, the definition of “employee” excludes:

any person elected to public office in any State or political subdivision of any State . . . or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

49 Congress amended ADEA by passing the Older Americans Act Amendments of 1984, Pub. L. No. 98-459, 98 Stat. 1767. In § 802, 98 Stat. 1792, the protection of the ADEA was extended to U.S. citizens employed abroad by American corporations or their subsidiaries. An exception exists if application of the ADEA would violate the law of the other country where the workplace is located. § 802(b)(1), 98 Stat. 1767, 1792.
‘employee’ includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.”

The amendment did not apply retroactively.

2. Title VII

The Supreme Court in *EEOC v. Arabian American Oil Co.* held that Title VII of the Civil Rights Act of 1964 did not apply extraterritorially to cover Americans working abroad for U.S. corporations (or foreign corporations controlled by U.S. corporations). Although a Title VII case, *Arabian* remains relevant not only because it confirms this principle of extraterritoriality but because it does so in the employment law context. “With a few minor exceptions, the prohibitions of [the ADEA] are in terms identical to those of Title VII of the Civil Rights Act of 1964 except that ‘age’ has been substituted for ‘race, color, religion, sex, or national origin.’” Thus, “analogies to Title VII cases are often helpful in age discrimination cases.”

C. What is the presumption against extraterritoriality?

The holding of *Arabian* demonstrates a strong concern about violating the generally accepted principle of international law that one country cannot impose its labor standards on another. “It is a long standing principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” From the briefs and oral argument in *Arabian*, it is apparent that the main

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51 See Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554, 559 (7th Cir. 1984) (“The amendment . . . does not apply retroactively . . .”).
54 *Arabian*, 499 U.S. at 246–47. Plaintiff was a naturalized U.S. citizen, hired in Houston, transferred to Saudi Arabia, and allegedly discriminatorily discharged. He was not protected by Title VII because the Court held that the law did not apply extraterritorially to protect U.S. citizens working abroad for U.S. companies.
55 Hodgson v. First Fed. Sav. & Loan Ass’n, 455 F.2d 818, 820 (5th Cir. 1972).
57 *Arabian*, 499 U.S. at 248.
58 Id. (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).
concern was that if the definition of "employer" were read broadly to include employers abroad, such an interpretation would necessitate application of this U.S. law to foreign employers abroad who employed U.S. citizens. This would be an extraterritorial application of the law, which was not explicitly intended.

In Arabian, the Court rejected the EEOC's argument that a negative inference could reasonably be drawn from Title VII's alien exemption provision in order to cover U.S. citizens working abroad for U.S. employers. The exemption provides that the statutes "shall not apply to an employer with respect to the employment of aliens outside any State." According to the EEOC, "[i]f Congress believed that the statute did not apply extraterritorially, it would have had no reason to include an exemption for a certain category of individuals employed outside the United States."

Following the decision in Arabian, Title VII was amended to account for and protect any U.S. citizen working abroad for a U.S. company or a company controlled by a U.S. company. This amendment was similar to the amendment made in 1984 to the ADEA.

Due to the similarities between Title VII and the ADEA, the court in Reyes-Gaona affirmed the principle developed in Title VII cases that "statutes affording protection from employment

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59 Id. at 255.

60 The Supreme Court states, for example, that even the EEOC would not contest that Title VII could not be applied to a U.S. citizen working for a French employer in France. Id.

61 Id.

62 Id. at 253 (quoting 42 U.S.C. § 2000e-1).

63 Arabian, 499 U.S. at 253 (quoting Petitioner's Brief at 12–13, Arabian (No. 89-1838)).


discrimination . . . apply to foreign nationals who are legally employed in the United States."\(^{66}\)

**D. Case Law**

**1. Pre-Amendment ADEA Cases**

Before the additional language became a part of the statute, a line of cases, referred to in *Reyes-Gaona* as the *Thomas* line of cases,\(^{67}\) established a workplace test for ADEA extraterritoriality. For example, in *Cleary v. U.S. Lines, Inc.*,\(^{68}\) the plaintiff worked thirty-three years for his employer, the latter part of his employment being in Europe.\(^{69}\) He was eventually discharged for what he claimed to be pretextual reasons and filed an age discrimination claim with the EEOC.\(^{70}\) The plaintiff argued that his claim was covered by the ADEA because the discharge decision had been made in New York.\(^{71}\) The Third Circuit rejected the plaintiff’s reasoning. It held that the ADEA incorporated the enforcement provisions of the Fair Labor Standards Act, which provides that the Act shall not apply to

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\(^{66}\) *Reyes-Gaona*, 250 F.3d at 867 (citing *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) ("Title VII was clearly intended to apply with respect to the employment of aliens inside any State."). The court in *Reyes-Gaona* also affirmed the court’s decision in *O’Loughlin v. Pritchard Corp.*, that the ADEA "in general protects noncitizens of the United States from unlawful discrimination." *Id.* (citing *O’Loughlin v. Pritchard Corp.*, 972 F. Supp. 1352, 1363–64 (D. Kan. 1997)). Further, the court in *Hartman v. Wick*, a case concerning women who applied for employment with or who were currently employed by the U.S. Information Agency, stated that the plaintiff class included nonresident aliens who applied for jobs with the Agency to be performed in the United States and "[n]othing in Title VII’s language, or its legislative history, supports exclusion of aliens employed in the United States from the Act’s scope." 678 F. Supp. 312, 325 (D.D.C. 1988) (citing 42 U.S.C. § 2000e; H.R. REP. No. 88-914, at 2391 (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2393).

\(^{67}\) In *Thomas*, the plaintiff began working for a North Carolina company, Brown & Root, Inc., at the age of fifty-six. *Thomas v. Brown & Root, Inc.*, 745 F.2d 279, 280 (4th Cir. 1984) (per curiam). After several years, he was transferred to Scotland and then to Rotterdam, where he was fired. *Id.* He testified that the London office told him that he was being discharged because he was too old. *Id.* The Fourth Circuit found that the ADEA could not be applied extraterritorially to cover his discharge overseas. *Id.* at 281.

\(^{68}\) 728 F.2d 607, 607 (3d Cir. 1984).

\(^{69}\) *Id.* at 608.

\(^{70}\) *Id.*

\(^{71}\) *Id.* at 608 n.4.
anyone employed in a workplace outside the United States.\textsuperscript{72} In other words, the Third Circuit rejected the “place of decision” theory.\textsuperscript{73}

Just months after \textit{Cleary}, the Tenth Circuit agreed with the \textit{Cleary} court and every court that had considered the question of extraterritorial application.\textsuperscript{74} In \textit{Zahourek v. Arthur Young & Co.},\textsuperscript{75} Zahourek was an American certified accountant, working for an American company that had offices all over the world. Zahourek worked primarily in other countries and was eventually terminated in Honduras.\textsuperscript{76} In response to Zahourek’s ADEA claim, the Tenth Circuit held, “the Act does not apply to the termination of employment of an American citizen by an American employer where, as here, the ‘workplace’ is in Honduras.”\textsuperscript{77} The court also commented,

Zahourek would escape the general rule above stated by claiming, alternatively, that this is not really a case of alleged age discrimination occurring in Honduras, but in reality is an instance where he was denied transfer from outside the United States to employment within the United States. However, . . . “[t]he discriminating effect was on Zahourek’s place of employment—Honduras.”\textsuperscript{78}

Two years after \textit{Cleary} and \textit{Zahourek}, the Fifth Circuit held that a plaintiff was not covered under the ADEA due to its lack of extraterritorial reach. In \textit{S.F. DeYoreo v. Bell Helicopter Textron},\textsuperscript{79} the plaintiff was fired at the age of sixty-five in the company’s Canada office.\textsuperscript{80} The court found that five circuit courts\textsuperscript{81} had already decided this issue, resulting in a denial of

\textsuperscript{72} Id. at 608 (citing Fair Labor Standards Act, 29 U.S.C. § 213(f) (1982)).

\textsuperscript{73} Id. at 610 n.6.

\textsuperscript{74} Zahourek v. Arthur Young & Co., 750 F.2d 827, 828 (10th Cir. 1984).

\textsuperscript{75} Id.

\textsuperscript{76} Id.

\textsuperscript{77} Id. at 828–29.

\textsuperscript{78} Id. at 829 (quoting the district court’s decision, 567 F. Supp. 1453, 1457 (D. Colo. 1983)).

\textsuperscript{79} 785 F.2d 1282, 1283 (5th Cir. 1986).

\textsuperscript{80} Id.

\textsuperscript{81} See Ralis v. RFE/RL, Inc., 770 F.2d 1121 (D.C. Cir. 1985) (holding that a plaintiff working in France who was forced to retire due to French law could not claim
coverage under the ADEA prior to the 1984 amendment. As before, the court applied a workplace test for extraterritoriality. Because the plaintiff’s workplace was in Canada, he was not covered by the ADEA. Further, the court found that the language of § 630(f) of the ADEA, as amended, must have added something that was not already in the Act, i.e., limited extraterritorial reach.

2. Hiring Cases

While most of the pre-amendment cases deal with the ADEA and its prohibition against discriminatorily firing a worker, Lopez v. Pan Am World Services, is similar to Reyes-Gaona in that it concerns a hiring decision. In Lopez, the Eleventh Circuit was asked to decide whether a U.S. citizen, who applied for protection under the ADEA prior to 1984); Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554 (7th Cir. 1985) (holding that because German law required retirement at the age of sixty-five, Plaintiff, a U.S. citizen working in Germany, was not protected by the ADEA); Zahourek, 750 F.2d 827, 828–29 (holding that the ADEA “does not apply to the termination of employment of an American citizen by an American employer if the ‘workplace’ is” abroad); Thomas, 745 F.2d 279 (holding that there was no protection for a plaintiff who was eventually fired abroad after having been hired in the United States and later transferred abroad); Cleary, 728 F.2d 607 (holding that the geographic scope of the ADEA was limited to the United States and since Plaintiff’s place of employment was outside the United States, the ADEA did not apply to him). In addition, Belanger v. Keydrol Co., 596 F. Supp. 823, 825 (E.D. La. 1984), aff’d, 755 F.2d 554 (7th Cir. 1985), held that

regardless of whether the employer made its termination decision through its personnel in the United States or abroad, the Federal ADEA simply does not apply if the employee was working in a foreign country. If Congress believed that the situs of the employer’s decision was the determining factor, then it would have clearly said so. Instead, Congress believed that the workplace of the employee should be the determining factor.

Id. at 825.

82 S.F. DeYoreo, 785 F.2d at 1283.

83 Id. But see Pfeiffer, 755 F.2d at 559–60 (rejecting Plaintiff’s claim but stating that “the legislative history of the 1984 amendment leaves totally obscure whether the amendment was meant to change the law, to state more clearly the original meaning of the law, or perhaps just to limit the extraterritorial application of the Act (to American citizens employed by American corporations and their subsidiaries in countries that do not have inconsistent laws) . . .") (citing H.R. Rep. No. 98-1037, at 49 (1984), reprinted in 1984 U.S.C.C.A.N. 2974, 3018, 3037 (describing the 1984 amendments to the age-discrimination laws as ‘minor’); 130 Cong. Rec. S11862, S11864 (daily ed. Sept. 26, 1984)).

84 813 F.2d 1118 (11th Cir. 1987).
employment with Pan Am World Services, a Florida corporation, was covered under the ADEA when he was interviewed in the United States, offered a job in Caracas, but subsequently had his offer withdrawn because the client in Caracas had a mandated age requirement that Lopez exceeded.\textsuperscript{85} Knowing that by this time, there were six circuits\textsuperscript{86} in agreement that an American employee working overseas was not covered when terminated due to age, Lopez sought to distinguish his case on the fact that he was an \textit{applicant}, not an employee.\textsuperscript{87} All of the relevant acts, Lopez said, occurred in the United States and there is a difference between the place of hiring and the place of termination.\textsuperscript{88} The court recognized that Lopez was presenting a "place of decision" theory and responded:

Appellant emphasizes that in this case a United States corporation decided in the United States not to hire a United States citizen. Appellant disregards the fact that his job would have been in Venezuela. To avoid the ADEA’s extraterritorial exemption, appellant attempts to distinguish between the place of hiring and the place of termination. Such a distinction appears to be a restatement of the "place of decision" theory. Under this theory, the place the personnel decision is made determines whether the ADEA is applicable . . . . "It is not the place where the plaintiff is hired, however, nor even the place where the termination decision is made that determines the applicability of the ADEA . . . . Instead, it is the location of the 'work station' that is determinative."\textsuperscript{89} 

3. \textit{Post-Amendment Cases}

Post-amendment cases also offer an interesting perspective on the nature of extraterritoriality and which test should be used to determine if extraterritorial application is required. In \textit{Denty v. SmithKline Beecham},\textsuperscript{90} Denty worked in Philadelphia for the U.S.

\textsuperscript{85} \textit{Id.} at 1118–19.
\textsuperscript{86} See cases cited \textit{supra} note 81. The sixth case referred to is \textit{S.F. DeYoreo}, 785 F.2d 1282.
\textsuperscript{87} \textit{Lopez}, 813 F.2d at 1119.
\textsuperscript{88} \textit{Id.} at 1120.
\textsuperscript{89} \textit{Id.} (quoting \textit{Wolf v. J.I. Case Co.}, 617 F. Supp. 858, 863 (E.D. Wisc. 1985)).
subsidiary of a corporation that was found to be controlled by a foreign parent corporation. Denty applied for a promotion to a position with the foreign corporation outside the United States. Although this case was decided well after the 1984 amendment, the court found that the controlling company was foreign and thus Denty did not fall within the category of "U.S. citizen employed by a U.S. company abroad." Although the case turns on which company is controlling, Denty shows that courts continue to look to the prospective workplace to decide the issue of extraterritorial application. The Third Circuit quoted the district court decision with approval, stating:

The court specifically ruled that "the relevant work site is the location of [the position for which the plaintiff applied], not the location of Denty's employment at the time of the alleged discrimination." The [district] court further opined that there was no distinction in the ADEA between a "failure to hire" case, in which the discrimination occurs in the country where the job site is located, and a "failure to promote" situation.

In Hu v. Skadden, Arps, Slate, Meagher & Flom, the district court agreed with the Denty court's view that there was no difference between a "failure to hire" and a "failure to promote" case. Hu was a "failure to hire" case. Hu sued a law firm for refusing to hire him based on his age after applying to work in the firm's Beijing and Hong Kong offices. Although a legal resident of the United States, Hu had Chinese citizenship. Accordingly,

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91 Id. at 148. Although Denty started work for SmithKline French, a Pennsylvania corporation, it subsequently merged with the Beecham Group plc, a British corporation, and the resulting corporation, SmithKline Beecham was found to be the wholly-owned American subsidiary. Id.

92 Id.

93 Id. at 150.

94 Id. "[T]he employment decisions at issue involved Denty's application for positions [abroad]. The relevant work site for ADEA purposes, therefore, is the location of these positions. We find support for this conclusion in the fact that the language of the ADEA does not distinguish between failure to hire and failure to promote situations." Id. at 151 n.5.

95 Id. at 149 (quoting Denty v. SmithKline Beecham Corp., 907 F. Supp. 879, 884 (E.D. Pa. 1995)).

96 76 F. Supp. 2d 476 (S.D.N.Y. 1999), vacated and remanded on other grounds, 214 F.3d 371 (2d Cir. 2000).

97 Id. at 477.
the district court found that Hu was not covered by the ADEA, which only grants extraterritorial application in one instance—where a U.S. citizen is working abroad for a U.S. company.\textsuperscript{98} The district court maintained “[p]laintiff’s claim clearly calls for extraterritorial application of the ADEA because the job which plaintiff sought was to be performed in Beijing and Hong Kong. The ADEA would apply to Hu, as a non-citizen, only if he sought to work in the United States.”\textsuperscript{99} The district court held that Hu’s conducting his job search in the United States, Skadden’s employment interviews in New York, and the probability that Skadden made the hiring decisions in New York did “not suffice to render the employment within the United States for ADEA purposes.”\textsuperscript{100}

Along these lines, in another hiring discrimination case decided by a district court under Title VII, the site of the workplace seemed to be the determining factor in whether the plaintiff’s claim was of an extraterritorial nature. In Hartman \textit{v.} Wick,\textsuperscript{101} a number of women who had either applied for employment or who were currently employed by the U.S. Information Agency,\textsuperscript{102} claimed that they were discriminated against in violation of Title VII.\textsuperscript{103} The court held that the plaintiff class, \textit{which included nonresident aliens}, had applied for jobs to be performed in the United States and were protected under Title VII because neither its language nor legislative history supported the exclusion of aliens employed in the United States.\textsuperscript{104} There is a provision in Title VII that excludes aliens employed “outside any State” from coverage.\textsuperscript{105} It is this provision that the defendant in \textit{Hartman}\textsuperscript{106} argued also excluded those class members who were

\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id. (citing \textit{Denty}, 109 F.3d at 150, for the proposition that the place where the job is to be performed constitutes the location of the work site for ADEA purposes).
\textsuperscript{101} 678 F. Supp. 312 (D.D.C. 1988).
\textsuperscript{102} Id. at 319.
\textsuperscript{103} Id. at 325.
\textsuperscript{105} “This subchapter shall not apply to an employer with respect to the employment of aliens outside any State . . . .” 42 U.S.C. § 2000e-1(a) (1994).
\textsuperscript{106} \textit{See supra} note 66 for discussion.
neither citizens nor residents of the United States when they applied for employment within the United States.\(^{107}\) However, the court stated that it was required to “give the language of civil rights statutes ‘broad and inclusive effect,’ and . . . extend their coverage to the outer limits permitted from a fair reading of the statute . . . .”\(^{108}\)

In *Gantchar v. United Airlines*,\(^{109}\) Pan Am flight attendants, who were not hired by United Airlines when it bought out Pan Am, filed claims under both the ADEA and Title VII.\(^{110}\) The case focused primarily on whether the work done by the flight attendants was ambulatory in nature. If the work was found to be ambulatory, then the amount of the work done abroad, in international airspace, or in the United States would determine whether the presumption against extraterritoriality applied to these federal statutes.\(^{111}\) The court found *J.I. Case Co.* and *Pfeiffer* “instructive in that they indicate[d] (1) the primary focus should be on the location of the work and (2) performing some work in the United States does not preclude finding the work

\(^{107}\) Hartman, 678 F. Supp. at 325.

\(^{108}\) Id. In another district court decision involving a non-citizen and the ADEA, the plaintiff was hired by the Pritchard Corporation and a few years later assigned to the United Arab Emirates, but the Pritchard Corporation had difficulty in obtaining a visa for the plaintiff. O’Loughlin v. Pritchard Corp., 972 F. Supp. 1352, 1357 (D. Kan. 1997). The United Arab Emirates placed an upper age limit on foreign national workers and the plaintiff was over sixty. Id. at 1357–58. In general, the court’s statutory interpretation led it to conclude that non-citizens of the United States were protected from discrimination because the statute said that an employer may not “discharge any individual or otherwise discriminate against any individual . . . because of such individual’s age.” 29 U.S.C. § 623(a)(1) (1994). “The phrase ‘any individual’ suggests that the Act in general protects non-citizens of the United States . . . .” O’Loughlin, 972 F. Supp. at 1363. However, the court found that such an interpretation did not mean that a non-citizen was protected when working abroad because that “could potentially intrude upon the domestic laws of other nations.” Id. It also found that O’Loughlin’s claim that the defendant did not hire him for work inside the United States was valid. Id. at 1366.


\(^{110}\) Id.

\(^{111}\) Gantchar v. United Airlines, No. 93 C 1457, 1995 U.S. Dist. LEXIS 5358, at *2 (N.D. Ill. Apr. 20, 1995) ("[P]laintiffs confuse determining whether a statute applies extraterritorially by applying the presumption against extraterritorial application of statutes with the issue in this case, whether the work of the plaintiffs is in fact extraterritorial in nature.").
extraterritorial." Thus, although *Gantchar* could be distinguished on the ground that it involved ambulatory workers, the reliance on a workplace test is significant.

Finally, *Iwata v. Stryker Corp.* provides an example of the literal interpretation that courts have given to Title VII and the ADEA. Iwata was a Japanese citizen legally residing in the United States, who took a job in the United States with Matsumoto, the Japanese subsidiary of the American parent, Stryker. Iwata worked in the United States for a while before he was relocated to Japan, where he claimed to have been discriminatorily discharged pursuant to both Title VII and the ADEA. Upon termination, Iwata went back to the United States and continued to live as a resident alien.

The court examined both statutes and found that unless a person was a United States citizen, he was not included in the definition of "employee" if he worked abroad. Since the ADEA provision defining "employee" is virtually identical to that of Title VII, most of the court’s analysis involved Title VII. Referring to Title VII, the court said, "[s]pecifically, 42 U.S.C. § 2000e(f) now provides that 'with respect to employment in a foreign country, such term [employee] includes an individual who is a citizen of the United States." Thus, the court stated that the Act would not apply unless the employee was a citizen of the United States and the corporation was controlled by an American employer. It did not matter to the court that while Iwata was in the United States, he was covered by the Act, but upon relocating, he no longer was

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113 59 F. Supp. 2d 600 (N.D. Tex. 1999).
114 *Id.* at 602.
115 *Id.*
116 *Id.*
117 *Id.*
118 The Civil Rights Act of 1991 amended Title VII so that the definition of "employee" included U.S. citizens employed abroad. This change legislatively superseded the *Arabian* decision. *Id.* at 603.
119 *Id.* (quoting 42 U.S.C. § 2000e(f)) (emphasis in original).
120 The court never decided the issue of control because the fact of Iwata’s non-citizenship eliminated the need. *Id.* at 604.
due to his citizenship status.

The cases above all addressed the concept of extraterritoriality in conjunction with the ADEA or Title VII. Stepping away from the focus on this combination and looking solely at the job situs test in the context of labor law, stands the case of Oil, Chemical & Atomic Workers International Union v. Mobil Oil (OCAW).\footnote{426 U.S. 407 (1976).} In OCAW, the issue was whether the Texas right-to-work law could be applied to bar a collective bargaining agreement provision for U.S. seamen, hired mostly in Texas, but working on the high seas.\footnote{Id. at 410.} The Court held the Texas state law was inapplicable.\footnote{Id. at 414, 420.} The Court discussed the type of test to be used in determining which law applied. The majority adopted a job situs test,\footnote{Id. at 418–20.} whereas the concurrence did not think it necessary to determine the appropriateness of a job situs test in this case.\footnote{Id. at 421 (Powell, J., concurring).} The dissent, on the other hand, wanted the Court to follow a place of decision test.\footnote{Id. at 437 (Stewart, J., dissenting, “I believe that the place of hiring is the critical factor in determining the choice of law . . . .”).} Ultimately, the job situs test eliminated the "unpredictability" of having to evaluate workers' contacts to a jurisdiction and was found by the Court to be a more workable test than the place of hiring test.\footnote{Id. at 419.} Although OCAW did not involve the ADEA or Title VII, the Supreme Court determined that, in the labor law context, the two benefits of predictability and workability played a substantial role in adopting a job situs test.

IV. Analysis

A. Case Law

Given the precedent affirmed in Reyes-Gaona, that non-citizens working in the United States are protected by the ADEA and Title VII, the affirmation of these cases would seem to be favorable to Reyes-Gaona.\footnote{"I emphasize that the decision reached by the court in this case does not conflict} However, the Fourth Circuit
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distinguished Reyes-Gaona's case because Reyes-Gaona was not yet working in the United States. The concurrence stated, "[h]ad Reyes-Gaona been hired by NCGA, once he began work in this country, the ADEA would have protected him from unlawful employment discrimination." This stands in stark contrast with the Third Circuit's statement in Denty, that there was no difference between a failure-to-hire case and a failure-to-promote case. In essence, the court in Reyes-Gaona was saying there could be discrimination in the hiring process of H-2A workers. A worker cannot be authorized to work in the United States until he is offered a job, which, of course, will never happen if the employer discriminates against foreign workers in the hiring process.

But what is the test to determine if a claim is extraterritorial in nature in the labor context? Is it the prospective workplace? The place of decision? Or, does the test change depending on if it is a refusal-to-hire, a refusal-to-promote, or an unlawful discharge claim? Did Reyes-Gaona, in his claim of discrimination, truly ask the court to apply a federal law beyond its scope?

If Reyes-Gaona's claim demanded extraterritorial application of the ADEA, any court would apply the strong presumption against extraterritoriality as stated in Arabian, and finding no explicit language in the statute or in the legislative history speaking to the facts of this case, would rule against him. This is what happened in the Fourth Circuit. "Notably missing from the 1984 amendments . . . is any provision regulating the conduct at issue here." The Fourth Circuit stated that Congress knew how to expand the jurisdictional reach of a statute when it desired, and that was not done with the provision at issue in Reyes-Gaona.

with the generally accepted principle that statutes affording protection from employment discrimination, such as Title VII and the ADEA, apply to foreign nationals who are legally employed in the United States." Reyes-Gaona, 250 F.3d at 866 (Motz, J., concurring) (citing Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973) ("We agree that aliens are protected under [Title VII].") ; Boureslan v. Aramco, Arabian Am. Oil Co., 892 F.2d 1271, 1273 (5th Cir. 1990) (holding that Congress intended to "provide Title VII coverage to aliens employed within the United States"); O'Loughlin v. Pritchard Corp., 972 F. Supp. 1352, 1363-64 (D. Kan. 1997) (The ADEA "in general protects noncitizens of the United States from unlawful discrimination.").

129 Reyes-Gaona, 250 F.3d at 866 (Motz, J., concurring).
130 See supra notes 94–95 and accompanying text.
131 Reyes-Gaona, 250 F.3d at 865.
132 Id. (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 258 (1991)).
However, the above analysis begins with the assumption that Congress did not think that the job situs test was the test for extraterritoriality. If Congress considered the workplace the proper focus (and the case law from the time of the 1984 amendment undoubtedly supports a job situs test), then there was no need to address any situation involving a domestic workplace, such as in the case of *Reyes-Gaona*. In other words, there was no need to distinguish a hiring case, with the workplace in U.S. territory, from a case where the plaintiff was already hired and working in the United States.

In sum, *Reyes-Gaona*’s claim hinged on the court applying the correct test for determining extraterritoriality. If the job situs test remains valid in the labor context, then *Reyes-Gaona*’s claim does not even invoke extraterritoriality because his job would have been in North Carolina. If, however, the job situs test is rejected, his claim fails because he was an applicant applying from abroad.

Before its amendment in 1984, many courts held that the ADEA had no extraterritorial application at all. If the pre-amendment definition of "employee," "an individual employed by an employer," had been interpreted to cover all U.S. citizens, then the fear is perhaps understandable that such a broad definition would open the door to Americans employed overseas by foreign employers to claim that they were also covered. This last situation would certainly infringe upon the laws of another nation because it would require foreign employers to obey U.S. laws for their U.S. workers. This would clearly violate the Supreme Court’s canon of law that one country cannot impose its labor standards on another.

Thus, the added language of the amendment, "[t]he term ‘employee’ includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country," is interpreted to have given limited extraterritorial application to a statute with no extraterritorial reach. For this reason, one has a good idea of what is considered extraterritorial. That is, applying U.S. labor laws to a U.S. citizen working for a

133 See discussion supra Part III.D.1.
135 *Arabian*, 499 U.S. at 248.
136 See *supra* notes 46–51 and accompanying text.
U.S. company abroad is considered extraterritorial, but, due to the amendment, a citizen is now protected under both the ADEA and Title VII. However, there is no precedent dictating whether a claim by a foreign applicant, such as Reyes-Gaona, applying for a job within the United States from abroad, should be considered extraterritorial. The best one can do is analyze the cases described above that invoke extraterritorial application of the law and consider on what facts those decisions turned.

Distinguishing between pre- and post-amendment cases is not particularly helpful since the 1984 ADEA amendment and the 1991 Title VII amendment merely give limited extraterritorial scope to the Acts in a narrow factual situation. Since Reyes-Gaona’s claim does not fit into the mold created by the amendments, it hinges on which “test” is chosen to ascertain whether a claim requires extraterritorial application of the law.

For Reyes-Gaona, a test that focuses on the workplace would remove his case from the issue of extraterritorial application since his prospective workplace was in the United States. However, the Fourth Circuit declared that the Thomas line of cases, employing a job situs test, merely “stands for the rather unremarkable proposition that before 1984 the ADEA had no extraterritorial application at all.”137 “The fact that the ADEA did not apply in those cases does not compel the conclusion that it does apply to this one.”138 If the test for extraterritoriality of the ADEA before 1984 was the workplace, why would this test change once the Act was given limited extraterritorial application?

It is not clear which test should be used, if any. Lower courts still look to the prospective workplace for extraterritoriality issues, which indicates that the job situs test with regard to extraterritorial application of the ADEA and Title VII is still very much alive. Three cases, Gantchar, Hu, and Iwata, are examined below. They are relevant to Reyes-Gaona because all three involved claims by foreign nationals and because both Gantchar and Hu were hiring cases. Those cases dealing with discrimination in the hiring process were most useful to Reyes-Gaona because the Fourth Circuit agreed with the precedent holding that a foreign national discriminated against when already employed in the United States

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137 Reyes-Gaona, 250 F.3d at 866.
138 Id. at 867 (Motz, J., concurring).
was covered by the ADEA.\textsuperscript{139} In addition to these three district court cases, \textit{Lopez}, a hiring case in which the Eleventh Circuit applied pre-Amendment ADEA, is analyzed below. Once again, distinguishing between pre- and post-amendment cases should not serve as a basis for changing the extraterritoriality test.

The court in \textit{Gantchar} held that the location of the workplace determined whether extraterritorial application was being requested.\textsuperscript{140} The case dealt with both foreign nationals and Americans, and included refusal-to-hire claims under Title VII and the ADEA.\textsuperscript{141} Notably, the district court devoted a good portion of its opinion to determining what percentage of the workplace was in the United States, in international territory, and on foreign land, despite the consensus that the plaintiffs were applying for London-based positions.\textsuperscript{142} This case, if not standing for a "workplace test" due to the ambulatory nature of the work (as with flight attendants), at least shows that a refusal-to-hire in the context of extraterritoriality will not be dismissed solely because the application process takes place abroad. In fact, with the number of plaintiffs involved, it is not clear from the facts of \textit{Gantchar} where the application process occurred. Because the plaintiffs were making claims under statutes enacted to eliminate discrimination in the workplace, the emphasis on the workplace seems reasonable. It provides the predictability and the workability acknowledged by the Supreme Court in \textit{OCAW} as benefits of a job situs test.\textsuperscript{143}

\textit{Hu} shows that courts still think the workplace test is valid.\textsuperscript{144}


\textsuperscript{140} No. 93-C1457, 1995 U.S. Dist. LEXIS 3910, at *21 (N.D. Ill. Mar. 24, 1995). However, ambulatory workers "might be considered to have a work station in more than one country." \textit{Id.} at *22 (citing Wolf v. J.I. Case Co., 617 F. Supp. 858, 862 (E.D. Wisc. 1985)). \textit{See supra} notes 109-12 and accompanying text.

\textsuperscript{141} \textit{Id.} at *1.

\textsuperscript{142} \textit{Id.} at *18-21.

\textsuperscript{143} \textit{See supra} notes 121-27 and accompanying text.

\textsuperscript{144} 76 F. Supp. 2d 476 (S.D.N.Y. 1999). \textit{See supra} notes 96-100 and accompanying text.
If Hu had been a U.S. citizen, his case would have fallen under the limited extraterritorial reach of the ADEA in applying for the jobs in Hong Kong and Beijing. However, Hu was not a U.S. citizen at the time he applied, although he was residing legally in the United States. The situs of the application process, once again, was irrelevant in this case.

Hu could also be seen as an example that a rigid reading of the ADEA results in strange outcomes. Imagine X, a foreign national who is a legal U.S. resident employed in the United States at a U.S. corporation with his co-workers, A and B, who are U.S. citizens. X, A, and B accept promotions entailing their transfer to their company’s office in France. Now, applying Hu, the very same company is given the go-ahead to discriminate with impunity against X, but not A and B, because the extraterritoriality provision only applies to U.S. citizens, and the fact that X was hired, employed, and promoted in the United States does not prevent a conclusion that the conduct is extraterritorial.

Another example of continuing use of the workplace test for extraterritoriality is Iwata v. Stryker Corp. It is also an example, like Hu, of a discrepancy in the treatment of U.S. citizens and legally residing foreign nationals due to the latter’s noncitizen status and a narrow reading of the ADEA and Title VII. Iwata, a Japanese citizen, legally residing and working in the United States, relocated with his corporation to Japan where he allegedly experienced discrimination. The court found that it lacked subject matter jurisdiction over his claims under Title VII and the ADEA because the relocation exempted him from the definition of “employee” when he became a foreign national working abroad. It seems strange that a foreign national working in the United States cannot be discriminated against here, but can be discriminated against abroad while working for the same company.

As mentioned earlier, there is no precedent with factual circumstances similar to Reyes-Gaona. All the precedent involves workplaces abroad and thus applies a test for extraterritoriality that

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145 Id. at 477.
146 Id.
147 59 F. Supp. 2d 600 (N.D. Tex. 1999).
focuses on the location of the workplace. Since the Fourth Circuit stated that the “reverse situation” did not mandate a workplace situs test,\(^{149}\) perhaps the Fourth Circuit was saying that what matters is that any part of the employment occurs abroad, regardless of whether it be the application process or the termination. Such a conclusion, however, is not clear.

According to the Fourth Circuit, a case such as *Lopez*\(^{150}\) is not relevant because the pre-amendment ADEA was applied. As stated earlier, distinguishing the proper analysis for extraterritoriality based on whether a case is pre- or post-amendment does not seem useful if the 1984 ADEA amendment merely extended extraterritorial coverage to Americans working for United States companies abroad. The logic of the workplace test should remain the same whether or not Americans are covered abroad. Further, *Lopez* is relevant to *Reyes-Gaona* because Lopez was allegedly discriminated against in the hiring process. According to *Lopez* and the other cases decided around that time, Congress was concerned with domestic conditions. This proposition stems from the language of *Arabian* and remains strong.\(^{151}\) Under this premise, it makes sense that an American worker was not covered prior to the amendment because a foreign country’s laws could protect a U.S. citizen. In *Denty*, for example, the Third Circuit stated: “We reject the EEOC’s argument that by failing to apply the ADEA extraterritorially here, Denty will fall into a ‘black hole.’ To the contrary, . . . he is protected by British law.”\(^{152}\) However, the age of the workforce in the United States is undoubtedly a domestic condition and the hiring of such a workforce is a function of the determined workplace, whether current or prospective.

Not only does *Denty* serve as a reminder that Congress is

\(^{149}\) *See supra* text accompanying notes 35–37.

\(^{150}\) *Lopez v. Pan Am World Services*, 813 F.2d 1118 (11th Cir. 1987).

\(^{151}\) *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (“[Un]less there is ‘the affirmative intention of the Congress clearly expressed,’ we must presume it ‘is primarily concerned with domestic conditions.’”) (citing *Benz v. Compania Naviera Hidalgo*, S.A., 353 U.S. 138, 147 (1957); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

\(^{152}\) *Denty v. SmithKline Beacham*, 109 F.3d 147, 151 (3d Cir. 1997), *cert. denied*, 522 U.S. 820 (1997). ("The fact that British law does not protect individuals forty years of age or older from discrimination is not our concern.").
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primarily concerned with domestic conditions, but also the Third Circuit in Denty concluded that there was no difference between a failure-to-hire case and a failure-to-promote case. If a hiring case is considered no different from a promotion or discharge case, then Reyes-Gaona becomes a member of the class of noncitizens described in Espinoza and O'Loughlin already working in the United States that are protected by the ADEA and Title VII. Following this logic, Reyes-Gaona's failure-to-hire claim and a noncitizen's failure-to-promote or unlawful discharge claim within the United States should all be treated the same—as claims made under the ADEA which do not invoke extraterritoriality.

B. The Federal H-2A Program

The Fourth Circuit relied on the combination of three critical elements in its holding: 1) a foreign national applicant, 2) applying abroad, 3) for a job in the United States. Because Congress did not address a situation specifically involving these three elements, the Fourth Circuit reasoned, Congress must not have wanted to include any person satisfying all three of these elements within the ADEA's coverage. However, the Fourth Circuit arrived at this conclusion based on several perplexing, conclusory remarks in Reyes-Gaona. For example, in rejecting the Thomas line of cases, the court made the following two conclusions:

Notably missing from the 1984 amendments, however, is any provision regulating the conduct at issue here. Congress explicitly gave the ADEA extraterritorial application with respect to certain U.S. citizens while simultaneously declining to extend coverage to foreign nationals like Reyes-Gaona. And the doctrine of expressio unis est exclusio alterius instructs that where a law expressly describes a particular situation to which it shall apply, what was omitted or excluded was intended to be omitted or excluded.

First, regarding this language, how apparent is it that the amendment "simultaneously declin[ed] to extend coverage to

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153 Reyes-Gaona, 250 F.3d 861, 865 (4th Cir. 2001), cert. denied, 2001 U.S. LEXIS 10008 (Oct. 29, 2001) ("[T]he Act certainly could not have reached the even more attenuated situation of a foreign national applying in a foreign country for work in the United States.").

154 Id.
foreign nationals"? True, it is not clear whether Congress passed the 1984 amendment to clarify the ADEA or to change it, but either way, if Congress saw that the courts were applying a workplace test for extraterritoriality, there was no reason to address Reyes-Gaona's situation. Congress quite reasonably could have assumed that Reyes-Gaona was covered, but the Fourth Circuit ignored this possibility.

Second, the Reyes-Gaona court stated that the amendment "expressly describe[d] a particular situation" of limited extraterritorial reach when an American is working abroad. However, that does not necessarily mean that Reyes-Gaona was intentionally omitted from the Act's scope if it was assumed that his claim would never fall within the scope of extraterritoriality due to the prospective domestic workplace.

Other perplexing remarks by the court include the conclusion that the "simple submission of a resume abroad" would have "staggering consequences for American companies" because the ADEA would be expanded "to cover millions of foreign nationals who file an overseas application." This remark is unfounded. The possibility of rejected applicants to programs similar to the H-2A program being in the "millions" is an exaggeration revealed by the Department of Labor Statistics.

155 Id. (emphasis added).
156 See supra note 83.
157 Reyes-Gaona, 250 F.3d at 865.
158 Id. at 866. With respect to agricultural workers, agribusiness tends to hire illegal immigrants and complain of the conditions imposed in order to hire H-2A workers. "[T]he reality is that hiring non-complaining undocumented workers is cheaper. The result is that in the $200 billion annual agricultural industry employing 1.2 million farmworkers, 624,000 are undocumented, only . . . 28,560 H-2A guest-worker visas [were obtained] in 1999, and close to 50,000 in 2000." Patrick Osio Jr., New Urgency for Immigration Reform, THE SAN DIEGO UNION-TRIBUNE, Oct. 23, 2001, at B9, available at LEXIS, News Library, San Diego Union-Tribune File.
159 Appellant's Petition for a Writ of Certiorari at 20, Reyes-Gaona (No. 00-1963) (on file with the North Carolina Journal of International Law and Commercial Regulation) (citing U.S. DEP'T OF LABOR, EMPLOYMENT AND TRAINING ADMIN., OWS INFO. BULLETIN NO. 03-01, H-2A SUMMARY REPORT at ii (2001)):

Most of these programs are subject to specific, annual, numerical limits, as well as complex and varied eligibility rules, which further limit the number of potential beneficiaries. While there is no specific limit on the number of H-2A visas that may be issued each year, in fiscal year 2000, the number of jobs which agricultural employers sought to fill with H-2A guestworkers was 48,480
Further, the Fourth Circuit decision ignored the increasing internationalization of the U.S. labor force and the globalization of the economy. More and more employers use federal employment visa programs to recruit foreign citizens to work in the United States. And, because there are several federal visa programs contained in the Immigration and Nationality Act, which approve and facilitate the process of hiring from abroad, *Reyes-Gaona* has significant implications for the U.S. labor force—it seems that an employer may now discriminate with impunity. Not only could the Fourth Circuit’s decision apply to age discrimination, but based on statutorily similar language in Title VII, *Reyes-Gaona* also implicates the regulation of recruiting practices discriminating based on gender, race, color, and religion as well.

The federal programs require that employment of aliens “will not adversely affect the . . . working conditions of workers in the United States similarly employed.” This now seems impossible if any employer chooses to manipulate its workforce by recruiting abroad in a way compliant with *Reyes-Gaona*. It already seems that many American companies prefer to hire foreign candidates because they are willing to work for lower wages than the American workers.

In short, the Fourth Circuit justifies its decision with a presumption against extraterritoriality, citing a concern for imposing U.S. labor standards abroad. However, there is little reason to believe that Mexico’s foreign sovereignty would be

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and the number of jobs approved reached 44,017.

*Id.* “The H-2B program only allows up to 66,000 visas to be issued each year.” *Id.* (citing 8 U.S.C. § 1184(g)(1)(B) (2000)).


161 Appellant’s Petition at 18, *Reyes-Gaona* (No. 00-1963).

162 *Id.*


164 Joyce Lain Kennedy, *Talent Overlooked in Youth, H-1B Era*, DALLAS MORNING NEWS, Aug. 13, 2000, at 1L (commenting that fewer than half of computer-science graduates actually get programming jobs because employers find hiring through the H-1B program more profitable).
undermined by preventing U.S. corporations from discriminatorily manipulating its U.S. labor force through its foreign hiring process. Rather, it is the U.S. workforce that is affected by such discrepancies in the hiring process.

V. Conclusion

In order to protect U.S. citizens working in the United States, their foreign counterparts should be given equal rights. This would deter employers from taking advantage of foreign workers to the detriment of both foreigners and U.S. workers.

The test for extraterritoriality is key in *Reyes-Gaona* because if the test remains the location of the workplace, as it most certainly was before the 1984 amendment and as it arguably still is, then Reyes-Gaona’s claim should have succeeded—there was no dispute that Del-Al’s policy could not be instituted within the United States. For a job within the United States, not hiring workers over the age of forty unless they are previous employees plainly violates the rights of U.S. citizens not to be discriminated against in the hiring process because of age. The uncertainty of the test for extraterritoriality should be clarified as the internationalization of the U.S. workforce increases. If the federal government is allowing U.S. employers to find needed labor abroad, the rules for doing so should not be in question.

RUHE C. WADUD