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

July 23, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding OCAHO Case No. 95B00118
HYATT REGENCY LAKE TAHOE, Respondent.	)	

FINAL DECISION AND ORDER GRANTING SUMMARY DECISION FOR RESPONDENT

I. *Factual and Procedural Background*

On August 4, 1995, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) filed a two-count complaint in the Office of the Chief Administrative Hearing Officer (OCAHO). Count One of the complaint alleges that Hyatt Regency Lake Tahoe (Hyatt or Respondent) requested from Juan Carlos Cuni Baro (Baro) a document issued by the Immigration and Naturalization Service (INS) to establish work eligibility under 8 U.S.C. §1324a(b) and that this constitutes a request for more or different documents than required to show employment eligibility in violation of the document abuse provisions of Section 274B(a)(6) of the Immigration and Nationality Act (INA), 8 U.S.C. §1324b(a)(6). Count Two of the complaint alleges that Hyatt maintained a pattern or practice of requesting more or different documents than are required for employment eligibility verification requirements and that such a pattern or practice constitutes an unfair immigration related employment practice in violation of 8 U.S.C. §1324b(a)(6).

The complaint was based on an intake questionnaire filed by Baro with the Nevada Equal Rights Commission (NERC) on April 1, 1994

(Intake Form). The intake questionnaire alleged that Baro was discriminated against by being laid off due to his national origin, race and color. The specific discriminatory conduct alleged was described in the intake form as consisting of Hyatt stating that Baro did not have "the right immigration paper." Intake Form ¶2. Pursuant to a work sharing agreement with the Equal Employment Opportunity Commission (EEOC), NERC referred Baro's charge to EEOC. On December 30, 1994, EEOC referred the portions of the charge relating to alleged violations of the document abuse provisions of IRCA to OSC allegedly pursuant to a Memorandum of Understanding between the agencies; OSC received such referral on January 6, 1995. Complaint ¶18.

On September 14, 1995, Respondent filed its answer by which it denies the substantive allegations of the two counts of the complaint, denies that the Complainants are entitled to any relief, denies that OCAHO has jurisdiction over this matter, and asserts multiple affirmative defenses. Answer ¶¶4, 22–36. The asserted affirmative defenses include: that there is insufficient evidence to prove that Baro is entitled to the protections of IRCA; that Baro was not discharged from employment, but was laid off due to lack of work in his department and inferior performance; that OCAHO and OSC lack jurisdiction because the charge is untimely; that Baro did not adequately and fully complete Section 1 of his Employment Eligibility Verification Form (I–9 form) and therefore could not prove his work authorization; and that Respondent had the obligation under the INA to not continue to employ individuals who cannot fully and honestly complete Section 1 of the I–9 form. Answer ¶¶29–36.

On December 1, 1995, Respondent filed a motion for partial summary judgment[1] and a concurrent motion to stay discovery.[2] Respondent, by

[1] While Respondent's motions request the Court to enter "summary judgment" in its favor, the applicable Rules of Practice and Procedure at 28 C.F.R. §68.38 provide for the entry of "summary decision." These terms are synonymous and will be treated as such throughout this Decision.

[2] The following abbreviations will be used throughout this Decision:

R. 1st MSJ	—	Respondent's December 6, 1995 revised motion for partial summary judgment
R. 2d MSJ	—	Respondent's December 12, 1995 motion for summary judgment regarding Count Two
R. 3d MSJ	—	Respondent's January 11, 1996 third motion for summary judgment
C. Memo	—	OSC's January 23, 1996 memorandum of points and authorities in opposition to Respondent's motions
R.R.Br	—	Respondent's February 21, 1996 reply brief
C.R.Br	.—	OSC's April 1, 1996 reply brief
PHC Tr	—	Transcript of April 25, 1996 prehearing conference

these motions, sought summary decision as to Count One of the complaint on the basis that as an alien not authorized for employment in the United States, Baro lacked standing to seek any form of relief under Section 274B of the INA, and for an immediate order staying discovery pending resolution of the summary decision issues.

On December 4, 1995, a telephonic prehearing conference was held during which argument was heard on Respondent's motion to stay discovery. The motion for stay was granted in part, with certain previously scheduled depositions and requests for production being allowed during the pendency of the stay.

On December 6, 1995, Respondent filed a revised motion for summary decision as to Count One. The only revision made to the motion was the renumbering of exhibits.

On December 12, 1995, Respondent filed a motion for summary decision regarding Count Two. Specifically, that motion asserts that OSC is not empowered to prosecute pattern or practice cases brought pursuant to 8 U.S.C. §1324b.

On January 11, 1996, Respondent's third motion for summary decision, dated December 20, 1995, was received by the Court. Respondent argues, by this motion, that the complaint is untimely and that it is therefore entitled to summary decision in its favor.

On January 23, 1996, OSC filed its memorandum of points and authorities in opposition to Respondent's motions. OSC states that summary decision is inappropriate here because there is a genuine issue of material fact as to Baro's status at the time of the alleged document abuse. C. Memo at 3. OSC also asserts that questions regarding who is protected from document abuse, OSC's authority to prosecute pattern or practice cases, and the timeliness of the charge and complaint, are legal issues which should be decided in OSC's favor.

On January 30, 1996, Respondent filed a motion for a right to reply to OSC's opposition and for oral argument on the motions for summary decision. On February 1, 1996, OSC opposed the request to file a reply brief because the briefs before the court set out the relevant arguments and case law sufficiently.

On February 6, 1996, I issued an Order which granted Respondent's motion for a right to file a reply brief. On February 21,

1996, Respondent filed its reply brief. Subsequent to Respondent's filing its reply brief, OSC filed a motion on February 22, 1996, seeking a right to reply to said reply brief, which was granted. On April 1, 1996, OSC filed its reply brief opposing the motions for summary decision.

On April 10, 1996, I issued a Notice of Prehearing Conference regarding a previously arranged April 25, 1996 telephonic conference during which I would hear oral argument on Respondent's pending motions for summary decision. On April 23, 1996, Respondent's counsel informed me that she would appear in person for the oral argument. Following such notice, I issued an Amended Notice of Prehearing Conference stating that the oral argument will take place in person in the Executive Office for Immigration Review hearing room on April 25, 1996.

On April 24, 1996, Ian E. Silverberg, Esquire, filed by facsimile a notice of appearance as counsel for Baro. On April 25, 1996, Mr. Silverberg filed by facsimile a letter stating that he had no objection to the oral argument scheduled for April 25, 1996 proceeding without his participation.

On April 25, 1996, I presided over the previously arranged prehearing conference, and heard oral argument on Respondent's motions for summary decision.[3] At the close of the oral argument, I stated that I might rule on the separate motions under separate orders. PHC Tr. at 135. Accordingly, on May 16, 1996, I issued an Order Granting Respondent's Motion for Summary Decision as to Count One of the Complaint. *United States v. Hyatt Regency Lake Tahoe*, 6 OCAHO 861 (1996). The present Order addresses Respondent's motions which seek summary decision as to Count Two of the complaint.

II. *Standards for Summary Decision*

OCAHO Rules of Practice and Procedure authorize the ALJ to "enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and

[3] On July 19, 1996, following the receipt of the transcript of the April 25, 1996 prehearing conference and proposed corrections from both parties, I issued an Order Correcting Prehearing Conference Transcript.

that a party is entitled to summary decision." 28 C.F.R. §68.38(c). A fact is material if it might affect the outcome of the case. *Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986). In demonstrating that there is an absence of evidence to support the non-moving party's case, the movant bears the initial burden of proof.

In determining whether the movant has met its burden of proof, all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the non-moving party. *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). The moving party satisfies its burden of proof by showing that there is an absence of evidence to support the non-moving party's case. *United States v. Davis Nursery, Inc.,* 4 OCAHO 694, at 8 (1994) *citing Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). The burden of production then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *Id.* Failure to meet this burden invites summary decision in the moving party's favor.

III. *Applicable Statutory and Regulatory Authority*

Count Two of the complaint alleges that "Respondent's regular and standard operating procedure, at least during the time Patty Ocheltree was employed as Employment Manager, was to request on a repeated and routine basis all non-U.S. citizens to produce INS-issued documents for employment eligibility verification purposes." Complaint ¶26. The complaint further alleges that this constitutes a pattern or practice of document abuse in violation of 8 U.S.C. §1324b(a)(6). Complaint ¶¶27–28. The document abuse provision of IRCA at 8 U.S.C. §1324b(a)(6) provides:

> For purposes of paragraph (1), a person's or other entity's request, for satisfying the requirements of section 1324a(b) of this title,[4] for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be

[4] Title 8 U.S.C. §1324a(b) contains IRCA's employment verification system, applicable to a "person or other entity hiring, recruiting, or referring an individual for employment in the United States." 8 U.S.C. §1324a(b). These requirements include the examination and attestation of such examination by the pending employer of documents establishing employment authorization and identity. 8 U.S.C. §1324a(b)(1)(A). Acceptable documents for establishing work authorization and/or identity are listed at 8 U.S.C. §§1324a(b)(1)(B), (C) and (D). Also required in the verification system is an attestation by the putative employee and retention of the documents by the employer for a period of time. *See* 8 U.S.C. §§1324a(b)(2) and (3).

> treated as an unfair immigration-related employment practice relating to the hiring of individuals.

In asserting that the charge relied on in filing the complaint was timely filed, OSC refers to a Memorandum of Understanding (MOU) between OSC and EEOC, 54 Fed. Reg. 32499 (1989). The MOU between the agencies was negotiated, signed, and became effective in 1989, and states, in pertinent part, that:

> The [EEOC], under Title VII of the Civil Rights Act of 1964, as amended, has jurisdiction to process certain charges of employment discrimination on the basis of national origin . . . under section 102 of the Immigration Reform and Control Act of 1986, has jurisdiction to process certain . . . charges of employment discrimination on the bases of national origin or citizenship status. The purpose of this Memorandum of Understanding between EEOC and [OSC] is to prevent any overlap in the filing of charges of discrimination under these statutes and to promote efficiency in their administration and enforcement.

As to the timeliness requirements for the filing of any complaint under Section 1324b, the statute provides that:

> [n]o complaint may be filed respecting any unfair immigration-related employment practice occurring more than 180 days prior to the date of the filing of the charge with the Special Counsel. This subparagraph shall not prevent the subsequent amending of a charge or complaint under subsection (e)(1).

8 U.S.C. §1324b(d)(3).

IV. *Respondent's Motions for Summary Decision as to Count Two and Complainant's Responses*

Count Two of the complaint alleges that Hyatt maintained a pattern or practice of requesting more or different documents than are required for employment eligibility verification requirements and that such a pattern or practice constitutes an unfair immigration related employment practice in violation of 8 U.S.C. §1324b(a)(6). Complainant seeks a penalty of $1,000 each for every work authorized individual requested to produce more or different documents than are required for employment eligibility verification purposes. Complaint at 6, ¶B.3. In addition, Complainant seeks the following additional relief: that Respondent educate its personnel and post notices concerning rights and responsibilities under 8 U.S.C. §1324b and Respondent's §1324a responsibilities, and for Respondent to be ordered to reinstate and give back pay and all retroactive employee benefits and seniority lost, including interest, to "each and every . . . work authorized individual who may have been discharged or denied

employment as a result of Respondent's illegal actions." Complaint at 6, ¶¶B.4–7.

In its answer, Respondent denied the substantive allegations of Count Two, and denied that Complainant is entitled to any relief whatsoever. Furthermore, Respondent pled as affirmative defenses that the Court and OSC lack jurisdiction because the charge filed with OSC was untimely. Answer ¶31.

A. *Respondent's Second Motion for Summary Judgment*

Respondent filed its second motion for summary judgment on December 12, 1995. In that motion, which addresses the allegations in Count Two, Respondent asserts that OSC is not empowered to prosecute a pattern or practice case brought under 8 U.S.C. §1324b. This argument is that both the explicit wording of §1324b and the legislative history indicate that no pattern or practice jurisdiction was conferred upon OSC. Respondent acknowledges that these arguments are contrary to the line of OCAHO cases where OSC was found to have pattern or practice jurisdiction. *See* R. 2d MSJ at 5 (citing *United States v. Mesa Airlines,* 1 OCAHO 74 (1989); *United States v. General* Dynamics, 3 OCAHO 517 (1993); United States v. A.J. Bart Inc., 3 OCAHO 538 (1993); *United States v. Robison Fruit Ranch Inc.,* 4 OCAHO 594 (1994)). However, as I rule *infra* at 11 that the pattern or practice allegations at Count Two of the complaint were untimely filed, I will not address OSC's authority to bring a pattern or practice of document abuse case. Consequently, as I am granting summary decision for Respondent on the basis of Respondent's third motion for summary judgment, I decline to reach the merits of the issues raised by the December 12, 1995 motion.

B. *Respondent's Third Motion for Summary Judgment*

In its third motion for summary judgment, filed on January 11, 1996, Respondent argued that if I treated the April 1, 1994 NERC filing as a filing with OSC, then the August 4, 1995 complaint would then be untimely because it was filed well outside the 210 days (120 to issue a determination and 90 more to investigate) permitted by the statute. 8 U.S.C. §1324b(d). In response, Complainant asserted that the 120 days that OSC has to investigate a charge and issue a determination should not have begun to run until January 6, 1995 when it actually received the charge from EEOC. Complainant stated that the MOU only serves to toll the 180 day deadline for fil-

ing a charge, and that the actual date of receipt by OSC should determine when the investigatory period should begin. In the alternative, Complainant asserts that as EEOC and OSC are made each other's agents for purposes of the statute of limitations, that EEOC's failure to timely forward the charge to OSC should not be applied against OSC for purposes of determining the investigatory period. Specifically, OSC asserts that the adverse interest exception of agency law, that when an agent acts adversely to the interest of the principal, knowledge of the agent is not imputed to the principal, should toll the starting of investigatory period until the charge is referred. PHC Tr. at 45–48. As I rule *infra* at 11 that the filing with OSC took place on January 6, 1995, I do not base my decision on this contention by Respondent.

Respondent's January 11, 1996 motion also asserts that it is entitled to summary decision as to the entire complaint because the filing of the charge with OSC was untimely, and because the filing of the complaint itself was also untimely.

Complainant's January 23, 1996 memorandum of points and authorities in opposition to Respondent's motions for summary decision asserts that the charge and complaint were timely filed. Specifically, Complainant states that the charge was timely filed with NERC, and that pursuant to a work-sharing agreement between EEOC and NERC the charge was deemed filed with EEOC at that time. C. Memo at 29–31. Furthermore, pursuant to the MOU between EEOC and OSC, the charge would also be deemed to have been filed with OSC. C. Memo at 32. Complainant also argues that the complaint was timely filed because charges are only deemed constructively filed with OSC under the MOU for purposes of satisfying the timeliness requirements for filing such charges. OSC asserts that its investigatory time period and the time limit for filing complaints does not begin to run until the it actually receives the charge. C. Memo at 35–36.

Respondent's Reply brief in support of the motions for summary decision, dated February 20, 1996, argues that OSC persists in advancing contradictory positions to keep this action alive. *See* R.R.Br. at 1. Respondent goes on to assert that Complainant's opposition does not raise genuine issues of material fact and does not address the central issue presented in Hyatt's Third Motion:

> ***In the face of the narrowly tailored limitations on the OSC's authority mandated by the INA, which speak in terms of days, not months or years, how can the OSC possibly justify filing a Complaint a full two years after the last alleged unlawful act?***

R.R.Br. at 2 (emphasis in original). The reply brief goes on to argue that the complaint cannot survive based on reliance on the MOU and the filings with NERC to overcome the timeliness issue.

Complainant filed its reply brief in opposition to the motions for summary decision dated April 1, 1996, which primarily focussed on Count One and the timeliness issue.

V. *Findings and Conclusions*

A. *Timeliness of the Charge Filed with OSC*

The MOU between OSC and EEOC was signed and became effective in 1989, and specifically refers to national origin and citizenship status discrimination in describing OSC's jurisdiction. Furthermore, the MOU specifically addresses guidelines to both EEOC and OSC for referring certain charges to the other agency. The Guidelines for the EEOC Staff specifically address *only* national origin and citizenship status discrimination. No mention is made of document abuse charges or pattern or practice of document abuse charges. The document abuse provisions were added to 8 U.S.C. §1324b as a result of the Immigration Act of 1990 (IMMACT'90), subsequent to the signing of the MOU and the date it became effective.

The issue here is not whether EEOC can refer a charge to OSC. Rather, the issue is whether the filing with EEOC (or with NERC where NERC is considered EEOC for filing purposes) is to be considered a filing with OSC for purposes of meeting the 180 day filing deadline in Section 1324b(d)(3). If the referral is validly made pursuant to the MOU, then the original filing with NERC can be considered the filing with OSC and fall within the 180 days. However, if the EEOC referral was not properly covered by the MOU, then the charge cannot be deemed filed with OSC until it received the charge on January 6, 1995. OSC admits that a filing on January 6, 1995 would not be timely. PHC Tr. at 30, ln. 22.

This is a case of first impression as there is no OCAHO case law that directly addresses the question of whether the MOU serves to toll the statute of limitations for a referral of a document abuse/pat-

tern or practice charge from EEOC to OSC. OCAHO cases do recognize that the MOU is "to prevent injustice arising out of a mistake in forum selection" and that it provides no assistance where a complainant failed to implicate any allegation cognizable under 8 U.S.C. §1324b in an EEOC filing. *See United States v. Auburn University*, 4 OCAHO 617, at 12 (1994); *Yefremov v. NYC Dep't of Transportation*, 3 OCAHO 466, at 3 (1992).

Complainant refers to case law which supports the validity of the MOU and its authority to enter into it. *See, e.g., Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663 (4th Cir. 1977), *cert. denied*, 435 U.S. 995 (1978). While this case supports the authority to enter into the MOU, it does not support the contention that the MOU should be given an expansive reading so that a document abuse filing would be covered by the OSC/EEOC MOU.

However, Federal District Court case law addressing a Memorandum of Understanding between EEOC and the Office of Federal Contract Compliance Program (OFCCP) demonstrates that courts do not give expansive readings to such MOUs. *See, e.g., Meckes v. Reynolds Metals Co.*, 604 F. Supp. 598 (N.D. Alabama 1985), *aff'd without opinion,* 776 F.2d 1055 (11th Cir. 1985).

In *Meckes*, documents were filed with OFCCP relating to age discrimination. OFCCP had no jurisdiction to deal with such a claim. Therefore, the MOU between EEOC and OFCCP was deemed *inapplicable* and the filing with OFCCP could not be considered a filing with EEOC. *Id.* at 602. The MOU analyzed in *Meckes* specifically stated:

> Complaints filed with OFCCP within the jurisdiction of EEOC which OFCCP refers to EEOC shall be deemed charges filed jointly with EEOC. OFCCP shall promptly transmit all such charges to the appropriate EEOC Field Office. For the purpose of determining the timeliness of the charge under statutes administered by EEOC the date the matter was received by OFCCP shall be deemed to be the date it was received by EEOC.

Id. at 601.

The District Court in *Meckes* held that:

> Only where OFCCP and EEOC have potentially overlapping or concurrent jurisdiction can a rational argument be made for deeming a filing with one as a filing with the other. No such rational argument can be made when OFCCP has no jurisdiction or connection whatsoever with Meckes' individual ADEA charge. Therefore, Meckes' purported filing of an age discrimination charge with the

> OFCCP was simply a nullity. It cannot be deemed filed with the EEOC, either on December 29, 1982 or on January 5, 1983. . . . Meckes' ADEA claim is thus barred.

Id. at 602. As the OFCCP did not have any ADEA jurisdiction, any ADEA filing with OFCCP was deemed a nullity and, therefore, was not covered by the referral to EEOC under the MOU, despite the general language of the MOU regarding complaints within EEOC jurisdiction.

The District Court in *NAACP Labor Committee v. Laborers' Intern. Union*, 902 F. Supp. 688 (W.D. Va. 1993), *aff'd.*, 67 F.3d 293 (4th Cir. 1995) also addressed this issue and concluded that the Fourth Circuit in the *Rumsfeld* decision only had recognized that the OFCCP serves as a conduit for misdirected Title VII complaints. The District Court specifically held that a complaint filed with OFCCP is not a charge filed with the EEOC, noting that OFCCP held the complaint for 20 months. *Id.* at 701.

Respondent contends that the MOU cannot cover document abuse charges because it predates IMMACT'90 which created document abuse. R.R.Br. 7–10. The MOU refers to citizenship status charges and national origin charges. There is no reference to document abuse charges. Complainant states that document abuse charges and pattern or practice of document charges are separate and independent charges from citizenship or national origin discrimination charges. *See* C. Memo at 14–16. As an independent charge, which Congress did not make an immigration-related unfair employment practice until after EEOC and OSC entered into the MOU, a referral for document abuse cannot be made pursuant to a MOU which only references national origin and citizenship status discrimination.

Respondent, in its revised motion for summary judgment and motion to stay discovery, filed December 6, 1995, argued that summary decision should be granted as to Count One of the complaint because Baro was not a protected individual and that document abuse, as alleged in this case, is a subset of citizenship status discrimination.[5] At oral argument, Respondent's counsel stated that despite its argument that document abuse is a subset of citizenship status discrimination, the MOU does not apply to a document abuse charge because the

[5] In order to assert a citizenship status discrimination claim a complainant must be a "protected individual," as defined at 8 U.S.C. §1324b(a)(3).

MOU predates IMMACT'90 and the document abuse provision. PHC Tr. at 83, ln. 9–21. OCAHO case law holds that document abuse is not a subset of citizenship status discrimination and that all work authorized individuals are protected from document abuse, not just protected individuals. *See, e.g., United States v. Guardsmark*, 3 OCAHO 572 (1993). As document abuse is a separate cause of action under 8 U.S.C. §1324b, I agree with Respondent's assertion at oral argument that, as the MOU predates the document abuse provision, the filing with EEOC, or NERC, cannot be considered a filing with OSC.

The *Meckes* fact situation is similar to the present case in that NERC and EEOC do not have document abuse jurisdiction, and the MOU between OSC and EEOC does not specifically mention document abuse referrals. Complainant relies on the general language of the MOU which makes OSC and EEOC agents for the purpose of allowing charging parties to file charges to satisfy statutory time limits, and which instructs an agency to refer charges it receives to the other when it becomes apparent during the processing of the charge that the other agency has jurisdiction. MOU, 54 Fed. Reg. 32499, ¶III. Complainant fails to address the fact that the MOU predates the document abuse provisions of IMMACT'90. In addition, the MOU specifically states that its purpose is to prevent any overlap in the filing of charges of discrimination under Title VII of the Civil Rights Act of 1964, as amended, of which EEOC has jurisdiction, and section 102 of the Immigration Reform and Control Act of 1986 (IRCA), of which OSC has jurisdiction. This specific reference is not to IRCA, as amended, rather it only refers to the original provisions of the 1986 statute. Furthermore, while the MOU instructs the referring agency to transmit charges, it also instructs them to do so according to the guidelines attached to the MOU. These guidelines only refer to national origin and citizenship status discrimination. Before IRCA was amended by IMMACT'90, its provisions protected certain individuals from discrimination based on citizenship status and national origin. The MOU was passed to avoid overlap in the filing of charges regarding these types of discrimination claims. As IRCA was amended to include document abuse and retaliation by IMMACT'90, and the MOU was not amended, the MOU does not encompass document abuse charges, and thus the filing of a document abuse charge with EEOC does not constitute a filing with OSC.

Complainant also argued that the inclusion of national origin discrimination on the NERC intake form rendered the transfer valid under the MOU. PHC Tr. at 87. However, as Hyatt has greater than

14 employees, EEOC has jurisdiction over any national origin charge against Hyatt and such a charge was properly not referred to OSC and was not included in the OCAHO complaint.

Complainant also asserts that the general agency relationship created by the MOU is sufficient to expand the coverage of the MOU to all areas where OSC and EEOC have differing jurisdiction. Complainant asserts that the language in the MOU is sufficient to cover the expanding jurisdiction. In particular, Complainant relies on the language at ¶IV of the MOU, which states:

> By this Memorandum of Understanding, the agencies hereby appoint each other to act as their respective agents for the sole purpose of allowing charging parties to file charges to satisfy the statutory time limits. To ensure that filing deadlines are satisfied, each agency will accurately record the date of receipt of charges and notify the other agency of the date of receipt when referring a charge.

However, the MOU limits its coverage to the statutes specifically identified therein. That is, the MOU states that its purpose is to prevent any overlap in the filing of charges of discrimination under Title VII of the Civil Rights Act of 1964, as amended, and under section 102 of the Immigration Reform and Control Act of 1986. *See* MOU, 54 Fed. Reg. 32499, 32500. There is no indication in the MOU that it was intended to apply to potential future amendments of either Title VII or IRCA. Therefore, as the terms of the MOU itself limit its coverage to section 102 of the Immigration Reform and Control Act of 1986, Complainant's argument that the general agency relationship created between OSC and EEOC is sufficient to cover referrals of document abuse charges is unconvincing because document abuse was not included in the 1986 Act.

As the referral from EEOC to OSC was not covered by the MOU, the filing date must be considered January 6, 1995, the date OSC received the charge. Complainant admits this date is well outside the requisite 180 day filing limit on OSC charges, since Baro was terminated from Hyatt on November 19, 1993. Therefore, to be timely under Section 1324b, Baro's charge had to have been filed with OSC on or before May 18, 1994, 180 days after the alleged discrimination. Clearly the January 6, 1995 filing with OSC is considerably late. Accordingly Baro's charge was untimely and should have been dismissed with prejudice by OSC. *See* 28 C.F.R. §44.301(d)(1).[6]

[6] The regulation at 28 C.F.R. §44.301(d)(1) provides that, "[i]f the Special Counsel receives a charge after 180 days of the alleged occurrence of an unfair immigration-related employment practice, the Special Counsel shall dismiss the charge with prejudice."

B. *Timeliness of the Pattern or Practice Count*

Complainant asserts that it was not aware that there was a possible pattern or practice of document abuse until May 25, 1995, following investigatory interviews conducted as a result of Baro's charge. PHC Tr. at 102, ln. 15. However, OSC does not allege that the pattern or practice Count in the complaint resulted from an independent investigation. Rather, OSC stated that the investigation grew out of Baro's charge. PHC Tr. at 102, ln. 5, which, as held above, was untimely and should have been dismissed by OSC pursuant to 28 C.F.R.§44.301(d)(1).

The charge in this case was filed with OSC on January 6, 1995. Therefore, as required by Section 1324b(d)(3), any alleged unfair immigration-related employment practice covered by the August 4, 1995 complaint would have to have occurred within the 180 day period prior to the filing of the charge on January 6, 1995, or on or after July 10, 1994. Any alleged unlawful conduct occurring prior to July 10, 1994 would not be cognizable in this action.

Two points of reference are given as to the pattern or practice allegations, the alleged document abuse against Baro, for which a charge was not timely filed, and the period during which Patty Ocheltree was employed as the Respondent's Employment Manager. The period of Ms. Ocheltree's employment is relevant because the pattern or practice charge in the complaint alleges that:

> Respondent's regular and standard operating procedure, at least during the time Patty Ocheltree was employed as Employment Manager, was to request on a repeated and routine basis all non-U.S. citizens to produce INS-issued documents for employment verification purposes.

See Complaint ¶26. At the latest, Patty Ocheltree's employment ended on July 1, 1994. *See* R. 3d MSJ, Ex. 8 (Sworn Affidavit of Andrew Fray, Director of Human Resources at Hyatt Regency Lake Tahoe). July 1, 1994, the date when Ms. Ocheltree's employment with Hyatt ended, precedes the July 10, 1994 date after which any alleged unfair immigration-related employment practices must have taken place to be timely included in the August 4, 1995 complaint.

In addition, Baro's charge should have been dismissed as, pursuant to 28 C.F.R. §44.301(d)(1), OSC must dismiss a charge with prejudice if it is filed after 180 days of the alleged unfair immigration-related employment practice.

Therefore, as I have ruled that the filing of the charge with OSC was untimely because it was filed more than 180 days after the alleged discriminatory conduct, and Complainant admits that the entire complaint was based on that charge, the entire complaint is untimely.

The standard for granting a motion for summary decision is whether the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. 28 C.F.R. §68.38(c). As previously stated, the movant bears the initial burden of proving that there is an absence of evidence to support the non-moving party's case. In determining whether the movant has met its burden of proof, all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the non-moving party. *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The moving party satisfies its burden of proof by showing that there is an absence of evidence to support the non-moving party's case. *United States v. Davis Nursery, Inc.*, 4 OCAHO 694, at 8 (1994) *citing Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). The burden of production then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *Id.* Failure to meet this burden invites summary decision in the moving party's favor.

On the issue of the lack of timeliness of the pattern or practice allegations of Count Two of the complaint, Respondent has met its burden by showing that Baro's employment ended on November 19, 1993, and by the affidavit establishing that Ocheltree's employment ended on July 1, 1994. Based on the allegations of the complaint, the only named individual to be utilized in determining the timeliness of the pattern or practice of document charges was Baro, who was terminated more than 180 days before the filing of the charge, and the only other time period alleged was Patty Ocheltree's tenure as Employment Manager. Therefore, the burden shifts to Complainant to show that there is a genuine issue of material fact remaining for trial. Specifically, Complainant would have to show that other document abuse occurred within the 180 days of the filing of the charge. The only assertion by Complainant as to the issue of how long the alleged pattern or practice of document abuse continued is the statement that "the evidence at trial will show that this illegal requirement [document abuse] continued to be imposed on Mr. Baro all the way through to his termination on November 19, 1993. Discovery as

to how long after this date Respondent continued the alleged pattern or practice of document abuse has not been completed." C.R.Br. at 1–2. Complainant has not provided any evidence in the form of affidavits or otherwise to show that any alleged discriminatory conduct occurred within 180 days of the filing of the charge. OCAHO Rules of Practice and Procedure provide that a party opposing the motion may not rest upon the mere allegations or denials of the motion and its supporting documents, but must set forth *specific facts* showing that there is a genuine issue of fact for the hearing. 28 C.F.R. §68.38(b) (emphasis added). Here, Complainant has failed to come forward with any such specific facts showing a genuine issue for trial.

VI. *Conclusion and Order*

Summary decision in Respondent's favor already has been granted as to Count One of the complaint. *See* Order Granting Respondent's Motion for Summary Decision as to Count One of the Complaint, 6 OCAHO 861 (May 16, 1996). Summary decision is appropriate in Respondent's favor for Count Two of the complaint because the charge upon which Complainant relied for both Counts One and Two was untimely, and because Complainant has failed to meet its burden of coming forward with some evidence of discriminatory conduct occurring within the requisite 180 period prior to the filing of the charge with OSC.

Therefore, pursuant to 28 C.F.R. §68.38, I grant Respondent's motion and enter judgment for Respondent.

ROBERT L. BARTON, JR.
Administrative Law Judge

Notice Concerning Appeal

As provided by statute, not later than 60 days after entry of this final order, a person aggrieved by such order may seek a 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 employer resides or transacts business. *See* 8 U.S.C. §1324b(i); 28 C.F.R. §68.53(b).