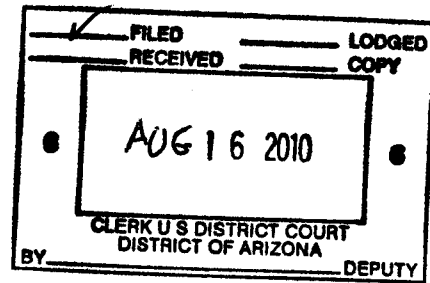


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CIV 10-501-TUC HCE

Attorneys for Applicant HILDA L. SOLIS,
Secretary of Labor, U.S. Department of Labor

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

In the Matter of:

CIVIL ACTION NO.

Establishment Inspection of:
DESERT DIAMOND CASINO
owned by The Tohono O'odham Nation.
7350 S. Nogales Highway
Tucson, AZ 85756

**EX PARTE APPLICATION FOR
INSPECTION WARRANT UNDER THE
OCCUPATIONAL SAFETY AND
HEALTH ACT OF 1970**

TO THE HONORABLE UNITED STATES MAGISTRATE JUDGE:

Comes now the Secretary of Labor, United States Department of Labor, acting through her Attorney, who applies to this Court *ex parte* for an inspection warrant pursuant to section 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 *et seq.*), hereinafter referred to as "the Act," and the regulations issued pursuant thereto, for the safety and health inspection and investigation of the Desert Diamond Casino, Tohono O'odham Nation, located at 7350 S. Nogales Highway, Tucson, Arizona 85756 (hereinafter "Desert Diamond Casino").

1. The Desert Diamond Casino operates a casino within the gaming industry with a worksite and business located at 7350 S. Nogales Highway, Tucson, Arizona,

1 which is within the jurisdiction of this Court. The aforesaid worksite houses the
2 workplace of employees who are employed by an employer believed to be engaged in a
3 business affecting commerce and is subject to the requirements of Section 3(3) the Act,
4 29 U.S.C. § 652(3).

5 2. Section 5(a) of the Act, 29 U.S.C. § 654(a), requires that an employer
6 engaged in a business affecting commerce “(1) shall furnish to each of his employees
7 employment and a place of employment which are free from recognized hazards that are
8 causing or are likely to cause death or serious physical harm to his employees; [and] (2)
9 shall comply with occupational safety and health standards promulgated under this Act.”

10 3. Section 8(a) of the Act provides for inspections and investigations to
11 determine compliance with the Act as follows:

12 Section 8(a). In order to carry out the purposes of this Act, the Secretary, upon
13 presenting appropriate credentials to the owner, operator, or agent in charge, is
authorized-

14 (1) to enter without delay and at reasonable times any factory, plant,
15 establishment, construction site, or other area, workplace or environment where
work is performed by an employee of an employer; and

16 (2) to inspect and investigate during regular working hours and at other
17 reasonable times, and within reasonable limits and in a reasonable manner, any
18 such place of employment and all pertinent conditions, structures, machines,
apparatus, devices, equipment, and materials therein, and to question privately
19 any such employer, owner, operator, agent or employee.

20 4. Advance notice of inspections to be conducted under the Act is prohibited
21 by Section 17(f) of the Act, 29 U.S.C. § 666(f).

22 5. Under the authority of Section 8(g)(2) of the Act to prescribe “regulations
23 dealing with the inspection of an employer's establishment,” the Secretary of Labor has
24 promulgated 29 C.F.R. § 1903.4, authorizing the Area Director of the Occupational
25 Safety and Health Administration (“OSHA”) or his designee to obtain compulsory
26 process to conduct an inspection, including ex parte application for an inspection warrant.
27 See also *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978); *Colonnade Catering Corp. v.*
28 *United States*, 397 U.S. 72 (1970); *See v. City of Seattle*, 387 U.S. 541 (1967); *Camara v.*

1 *Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967); *Reich v.*
 2 *Kelly-Springfield Tire Co.*, 13 F.3d 1160 (7th Cir. 1994); *In re Kohler Co.*, 935 F.2d 810
 3 (7th Cir. 1991); *In re Midwest Instruments Co.*, 900 F.2d 1150 (7th Cir. 1990); *In re*
 4 *Cerro Copper Products Co.*, 752 F.2d 280 (7th Cir. 1985); *Burkart Randall Div. of*
 5 *Textron, Inc. v. Marshall*, 625 F.2d 1313 (7th Cir. 1980); *Stoddard Lumber Co., Inc. v.*
 6 *Marshall*, 627 F.2d 984 (9th Cir. 1980); and *Marshall v. Chromalloy American Corp.*,
 7 589 F.2d 1335 (7th Cir. 1979).

8 6. The Court has jurisdiction for the *ex parte* issuance of an administrative
 9 inspection warrant under section 8(a) of the Act. *Marshall v. Barlow's, Inc.*, 436 U.S.
 10 307, 98 S.Ct. 1816 (1978); *Marshall v. W and W Steel Co., Inc.*, 604 F.2d 1322 (10th Cir.
 11 1979). Probable cause for the issuance of an administrative warrant under Section 8(a) of
 12 the Act may be based either upon specific evidence of an existing violation or upon a
 13 showing that the proposed inspection is pursuant to an administrative plan containing
 14 specific neutral criteria. *Marshall v. Barlow's, Inc.*, 436 U.S. at 319, 98 S.Ct. at 1824;
 15 *Martin v. International Matex Tank Terminals--Bayonne*, 928 F.2d 614, 622 (3rd Cir.
 16 1991).

17 7. The accompanying affidavit of Nancy McCormick, Acting Assistant
 18 Regional Administrator for Enforcement Programs of the Occupational Safety and Health
 19 Administration (OSHA), describes the circumstances surrounding the inspection of the
 20 above worksite:

21 On January 11, 2010, June 2, 2010, and July 22, 2010, OSHA received
 22 complaints from three different employees of the Desert Diamond Casino
 23 alleging that ozone levels at the employer's worksite may be above the
 24 permissible exposure limit. A letter was sent to the Desert Diamond
 25 Casino following the January 11, 2010 and June 2, 2010 complaints
 26 notifying Desert Diamond Casino that OSHA was conducting an inquiry
 27 into the percentage of ozone that is pumped into the casino. OSHA was
 28 satisfied with the response until it received yet another complaint on July
 22, 2010. On July 29, 2010, at the aforesaid location, a duly authorized
 compliance officer of the Occupational Safety and Health Administration,
 United States Department of Labor, pursuant to and in accordance with the
 Act, presented herself to the owners, operators, or agents in charge thereof
 for the purpose of conducting a safety and health inspection at said
 location under the authority of the Act. At the attempt to carry out such
 purpose, the representative was refused entry upon the premises by

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1 persons representing the employer. See Paragraphs 10 through 15 of
2 Declaration of Nancy McCormick.

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4 8. The inspection and investigation will be conducted by one or more
5 compliance officers designated by the Secretary of Labor, United States Department of
6 Labor, to be her authorized representative(s), pursuant to proper and reasonable
7 administrative standards contained in regulations duly issued by the Secretary under
8 authorization granted in the Act and found in 29 C.F.R. § 1903.

9 9. The inspection and investigation will be conducted during regular working
10 hours, within reasonable limits, and in a reasonable manner. The compliance officers'
11 credentials will be presented to the employer, and the inspection and investigation will be
12 commenced as soon as practicable after the issuance of this warrant and will be
13 completed with reasonable promptness, in accordance with Section 8(a) of the Act.

14 10. Pursuant to OSHA's administrative plan for enforcement, the inspection
15 and investigation will focus on the safety and health hazards to which employees are
16 exposed, and will extend to those areas of the establishment or other areas, workplaces,
17 or environments where work is performed or permitted to be performed by employees of
18 the employer, as well as any hazardous working conditions within the plain view of the
19 compliance officer(s) during the course of the inspection, and to all pertinent conditions,
20 structures, machines, apparatus, devices, equipment, materials, and all other things
21 therein (including a review of records required by the Act and/or directly related to the
22 purpose of the inspection). This investigation will not extend to or include records
23 containing personally identifiable employee medical information within the meaning of
24 29 C.F.R. § 1910.10.

25 11. OSHA's compliance officers are authorized by Section 8(a)(2) of the Act
26 to inspect and investigate the place of employment and to question privately any
27 employer, owner, operator, agent, or employee of the general contractor or subcontractor.
28 By regulation at 29 C.F.R. § 1903.7 and OSHA Instruction CPL 2.103, Chapter II,
Paragraph A.2.c.(2), pages II-2-3, and Paragraph A.4.d., page II-15, the compliance

1 officers are further authorized to take environmental samples and to take or obtain
2 photographs and/or video recordings related to the purpose of the inspection.

3 12. The compliance officers may be accompanied by a representative of
4 Desert Diamond Casino and a representative authorized by the employees of Desert
5 Diamond Casino pursuant to section 8(e) of the Act.

6 13. The Court will be notified of the completion of the inspection and
7 investigation.

8 WHEREFORE, the applicant prays that this Court enter a Warrant for Inspection
9 by authorized representatives of the Occupational Safety and Health Administration upon
10 the premises described above. A proposed warrant is submitted herewith.

11 Dated: August 12, 2010

M. PATRICIA SMITH
Solicitor of Labor

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13 LAWRENCE BREWSTER
Regional Solicitor

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15 SUSAN GILLETT KUMLI
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