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

NRIPENDRA S. DHILLON Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	CASE NO. 92B00097
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA (UNIVERSITY OF CALIFORNIA, DAVIS, DEPARTMENT OF HUMAN ANATOMY), Respondent.	)	

FINAL ORDER AND DECISION GRANTING
RESPONDENT'S MOTION FOR SUMMARY DECISION
(March 10, 1993)

Appearances:

Nripendra S. Dhillon,
Pro Se Complainant

Susan M. Thomas, Esq.
For the Respondent

Before: ROBERT B. SCHNEIDER
Administrative Law Judge

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I. *Introduction*

Nripendra S. Dhillon ("Complainant" or "Dhillon"), a native of Bombay, India, is a permanent resident alien of the United States. Dhillon brought this action pursuant to § 102 of the Immigration Reform & Control Act of 1986 ("IRCA"), as amended, 8 U.S.C. § 1324b(d)(2), against Respondent for alleged unfair immigration-related employment practices which involved Respondent's discharge of Dhillon on September 25, 1991, from employment as a part-time Laboratory Assistant II, and Respondent's failure to promote or hire him for the position of full-time Laboratory Assistant III.[1]

Currently before me is Respondent's motion for summary decision. The complaint in this case alleges both national origin and citizenship status discrimination in the discharge and failure to hire claims. Although Complainant has made a strong showing that Respondent's refusal to promote or hire him was based on national origin discrimination, I do not have jurisdiction over the national origin portion of either of his claims. I do have jurisdiction over the citizenship status portion of his claims as Complainant is a member of the class of individuals protected against citizenship status discrimination under IRCA. I find, however, that Complainant has failed to submit any evidence of citizenship status discrimination. For these reasons, more fully explained herein, Respondent is entitled to summary decision as a matter of law.

II. *Background*

A. Facts

1. Regarding Dhillon's Eligibility for Naturalization

Dhillon was admitted to the United States for permanent residence on May 28, 1982, at the age of 20 as a child of a permanent resident alien. Dhillon's visa classification was P5-3, a fifth preference as a child of an alien classified P5-1 (sibling of a U.S. citizen over 21 years).[2] Dhillon's parents and sister were admitted to the United

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[1] Complainant was actually employed by the University of California, Davis Medical School's Department of Human Anatomy, but I previously determined that the appro-priate respondent is the Regents of the University of California. See Order of June 30, 1992.

[2] Such classifications no longer exist.

States for permanent residence in August of 1981. At the time of Dhillon's initial entry into the United States, he was a third-year student at a medical school in New Delhi, India. Dhillon's initial stay in the United States was for approximately two months, after which he returned to India to continue medical school.

Dhillon visited the United States for about two months each summer in 1983 and 1984 to spend time with his family while school was not in session. During each of these visits, Dhillon lived with his family in an apartment in San Jose, California, where he shared a room with his sister. Dhillon sought employment during each of these visits and he got a job the summer of 1984 working as an assembler in Sunnyvale, California for approximately seven weeks. Dhillon graduated from medical school in December of 1985. He then made his final entry into the United States on February 23, 1986, and has not left since.[3]

On October 31, 1990, Complainant filed his application for naturalization with the Immigration & Naturalization Service ("INS") office in Sacramento, California. Based on Dhillon's application, the INS scheduled a naturalization interview for May 9, 1991. Due to a conflict with an exam in one of his classes at the University of California, Davis, Graduate Division, where he was pursuing a master's degree in pharmacology and environmental toxicology, Dhillon could not keep the appointment. He therefore requested in a letter dated April 30, 1991, that the INS reschedule the interview. Because he had not heard from the INS, Dhillon again requested a response in a letter dated October 31, 1991. According to Dhillon's "A" file, the interview was rescheduled for November 12, 1991. Dhillon claims he was out of town from about October 31, 1991 to November 11, 1991, and that when he returned home, he discovered that the INS had sent him a notice, dated October 31, 1991, asking him to appear at the INS office on November 12, 1991, the next morning. Dhillon contends that he could not keep the appointment due to the short notice and a conflict with his work schedule. Dhillon further contends that he telephoned the INS office November 12, 1991, but the lines were busy. He wrote the INS a letter on that date, indicating the problem. (Complainant

[3] The dates of Dhillon's entries into and departures from the United States were as follows:

Entry	Departure
May 28, 1982	July 28, 1982
June 12, 1983	Aug. 2, 1983
June 2, 1984	Aug. 8, 1984
Feb. 23, 1986	N/A

submitted to this office certified receipts of communications he had with INS on November 1 and 18, 1991 and February 10, 1992.) Complainant's "A" file, however, indicates only that he failed to appear for his November 12th interview; it contains no document or note indicating that Complainant offered INS an explanation as to his failure to appear for the interview. To date, as confirmed by Dhillon's alien ("A") file which I subpoenaed from the Sacramento office, the INS has not completed the processing of Dhillon's application for naturalization.

2. Regarding Dhillon's Employment With Respondent

In February of 1988, Dhillon was hired by Respondent as a part-time Laboratory Assistant II.[4] In July of 1989, his position was reclassified to a 43% "casual employee" position and he was to work no more than 60-70 hours a month. Dhillon's primary responsibility was to receive and preserve donated human cadavers. From his date of hire through August 1, 1991, Dhillon reported to Dr. Hugh H. Patterson, Director of the Donated Body Program ("DBP"). As Director, Dr. Patterson's primary responsibility was to manage the DBP, to act as a liaison for potential donors and their next of kin, and to monitor the usage and need of donated cadavers. Dr. Patterson reported to Majore Chambers, the Management Service Officer ("MSO"), who reported to Kent L. Erickson, the Chairman of the Department of Human Anatomy. In April of 1991, Patterson announced that he would be leaving the DBP on August 1, 1991.

In meetings from June through August of 1991, Erickson met with Patterson and Dhillon to discuss the possibility of assigning the Director's duties to Dhillon. As a result of these meetings, Patterson informed Dhillon that he would be selected for the job. In June and July of 1991, Patterson was on leave and preparing for his transfer. During this time, Dhillon performed many of Patterson's duties. In August of 1991, Dhillon was the sole employee of the DBP and performed all of the duties of both Laboratory Assistant II and Director, including the requisition of a computer and paging system for the DBP which were approved by Erickson. Although Dhillon was still

[4] Prior to filing the complaint in this case, Dhillon filed a charge with the Equal Em-ployment Opportunity Commission ("EEOC") based on the same facts, alleging sex and national origin discrimination. The facts set out herein are taken from the determination issued by the EEOC as to the merits of Dhillon's charge, No. 370-92-0014. The EEOC found that Dhillon was discharged due to his gender (male) and his national origin (East Indian). Although I am not bound by the EEOC's findings, the facts giving rise to this cause of action are the same as those which gave rise to Dhillon's EEOC charge.

only classified as a "casual employee," he worked 164.5 hours for the month of August.

Also in August, Erickson informed Dhillon that a new position, classified as full-time Laboratory Assistant III, would be created in DBP and would be posted to formalize the hiring process. The primary responsibility of this new position would be the receiving and preserving of donated human cadavers.[5] Dhillon, as instructed, submitted an application for the position. He believed that the hiring process was merely a formality to ensure his reclassification to the new position. On August 20, 1992, Dhillon met with Erickson and Chambers. Respondent considered this meeting to be Dhillon's interview for the position. Dhillon states that he was not informed that this meeting was an interview and he believed it to be only one in a series of meetings regarding the new position.

On August 27, 1991, Respondent selected a female American (herein-after "selectee") for the new position of Laboratory Assistant III in the DBP. Respondent states that Dhillon was not offered the position because he objected to its classification, hours and salary. Dhillon acknowledges that he disagreed with the classification of the position, but asserts that this was based on his previous conversations with Erickson. Dhillon thought that the person selected for the new position would be required to perform the duties of the Director, and that those duties were not included in the job description for the new position.

Dhillon and the selectee were the only two candidates considered for the job of Laboratory Assistant III. The selectee had no experience preserving human cadavers and had never performed any of the other duties of the position. Respondent's hiring policy states that the primary objective in hiring is based on Affirmative Action, that rehires and promotions should be considered over other factors, and that the best qualified person should be selected. Mr. Erickson knew the posi- tion of Laboratory Assistant III would eliminate the need for Dhillon's part-time job.

On September 12, 1991, Dhillon received a memorandum stating that he would be discharged on September 25, 1991. This memorandum instructed Dhillon to turn in his keys and paging device as of September 12, 1991. Dhillon worked minimal hours during these last

[5] The job descriptions of the Laboratory Assistant II and the advertised position of Laboratory Assistant III were identical.

two weeks and Respondent acknowledged using a volunteer to perform some of Dhillon's duties during this time period. Contrary to Respondent's policy and practice, Dhillon's discharge memorandum did not state the reason for his discharge.

On October 2, 1991, a week after Dhillon's official termination date and twelve days after Dhillon had filed a grievance with the EEOC concerning the hiring process and his discharge, Dhillon received a letter from Respondent that stated he was discharged because of "a lack of work."

B. Procedural History

1. EEOC Charge

Dhillon filed a charge with the EEOC on October 11, 1991, alleging that the University of California, Davis discriminated against Dhillon because of his sex (male) and national origin (East Indian) by discharging him on September 25, 1991 and failing to hire him for a position for which he was qualified, for which he had applied, and which he was already performing.

Dhillon based his allegations of discrimination on several grounds, including that he was subjected to remarks by the Management Ser-vices Officer (female-American), such as "Women can do without men in the world" and "You Indians need to realize that you are in America now." Furthermore, Dhillon alleged that he was not allowed to inter-view for a position for which he was qualified, that he had applied for and that he was actually performing; and that "a female-[A]merican with no prior experience in embalming and other morgue duties, was hired for the position."

After investigating Dhillon's claims, the Director of the EEOC issued a "determination" letter, dated August 12, 1992, stating that there was reason to believe that Respondent violated Title VII of the Civil Rights Act of 1964, as amended, when it discharged Respondent and failed to select him for the job of full-time Laboratory Assistant. In her "determination" letter, the Director made a number of findings including: (1) that Dhillon was not selected for the position of full-time Laboratory Assistant because of his gender (male) and national origin (East Indian); (2) that the reasons given by the Respondent for dis- charging Dhillon were pretextual because "evidence indicates that the Respondent was aware that the new full-time position would eliminate the need for Dhillon's part-time position"; (3) that the Respondent employed a volunteer to perform some of Dhillon's duties after his

discharge; and (4) that Dhillon was discharged due to his gender (male) and his national origin (East Indian).

After making her findings, the Director, on behalf of the EEOC and pursuant to § 706(b) of Title VII, directed the parties to work with the EEOC in an effort to resolve their differences by conciliation.

2. OSC Charge

On October 20, 1991, Dhillon filed a charge with the United States Department of Justice, Office of Special Counsel for Immigration- Related Unfair Employment Practices ("OSC"), in which he alleged that the Department of Human Anatomy of the medical school at the University of California, Davis, had committed two unfair immigra-tion-related employment practices against him. On the charge form, Dhillon checked both national origin and citizenship status discrimination as the bases for his charge. He described the alleged discrimination as follows:

> I believe that I have been discriminated against because I am a foreign immigrant in that I was subjected to remarks by the Management Service Officer of the Department such as, "You Indians need to realize you are in America now" and "You Indians need to get used to American culture or go back to India.". . . . An American with no prior experience was hired for a position that I was qualified for, had applied for and was actually performing at that time. I was continuously made to perform duties out of my classification without compensation. The American hired was provided a higher classification and twice the time base for half the workload that I was performing at the time. I was then discharged on 9-11-91 without being provided proper notice. I believe that I was actually terminated because of my immigrant/foreign status.

On March 20, 1992, OSC wrote a letter to Dhillon notifying him that after investigating his charge, OSC had determined that it did not have jurisdiction over his charge because of "the number of individuals employed by his employer" and because Dhillon was "not a protected individual under the statute."

3. OCAHO Complaint

Dhillon then filed a private action with OCAHO on May 7, 1992, pursuant to 8 U.S.C. § 1324b(d)(2). Respondent filed an answer on June 25, 1992, alleging two affirmative defenses: (1) that the EEOC has exclusive jurisdiction over the allegations of the complaint as they "are grounded in alleged national origin discrimination"; and (2) that Complainant has failed to invoke the jurisdiction of the Administrative Law Judge with respect to his claim of citizenship status discrimination as Complainant has failed to show that he is a "protected

individual" within the meaning of 8 U.S.C. § 1324b(a). On September 16, 1991, Respondent filed a motion for summary decision, contending that these affirmative defenses were "fatal flaws" in Dhillon's complaint. Dhillon filed his response to the motion on October 2, 1992. He subsequently filed with this office three sets of responses to my interrogatories and a request for the production of facts.[6]

On December 16, 1992, I issued a subpoena to the INS office in Sacramento for the production of Dhillon's "A" file.

III. *Discussion, Findings & Conclusions*

A. Defendant's Motion for Summary Decision

The regulations governing this proceeding authorize an Administrative Law Judge ("ALJ") to "enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material facts and that a party is entitled to summary decision." 28 C.F.R. § 68.38, as amended by the Final Rule of December 7, 1992, 57 Fed. Reg. 57669 (to be codified at 28 C.F.R. Part 68) (hereafter cited as "28 C.F.R. § 68"). This regulation is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure which provides for summary judgment where "the pleadings, depositions, answers to interrogatories and admission on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

I have previously stated that federal case law interpreting Rule 56(c) is instructive in setting out the burdens of proof and requirements for a summary decision in a case involving allegations of unfair immigration-related employment practices. See, e.g., Alvarez v. Interstate Highway Construction, 3 OCAHO 430, at 7 (June 1, 1992). I shall continue to follow the federal precedents regarding a motion for summary judgment and apply them to a motion for summary decision under our regulations.

The Supreme Court and the Ninth Circuit, recognizing the significant contribution summary judgment motions can make to resolve litigation when there are no factual issues, have established the

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[6] In view of Complainant's pro se status, he is to be commended for providing this agency with substantial help in determining the relevant facts of this case.

following standards for consideration of such motions. The party moving for summary judgment has the initial burden of identifying for the court those portions of the materials on file that the movant believes demonstrate the absence of any genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1985). The moving party may discharge this burden by "'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Id. at 325. Once the moving party has met this burden, the burden of production shifts so that the nonmoving party must set forth by affidavit or as otherwise required by Rule 56(c), Id. at 323-4, "specific facts showing that there is a genuine issue for trial." T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (quoting Fed. R. Civ. P. 56(e) and citing Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103-4 (9th Cir. 1986), cert. denied, 484 U.S. 1066 (1988). With respect to these specific facts offered by the nonmoving party, the court does not make credibility determinations, T.W. Electrical Service at 630, or weigh conflicting evidence, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986), and is required to draw all inferences in a light most favorable to the nonmoving party. Matsushita Electrical Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Long v. Bureau of Economic Analysis, 646 F.2d 1310, 1321 (9th Cir. 1981).

The Supreme Court has stated that Rule 56(c) nevertheless requires courts to enter summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322. "The mere existence of a scintilla of evidence in support of the [non-moving party's] position is insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." Liberty Lobby, 477 U.S. at 252. The federal courts thus apply to a motion for summary judgment the same standard as to a motion for directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

Respondent has moved for summary decision on Dhillon's dis- criminatory discharge claim as well as his claim of discriminatory failure to hire. Respondent argues (1) that the EEOC has exclusive jurisdiction over Dhillon's allegations and (2) that Dhillon has failed to allege facts sufficient to prove that he is protected under IRCA's prohibition against citizenship status discrimination. For the reasons

stated below, I find that Respondent is entitled to summary decision with respect to both claims.

B. Lack of Jurisdiction Over the Allegations of National Origin Discrimination

IRCA provides that the OSC and the EEOC cannot simultaneously entertain a charge of national origin discrimination based on the same set of facts. 8 U.S.C. § 1324b(b) (2).[7] The regulations promulgated to effectuate this section of the statute state that:

> No charge may be filed respecting an unfair immigration-related employment practice . . . if a charge with respect to that practice based on the same set of facts has been filed with the [EEOC] under title VII of the Civil Rights Act of 1964, unless the charge is dismissed as being outside the scope of such title.

28 C.F.R. § 44.300(d) (1991).

A careful review of the complaint and all pleadings filed in this case clearly shows that the alleged unfair immigration- related employment practices are based upon the same set of facts asserted in Dhillon's EEO complaint. Because his case before the EEOC is still pending, Dhillon is barred from alleging national origin discrimination in his complaint filed with OCAHO. See, e.g., Ignacio Mercado v. Arrow Automobile Industries, OCAHO Case No. 92B00007 (Decided Sept. 4, 1992). The national origin portion of the two claims is therefore dis- missed.[8]

C. Jurisdiction Over the Allegations of Citizenship Status Discrimination

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[7] The prohibition against overlap is limited to charges of national origin discrimination. Therefore, a complaint filed with OCAHO alleging citizenship status discrimination that arises out of the same set of facts as a charge of national origin discrimination over which the EEOC has jurisdiction, may be heard by an ALJ. See Romo v. Todd, 1 OCAHO 25, at 8-10 (August 19, 1988), aff'd, United States v. Todd Corp., 900 F.2d 164 (9th Cir. 1990); U.S. v. Marcel Watch Corp., 1 OCAHO 143, at 11-13 (March 22, 1990), amended by 1 OCAHO 169 (May 10, 1990).

[8] Even if this matter was not before the EEOC, I would not have subject matter juris-diction over Complainant's allegations of national origin discrimination because Respon-dent employs in excess of fourteen employees. 8 U.S.C. § 1324b(a) (2)(A) and (a)(2)(B); United States v. Huang, 1 OCAHO 288 (Jan. 11, 1991), aff'd, Ching-Hua Huang v. United States Department of Justice, No. 91-4079 (2d Cir. Feb 6, 1992); Salazar-Castro v. Cincinnati Public Schools, 3 OCAHO 406 (Feb. 26, 1992); Bethishou v. Ohmite Mfg. Co., 1 OCAHO 77 (Aug. 2, 1989).

1. Dhillon is a "Protected Individual"

In order to be eligible to bring a claim of citizenship status discri-mination under IRCA, a complainant must be a "protected individual" as defined at 8 U.S.C. § 1324b(a)(3). 8 U.S.C. § 1324b(a)(1)(B). The group of individuals protected by the prohibition against citizenship status discrimination includes United States citizens and nationals and aliens with the immigration status of permanent resident, temporary resident, asylee or refugee,[9] subject to the following exclusions:

> (i) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, within six months after November 6, 1986 [(the date IRCA was enacted)] and (ii) an alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of the application, unless the alien can establish that the alien is actively pursuing naturalization, except that time consumed in [the Immigration & Complainant has the burden of showing that he does not fit within either of the two exclusions to protection under IRCA. See, e.g., Valenzuela v. J. R. Hale Contracting Co., Inc., OCAHO Case No. 92B00226 (ALJ Schneider's Order Directing the Parties to Conduct Discovery to Determine Whether Complainant is a Protected Individual (Nov. 24, 1992)). Naturalization Service's] processing the application shall not be counted toward the 2-year period.

8 U.S.C. § 1324b(a)(3)(B).

a. Dhillon Applied For Naturalization Within Six Months of His Eligibility To Do So

As Dhillon applied for naturalization after May 6, 1987, he must first show that he applied for naturalization within six months of the date he became eligible to do so. A permanent resident alien is first eligible to file for naturalization once he or she has resided in the United States for at least five years after attaining status as a lawful permanent resident. Immigration & Nationality Act of 1952 ("INA"), as amended, § 316(a), 8 U.S.C. § 1427(a). This period is shortened to

[9] As originally enacted in 1986, 8 U.S.C. § 1324b protected only U.S. citizens, nationals, and "intending citizens" from employment discrimination based on their citizenship status. Immigration Reform and Control Act of 1986, Pub. L. No. 9-603, Sec. 102, 100 Stat. 3374. "Intending citizens" were defined in the law as permanent residents, temp-orary Residents, asylees and refugees, who evidenced an intention to become citizens of the United States. 100 Stat. at 3375. Under the law as it existed at that time, an indivi-dual's intent to become a citizen was a prerequisite to protection under IRCA. See United States v. Mesa Airlines, 1 OCAHO 74, at 10-12 (July 24, 1989), appeal dismissed as untimely, 951 F.2d 1186 (10th Cir. 1991).

three years for a permanent resident living with a United States citizen spouse.

8 U.S.C. § 1430(a).

On October 31, 1990, the date Complainant filed his application for naturalization with the INS, the statutory requirement as to residence in the United States stated in pertinent part that:

On November 6, 1990, § 1324b was amended to remove retroactively the "intending citizen" requirement. Immigration Act of 1990, Pub. L. No. 101-649, Sec. 533, 104 Stat. 5054. That this amendment has a retroactive effect with respect to the "intending citizen" requirement has already been judicially recognized. See, e.g., Ryba v. Tempel Steel Co., 1 OCAHO 289, at 11 (Jan. 23, 1991).

> No person, except as otherwise provided in this title, shall be naturalized, unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months . . . .

INA § 316(a), 8 U.S.C. § 1427(a) (emphasis added).[10]

The immigration laws allow a lawfully admitted permanent resident to be absent temporarily from the United States without jeopardizing his or her immigration status "if the absence was temporary and the departing alien had retained an intention to return, even though his [or her] absence may have been protracted." C. Gordon & S. Mailman, 4 Immigration Law & Procedure § 95.02[4][a] at 95-15 (Cum. Supp. 1992) (hereafter "Immigration Law & Procedure"). The naturalization laws, however, require more than the mere retention of lawful residence status as they prescribe a period of continuous residence prior to application for citizenship. Id. A disqualifying break in the continuity of residence, however, does not preclude an individual "who

[10] This section was amended by the Immigration Act of 1990 (Pub. L. No. 101-649, November 29, 1990), effective on November 29, 1990. Section 407(c) substituted the terms "applicant" and "application" for the terms "petitioner" and "petition." Section 402 amended subsection (a)(1), substituting a provision requiring that the applicant reside within the State or district of the Service in which the application was filed for at least 3 months for the provision requiring that the applicant reside within the State in which the application was filed for at least 6 months.

retains permanent resident status in the United States from starting a new period of continuous residence in the United States which eventually will satisfy the naturalization requirements." Id. at 95-16.

i. Effect of Dhillon's Temporary Absence on His Continuity of Residence

The effect of temporary absence on the continuity of residence for naturalization purposes at the time Complainant filed his application on October 31, 1990, was as follows:

> Absence from the United States of more than six months but less than one year during the period for which continuous residence is required for admission to citizenship, immediately preceding the date of filing the petition for naturalization . . . shall break the continuity of such residence, unless the petitioner shall establish to the satisfaction of the court that he did not in fact abandon his residence in the United States during such period. Absence from the United States for a continuous period of one year or more during the period for which continuous residence is required for admission to citizenship . . . shall break the continuity of such residence, except that in the case of a person who has been physically present and residing in the United States, after being lawfully admitted for permanent residence, for an uninterrupted period of at least one year, and who thereafter is employed by or under contract with the Government of the United States . . . or an American institution of research . . . or is employed by an American firm or corporation engaged in . . . the development of foreign trade and commerce of the United States . . . no period of absence from the United States shall break the continuity of residence . . . .

INA § 316(b), 8 U.S.C. § 1427(b).[11]

Absence of greater than six months but less than a year thus creates a rebuttable presumption of a break in the continuity of residence, allowing the individual to prove that he or she did not abandon his or her residence during that period. In contrast, absence of a year or more creates a statutory bar, with specific narrow exceptions. As absence of six months or less is not included in the statute, it does not disrupt the continuity of residence. Immigration Law & Procedure at 95-17.

ii. *I Am Not Bound By INS Operations Instruction 316.1(b)*

Because Dhillon is not living with a U.S. citizen spouse, he is subject to the requirement of five years of continuous residence preceding the

[11] This subsection was amended by Pub. L. No. 101- 649, Title IV (Nov. 29, 1990), as fol-lows: (1) section 407(c) substituted the terms "applicant" and "application" for the terms "petitioner" and "petition"; (2) reference to "the Attorney General" was substituted for reference to "the court." § 407 (d)(1)(A).

date of filing his application for citizenship, pursuant to 8 U.S.C. § 1427(a)(1). As the INS computes this period of residence, a person who has been lawfully admitted for permanent residence and then is absent from the United States for a year or more, need not accumulate a full five-year period of continuous residence from the date of return. INS Operations Instruction 316.1(b)(4) (December 6, 1972). Therefore, the individual may be continuously absent for as long as 364 days during the statutory period without breaking the continuity of residence. Thus, after absence from the United States for a year or more, the individual may file the petition four years and one day following his or her return as the five-year period will contain no period of absence greater than one year.[12] INS Operations Instruction 316.1(b)(4).

Any break in residence occurring outside the most recent five-year period is therefore irrelevant for naturalization purposes.

This policy of the INS in calculating the five years of continuous residence, however, does not have the force of law. As an interpretive rule, the operations instruction is exempt from the notice and public comment requirements of the Administrative Procedure Act ("APA"). Rivera v. Becerra, 714 F.2d 887 (9th Cir. 1983), cert. denied, 465 U.S. 1099 (1984); see 5 U.S.C. § 553(d)(2). Unlike substantive rules, which "effect a change in existing law or policy," Powderly v. Schweiker, 704 F.2d 1092, 1098 (9th Cir. 1983), interpretive rules are "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." San Diego Air Sports Center, Inc. v. Federal Aviation Administration, 887 F.2d 966, 969 (9th Cir. 1989); see Alcaraz v. Block, 746 F.2d 593, 613 (9th Cir. 1984) (interpretive rules explain existing law or regulations). Therefore, the INS was authorized to issue the interpretive rule pursuant to 5 U.S.C. § 553, and I do not suggest that the INS exceeded its statutory authority in promulgating it. See Animal Legal Defense Fund v. Quigg, 710 F.Supp. 728, 731 (N.D. Cal. 1989).

I find, however, that I am not bound by Operations Instruction § 316.1(b)(4). See Ponce-Gonzales v. Immigration & Naturalization

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[12] The regulations implementing § 1427(a) were amended October 7, 1991 to reflect the application of this "four years and a day" rule. The amendment provides that an appli-cant who must satisfy a five-year statutory residence period and who has been absent from the United States for a continuous period of one year or more during the period for which continuous residence is required, "may file an application for naturalization four years and one day following the date of the applicant's return to the United States to resume permanent residence." 8 C.F.R. § 316.5(c)(1)(ii) (1992).

Service, 775 F.2d 1342 (5th Cir. 1985) (INS operations instructions generally do not have the force of law; they furnish only general guidance for INS employees and do not confer substantive rights or provide procedures upon which an alien may rely); Dong Sik Kwon v. Immigration & Naturalization Service, 646 F.2d 909, 918 (5th Cir. 1981) (the INS is not legally bound to follow an operations instruction as it would be in the case of its own regulations); Soon Bok Yoon v. Immigration & Naturalization Service, 538 F.2d 1211 (5th Cir. 1976); Yan Wo Cheng v. Rinaldi, 389 F.Supp. 583, 588-89 (D.N.J.); Matter of Tuakoi, 19 I. & N. Dec. 341 (BIA 1985); Matter of Cavazos, 17 I. & N. Dec. 215, 217 (BIA 1980) (INS's operations instructions bind neither the immigration judge nor the Board of Immigration Appeals); see also Boating Industry Associations v. Marshall, 601 F.2d 1376, 1383 (9th Cir. 1979) quoting American President Lines Ltd. v. Federal Maritime Commission, 316 F.2d 419, 422 (D.C. Cir. 1963) (neither the affected parties nor the courts were bound by [the interpretive rule] unless they elect[ed] to adopt it as a correct interpretation of the statute); Continental Oil Co. v. Burns, 317 F.Supp. 194, 200 (D. Del. 1970) (stating that an interpretive rule was not binding upon the courts). But see Nicholas v. Immigration and Naturalization Service, 590 F.2d 802, 807-808 (9th Cir. 1979) (the Ninth Circuit applied the same standard of review to the INS district director's decision under Operations Instruction 103.1(a)(1)(ii) as it would to a Congressional statute). In Nicholas, the Ninth Circuit found that unlike most operations instructions which merely provide internal procedural guidelines to the INS, the operations instruction at issue conferred substantive benefits upon aliens by directly affecting the ability of an individual subject to its provisions to continue residence in the United States. Id. at 807. The case before me is distinguishable, however, as I find that Operations Instruction 316.1(b)(4) did not provide substantive rights to the permanent resident aliens subject to its provisions.

iii. The Plain Meaning of the Statute is Controlling in this Case

I view § 316 of the INA, 8 U.S.C. § 1427(a) and (b) as plainly stating that after a lawful permanent resident has been absent from the Uni-ted States for a year or more, he or she is eligible to file a petition for naturalization five years from the date of his or her return. Because I am not bound by the INS's method of calculating the five-year contin-uous residence requirement for naturalization as set out in Operations Instruction 316.1(b)(4), because a plain reading of the statute provides a different method for calculating the five-year continuous residence period, and because Dhillon was not aware of the INS's interpretive rule, I conclude that Operations Instruction 316.1(b)(4) does not apply to Dhillon with regard to whether he is a "protected individual" under

IRCA.[13] Rather, I find that the plain meaning of 8 U.S.C. § 1427(a) and (b) is controlling in calculating the five-year continuous residence requirement as applied to Dhillon.

iv. The Plain Meaning As Applied to the Facts

I will now set out the facts relevant to the continuity of Dhillon's resi-dence in the United States. Dhillon initially entered the United States on May 28, 1982 as a permanent resident. He lived with his family and then left the United States on July 28, 1982 and returned on a reentry permit on June 12, 1983 to resume his permanent residence. There is a rebuttable presumption that Dhillon's absence of approximately eleven months broke his continuity of residence and, therefore, that a new residence period began on June 12, 1983. However, Dhillon's attainment of a reentry permit shows his intent to preserve his permanent residence in the United States, thus preserving the continuity of residence. Dhillon then left the United States on August 2, 1983 and returned on June 2, 1984. Again, the rebuttable presumption that this ten-month absence of approximately eleven months broke Dhillon's continuity of residence applies, so that a new period may have begun on June 2, 1984. There is nothing in the record, however, to indicate that the continuity of residence was broken. Dhillon once again left the United States on August 8, 1984 and returned on a reentry permit on February 23, 1986, with his permanent residence status intact. According to the statute, this absence of approximately 21 months broke the continuity of residence, and a new residency period began on February 23, 1986. Dhillon has remained in the United States since his final entry on that date.

As I apply the plain meaning of § 1427(a) and (b) to Dhillon, he was eligible to file his petition for naturalization on February 23, 1991, five years from February 23, 1986, the date of his final entry into the United States. I find that Dhillon was eligible to file his application on February 23, 1991. He filed it on October 31, 1990, which I find was within six months of the date he was eligible to do so. I therefore find that Dhillon has shown that he he does not come within IRCA's first

[13] Dhillon calculated the residency period by taking his final entry of February 23, 1986, adding five years and subtracting the six months he had spent in the United States during the summers he had visited, for an eligibility date of "August/ September 1990."

exclusion of permanent residents to IRCA's protection against citizenship status discrimination.[14]

b. Two-Year Period Has Not Run Due to INS's Processing Time

Dhillon must also show that he does not come within IRCA's second exclusion. A complainant who timely applied for naturalization, but two years after such application has not been naturalized, may rebut his or her exclusion from IRCA's protection by showing that he or she is "actively pursuing naturalization." 8 U.S.C. § 1324b(a)(3)(B)(ii); see United States v. Southwest Marine Corp., 3 OCAHO 429 (May 15, 1991), Appendix A at 10 (Interim Decision and Order Denying Respondent's Motion to Dismiss; June 9, 1989) (A permanent resident alien eligible to apply for naturalization in 1970 was protected from citizenship status discrimination even though no naturalization petition was pending in 1988 because he was "actively pursuing naturalization" and, therefore, did not come within the second exclusion to permanent resident aliens protected by IRCA).

Time consumed in the INS's processing of the application, however, does not count toward the 2-year period. 8 U.S.C. § 1324b(a)(3)(B)(ii). Dhillon filed his application October 31, 1990, but to date, approximately 2 years and four months later, had not been naturalized. I find, however, that based on Dhillon's "A" file and his filing with this office of certified receipts of communications he has had with INS indicate that INS has spent a great deal longer than four months processing his application. Therefore, Dhillon does not fit within this exclusion.

Thus, Dhillon is a "protected individual" under IRCA who, as such, has standing to file allegations of citizenship status discrimination. I

[14] The fact that Dhillon applied for naturalization almost four months early did not affect my finding that he applied within six months of his eligibility to do so. Neither 8 U.S.C. § 1324b(a)(3)(B) nor its implementing regulations, found at 28 C.F.R. Part 44, indicate that a permanent resident alien must apply for naturalization after he is eligible, in order to be protected against citizenship status under IRCA. In support of this line of thinking, after the time period at issue in this case, the naturalization laws were amended to provide for early filing of the application for naturalization. See 8 U.S.C. § 1445, as amended by § 401(b) of the Immigration Act of 1990 (P.L. 101-649, Nov. 29, 1990, 104 Stat. 5038), effective on November 29, 1990 under § 408(a)(3) of that Act (allowing an applicant subject to the continuous residence requirement under 8 U.S.C. § 316(a) to file the naturalization application "up to 3 months before the date the applicant would first other wise meet such continuous residence requirement."); 8 C.F.R. § 334.2(b) (1991) (basically reiterating the statutory language).

will now address Respondent's Motion for Summary Decision with regard to the citizenship status portion of Dhillon's discharge and failure to hire claims.

2. Respondent Did Not Discriminate Based on Citizenship Status

I have previously held that claims of unfair immigration-related employment practices brought under IRCA must be proven according to a "disparate treatment" theory of discrimination. United States v. Lasa Marketing Firms, 1 OCAHO 141, at 10 (March 14, 1990), amending 1 OCAHO 106 (November 27, 1989). Disparate treatment is where an "employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n. 15 (1977); see also Gay v. Waiters' and Dairy Lunchmen's Union, 694 F.2d 531, 537 (9th Cir. 1982). IRCA added to this list of prohibited bases for discrimination an individual's citizenship status. 8 U.S.C. § 1324b(a)(1)(B). Direct or circumstantial proof of discriminatory motive is required. Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987) (en banc); Spaulding v. University of Washington, 740 F.2d 686, 700 (9th. Cir.), cert. denied, 469 U.S. 1036 (1984), overruled on other grounds. The amount of proof that must be produced in order to create a prima facie case is "very little." Lowe v. City of Monrovia, 775 F.2d 998, 1009 (9th Cir. 1985), as amended, 784 F.2d 1407 (9th Cir. 1986).

Case law developed under Title VII of the Civil Rights Act of 1964, as amended, provides guidance in determining the parties' respective burdens of producing evidence in a disparate treatment case under IRCA. See, e.g., United States v. Marcel Watch Co., 1 OCAHO 143 (March 22, 1990) ("Title VII disparate treatment jurisprudence provides the analytical point of departure for [IRCA discrimination] cases.").

> In order to prevail in a Title VII disparate treatment case, a plaintiff must first establish a prima facie case of discrimination. The burden of production then shifts to the respondent to articulate a legitimate nondiscriminatory reason for the adverse employment decision. If the respondent carries its burden, the plaintiff is then afforded an opportunity to demonstrate that the asserted reason was a pretext or discriminatory in its application.

Diaz v. American Telephone & Telegraph, 752 F.2d 1356, 1358-59 (9th Cir. 1985) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973)). "The district court must decide which party's explanation of the employer's motivation it believes." Castillas v. United States

Navy, 735 F.2d 338, 342 (9th Cir. 1984) (quoting United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 717 (1983)). The plaintiff, however, at all times retains the ultimate burden of persuasion. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); see also Castillas, 735 F.2d at 342.

In order for Complainant to prove a prima facie case of discriminatory discharge under IRCA, he must show that:

(1) he belonged to a class of individuals protected under IRCA;

(2) he was performing his job well enough to rule out the possibility that he was discharged for inadequate job performance; and

(3) his employer sought a replacement with qualifications similar to his own, thus demonstrating a continued need for the same services and skills.

See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); see also Burdine, 450 U.S. at 253 n.6 (explaining that the McDonnell Douglas formulation is flexible, so it can be adapted to fit the facts of each case); Pejic v. Hughes Helicopters, Inc., 840 F.2d 667, 672 (9th Cir. 1988) (applying McDonnell Douglas framework to Title VII discriminatory discharge case); Sengupta v. Morrison-Knudseff Co., 804 F.2d 1072, 1075 (9th Cir. 1986) (same). The prima facie case is established by a preponderance of the evidence. Burdine, 450 U.S. at 252-253; Castillas, 735 F.2d at 343; Iandolo v. New York Zoological Society, OCAHO Case No. 91200169 (Decision and Order; June 30, 1992).

It is undisputed that Complainant satisfies the first and second elements. He is a "protected individual" under IRCA, as discussed supra at section III(C)(1) and he performed his job as a Laboratory Assistant II well enough to rule out his being discharged for inadequate job performance. Complainant is unable to prove the third element, however, as Respondent did not seek a replacement for the position of Laboratory Assistant II. See Pejic, 840 F.2d at 672 (applying McDonnell Douglas framework to Title VII discriminatory discharge case); Sengupta, 804 F.2d at 1075 (9th Cir. 1986). Because Complainant has failed to establish a prima facie case of discriminatory discharge based on citizenship status, the citizenship portion of his discharge claim is dismissed.

In order for Complainant to prove a prima facie case of failure to hire under IRCA, he must show that:

(1) he belonged to a class of individuals protected under IRCA;

(2) he applied for and was qualified for the position with the employer;

(3) despite being qualified, he was rejected for employment by the employer; and

(4) after being rejected, the position remained open and the em- ployer continued to seek applications from similarly qualified applicants.

Ipana v. Michigan Dept. of Labor, 2 OCAHO 386, at 14 (October 17, 1991); United Stats v. Marcel Watch, Co., 1 OCAHO 143 (March 22, 1990); United States v. Mesa Airlines, 1 OCAHO 74 (July 24, 1989), appeal dismissed, No. 89-9552 (10th Cir. 1991); see Lindahl v. Air France, 930 F.2d 1434, 1437 (9th Cir. 1991) (applying this formulation to a discriminatory failure to hire claim under Title VII).

Complainant has satisfied all the elements of a prima facie case of discriminatory failure to hire under IRCA. At the time of the alleged discrimination, he was a "protected individual" under 8 U.S.C. § 1324b(a)(3); he applied for and was qualified for the position of Laboratory Assistant III; and Respondent rejected him for the position and sought applications from similarly qualified applicants. Complainant, therefore, has made a prima facie case of discrimination as to Respondent's failure to hire him for the position of Laboratory Assistant III.

The burden then shifts to Respondent to assert a legitimate nondiscriminatory reason for his failure to hire Complainant Respondent states that Complainant was not offered the position of Laboratory Assistant III because he objected to the classification, hours and salary of the new position. I find that to be a legitimate reason for Respondent not to hire Complainant. The burden then shifts to Complainant to demonstrate that the reason given by Respondent was a pretext for citizenship status discrimination.

Despite Complainant's ample opportunity for discovery, he has failed to submit any evidence that indicates that Respondent's decision not to hire Complainant for the position of Laboratory Assistant III was based in any way on his citizenship status. See Goldberg v. B. Greed & Co., Inc., 836 F.2d 845 (4th Cir. 1988) (evidence in rebuttal of employer's nondiscriminatory reason must bear in some fashion upon intent); Friedel v. City of Madison, 832 F.2d 965 (7th Cir. 1987) (same).

There is evidence in the record that some derogatory comments were made to Complainant by a Management Service Officer. This is the only evidence Complainant has submitted which suggests that Respondent's decision was based on unlawful discrimination. These comments, however, concerned Complainant's national origin, a matter quite distinct from Complainant's citizenship status. See Espinoza v. Farah Manufacturing Company, 414 U.S. 86 (1973) (distinguishing national origin discrimination from discrimination based on citizenship or alienage); see also Mesa Airlines, 1 OCAHO 74 (ALJ found employer's policy of hiring only United States citizens to constitute citizenship status discrimination in violation of IRCA). Such evidence is an insufficient basis on which to make a finding of intentional discrimination. See Liberty Lobby, 477 U.S. at 252; Celotex, 477 U.S. at 322. I therefore find that Complainant has failed to fulfill his burden of demonstrating that Respondent's reason for not hiring Complainant was a pretext for citizenship status discrimination. Thus, the citizenship portion of Complainant's failure to hire claim is dismissed.

D. Determination

Accordingly, Respondent's motion for summary decision is granted.

This Decision and Order is the final administrative order in this case, pursuant to 8 U.S.C. § 1324b(g)(i). Not later than 60 days after entry, Complainant may appeal this Decision and 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. 8 U.S.C. § 1324b(i)(1).

SO ORDERED this 10th day of March, 1993.

ROBERT B. SCHNEIDER
Administrative Law Judge