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

IN RE CHARGE OF
SHAHROKH DAGHIGHIAN

UNITED STATES OF AMERICA, Complainant,	)
v.	) 8 U.S.C. 1324b Proceeding
	) CASE NO. 89200442
SAN DIEGO SEMICONDUCTORS, INC., a California Corporation, Respondent.	)

DECISION AND ORDER

E. MILTON FROSBURG, Administrative Law Judge

Appearances

Kirk M. Flagg, Esquire, Office of Special Counsel,
for Complainant
Isaias Ortiz, Esquire, Office of Special Counsel,
for Complainant

Ivor M. Thomas, Esquire, for Respondent
(appearance withdrawn)

TABLE OF CONTENTS

I . *Introduction*

In the Immigration Reform and Control Act of 1986 (IRCA), Pub.L. No. 99-603, 100 Stat. 3359 (November 6, 1986), Congress established a system to prevent the hiring of unauthorized aliens by significantly revising the policy on illegal immigration. In section 101 of IRCA, which enacted section 274A of the Immigration and Nationality Act of 1952 (the Act), codified at 8 U.S.C. § 1324a, Congress prohibited the hiring, recruiting, or referral for a fee, of aliens not authorized to work in the United States, and provided for civil penalties for employers who failed to comply with the employment eligibility verification requirements of 8 U.S.C. § 1324a(b).

As a complement to the employer sanctions provisions, section 102 of IRCA, section 274B of the Act, prohibited discrimination by employers on the basis of national origin or citizenship status. Found at 8 U.S.C. § 1324b, these antidiscrimination provisions were passed to provide relief for those employees or potential employees who are authorized to work in the United States, but who are discriminatorily treated because they are foreign citizens or of foreign descent.

The aims of IRCA are thus dual in nature. The plan seeks to prevent employers from hiring unauthorized workers, but is alternatively designed to prevent employers from being overly cautious or zealous in their hiring practices by avoiding certain classes of employees or treating them in a discriminatory fashion.

Title 8 U.S.C. § 1324b dictates which classes of employees are provided protection under the Act. These include United States citizens and nationals, permanent resident aliens, temporary resident aliens, refugees, and persons granted asylum who intend to become citizens.

The IRCA legislation expanded the national policy on discriminatory hiring practices, found in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. Claims under Title VII did not raise a distinction between national origin and alienage discrimination. See Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86 (1973). Further, Title VII provided for claims solely against employers of 15 or more employees. Accordingly, IRCA was enacted to provide for causes of action arising out of unfair immigration-related employment practices resulting in citizenship and/or national origin discrimination, while providing jurisdictional requirements based on the size of the employer's business, in order to avoid overlap with Title VII claims.

Section 102 provides for claims of discrimination based upon national origin with respect to employers of more than three, but less than 15 employees. This section also fills in the gap left in Title VII by allowing for causes of action based upon citizenship discrimination against all employers of more than three employees.

IRCA authorizes individuals to file charges of national origin or citizenship discrimination with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). OSC can then file complaints with the Office of the Chief Administrative Hearing Officer (OCAHO) on behalf of the individual. If the OSC does not file such a charge within 120 days of receipt of the claim, the individual is authorized to file a claim directly with an Administrative Law Judge (ALJ), through OCAHO. 8 U.S.C. §§ 1324b(b)(1) and 1324b(d)(2).

II. *Procedural History*

On February 8, 1989, Mr. Shahrokh Daghighian (Daghighian or Charging Party) filed a charge with the OSC alleging that he had been discharged from employment based on his citizenship in violation of 8 U.S.C. § 1324b. On September 8, 1989, the OSC filed a Complaint against Respondent, San Diego Semiconductors, Inc, alleging that Respondent violated section 1324b(a)(1)(A) of IRCA by unlawfully terminating Daghighian's employment based on his citizenship status.

On September 13, 1989, the OCAHO issued a Notice of Hearing on Complaint Regarding Unfair Immigration-Related Employment Practices.

This Notice assigned me as the ALJ in this matter, informed Respondent of its right to file an Answer to the Complaint within 30 days of its receipt, and set a hearing on or about January 9, 1990 in San Diego, California.

On September 21, 1989, Complainant served its First Request for Production of Documents and First Request for Admissions upon Respondent. Subsequently, through documents dated October 9, 1989, Respondent filed an Answer, a Notice of Appearance for Attorney Ivor F. Thomas, and responses to Complainant's discovery requests. On October 11, 1989 I issued an Order Directing Procedures for Pre-Hearing.

Respondent served Amended Responses to Complainant's First Request for Admissions and to Complainant's First Request for Production of Documents on October 13, 1989. On October 24, 1989, Complainant served its Second Request for Admissions upon Respondent. I conducted a pre-hearing telephonic conference on October 25, 1989 during which discovery and settlement were discussed. On November 2, 1989, Complainant filed its First Set of Interrogatories and Request for Production.

On November 15, 1989, Respondent's Second Amended Responses to Complainant's First Request for Production of Documents was received, followed on November 16, 1989 by Respondent's Responses to Complainant's Second Request for Admissions.

A pre-hearing telephonic conference was held on November 21, 1989. During the conference the parties indicated that the January 9 hearing date would not allow the parties sufficient time to complete discovery. Therefore, I issued an Order continuing the hearing date indefinitely and requested monthly status reports.

Complainant filed a Notice of Deposition on November 21, 1989, indicating that it intended to depose Dr. Emmanuil Raiskin and Dr. Jack Butler, owners of Respondent corporation. On December 8, 1989, Complainant filed a Motion for Protective Order under Fed. R. Civ. P. 26(c) to exclude the above named individuals from each other's depositions, and its Response to Interrogatories and Requests. On the same day, Respondent filed its points and authorities in opposition to Complainant's request for protective order.

In my Order, dated December 8, 1989, I granted Complainant's motion to have Dr. Raiskin excluded from the deposition of Dr. Butler, but found no cause to then exclude Dr. Butler from Dr. Raiskin's deposition. I also denied Complainant's request for costs.

On January 9, 1990, Complainant filed a Response to Charging Party's Request for Production of Documents. Complainant served upon

Respondent a Second Request for Production of Documents on January 18, 1990, and its First Set of Interrogatories on January 23, 1990.

Respondent served its First Set of Interrogatories and Request for Production of Documents upon the Charging Party on February 2, 1990, and its Second Set of Interrogatories and Request for Production upon Complainant on February 5, 1990. On February 21, 1990, Respondent served its Response to Complainant's Second Request for Production of Documents with accompanying exhibits, as well as a Response to Complainant's First Set of Interrogatories to San Diego Semiconductors, Inc.

On March 1, 1990, Respondent served its Third Set of Interrogatories and Request for Production upon Complainant. The Charging Party submitted an undated response to Respondent's First Set of Interrogatories and Requests which was received on March 8, 1990. Complainant's Response to Respondent's Second Request for Interrogatories and Requests was submitted March 12, 1990, and its Third Request for Admissions was submitted March 15, 1990. On this date Complainant also served its Second Set of Interrogatories upon Respondent. On April 5, 1990, Complainant filed its Response to Respondent's Second Request for Interrogatories and Requests.

I conducted a pre-hearing telephonic conference on April 11, 1990, during which the parties indicated that settlement appeared unlikely, therefore I scheduled the dates of June 19-21, 1990 for the hearing on this matter.

Complainant filed a Motion to Extend Time for Hearing and a declaration in support thereof on April 19, 1990. On April 20, 1990, Respondent filed its Responses to Complainant's Third Request for Admissions, as well as its Responses to Complainant's Second Set of Interrogatories. Also on April 20, 1990, Respondent filed a motion to vacate my Order of December 8, 1989 which forbade Dr. Butler from discussing his deposition with Dr. Raiskin until Dr. Raiskin had also been deposed.

On April 27, 1990, Respondent filed an Opposition to Complainant's Motion to Extend Time for Hearing, arguing that Complainant unreasonably requested to delay the proceeding. On the same date Complainant filed a response to Respondent's Motion to Vacate. On April 31, 1990 I conducted a fourth pre-hearing telephonic conference, granting in part Complainant's request for a continuance by extending the hearing date for 28 days, and not the 60 days requested. I also granted Respondent's Motion to Vacate the sequestration order of December 8, 1989 by permitting open discussion between the principal owners of Respondent corporation to enable them to prepare for the hearing.

On May 11, 1990, Respondent's attorney of record filed a Motion for Permission to Withdraw Appearance, with an accompanying declaration.

Following a hearing on this issue on May 24, 1990, I granted Attorney Thomas' motion to withdraw based upon the mounting litigation expenses and Respondent's desire to minimize the costs by representing itself.

Following Complainant's Notice of Inspection of Respondent's Premises filed May 10, 1990, a pre-hearing telephonic conference was held to consider the parameters of Complainant's inspection. Subsequent to this telephonic conference, on May 25, 1990, I issued a Protective Order Re: Inspection of Respondent's Premises, restricting the inspection to those areas where Daghighian would have performed scientific or technical work. Said inspection was held on May 30, 1990.

On May 31, 1990, Respondent served its Fourth Request for Admissions. On June 4, 1990 Complainant filed a Motion to Compel Discovery with a supporting declaration and memorandum. Because this motion was filed so close in time to the scheduled hearing dates, I issued an Order of Inquiry to Respondent on June 7, 1990, as to its intention concerning said Motion to Compel. On this same date, Complainant filed an additional Declaration in Support of Motion to Compel Discovery.

In its letter of June 13, 1990, Respondent requested additional time to respond to Complainant's Motion to Compel, which I granted on June 14, 1990, giving Respondent until June 25, 1990 to respond. Respondent's Opposition to Motion to Compel, with an accompanying declaration and memorandum, was received on June 22, 1990.

After considering the pleadings of both parties in regard to Complainant's Motion to Compel, I issued an Order denying said
motion on June 29, 1990, finding that Respondent's previous responses to interrogatories were adequate and did not justify additional responses. On June 29, 1990 Respondent filed its Responses to Complainant's Fourth Request for Admissions.

Both Complainant and Respondent submitted their pre-hearing statements on July 6, 1990. The hearing on the merits commenced on July 17, 1990 in San Diego, California and concluded on July 23, 1990. Nine witnesses for Complainant and six witnesses for Respondent appeared and gave testimony. I received 47 Complainant's exhibits and 17 Respondent's exhibits. A hearing transcript of 1020 pages was compiled.

On September 7, 1990, I issued an Order regarding the period for review of the transcript, for filing corrections to the transcript, and for submission of post-hearing briefs. An Order Accepting Corrections to Transcript was issued on November 13, 1990. Complainant's Post-Trial Brief was filed November 30, 1990, and Respondent's Post Hearing Brief was filed December 3, 1990.

III. *Applicable Standards of Law*

An allegation of discrimination is proven by a showing of deliberate discriminatory intent on the part of an employer, regardless of the employer's motive. Discrimination or disparate treatment (as opposed to disparate impact) is defined in the case of Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), wherein the Court explained, it is when "the employer is treating some people less favorably than others because of their race, color, religion, sex, or national origin." 438 U.S. at 577. See also U. S. Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983). The IRCA added to this list of protected classifications an individual's citizenship status. 8 U.S.C. § 1324b(a)(1).

The majority of IRCA discrimination cases previously decided have relied upon the body of law pertaining to Title VII discrimination cases. I agree with the reasoning of the Administrative Law Judge in the case of United States v. Marcel Watch Co., OCAHO Case No. 89200085, (Mar. 22, 1990), who stated, "Title VII disparate treatment jurisprudence provides the analytical point of departure for Section 102 cases." I will examine in summary fashion the leading Title VII decisions and the IRCA cases which followed their analyses.

The Supreme Court established the order and allocation of proof to be used in discrimination cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The claimant must first establish a prima facie case of discrimination or disparate treatment by showing that: (i) he belongs to a minority or suspect class; (ii) he applied and was qualified for employment by the employer; (iii) he was rejected for employment despite his qualifications; and (iv) after being rejected, the position remained open and the employer continued to seek applications from similarly qualified applicants. Then the burden shifts to the employer who must show a legitimate, nondiscriminatory reason for its refusal to hire the claimant. The claimant will then be given the opportunity to prove that the reason offered by the employer was a pretext to cover an illegal motive.

This analysis was followed again by the Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). The Court expanded upon its ruling in McDonnell Douglas by explaining that the employer bears only the burden of explaining the nondiscriminatory reasons for its actions. The employer need not prove by a preponderance of the evidence that its reasons for rejecting the claimant were legitimate. The employer must only meet the claimant's prima facie case with evidence of a nondiscriminatory explanation for its actions. The employer, however, must contradict the prima facie case.

Marcel at 14. The burden of persuasion remains at all times with the claimant, who then has the opportunity to show that the employer's reason was pretextual.

Although the elements required to make out a prim a facie case of employment discrimination as set forth in McDonnell Douglas focus on the "refusal to hire" scenario, wrongful termination of employment is also encompassed in 8 U.S.C. Section 1324b(a)(1). See Prieto v. News World Communications, Inc., OCAHO Case No. 88222164, (May 24, 1990); Fayyaz v. The Sheraton Corp. OCAHO Case No. 89200430, (Apr. 10, 1990).

The shifting burden scheme of McDonnell Douglas and Burdine is equally applicable to a discriminatory discharge scenario. As provided in Wisniewski v. Douglas County School Dist., OCAHO Case No. 88200037, (Oct. 17, 1988), the claimant must show that: (i) he was a member of a protected class; (ii) he was discharged; and (iii) a causal connection existed between the protected status and the discharge, resulting in disparate treatment. See also Ryba v. Tempel Steel Co., OCAHO Case No. 90200206, (Jan. 23, 1991). Once the claimant makes out a prima facie case of discrimination related employment termination, the burden of production shifts to the employer who

must explain the legitimate reasons for the discharge. The claimant must then attempt to show that the reasons offered are pretextual.

In the age discrimination case of Trans World Airlines, Inc., v. Thurston, 469 U.S. 111 (1985), the Court stated that in cases where direct evidence of discrimination is shown, the McDonnell Douglas test does not apply. The Court reasoned that the shifting burden test was necessary to provide a plaintiff a day in court despite the unavailability of direct evidence. In Thurston, the Court found that TWA's policy was discriminatory on its face, therefore, direct evidence was shown. See Tovar v. United States Postal Service, OCAHO Case No. 90200006, (Nov. 19 1990) (policy of U.S. Postal Service which excluded all aliens but permanent residents from employment found to be discriminatory on its face, but found to be an exception within the parameters of 8 U.S.C. Section 1324b(a)(2), therefore, the claimant did not prevail).

It appears that to bypass the McDonnell Douglas/Burdine test, the direct evidence must show that the contested employment practice is discriminatory on its face. Thurston, 469 U.S. at 121. When the direct evidence excludes the McDonnell Douglas/Burdine scheme, Thurston permits the employer to attempt to prove an affirmative defense to its discriminatory practice. Id. at 122.

Recent discrimination law has produced another analytical test or method to be used when the employer at least partially based the employment decision on the individual's protected status, but when other factors were also considered. This is known as the mixed-motive theory and was explained by the Supreme Court in the case of Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775 (1989).

Price Waterhouse states that "a plaintiff [need not] identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. ... Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision. ... [A]n employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person." 109 S.Ct. at 1786.

In IRCA cases, if it is demonstrated that the individual's citizenship or national origin was a factor in the decision to refuse to hire or to terminate the employment of the individual, then the inquiry would focus on whether the ultimate employment decision would have been made even in the absence of that prohibited factor.

The trier of fact must assess what criteria contributed to the employer's decision at the time the decision was made. Id. at 1785. The employer bears the burden of proving, as an affirmative defense, that non-discriminatory factors would have led to the action despite the consideration of citizenship or national origin. The Court did not deem this a shift in the actual burden of persuasion to the employer. "Our holding casts no shadow on Burdine, in which we decided that, even after a plaintiff has made out a prima facie case of discrimination under Title VII, the burden of persuasion does not shift to the employer to show that its stated legitimate reason for the employment decision was the true reason." 109 S.Ct. at 1788 (citing Burdine, 450 U.S. at 256-258).

The Court in Price Waterhouse stressed that an employer may not prevail merely by offering a legitimate, non-discriminatory justification for the employment decision. The employer's affirmative defense must demonstrate that the justification offered was actually relied upon at the time of the decision. The employer must further "show that its legitimate reason, standing alone, would have induced it to make the same decision." 109 S.Ct. at 1792 This showing must be made by a preponderance of the evidence. Id.

V. *Findings of Fact*

I have carefully considered both the testimonial and documentary evidence presented in this case and have arrived at the following relevant findings of fact, denoting the appropriate references to the Transcript of Proceeding and admitted exhibits:

1. That Shahrokh Daghighian (Daghighian) is a native of and citizen of Iran. (Tr. 51)

2. That Daghighian entered the United States on December 28, 1978, on a F-l Student Visa. (Tr. 52)

3. That Daghighian attended and graduated from high school in Irvine, California, that he graduated from the University of California, Irvine with a BS degree in Physics in 1985, and that he received a Masters of Science and Engineering Degree from the University of Southern California (USC) in 1987. (Tr. 52)

4. That Daghighian applied for asylum in June of 1986 which was granted on August 14, 1986. (Tr. 53; Ex. C-50)

5. That Daghighian applied for permanent residency and received an alien registration card on October 3, 1987. (Tr. 54; Ex. C-60)

6. That Daghighian intends to become a United States citizen when eligible. (Tr. 54; Ex. C-8)

7. That San Diego Semiconductors, Inc. (S.D.S.) first began its operations in 1985 under the name of Pacific Semiconductors, which was changed to its present name after the owners learned that another business had previously used its original name. (Tr. 520-21)

8. That Doctors Emmanuil Raiskin and Jack Butler are co-owners of the company, each owning a 50 percent share. (Tr. 521)

9. That S.D.S. placed an ad in the Los Angeles Times in October 1987, seeking employment applications from engineers and material scientists for a "start-up" company. (Tr. 60, 524-25)

10. That Daghighian sent a copy of his resume to S.D.S. in response to the ad. (Tr. 60, 527; Ex. R-l)

11. That Daghighian was interviewed by Doctors Raiskin and Butler of S.D.S. in December 1987 for approximately three hours. (Tr. 60, 574)

12. That Daghighian discussed his academic background and laboratory experience and answered conceptual questions regarding various types of physics and instrumentation during the interview. (Tr. 61-69, 575)

13. That during Daghighian's interview with S.D.S., Dr. Raiskin requested Daghighian to come in for a trial period or testing for one week, but Daghighian stated that he could not leave the University for that long. (Tr. 854-55)

14. That S.D.S. was impressed with Daghighian's presentation and offered Daghighian a position as project engineer within a few days of the interview, with a negotiated starting salary of $30,000 plus a possibility for

a stock option of .5 percent interest in the company if certain conditions were met. (Tr. 69-70, 586-87)

15. That Daghighian began working for S.D.S. in January of 1988. (Tr. 71, 588)

16. That Daghighian was assigned to work on the 4001 (Air Force) and 4002 (Classified) contracts when he began working at S.D.S. and was assigned to the laboratory under the supervision of Dr. Raiskin. (Tr. 71-74)

17. That Dr. Raiskin asked Daghighian to seal a quartz tube of approximately one inch diameter in January of 1988 and Daghighian spent several hours attempting to seal the tube, but instead Daghighian burned a hole in the quartz tubing. (Tr. 869-876)

18. That Dr. Raiskin then demonstrated to Daghighian the correct method of sealing the tube and asked Daghighian to repeat the process, which Daghighian declined to do. (Tr. 877)

19. That Daghighian told Doctors Raiskin and Butler in his interview that he knew how to seal a quartz tube and had done so at U.S.C. (Tr. 888)

20. That Daghighian was asked to lap and polish crystals at S.D.S., which his resume indicated that he knew how to do, but he broke several crystals in the process. (Tr. 891-894)

21. That Dr. Raiskin first discussed Daghighian's failures with Dr. Butler in late January to early February 1988, and complained to Dr. Butler about Daghighian's sloppy, careless laboratory work. (Tr. 591-92)

22. That Doctors Raiskin and Butler decided to remove Daghighian from laboratory assignments in mid-February 1988 as a result of his poor performance. (Tr. 593)

23. That Dr. Butler talked to Daghighian in February, explaining that he was not working out as well as expected and that the stock option was not going to be available to him at that time, but that if Daghighian chose to remain with S.D.S. the possibility would be re-evaluated in the future. (Tr. 595-96)

24. That Daghighian was asked to help prepare a progress report for the 4001 contract in February 1989, which he signed as project engineer. (Tr. 77-78)

25. That S.D.S. submitted Daghighian's progress report to the Department of the Air Force in February 1988. (Tr. 78)

26. That Daghighian was removed from any assignments dealing with the 4001 contract after Robert L. Cahall from the Department of the Air Force contacted S.D.S. telephonically and in writing, stating that non-U.S. citizens could not work on that project. (Tr. 78-79, 708-712; Ex. R-21, pp. 44-46)

27. That Doctors Raiskin and Butler attempted to discover the reasons for the Air Force's position by speaking with the contracting officer, and then contacted Daghighian's immigration attorney. The attorney stated that he saw no reason why Daghighian could not work on the 4001 contract. (Tr. 709-710)

28. That Doctors Raiskin and Butler decided to comply with the Air Force directive rather than risk losing this valuable contract. (Tr. 710-712)

29. That Daghighian was assigned to work on the 5001 (NASA) contract after being relieved from the 4001 contract and after being removed from performing laboratory assignments for Dr. Raiskin. (Tr. 79-80, 598)

30. That Daghighian began familiarizing himself with the 5001 contact in early March by reviewing the program and literature on cadmium telluride arrays. (Tr. 81)

31. That Daghighian participated in the construction of the system used in the testing and cutting of the arrays for contract 5001. (Tr. 82)

32. That Daghighian worked on the fabrication of the array from late March to late April, 1988. (Tr. 97)

33. That Daghighian worked on the testing of the array from April to May and provided his results to Dr. Butler in June 1988. (Tr. 100)

34. That the results of the testing were reviewed by Dr. Raiskin and Dr. Butler, who noted problems with non-uniformity in the size of the elements caused by Daghighian's chipping of the areas during fabrication or cutting of the array. (Tr. 100-104, 610)

35. That Daghighian had to repeat the testing procedure using a different method as a result of the non-uniform units in the array. (Tr. 194)

36. That Daghighian was asked to write a final report regarding the processes he had worked on for the 5001 contract and he submitted his report to Dr. Butler in July 1988. (Tr. 104-09)

37. That the report Daghighian submitted to Dr. Butler regarding the 5001 contract was very poorly written and poorly organized, causing Dr. Butler to re-write the report. (Tr. 611)

38. That Patrick Temple and George Voloshin, fellow employees of Daghighian at S.D.S., observed occasions when Daghighian did not appear to be motivated to do his work, and stated that certain tasks were beneath his educational level. (Tr. 394-396, 639-643, 678; Ex. C-61, R-13)

39. That Regina Monas, an employee of S.D.S., observed Daghighian, who appeared to be sleeping at his desk in the laboratory on occasions between May and September 1988, which she reported to Dr. Raiskin. (Tr. 475-79)

40. That Daghighian told Scott Knox, an employee of S.D.S., on numerous occasions between July and August, 1988, that he (Daghighian) was going to be fired. (Tr. 534)

41. That Daghighian commented to George Voloshin, an employee of S.D.S., several times between June and September 1988, that he was worried about receiving a termination notice with his pay check. (Tr. 647)

42. That Dr. Raiskin asked Daghighian to help seal the furnace in March of 1988 and Daghighian refused to do it, claiming a hernia prevented him from doing heavy work, however, he had provided information during his initial interview that one of his activities was weight lifting. (Tr. 898-99)

43. That Doctor Raiskin believed Daghighian to be a negative influence on other employees. (Tr. 954)

44. That Daghighian was assigned to work on a project involving the testing of detector samples for radiation at the General Atomics (G.A.) facility in San Diego. (Tr. 109)

45. That Daghighian was forty minutes late for a meeting at G.A.'s facility after being told the importance of arriving on time by Dr. Raiskin. (Tr. 988-990)

46. That Doctors Raiskin and Butler decided to terminate Daghighian's employment on September 15, 1988, after discussing the subject for a few months prior to that date. (Tr. 612-613)

47. That Dr. Raiskin wrote a memorandum to Dr. Butler on September 13, 1988, informing Dr. Butler that he had no more tasks to give Daghighian and that the situation would continue for at least six months. (Tr. 706, 952-954; Ex. R-21, p. 27)

48. That Dr. Butler asked Daghighian to come to his office on September 15, 1988, where he terminated his employment by explaining that Daghighian had failed some tasks and that Dr. Raiskin had no more assignments that Daghighian could do. (Tr. 614-615)

49. That Dr. Butler did not discuss Daghighian's citizenship status as a reason for Daghighian's termination. (Tr. 615)

50. That Regina Monas overheard Dr. Butler's conversation with Daghighian on September 15, 1988, and recalls Dr. Butler telling Daghighian that Dr. Raiskin complained about Daghighian's work performance and that he failed different tasks that he was given. (Tr. 489)

51. That Regina Monas did not hear any references to Daghighian's citizenship status during this conversation. (Tr. 89)

52. That S.D.S. paid Daghighian through October 15, 1988. (Tr. 342, 423, 615)

53. That Daghighian began searching for employment immediately after his discharge and was hired in February 1989 by United Detector Technology, beginning employment in March. (Tr. 146-48)

54. That Daghighian filed for unemployment compensation after his termination from S.D.S., claiming "lack of work" as the basis for his termination. (Tr. 618-19, 699; Ex. R-21, pg. 20)

55. That Dr. Butler provided a letter of recommendation for Daghighian on October 15, 1988, and at Daghighian's request stated that one reason for his discharge was S.D.S.' inability to employ a non-citizen on its Department of Defense contracts. (Tr. 700; Ex. C-16)

56. That although Dr. Butler and Dr. Raiskin were dissatisfied with Daghighian's work performance at S.D.S, Dr. Butler did not want a negative letter of recommendation to prevent Daghighian from getting further employment, therefore Dr. Butler's letter of recommendation was favorable. (Tr. 700-702)

57. That Daghighian's citizenship played a small part in S.D.S.' decision to discharge him. (Ex. C-2)

58. That during the existence of S.D.S. the company has terminated four employees, all U.S. citizens, in addition to Daghighian, for unacceptable performance. (Tr. 908-912)

59. That Daghighian timely filed his charge of employment discrimination with the OSC on February 7, 1989. (Tr. 139; Ex. C-7)

60. That S.D.S. employed more than three employees as of September 15, 1988 and October 15, 1988. (R's Answer)

V. *Analysis and Conclusions of Law*

I have reviewed and considered all evidentiary matters of record, all pleadings, and the relevant legal authority applicable to this IRCA case. I was most impressed with the thoroughness of both parties' presentations during the hearing on the merits as well as in the post-hearing briefs. I have arrived at the conclusion which is most supported by the weight of the evidence and which is, I believe, the most fair and equitable.

My analysis of the evidence, which caused me to arrive at my factual findings, required that I utilize the Price Waterhouse mixed-motive theory. Respondent's admission that it did consider Daghighian's citizenship status as a factor in the decision to terminate his employment supported the use of this theory. (FF 57) I conclude that Respondent sufficiently articulated reasons, which regardless of the consideration of his citizenship status, prompted it to discharge Daghighian.

Complainant's brief covered both the mixed-motive theory and the McDonnell Douglas theory. Although the former is the most appropriate, both theories can be analyzed to arrive at the same ultimate conclusion - that Respondent did not discriminatorily discharge Daghighian in violation of Section 274B of the Act.

The starting point is to assess the Complainant's case in chief and determine whether it made out a prima facie case of discrimination. Complainant presented uncontradicted evidence supporting the basic jurisdictional elements set out in 8 U.S.C. § 1324b. Complainant demonstrated that Daghighian is a member of a protected class, that he is eligible and authorized for employment in the United States, and was so authorized when hired by S.D.S. in January 1988, that he was terminated from S.D.S. in September 1988, that S.D.S. employed more than three employees as of the date of termination, and that he timely filed a charge under section 102 of IRCA. (FF 4,5,6,15,48,59,60)

Complainant also introduced evidence regarding the remaining element, that Daghighian's termination was the result of unlawful citizenship-based

employment discrimination. In support of this element Complainant offered Respondent's response to request for admission number 1, wherein Respondent conceded that Daghighian's citizenship was a factor in its employment decision. Respondent stated, "to the extent that Mr. Daghighian's citizenship status had the effect of reducing the number of task assignments to which, under the direction of U.S. Government procurement agency, Mr. Daghighian could be assigned, Mr. Daghighian's citizenship status played a part in San Diego Semiconductors, Inc.'s decision to terminate him." Complainant also relied heavily upon the testimony of Daghighian to establish its case.

Daghighian testified that shortly after his employment began in January 1988, he was prohibited from performing work on the 4001 (Air Force) contract. Respondent reassigned Daghighian as a result of a directive from the Air Force contracting officer which stated that Daghighian was not permitted access to this contract or the work product being performed.

Daghighian stated that when he was subsequently discharged in September 1988, Dr. Butler explained that his citizenship status prevented him from being utilized on existing contracts and that Respondent could not retain him. Complainant also introduced a letter of recommendation written by Dr. Butler after Daghighian's discharge which included the language, "our other projects were either not in his area of expertise or were supported by DOD agencies which forbade employment of asylum-status aliens." (Ex. C-16)

At the close of Complainant's case, I found that a prima facie case had at least been made. Evidence had been presented on all elements required under IRCA. Under the Price Waterhouse theory, Respon
dent was given the opportunity to prove its affirmative defense that it would have fired Daghighian on other, legitimate grounds despite his citizenship status.

Respondent's principal witnesses, Dr. Butler and Dr. Raiskin presented several instances of poor work performance by Daghighian which they considered in their decision to release him. Despite Complainant's contentions to the contrary, I found their testimony to be credible.

Respondent's owners had certain expectations of Daghighian when they offered him employment. They were impressed with his academic background, his oral and written skills, and his laboratory experience at the university level. Dr. Raiskin was also sympathetic to his emigrant status as he, too, had come to the U.S. seeking citizenship. Doctors Raiskin and Butler concluded Daghighian possessed sufficient knowledge and hands-on laboratory expertise that he could be assigned certain fundamental laboratory tasks without additional training.

While initially assigned to perform laboratory functions for Dr. Raiskin, Daghighian demonstrated that he was not as capable in lapping and polishing crystals and in sealing quartz tubes as his resume indicated. (FF 17-20) Within a month of his initial employment, Dr. Raiskin wanted Daghighian out of the laboratory and out of S.D.S. Dr. Butler wanted to give Daghighian the opportunity to find his niche in the company and persuaded Dr. Raiskin to retain him. Daghighian was counseled by Dr. Butler in February 1988 regarding his performance, advising Daghighian that he no longer qualified for a stock option. Dr. Butler offered Daghighian the opportunity to remain or to seek other employment and Daghighian chose to continue working at S.D.S. (FF 21-23)

Complainant contends that Daghighian's ultimate termination came as a complete surprise and that he had no prior complaints. I do not agree. I found relevant the testimony of Scott Know and George Voloshin who both indicated that on several occasions Daghighian remarked to them that he expected to be terminated with each upcoming pay check. (FF 40-41)

The decision to remove Daghighian from the laboratory came close in time to the receipt by S.D.S. of the Air Force directive to remove Daghighian from all aspects of the 4001 contract. Respondent admits that this letter from the contracting officer played a small part in the decision to ultimately release him. (FF 57)

Had the termination of Daghighian taken place upon receipt of this letter, my findings may have skewed more toward Complainant. The fact that he was retained for at least six months thereafter supports Respondent's argument that Dr. Butler hoped to find other work suitable for Daghighian and that the Air Force directive was not the motivating factor in Daghighian's discharge.

Complainant also argues that Respondent did absolutely nothing to ascertain the validity of the contracting officer's statements. I find that Respondent did act to persuade the contracting officer differently by discussing the matter with him and with other Air Force representatives prior to receipt of the February 25, 1988 letter. Respondent also contacted Daghighian's immigration attorney who stated that Daghighian should be permitted to work on the contract. (FF 27)

Respondent chose to adhere to the directive rather than risk losing a valuable contract with the Air Force. I find that this act by Respondent was not discriminatory for IRCA purposes, as Complainant suggests, because it dealt with a term or condition of employment, which is not covered under IRCA. This specific decision was not a hiring or termination decision which are covered under IRCA.

I believe that Respondent's actions in removing Daghighian from the 4001 contract were reasonable in light of the threatening tone in this official

document. They had a choice of retaining Daghighian on this contract and risk losing the contract, or to reassign Daghighian. They made a business decision which was not discriminatory under IRCA because it was too remote in time to the ultimate discharge decision to have been the contributing cause for the discharge.

Complainant argues in its brief that Respondent could not claim a good faith reliance on the Air Force directive because the Air Force was wrong. However, Complainant did not present sufficient evidence that the Air Force was mistaken in its instruction. Additionally, Complainant relies on several cases to support its proposition that "[e]employers have been found liable for discriminating against individuals on a prohibited basis even when the employer was relying upon state guidelines, a state statute, and even the United States Constitution." C's Post-Trial Brief at 58 (citations omitted).

Complainant cites Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) for support. Rosenfeld brought a Title VII sex discrimination action in which she alleged she was assigned an

inferior position to a man based on her gender. At the trial level the State of California was permitted to intervene because the defendant was relying upon California's labor laws as justification for its employment decision. A summary judgment was awarded to plaintiff which declared relevant portions of the California Labor Code violative of the Equal Employment Opportunity Act of 1964. The case on appeal dealt with separate issues, but the court did state "[p]rior to a judicial determination such an evidenced by this opinion, an employer can hardly be faulted for following the explicit provisions of applicable state law." Id. at 1227.

In the case of Shaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972), the plaintiff also filed sex discrimination actions which the cab company defended by relying on the same state statutes as in Rosenfeld. In the first go-around, (prior to Rosenfeld), the EEOC declared the California labor statute valid and dismissed Shaeffer's action. While her second action was pending, the Rosenfeld case was decided which declared the labor code provisions relevant to Shaeffer's case invalid. Shaeffer prevailed. The Ninth Circuit did not alter the lower court's ruling.

Both of these cases are distinguishable as the statutes relied upon were declared violative of Title VII. Complainant did not present any concrete evidence that the Air Force's position has been found in violation of Title VII or IRCA. Respondent "could hardly be faulted" for adhering to it.

In a similar case, the Ninth Circuit did not allow back pay to a claimant during the time period the employer relied upon a California Industrial Welfare

Commission Order which prohibited women from certain warehouse jobs. In Alaniz v. California Processors, Inc., 785 F.2d 1412 (9th Cir. 1986), the court held that the employer's good faith reliance on the Commission's order shielded it from back pay awards prior to 1971, when the order was repealed.

Complainant also attempts to persuade me that even if an employer relies on the U.S. Constitution, it will be held liable if it runs afoul of Title VII. Complainant again misreads the Court's interpretation by attributing statements to the case which are not present. Complainant relies on Bollenbach v. Monroe-Woodbury Cent. School Dist. 659 F. Supp. 1450 (S.D.N.Y. 1987). Complainant appears to suggest that if the employer relies on the U.S. Constitution, and its actions are found to be violative of Title VII, then Title VII prevails. What Complainant fails to consider is that in Bollenbach, the Court found no conflict between the Constitution's First Amendment Establishment and Free Exercise Clauses and Title VII's dictates against gender based discrimination. The defendant's reliance upon the Constitution for its employment practices was misplaced and not in conformity with the Constitution. Therefore, Complainant's argument is not sound.

These cases seem to suggest, in contrast to Complainant's theory, that an employer may have a good faith defense if it relies upon a federal or state mandate or agency order, unless the mandate or order is judicially declared invalid or is otherwise eliminated. I do not reach the determination that a respondent in an IRCA action may use good faith as a defense, because it is not relevant to this action. As I stated above, I will not find the action of Respondent in prohibiting Daghighian to work on the 4001 contract violative of IRCA because it was not a hire or termination decision covered by IRCA. I merely desired to clear the air on what I believed to be an erroneous argument by Complainant.

Complainant also relies on Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (1969), for the proposition that "[m]isinformation from the Department of Defense is not a defense to S.D.S.'s (sic) discriminatory actions as it is not an exception under Section 102." C's Post-Trial Brief at 25. In Local 189, an employer defended its Title VII race discrimination action by relying on a letter from the EEOC's Executive Director which approved the employer's progression line system, ultimately found to be discriminatory. The court held that the letter did not classify as an "opinion letter" nor as a "written interpretation...within the meaning of section 713 of Title VII." 416 F.2d at 997. Therefore, its reliance on the unofficial approval would not shield it from liability.

Complainant seems to be arguing that the only way Respondent can prove its affirmative defense is by showing that its actions fall within the parameters of

the exception clause of 8 U.S.C. § 1324b(a)(2). Whereas in Local 189 the affirmative defense centered on the defendant's reliance on the EEOC's letter, the affirmative defense in the instant action is based mainly on Daghighian's poor performance. Respondent here is not arguing, and it is not required to, that it's defense falls under the umbrella of the exception clause. Nothing in IRCA requires that an affirmative defense, to prevail, must be an articulated exception.

In the Tovar case, the Respondent postal service did rely upon the exception clause because it agreed that its hiring guideline was discriminatory on its face. I found that its policy was indeed encompassed within exception number 3 of 8 U.S.C. § 1324b(a)(2) Similar Title VII actions have explored the comparable bona fide occupational qualifications (BFOQ's) when the contested employment practices are unquestionably discriminatory. Thurston, 469 U.S. at 122.

I do not agree with Complainant's argument that it must prevail in this case because Respondent's defense does not encompass any of the available exceptions. In Price Waterhouse the employer was not required to show that its employment decision, even if partially based on illegitimate grounds, was covered by a BFOQ. 109 S.Ct. at 1791-179 5. Neither is there such a requirement in this case. As Price Waterhouse makes clear, the employer must do more than simply offer a legitimate reason supporting its employment decision. Respondent must prove that its decision was based on other legitimate factors at the time the decision was made.

Respondent's evidence shows that between February and September 1988 Daghighian's performance was not up to Respondent's standards. Although testimony from co-workers of Daghighian is enlightening, I considered only the credible facts known to Dr. Raiskin or Dr. Butler at the time they made their decision to fire him.

I gave no weight to the suggestion that Daghighian was involved in surreptitious activity. The testimony that someone, believed to be Daghighian, was walking in the offices of Doctors Raiskin and Butler while they were not present is speculative at best. There was no evidence that either owner was aware of this suspected activity in September 1988.

I also did not consider whether Daghighian had removed any documents from S.D.S. trash cans or files. Respondent apparently learned subsequent to Daghighian's termination that he possessed company documents. I do not find that Doctors Raiskin or Butler used this information when considering his discharge in September.

I did consider Dr. Butler's testimony that Daghighian presented to him "a mess" of a draft of the final report on the 5001 contract. (FF 37) Dr. Butler

conceded that he did not have time to assist Daghighian in the preparation of the report, but that he expected at least a draft which he could edit and polish. The mistakes he discovered were not technical in nature, but were basic writing flaws, such as poor grammar, spelling errors, and poor structure and organization. Dr. Butler was not unreasonable in expecting these basic writing skills.

Both Dr. Raiskin and Dr. Butler testified to Daghighian's careless fabrication of the array for the 5001 contract. (FF 34) I found this to be a legitimate factor in their decision to terminate him.

I find also that the owners were aware of Daghighian's negative influence on fellow employees, of his inactivity during working hours, and of his failure to be punctual to the General Atomics meeting. These factors also contributed to their negative assessment of Daghighian's worth to S.D.S. (FF 39,43,45)

Respondent expected a lot from all its employees, not just Daghighian. S.D.S.' employment history shows that it terminates those employees who do not perform to its expectations. (FF 58) Complainant attempted to show, through its expert witness, Dr. Arsenault, that Daghighian could not have been expected to handle many of the tasks assigned to him without additional training and industrial experience. Much of this testimony was refuted by Daghighian himself and by Respondent's witnesses. Whether Respondent's standards were too high, however, does not necessarily lead to discriminatory conduct. Again, other employees who were U.S. citizens were asked to leave Respondent's employ because of poor performance. I see no link between what Daghighian should reasonably have been expected to perform, and any alleged discriminatory conduct.

Of major significance to my decision was my finding that Dr. Butler did not explain to Daghighian that he was being discharged as a result of his citizenship. Complainant's case relied heavily upon Daghighian's assertions to the contrary. Certainly each of the witnesses who testified to this exchange brought their biases to the stand with them, but Dr. Butler's credibility, coupled with Ms. Monas' testimony caused me to find for Respondent on this crucial factor. Daghighian's testimony was not persuasive. Complainant simply did not meet its burden of preponderance of the evidence on this issue.

Therefore, utilizing the Price Waterhouse mixed-motive theory, I find that Complainant's prima facie case was successfully met and defeated by Respondent's proof of legitimate, non-discriminatory reasons for Daghighian's discharge, above and beyond its consideration of citizenship in the employment decision. Respondent would have made the same decision absent its consideration of his citizenship.

I will assume again, using the McDonnell Douglas analysis, that Complainant at least made out a prim a facie case of discrimination. (I do not believe that it showed Respondent's practice to be discriminatory on its face, therefore Thurston does not apply.) Respondent offered a legitimate, non-discriminatory reason for the discharge which contradicts Complainant's case. Complainant could then offer evidence to show that Respondent's reason was pretextual.

Complainant argued very strongly that Dr. Butler's letter of recommendation (Ex. C-16), his letter to the Army contracting officer (Ex. C-14), and Dr. Raiskin's memo (Ex. R-21, p. 26) demonstrated that Daghighian was a good performer. Complainant further argues that the "lack of work" justification was pretextual to mask Respondent's discriminatory motive.

I agree that Respondent's testimony regarding Daghighian at the hearing does not correspond to its description of him in the letter of recommendation. Practically speaking, however, it seems that letters of recommendation are often inflated in the business community. I had no difficulty believing Dr. Butler's reasoning for the favorable recommendation. (FF 56) Dr. Butler's entire presentation and demeanor suggested that he was very sympathetic to Daghighian and did not want to see him fail. At Daghighian's request Dr. Butler prepared a letter of recommendation which did not accurately reflect the true reason for Daghighian's discharge, that being his performance. I gave little weight to this document despite Complainant's reliance upon it.

The letter to the Army was similarly exaggerated. Respondent was considering using Daghighian on the Army contracts 5002 and 5003, but did not want to encounter the same problem they had with the Air Force. Respondent made a business decision to fire Daghighian before they received notification from the Army. Complainant contends that Respondent relied upon the Air Force directive to prohibit Daghighian from working on the Army contracts. I believe that Respondent would not have made the inquiry to the Army if that was indeed the case. I do not find that the contents in this letter accurately reflected S.D.S.' assessment of Daghighian's performance.

Dr. Raiskin's memo supported his testimony at the hearing that he did not believe work was available for Daghighian that he could do in September 1988. Both owners agreed that Daghighian was reasonable proficient in performing some tasks, but that he was not earning the amount being paid him due to deficiencies in more

crucial areas. I also believe that the delay in installation of the additional furnaces at S.D.S. delayed Daghighian's assignment to projects which he could have performed. (Tr. 686-88)

After assimilating all the evidence regarding what work was available at the time of Daghighian's discharge, I find that some work was available on certain existing contracts, and that future contract work was available. However, I find that Daghighian was not S.D.S.'s choice to assign to those contracts because of his performance. S.D.S. felt that Daghighian's contribution to the company did not compare to the salary he was receiving and that the best course of action would be to let him go.

I do not find that S.D.S.' claim of lack of work due to poor performance was pretextual. I find instead that it was the actual motive behind the discharge decision. Therefore, Complainant's case does not meet the standard of preponderance of the evidence under either theory.

I am required under the procedural rules applicable to this proceeding to dismiss any claims of unfair immigration-related employment practices which have not been proven. 28 C.F.R. Part 68.50(c)(1). Although the same rule permits me to award attorneys' fees to any prevailing party, other than the United States, I do not believe such an award to be warranted in this case. To justify an award of attorneys' fees, the prevailing party must show that the losing party's argument was without reasonable foundation in law and fact. I do not believe Complainant's case was totally without foundation.

VI. *Ultimate Findings of Fact, Conclusions of Law and Order*

In addition to the findings and conclusions already mentioned, I make the following ultimate findings of fact and conclusions of law:

1. That Shahrokh Daghighian timely filed a charge against Respondent San Diego Semiconductors, Inc., a corporation employing more than three employees.

2. That Respondent employed Daghighian in January 1988 and subsequently discharged him in September 1988, paying him through October 15, 1988.

3. That Respondent based a small part of its decision to terminate Daghighian's employment on his citizenship because the Department of the Air Force directed Respondent not to utilize Daghighian on its contract with Respondent.

4. That Respondent would have discharged Daghighian regardless of his citizenship due to his poor performance and lack of motivation to perform "hands on" technical work in the laboratory.

5. That Complainant did not prove its case of alleged discrimination against Respondent by a preponderance of the evidence.

6. That pursuant to 28 C.F.R. Part 68.50(c)(1)(iv), the Complaint is dismissed.

7. This Decision and Order is the final decision and order of the Attorney General. Pursuant to 8 U.S.C. § 1324b(i) and 28 C.F.R. Part 68.51(b), any person aggrieved by this final Order may, within sixty (60) days after entry of the Order, seek review of the Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the Respondents transact business.

8. That all motions and/or requests not previously disposed or are denied.

IT IS SO ORDERED this 4th day of April, 1991, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge