

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

July 18, 2024

ZAJI OBATALA ZAJRADHARA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324b Proceeding
)	OCAHO Case No. 2021B00061
ALJERIC GENERAL SERVICES, LLC a.k.a.)	
ALJRIC GENERAL SERVICES, LLC,)	
Respondent.)	
_____)	

Appearances: Zaji Obatala Zajradhara, pro se Complainant
Colin Thompson, Esq., for Respondent

FINAL DECISION¹ AND ORDER

This case arises under the employment discrimination provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324b.

On September 29, 2021, Complainant filed his Complaint, alleging discrimination based on national origin² and/or citizenship status, and retaliation. 8 U.S.C. §§ 1324b(a)(1) and (a)(5).

On December 1, 2021, Respondent provided an Answer.

On September 13–15, 2023, the Court held an in-person hearing pursuant to 28 C.F.R. § 68.39.

The record ultimately closed on June 14, 2024.

¹ In conformity with 28 C.F.R. § 68.52(e), this is the Final Order in this case. OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2023).

² This allegation was dismissed on July 15, 2024 in a separate order.

I. BRIEF SYNOPSIS

To better orient the reader, the Court provides this brief synopsis of the facts which give rise to the Complaint.³

Complainant, a citizen of the United States, resides on the island of Saipan, in the Commonwealth of the Northern Marianas Islands (CNMI), a United States Territory. The CNMI has unique visa options available for eligible individuals.

Respondent, Aljric General Services, is a business located on the island of Saipan with a staff of approximately five people. It provides commercial cleaning services, primarily in the hospitality industry.

On May 31, 2021, Complainant applied for the Operations Manager position with Respondent, of which he was made aware through the CNMI Department of Labor.

By June 28, 2021, Complainant was not selected for the Operations Manager. Respondent did hire an individual for this position; the hired individual was the incumbent holder of the position.

At the hearing, Complainant identified his protected activity as the IER complaint which gave rise to this case, which he filed on June 28, 2021. He stated he applied to the position at issue, (and other advertised positions with Respondent), but was not selected for any vacancies.

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³ An omission or inclusion of a fact in this brief synopsis should not be construed as dispositive to the analysis. This section merely serves to orient the reader. The Court made full Findings of Fact, which are available at a later section of this Order.

III. PROCEDURAL HISTORY

On September 21, 2021, Complainant filed his Complaint. He alleges that Respondent discriminated against him due to his citizenship and national origin and retaliated against him.⁴ Complainant seeks back pay from June 16, 2021.

On December 1, 2021, Respondent filed its Answer, denying the allegations in the Complaint.

On September 27, 2022, the Court issued an Order to Show Cause requiring Complainant to prove the Court had jurisdiction over his national origin allegation (based on the number of Respondent's employees). *Zajradhara v. Algeric Gen. Servs., LLC*, 16 OCAHO no. 1432b, 3-5 (2022).

On January 11, 2023, the Court issued an Order on Complainant's Motion to Compel and on Subject Matter Jurisdiction. *Zajradhara v. Algeric Gen. Servs., LLC*, 16 OCAHO no. 1432c (2023). In this Order, the Court held Complainant had not "met his burden to assure the Court of its subject matter jurisdiction over his national origin discrimination claim . . . The appropriate disposition of a jurisdictionally deficient complaint is dismissal of the case." *Id.* at 6. After issuance of this January 2023 Order, Complainant had one stayed allegation,⁵ and two active allegations remaining - citizenship discrimination and retaliation.

In preparation for the hearing, the Court issued several orders.

On May 3, 2023, the Court issued an Order Clarifying Complainant's Prehearing Submission. The Court explained the elements of a prima facie case of citizenship discrimination under 8

⁴ Complainant alleged that he was not hired because "[he has] continued to expose the CW-visa fraud system here in the CNMI" as a "pro-American worker advocate and activist," and the Respondent hired a "foreign worker, my primary assumption would be CW-1 workers of Filipino nationality." Compl. 9 (revised for clarity).

As to retaliation, Complainant alleges Respondent is a "document handling" company, and "probably is a member of the United Filipino Unition and/or is founded by members who were at some point a CW-1 worker, as such, they know that I am a pro-American worker advocate – as such, took a retaliatory perspective at the idea of my application; and thus did not hire me." *Id.* at 11 (revised for clarity).

⁵ At the time of issuance of that order, the Court opined that because it "finds itself in a position wherein it is unable to execute this disposition [i.e. dismissal of the national origin allegation], it now issues a stay of proceedings as to Complainant's national origin claim." *Zajradhara*, 16 OCAHO no. 1432c, at 7.

U.S.C. § 1324b(a)(1), and the elements of a prima facie case of retaliation under 8 U.S.C. § 1324b(a)(5). After receiving this guidance, the parties were permitted to supplement their proposed witnesses and exhibits.

On June 15, 2023, the Court issued a subpoena to an employee of the CNMI Department of Labor to ensure the record contained accurate information related to the CNMI Department of Labor Job Vacancy Announcement (JVA) process. *Zajradhara v. Algeric Gen. Servs., LLC*, 16 OCAHO no. 1432g, 5 (2023).

On September 1, 2023, the Court provided an Order Issuing Guidance for Upcoming Hearing. The Court provided information about the hearing structure and logistics, the handling of witnesses and exhibits during the hearing, and post-hearing processes.

The Court held an in-person hearing on September 13–15, 2023 at the United States District Court, District Court for the Northern Mariana Islands. Complainant personally appeared, was present for the entirety of the hearing, and chose to represent himself. Respondent personally appeared, was present for the entirety of the hearing, and was represented by counsel. At the conclusion of the proceedings, the record remained open to allow for documentary submissions related to damages. Post-Hearing Order – Damages Exhibit Submission Schedule 1–2 (citing 28 C.F.R. § 68.49(a)). After providing an opportunity to submit documentary evidence, the Court closed the record on November 21, 2023 (although it was later re-opened, closing again on June 14, 2024).⁶

On April 15, 2024, the Court certified the hearing transcript. Both parties had an opportunity to review the transcript and submit motions related to the transcript contents and accuracy prior to the Court’s certification. *Zajradhara v. Algeric Gen. Servs.*, 16 OCAHO no. 1432h, 1–2 (2024).

On April 15, 2024, the parties were provided with a schedule for submitting post-hearing briefings. Post-Hearing Order – Order Certifying Hearing Transcript and Setting Briefing Schedule 2 (Apr. 15, 2024). This schedule was later revised. Post-Hearing Order—Order Revising Post-Hearing Briefing Schedule 1–2 (Apr. 18, 2024).

On April 16, 2024, Complainant submitted his written brief.

⁶ On May 13, 2024, the Court issued a Post-Hearing Order Re-Opening Record – National Origin Basis Only, in which it re-opened the record to address the previously stayed (but not dismissed) national origin allegation. *Zajradhara v. Algeric Gen. Servs., LLC*, 16 OCAHO no. 1432k (2024). After providing the parties an opportunity to supplement the record, the Court closed the record on June 14, 2024. The Court considered both parties submissions, and on July 15, 2024, dismissed the allegations for the reasons outlined in a separate Order. Consequently, this Final Order addresses the remaining citizenship and retaliation allegations.

On May 28, 2024, Respondent submitted its brief on the citizenship and retaliation allegations.

IV. EVIDENCE PRESENTED AT AND PRESENTED POST-HEARING⁷

At hearing, Complainant and Respondent both presented evidence. The Court received testimony from a subpoenaed witness. This witness brought documentary evidence of his own volition, which the Court accepted for inclusion in the record. After the hearing, the Court permitted the parties to submit documentary evidence (exhibits) related to damages.

A. Witness Subpoenaed by Presiding Administrative Law Judge

Mr. James Ulloa, a labor certification supervisor for the CNMI Department of Labor (DOL), testified on September 14, 2023. Transcript Day 2, p. 27. He has worked for the CNMI DOL for 32 years. Transcript Day 2, p. 27. In his current position, he oversees the Job Vacancy Announcements (JVA's), certification, job placement, and supervising a statistics unit. Transcript Day 2, p. 27.

A JVA will identify a particular job opening at a particular employer, including details about the position and the deadline by which interested individuals must apply. Transcript Day 2, p. 29. There are standardized classifications (including standardized sub-categories and position descriptions) for jobs posted by way of JVA. Transcript Day 2, p. 40.

The JVA's are posted by employers on the CNMI DOL website, and any posting employer must first be registered as such with the CNMI DOL. Transcript Day 2, p. 28. After registration is successful, an employer can post a JVA, and the CNMI DOL expects employers to post true and accurate information. Transcript Day 2, p. 29.

When a registered employer submits a JVA, it automatically goes "live" on the CNMI DOL website, and can be changed by the employer at any point before it closes (i.e. the end of the 21-day posting period), but a change must be minor and will need approval by the CNMI DOL. Transcript Day 2, p. 72, 73, 80. If a change is major, the CNMI DOL will tell the employer they must cancel the JVA and repost. Transcript Day 2, p. 82. The CNMI DOL may ask to see US

⁷ The hearing occurred over the course of three days. The transcripts will be referred to as "Transcript Day #, p. #." All exhibits furnished by Complainant (for identification or for inclusion in the record) were marked with a number. All exhibits furnished by Respondent (for identification or for inclusion in the record) were marked with a letter. All remaining exhibits were placed in the record by the ALJ. These exhibits were marked with a roman numeral.

(i.e. federal) DOL-generated documents when an employer seeks to change a posted and active JVA to ascertain what kind of change it is (providing as an example that a requested update could simply be a typographical error). Transcript Day 2, p. 83.

Specific to JVA posting and CW-1 visa-related positions,⁸ the JVA must be posted for 21 days. Transcript Day 2, p. 52. When a JVA relates to a CW-1 visa-related position, there are additional steps antecedent to the JVA posting. Transcript Day 2, p. 55. The US Department of Labor's Office of Foreign Labor Certification may first provide a Notice of Acceptance to the employer (and only to the employer, not to the CNMI DOL). Transcript Day 2, p. 55, 60. After the employer receives the US DOL Notice of Acceptance, it has 14 days to post the JVA. Transcript Day 2, p. 56. At the conclusion of the 21-day posting window, the US DOL does not require a certification from the CNMI DOL; rather the employer only need show proof of posting the JVA on the CNMI DOL website. Transcript Day 2, p. 103.

Mr. Ulloa oversees the certification process – a certification is something a registered employer can request. Transcript Day 2, p. 32. Specifically, the request for certification is a request (from an employer) of the CNMI DOL stating there were no qualified applicants for a particular position. Transcript Day 2, p. 33. In considering whether to issue a certification, Mr. Ulloa, on behalf of the CNMI DOL, could withhold a certification if there were a disagreement between him and the requesting employer as to whether any applicants were in fact qualified. Transcript Day 2, p. 35. If such a disagreement were to occur, it would be resolved by a hearing process within the CNMI. Transcript Day 2, p. 36.

Specific to this case, Mr. Ulloa was provided the JVA at issue to refresh his recollection before providing testimony. Transcript Day 2, p. 85. For this JVA, there were no “self-referrals,” meaning no one registered with the CNMI DOL replied to the JVA through the website.

⁸ The Court will take official notice, *see* 28 C.F.R. § 68.41, of information about the CW-1 visa available through United States Citizenship and Immigration Services:

The CNMI-Only Transitional Worker (CW-1) visa classification allows employers in the CNMI to apply for permission to employ individuals who are otherwise ineligible to work under other nonimmigrant worker categories. The CW classification provides a method of transition from the former CNMI foreign worker permit system to the U.S. immigration system.

<https://www.uscis.gov/working-in-the-united-states/temporary-workers/cw-1-cnmi-only-transitional-worker>.

Transcript Day 2, p. 85. The CNMI DOL does have notes within their internal-facing portion of the website memorializing Complainant did apply directly with this employer for the position on May 31, 2021. Transcript Day 2, p. 89. (This document became Exhibit I). Mr. Ulloa explained this JVA was changed by the CNMI DOL after the posting had closed, even though this was not the normal procedure. Transcript Day 2, p. 113. Mr. Ulloa did not have an independent ability to recall why this was done; he speculated it was perhaps because a change from 15 openings to one opening might have been considered a typographical error. Transcript Day 2, p. 116. He does not recall looking at any documentation from the US DOL before changing the JVA. Transcript Day 2, p. 116. Mr. Ulloa doesn't recall if he was asked to certify this JVA (request from the employer). Transcript Day 2, p. 93.

Court Exhibit I is a four-page document that Mr. Ulloa brought with him to hearing. It is a print-out of the CNMI Department of Labor internal-facing website for the JVA at issue, electronically date-stamped August 29, 2023. The document lists Aljric as the employer with contact information, including contact information for Ms. Alma Habos. It lists the JVA type as "renewal" and the visa type as "CW." The number of openings is "one" and the job classification is "management operations," with a job title of "operations manager." It provides the job duties,⁹ and states the position requires a high school diploma and six months of work experience. The document memorializes Complainant applied to this vacancy on May 31, 2021.

B. Complainant Witness Testimony

The Complainant testified. The presiding ALJ reminded him parties previously stipulated to some facts (and he need not present evidence related to those facts). Transcript Day 2, p. 128. Specifically, Respondent stipulated the Complainant is a U.S. citizen; there was a vacant position (the JVA); Complainant applied for that vacant position; and Complainant was not selected for that vacant position. Transcript Day 2, p. 129. The presiding ALJ informed Complainant he could develop the record further as to the causal link between his non-selection and citizenship status, and he could develop the record further as to his protected activity. Transcript Day 2, p. 129–33. The Complainant clarified Respondent had five employees. Transcript Day 2, p. 148.

On his non-selection allegation, Complainant testified about process anomalies for the JVA posted with the CNMI DOL. Transcript Day 2, p. 141. He noted there were 15 open positions according to the JVA. Transcript Day 2, p. 141. Complainant stated he was qualified for the position listed – Operation Manager. Transcript Day 2, p. 141. Following a question from the

⁹ For context, the job duties include "prepare business proposals... meeting with present customers... follows management instructions as per project specifications... monitor and check project is within budget... marketing and sourcing of materials... implement safety and discipline to all workers..." Ex. I, p. 2.

presiding ALJ, the Complainant explained his resume listed experience which demonstrated his qualifications (like owning a business or operating a business). Transcript Day 2, p. 149.

Complainant detailed his interactions with the company (Respondent). Transcript Day 2, p. 141. According to Complainant, Respondent's owner and operations manager (Ms. Alma Habos) confirmed receipt of his application, and on June 19, 2021 she emailed him requesting he bring in identification and employment verification documents, providing a start date of October 1, 2021. Transcript Day 2, p. 142. He received another email on June 28, 2021¹⁰ which stated Respondent would not be hiring him for this position after a review of his resume and a background check. Transcript Day 2, p. 142.

Complainant identified his protected activity as filing a complaint with IER. Complainant lodged this matter with IER on June 28, 2021 (the same day he received the rejection email from Respondent). Transcript Day 2, p. 131; Ex. 15. When asked to clarify the alleged retaliatory action taken by Respondent, Complainant explained it was the denial of employment. Transcript Day 2, p. 132. He clarifies that the jobs to which he applied are evidenced in his Exhibit 14.

On cross-examination, Complainant reviewed his resume. Transcript Day 2, p. 176. Complainant explained he believed the Respondent business was possibly one of construction, marketing, or project-oriented office-work, or alternatively, it was a "visa mill." Transcript Day 2, p. 178–79. Ultimately, Complainant did not seek additional information about the nature of the business, as he concluded he could glean enough about the position from the JVA. Transcript Day 2, p. 190. Complainant explained that CW visa-designated positions were for "unskilled" or "semi-skilled" individuals, and thus his experience owning his two businesses should have qualified him for the position. Transcript Day 2, p. 192.

Complainant was also questioned about his formal education. Transcript Day 2, p. 195. Complainant's resume reflects he earned a GED. Transcript Day 2, p. 195. Complainant explained that he left school in the sixth grade due to his family's situation, and he later earned his GED as an adult. Transcript Day 2, pp. 195, 197.

As to retaliation, Complainant could not provide an example of protected activity (i.e. contact with IER) prior to June 28, 2021. Transcript Day 2, p. 201. He stated he informed Respondent he would "file a federal complaint" the same day of his non-selection. Transcript Day 2, p. 199.

¹⁰ Exhibit 1, and at page 6 states "After a thorough review of your resume and background check, we're sorry to inform you that we finally decided not to hire you for this position to run our company. This is a very sensitive position that deals with our present and prospective clients, customers, and workers. We will try to consider you for other positions in our company."

Under the construct of Federal Rule of Evidence¹¹ 613(b), Respondent moved into the record (with no objection from Complainant) Exhibit D (during cross-examination), a document where Complainant attested he had never been convicted of a crime; however Complainant had previously been convicted of a crime (the record of that conviction was offered as Exhibit E). Transcript Day 2, pp. 208, 220. After providing Complainant the opportunity to explain and/or deny his prior statement, and providing Respondent an opportunity to examine Complainant about it, the presiding ALJ determined both exhibits admissible as extrinsic evidence of a prior inconsistent statement. *See* Fed. Rule Evid. 613.

On damages, Complainant discussed his current lack of employment, and provided his rationale for the dollar amount he claimed in damages.¹²

C. Complainant's Exhibits

Complainant offered many exhibits (20 in total); each was considered, and most were moved into the record (his proposed exhibits 3, 6, 11, 17, and 18 for identification were excluded or withdrawn).

Complainant provided exhibits specific to the position to which he applied and/or his interactions with Respondent-employer.¹³ Complainant also provided exhibits pertaining to the CNMI and his general advocacy efforts on local issues.¹⁴ He provided exhibits relating to his other business

¹¹ The forum is not bound by the Federal Rules of Evidence; however they are a “general guide to all proceedings.” 28 C.F.R. § 68.40(a); *see also* *Ogunrinu v. Law Resources*, 13 OCAHO no. 1332b, 2 (2019) (noting that the “FRE do not automatically apply to cases before federal agencies governed by the Administrative Procedure Act (APA),” but that “[i]t is proper for a party to cite the FRE as persuasive authority, and evidence that would be admissible under the FRE clearly will be accepted in an OCAHO case”) (internal quotations omitted) (citing *Hsieh v. PMC-Sierra, Inc.*, 9 OCAHO no. 1093, 8 (2003)).

The Presiding ALJ offered a physical copy of the Federal Rules of Evidence Article VI Witnesses (which contains Rule 613) to Complainant during a break to ensure he could meaningfully opine on this issue.

¹² Because the Court does not find Respondent liable, it need not provide greater detail about Complainant's testimony related to damages.

¹³ These include Exhibit 1 – Email correspondence between Complainant and Respondent (May 2021) and Exhibit 15 – 13 Jul 21 Complainant email to IER.

¹⁴ These include Exhibit 2 – “What is a ‘Persona Non Grata’ and is it really a bad thing?”; Exhibit 4 – Complainant letter to VP and other secretaries and members of Congress; Exhibit 7 –

enterprises.¹⁵ Finally, he submitted an exhibit with his proposed damages calculations and later, post hearing, he submitted a revised version of those damages calculations.¹⁶

Exhibit 1 (E-mail Correspondence between Complainant and Respondent (May 2021)) is a document providing the correspondence from Complainant to Respondent and the CNMI DOL providing his resume for the JVA at issue, and reflects the following:

On May 31, 2021, Complainant initiates the correspondence by emailing Respondent and attaching his resume.

On June 16, 2021, Respondent replies to Complainant's email and states: "Thank you for your interest in joining our company. We found your resume and employment documents interesting, BUT please note that this job opportunity is full-time BUT temporary and the intended start date of employment is from October 1, 2021 up to September 30, 2022. Please take time to call us at [phone number omitted] or drop by our office in Dandan, Saipan and we are much willing to discuss to you this job offer." Ex. 1, p. 5.

On June 19, 2021, Complainant responds and states: "I don't mind that the job is only for 1 year; it's a great salary for a great position; wherein I can learn additional skills and add experience to my resume. I want to thank you in advance for this opportunity. I shall be contacting your office on Monday." Ex 1, p. 6.

On June 28, 2021, Respondent sends the following email: "After thorough review of your resume and background check, we are sorry to inform you that we finally decided not to hire you for this position to run our company. This is a very sensitive position that deals

CNMI HR declaring Complainant persona non grata; Exhibit 8 – Complainant letter to Congressman Bruce Westerman; Exhibit 9 – Letter from CNMI AG – declining prosecution for a criminal case; Exhibit 10 – Author David North Article about Complainant; Exhibit 13 – Letter from Complainant to US DOL; Exhibit 14 – 23 May 22 email from Complainant to Respondent & government officials about other Respondent JVA's; Exhibit 16 – Sep 23 email correspondence from Complainant to members of US federal government (DoD, Congress, etc).

¹⁵ These include Exhibit 12 – Certificate from Myanmar referencing Panopticon Group WW (company with which Complainant is affiliated).

¹⁶ These include Exhibit 19 – Complainant's Initial Damages Calculations, and Exhibit 20 – Complainant's Damages Calculations on 22 Sep 23. Of note, Exhibit 20 entered the record post-hearing, and is accompanied by Court Exhibit II – October 4, 2023 Email from Court Admitting Complainant Exhibit 20, which demonstrates the way by which the Court received the evidence. Because the Court does not find in favor of Complainant, it need not address damages exhibits.

with our present and prospective clients/customers and workers. We will try to consider you for other position in our company.” Ex 1, p. 6.

On June 28, 2021, Complainant replies (in all capital letters): “Okay, please know that I shall file the necessary federal complaint regarding issue. Thank you and have a great day.” Ex 1, p. 7.

Exhibits 2, 4, 7, 8, 10, 13, and 16 relate to Complainant’s advocacy efforts related to visa policy and immigration in the CNMI. Complainant provided a CNMI Legislature’s House Resolution declaring him a “persona non-grata” in 2019, which cites the frequency of matters between him and businesses in the CNMI. In his correspondence to various federal government officials, he expresses his concerns and viewpoints related to the CW-1 visa and its impact on “indigenous” people and “American workers,” and non-payment of benefits (“PUA”). Ex 4, p. 3; Ex. 13.

Exhibit 5 provides generalized information and viewpoints about US domestic policy related to labor issues and the economy.

Exhibits 9 and 12 relate to Complainant, but don’t appear to have a direct link to the facts which gave rise to his allegations. Specifically, one is from the Attorney General of the CNMI stating his office is declining prosecution in a criminal case, and one relates to a business in Myanmar to which Complainant may have ties or in which he may have an ownership interest.

Exhibit 14 (originally referenced by Complainant as the exhibit which shows additional positions to which he applied under his retaliation theory) contains email correspondence and a JVA for janitorial positions at Respondent business in April 2022. The correspondence (from Complainant to Respondent) surrounding this JVA does not show he applied for this position; rather it shows Complainant expressed his opinion to Respondent (and various government officials) as to whether Respondent had properly (or “fraudulently”) completed the JVA and CW-1 visa process.

D. Respondent Witness Testimony

On the third day of the hearing, Ms. Alma Habos, the owner and operations manager of Aljric General Services, LLC, testified. Transcript Day 3, pp. 30, 42. She started Aljric General Services, LLC, in 2016 to provide janitorial and professional cleaning business. Transcript Day 3, p. 31. She is a native and citizen of the Philippines, and she speaks English as her third language. Transcript Day 3, p. 32. She has three U.S. citizen children. Transcript Day 3, p. 50.

She first came to Saipan, CNMI in 1994 and worked as a housekeeping cleaner for the Saipan Grand Hotel from 1994 through 2010. Transcript Day 3, p. 33. In 2010, she moved to a different hotel, and worked as a housekeeping supervisor. Transcript Day 3, p. 38. As a supervisor, she performed quality control, conducted training, and completed other management

tasks. Transcript Day 3, p. 40. She has a bachelor's degree in hotel and restaurant management, which includes professional cleaning. Transcript Day 3, p. 35. In professional or commercial cleaning, there are operating standards. Transcript Day 3, p. 36.

As to the JVA at issue, Ms. Habos confirmed she posted it on the CNMI DOL website. She stated it was for the operations manager position. Transcript Day 3, p. 42. She confirmed Complainant did in fact apply for this position. Transcript Day 3, p. 43. She ultimately chose to hire herself into the position. Transcript Day 3, 43. If she had selected someone other than herself for the position, she would have had to depart the CNMI. Transcript Day 3, p. 61. She does not view this as a conflict, because "it is [her] business." Transcript Day 3, p. 63. She stated this JVA was characterized as a "renewal." Transcript Day 3, p. 80. She also sought a Notice of Acceptance from the US DOL in advance of posting the JVA, and in that Notice she listed one, not 15 positions. Transcript Day 3, p. 118.

She is familiar with the CW-1 visa and the application process, as she applies for them for her business (and has done so for several years). Transcript Day 3, pp. 56, 70. She stated her company applies for CW-1 visas for cleaning positions. Transcript Day 3, p. 56.

When asked why she declined to hire Complainant, she provided a few reasons. First, she stated she did not hire him "based on his resume [Exhibit C]... He doesn't have experience as much that I can do... He [] only... has a limited... experience through housekeeping with cleaning services... [it doesn't show that] he cleans hotel rooms or houses." Transcript Day 3, p. 43-45. When asked about the specific experience in his resume, she felt it was distinguishable from the work her company performs (i.e. she believes FEMA debris removal is not like commercial cleaning). Transcript Day 3, p. 67.

She was aware of Complainant, based on information she saw in newspapers, specifically "about domestic violence and some threatening issue... So [she was] kind of scared... because it's [her] small business that [she] develop[ped].... [She doesn't] think he can run the business [as well as] she can." Transcript Day 3, p. 47.

She did not consider Complainant's citizenship status in her decision not to hire him. Transcript Day 3, p. 49. Two part-time employees of her business are U.S. citizens; one is Chamorro (indigenous to the Marianas Islands) and one is Filipino. Transcript Day 3, p. 51. There are five total employees (including her). Transcript Day 3, p. 52.

She said Complainant did not inform her of a "case against [her]," and such a case played no part in her decision not to hire him. Transcript Day 3, p. 49.

E. Respondent's Exhibits

Respondent provided six exhibits in total, including the JVA for the position at issue (Exhibit A); Email Correspondence from Respondent to Complainant – non-selection for position (Exhibit B);¹⁷ Complainant Resume for JVA Position (Exhibit C); Petition for Name Change (Exhibit D); Criminal History of Complainant (Exhibit E); and the US DOL Notice of Acceptance (Exhibit F). Respondent submitted no exhibits pertaining to damages.

Exhibit A, the JVA for the position at issue, is a five-page document internally date-stamped June 26, 2021. The JVA provides the position information and details of the vacancy consistent with descriptions above; however the final page is an email from Respondent to the CNMI DOL. Respondent emails Mr. James Ulloa on June 21, 2021 and requests he “make necessary correction... specifically please change [number of openings] from 15 to only 1.” Exhibit A, p. 5. On June 23, 2021, Mr. Ulloa responds “correction made as noted.” Exhibit A, p. 5.

Exhibit C, Complainant's Resume, is a 32-page document. It is the resume he provided when he applied for the vacant position. The resume lists his experience dating back to 1995, awards and certificates, and education; beginning at page 9 are copies of each listed certificate/ certification.

Exhibit's D and E relate to Respondent's efforts to show Complainant's prior inconsistent statements. Exhibit D is a pro se petition for “change of name” in 2012 wherein Complainant states he “has never been convicted of a crime.” Exhibit E is a Register of Actions from the State of Minnesota showing Complainant was convicted of a crime in 1997.

Exhibit F is a 7-page letter with instructions from the US DOL to Respondent pertaining to Respondent's “Application for Temporary Employment Certification,” dated May 21, 2021. The letter informs Respondent her application to the US DOL was timely and meets the “requirements set forth in subpart E.” Exhibit F, p 1.

V. POSITION OF THE PARTIES

A. Complainant's Written Brief (April 17, 2024)

In his written submission, the Complainant states he is a citizen of the United States. He affirms his allegation relates to discrimination based on citizenship status and separately add he seeks “[to] implement regulations at 20 C.F.R. Part 655.”¹⁸ Complainant's Br. 2.

¹⁷ This exhibit is one page, and is identical to Complainant's Exhibit 1, page 6.

¹⁸ These regulations are Department of Labor regulations pertaining to the temporary employment of foreign workers in the United States.

Specifically, he explains he applied for a position listed through a May 2021 Job Vacancy Announcement (JVA) as Operations Manager with Respondent; however he was not selected. Complainant's Br. 2. He states he was qualified for the position, and the Respondent declined to hire him, instead hiring a CW-1 (visa) worker. Complainant's Br. 2. He argues these facts demonstrate they acted with "discriminatory preference for hiring a foreign worker over a qualified U.S. citizen." Complainant's Br. 2.

He provides a description of the "Workforce Act and its implementing regulations at 20 C.F.R. Part 655, Subpart E." According to Complainant, the Act and regulations state "employers seeking to hire CW-1 workers must first conduct a good faith recruitment effort for qualified U.S. workers [by] posting a clear and accurate JVA... Utilizing the CNMI Department of Labor job listing system . . . [and c]onsidering U.S. applicants" Complainant's Br. 2–3.

With this framework, Complainant concludes Respondent did not comply with the Workforce Act and the regulation because the JVA first listed 15 openings and then later was reduced to one; the Respondent did not properly comply with the CNMI Department of Labor job listing system requirements; and he (a U.S. citizen) was not interviewed and was thus not considered. Complainant's Br. 2–3. Complainant asks the Court to consider Respondent's alleged non-compliance with the Workforce Act and regulation because he argues it demonstrates Respondent intended to hire the selectee because of her visa status. Complainant's Br. 3.

His written submission does not reference the record (transcript or admitted exhibits).

B. Respondent's Written Brief

On May 28, 2024, Respondent provided its written submission. In conformity with the instructions provided to the parties, Respondent provided proposed findings of fact (with a citation to the record for each proposed finding of fact) and proposed conclusions of law (with citations to statute or precedential decisions as appropriate).

"Processes administered by Departments of Labor (federal, state, or territorial) are outside the jurisdiction of this tribunal." *Zajradhara v. Ranni's Corp.*, 16 OCAHO no. 1426d, 6 n.8 (2023) (citing *United States v. Facebook, Inc.*, 14 OCAHO no. 1386b, 8 (2021) ("To the extent Respondent has framed the issue at hand as a referendum on its DOL [process] and whether [that] process imposes certain obligations on employers, the Court will defer to the Department of Labor.")).

Respondent's proposed findings of fact detail the qualifications of the incumbent, Ms. Alma Habos, for the advertised position, including her degree and formal education in hospitality services and her many years of housekeeping experience followed by supervisory experience in the hospitality industry. Respondent also highlighted by way of proposed findings of fact that Ms. Habos created Aljric, the Respondent business. Resp't Br. 2–4. Respondent next identified the requirements of the posted position, and then provided factual citations to the record to support the proposition Complainant did not have the required experience or other qualifications, or alternatively, Ms. Habos had superior qualifications. Resp't Br. 5–9.

Respondent's proposed conclusions of law provide citations to case law and statute leveraged to argue Complainant cannot establish a prima facie case of discrimination because he was not qualified for the vacant position, or alternatively there was a legitimate, non-discriminatory reason for his non-selection. Resp't Br. 9–15. As to retaliation, Respondent argues it was unaware of the protected activity, and the non-selection for the manager position predates the protected activity. Resp't Br. 15–19.

C. Complainant's Rebuttal to Respondent's Brief

On May 24, 2024, Complainant filed a rebuttal to Respondent's submission. Complainant disputes several of Respondent's proposed findings of fact and conclusions of law.

As to findings of fact, first, Complainant argues Respondent ignores Complainant's skills and experience—stating the record reflects his experience in management, customer service, cleaning and maintenance. Further, Respondent omits mention of Complainant's co-ownership of a four-plex, providing management, maintenance, and social experience. Rebuttal 1 (citing Ex. C). Second, Complainant argues the position was not “sensitive,” and did not require skills beyond his ability. Rebuttal 2. Third, Complainant argues there is no evidence that he demonstrated a lack of “hospitality” at his interview, describing Ms. Habos' characterization as subjective and misleading. Rebuttal 2. Fourth, Complainant argues Respondent's references to a “visa fraud” allegation are a “misdirection.” Fifth, he argues claims regarding alleged domestic violence are irrelevant. Rebuttal 2–3.

As to conclusions of law, Complainant states Respondent attempts to shift the burden of proof to Complainant by asserting that Complainant must establish a prima facie case of discrimination. On retaliation, Complainant's states his protected activity was communicating his intent to file a complaint regarding Respondent's actions, and Complainant's email informing Respondent of this intent coupled with Respondent's “subsequent actions” establishes a causal link. Rebuttal 3.

VI. ANALYSIS OF EVIDENCE

A. Evaluating Evidence (Reliability and Probative Value)

The Court must carefully analyse the evidence (documentary and testimonial) presented by the parties. To conduct this analysis, the Court will evaluate the reliability of the evidence, and then it will consider what weight, if any, to assign the evidence based on its probative value. It is this multi-step analysis which allows the Court to identify which facts may and should appear in the Findings of Fact section.

B. Evaluating Evidence – Law

1. Evaluating Documentary Evidence

The proponent of documentary evidence must “authenticate a document by evidence sufficient to demonstrate that the document is what it purports to be[.]” *United States v. Carpio-Lingan*, 6 OCAHO no. 914, 5 (1997) (citations omitted). Reliability can be analyzed by looking at whether documents “originate from the purported source;” whether other evidence calls into question a document’s reliability (i.e. disavowed correspondence); or whether a document is consistent or inconsistent with other record evidence. *See United States v. Fasakin*, 14 OCAHO no. 13751, 27–28, 32–33, 35 (2023); *see also United States v. Commander Produce, LLC*, 16 OCAHO no. 1428d (2023). “Generally, documentary evidence that is complete, signed, sworn under penalty of perjury, dated, authenticated, laid down with foundation contains sufficient indicia of reliability.” *United States v. R&SL Inc.*, 13 OCAHO no. 1333b, 24 (2022) (citing *United States v. Psychosomatic Fitness LLC*, 14 OCAHO no. 1387a, 5–7 (2021); and then citing *United States v. Bhattacharya*, 14 OCAHO no. 1380a, 4–5 (2021)).

2. Evaluating Testimonial Evidence (Credibility)

In assessing the reliability of testimonial evidence, the Court must consider whether witnesses have testified credibility. As previously observed by the CAHO:

OCAHO case law illustrates some of the factors relevant to assessing the credibility of witnesses in OCAHO proceedings. *See, e.g., United States v. Kurzon*, 3 OCAHO no. 583, 1829, 1842–43 (1993) (“However, as to Respondent’s testimony, I have found the record to be rife with examples of Respondent’s incredulous testimony, inconsistencies, suspicious memory lapses and blame shifting, leading me to find that Respondent’s testimony was not credible.”). In finding witnesses not credible, OCAHO ALJs have cited shifting and inconsistent answers, *see United States v. DeLeon Valenzuela*, 8 OCAHO no. 1004, 10 (1998); repeatedly responding to questions by testifying that the witness does not know, does not remember, or does not understand, *see id.* at 11;

testifying in a vague and evasive manner, *see id.*; demonstrably false statements, *see id.* at 12; discrepancies between hearing testimony and other record documents, *see Kurzon*, 3 OCAHO no. 583, at 1858–60; a variety of excuses or justifications for inconsistent information, *see id.*; and incorrect or inconsistent information provided by a witness in forms or proceedings unrelated to the central claims in the case, *see id.*

United States v. Fasakin, 14 OCAHO no. 1375b, 12 (2021); *see also Davis v. Alaska*, 415 U.S. 308, 318 (1974).

3. Evaluating Weight of Evidence (Probative Value)

“Only reliable evidence merits a probative value assessment. Stated a different way, if the source of the evidence is not trustworthy, its purported weight is irrelevant.” *United States v. Fasakin*, 14 OCAHO no. 1375l, 35 (2023) (citing *R&SL, Inc.*, 13 OCAHO no. 1333b, at 42).

“Probative value is determined by how likely the evidence is to prove some fact[.]” *United States v. R&SL, Inc.*, 13 OCAHO no. 1333b, 26 (2022) (citations omitted). Federal Rule of Evidence 401 provides the test for relevance; “[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” *United States v. Rose Acre Farms, Inc.*, 12 OCAHO no. 1285, 8 (2016).

Fasakin, 14 OCAHO no. 1375l, at 29.

C. Evaluating Evidence - Analysis

1. Complainant’s Evidence

a. Reliability of Documentary Evidence

In considering how to apply the rubric of reliability to Complainant’s documentary evidence, the Court remained mindful of both Complainant’s pro se status and his status as the party bearing the burden to demonstrate discrimination and retaliation. These two factors augur in favor of a more permissive analysis on reliability. Separately, Respondent was invited to provide additional argument related to any reliability concerns raised during the hearing,¹⁹ which he did on several occasions, *see* Transcript Day 3, p. 16; Transcript Day 1, p. 28.

¹⁹ “So the admission of a document is a reflection of it meeting a low standard for reliability, which is something that any party can point out in argument at the appropriate time.” Transcript Day 1, p. 30, Transcript Day 2, p. 137

Complainant's Exhibit 1 contains email correspondence between Complainant and Respondent. This document is sufficiently reliable. Complainant provided foundational explanation for how he created the exhibit, and Respondent, who testified credibly, at no point disavowed the correspondence. In fact, Respondent's own Exhibit B is identical to page 6 of Exhibit 1.

Complainant's Exhibits 2, 4, 7, 8, 10, 13, and 16 relate to Complainant's advocacy efforts surrounding visa policy and immigration in the CNMI. These documents are what they purport to be insofar as they demonstrate Complainant corresponds with individuals at various levels of government to voice his opinions and concerns related to policy issues. This set of exhibits is also consistent internally as each exhibit tends to show a consistent viewpoint and outlook held by Complainant on policy issues related to visas and immigration and each is consistent with the findings contained in Exhibit 7, which is a CNMI legislative entity detailing all the various civil activities in which Complainant is engaged. Similarly, Exhibits 9 and 12 appear to be what Complainant purports them to be; the Letter from the CNMI Attorney General appears to be the entire document, and it is on letterhead consistent with the Office of an Attorney General. It is signed and dated by its author.

Complainant Exhibit 14 contains email correspondence and a JVA for janitorial positions at Respondent business in April 2022. At no point in her testimony did Respondent dispute the additional posting of janitorial positions. Further, the email correspondence contained alongside the JVA for the janitorial positions only purports to be correspondence from Complainant to Respondent (and others) wherein he expresses his position on the propriety of Respondent's JVA. To that end, it is consistent with the group of exhibits discussed above (i.e. Complainant's policy ideas and concerns garnered from Exhibit 14 are consistent with those policy concerns outlined in other exhibits).

Complainant's admitted documentary evidence is sufficiently reliable to be considered in reaching a conclusion on the merits of his Complaint.

b. Probative Value of Documentary Evidence

While the Court takes a generous approach to reliability, it must take a more measured one in considering the probative value of the admitted exhibits. At the outset, it is worth noting that Complainant does not reference (and thus appears not to rely upon) the exhibits he provided for the Court's consideration in his written submission. That curiosity aside, the Court still independently considered the potential probative value of the exhibits.

The probative value of Exhibit 1 (email correspondence between parties about the job vacancy at issue) is high. This exhibit speaks to one of the central factual issues of the case – namely that Complainant applied, but was not selected for, a position with Respondent. The Exhibit provides

Respondent's stated reason for her decision, and it provides the factual framework (alongside other exhibits) for what was available for her consideration in making that decision.

In contrast, the probative value of Exhibits 2, 4, 7, 8, 10, 13, and 16 is low. These exhibits don't provide facts "of consequence," as Complainant's general advocacy efforts and policy initiatives don't assist the Court in understanding whether he's made a *prima facie* showing he was discriminated against when he applied to and was non-selected for a particular position. Further, these exhibits have no bearing in establishing whether he applied for future positions with Respondent employer under his retaliation theory. Through an alternate lens, these exhibits, and in particular, Exhibit 7, do show that Complainant has some notoriety in the small island community for his efforts and tactics in engaging in civil actions and advocating for his viewpoint, earning him the status of *persona non grata* from the CNMI legislative body. Thus, these exhibits may have some probative value insofar as they tend to lend credence to Respondent's assertion she was aware of Complainant or Complainant's reputation.

Similarly, Exhibits 9 and 12 have virtually no probative value. Indeed, whether the CNMI AG declined prosecution in an unrelated matter has no bearing on the employment action at issue. There is no link between that decision and Respondent's decision not to hire Complainant. Similarly, Complainant's business venture in Myanmar was unknown to Respondent at the time she decided not to hire him.

Exhibit 14, email correspondence and a Respondent JVA for janitorial positions in April 2022, has limited probative value. It shows Respondent sought employees on a date which post-dates Complainant's protected activity; however it does not show Complainant applied to these positions. Rather, the shows Complainant believed (and communicated) the Respondent's actions were in contravention of visa processing regulation/law/ policy.

c. Reliability of Testimonial Evidence (Credibility) & Probative Value

Complainant was placed under oath and testified. During his testimony, the Court had an opportunity to observe Complainant, and, while at times he was animated, there was nothing about his demeanor which would detract from his credibility. Complainant appeared to answer questions to the best of his ability,²⁰ and he was largely consistent on key points.²¹ While

²⁰ Complainant noted on several occasions he is not an attorney and was doing his best, given his education and access to resources. While he was, at times, combative with opposing counsel, observation by the presiding ALJ caused her to conclude Complainant answered questions to the best of his ability and at no point engaged in suspicious, or otherwise concerning tactics while under cross-examination.

Respondent did provide evidence of prior inconsistent statements (under a FRE 613 theory),²² on balance, this additional data point does not serve to sway the Court from its conclusion that the Complainant was credible, and his testimony could be given its due weight.

While Complainant was given wide latitude during the hearing to provide testimony he deemed important to the presentation of his case, much of it lacked probative value. The Court reminded Complainant on several occasions that concerns about CNMI DOL process or compliance are outside the scope of the hearing.

The probative portions of Complainant's testimony included his explanation of his qualifications for the vacant position, specifically identifying portions of his resume that he believed demonstrated applicable experience. He also explained that he didn't feel he needed to understand the exact nature of the business because he felt the management skillset he possessed was universal. His belief was predicated at least in part by his understanding that a CW-1 visa position was one for unskilled or semi-skilled individuals.

Complainant also used his testimony to provide clarity on his retaliation allegation – namely he confirmed the protected activity was his contact with IER on June 28, 2021, and he identified a separate vacancy with Respondent in 2022 (Exhibit 14), although he doesn't provide any additional detail about applying to that vacancy. Complainant stated Respondent would have

²¹ For example, he would provide answers that weren't responsive on cross-examination; however, his responses did not shift. *See, e.g.*, Transcript Day 2, pp. 179, 182-83, 213, 217, 223.

²² Complainant stated he had never been convicted of a crime even though he had been convicted of a crime. In considering how to evaluate his credibility, the Court considered how the age of the conviction impacted Complainant's understanding of its disposition (i.e. Complainant seemed to believe it had been expunged or otherwise removed from his record). Complainant's imprecise understanding of the nature and existence of a conviction or criminal record is consistent with his imprecise understanding of other legal concepts as observed by the Court.

The Court used a liberal approach in allowing Complainant to enter exhibits into the record even when they were barely reliable, as this would allow him to have access to exhibits he deemed key to meeting his burden. Mindful of the Court's duty to treat the parties equitably on this point, the Court felt it prudent to permit Respondent to enter evidence pertaining to this credibility issue, even though it did not seem likely to tip the balance. *See* Transcript Day 2, p. 240 (admitting State of Minnesota Register of Actions as Exhibit E pursuant to FRE 613(b), noting that Complainant could submit arguments regarding this decision in a written submission).

been aware of his protected activity also on June 28, 2021 because he informed her he would “file a federal complaint.”

2. Respondent’s Evidence

a. Reliability of Documentary Evidence

Respondent provided six exhibits in total, including the JVA for the position at issue (Exhibit A), Email Correspondence from Respondent to Complainant – non-selection for position (Exhibit B),²³ Complainant Resume for JVA Position (Exhibit C), Petition for Name Change (Exhibit D), Criminal History of Complainant (Exhibit E), and the USDOL Notice of Acceptance (Exhibit F). Respondent submitted no exhibits pertaining to damages.

Respondent’s Exhibits are all sufficiently reliable. Complainant did not raise any issues of reliability (in fact, at times, he affirms them as what they purport to be),²⁴ and each has sufficient indicia of reliability. The documents appear to be complete; where they are date-stamped, the date-stamp is temporally possible within the scope of the fact pattern.

b. Probative Value of Documentary Evidence

Respondent provides some Exhibits which pertain to the allegations directly, and some which pertain to the credibility of the Complainant. The probative value of Exhibits A, B, and C are high. These documents memorialize the vacant position at the heart of the allegation, and what documents (i.e. resume) Respondent considered in making the decision not to hire Complainant. They also provide the statements memorialized in email, close in time to the decision.

Exhibit F has limited probative value. It demonstrates Respondent engaged with the US DOL.²⁵ Whether Respondent did this process correctly has no bearing on these proceedings.

Exhibits C and D relate to Complainant’s credibility, which is invariably central to how the Court should consider or view the testimonial evidence Complainant presented. However, for

²³ This exhibit is one page, and is identical to Complaint’s Exhibit 1, page 6.

²⁴ For example, the Complainant utilizes Respondent Exhibits during his presentation, like Exhibit C, his resume. Transcript Day 3, pp. 64-67.

²⁵ It is worth noting Respondent may have offered this Exhibit purely for the Court’s benefit during the hearing (i.e. to provide clarity after a fair amount of discussion about the US DOL), vice offering it to prove or disprove any particular fact.

the reasons described above, it does not outweigh all the other identified data points auguring in favor of finding Complainant credible.

c. Reliability of Testimonial Evidence (Credibility) &
Probative Value

Respondent's owner and operations manager, Ms. Habos, was placed under oath and testified. During her testimony, the Court had an opportunity to observe her demeanor and concluded there was nothing about her demeanor which would detract from her credibility. She was responsive to questions and was consistent with the reliable documentary evidence in the record. The Court was also mindful that she is not a native English speaker, the language in which she testified.

Respondent's testimony was highly probative. She provided details about the nature of the business, her background and experience in working in hospitality and professional cleaning, and the nature of the operations manager position announced through the JVA. She explained her rationale for hiring herself instead of Complainant. She also candidly relayed she was aware of Complainant's advocacy efforts and notoriety in the community, and had articulable reasons why she did not want him to work for her company.

VII. FINDINGS OF FACT

BACKGROUND - CNMI STATUS & RELATIONSHIP TO THE UNITED STATES²⁶

1. On February 15, 1975, the Marianas Political Status Commission and a delegation from the United States signed The Covenant to Establish a Commonwealth of the Northern Marianas Islands in Political Union with the United States of America (The Covenant). Following a ratification process on the CNMI, the President of the United States signed into law the "Joint Resolution to Approve the 'Covenant,'" doing so on March 24, 1976. U.S. Pub. L. No. 94-241, 90 Stat. 263 (1976).²⁷

²⁶ While the facts contained in this sub-section may have not been expressly entered into the record by the parties; they were implicitly relied upon by each, and to ensure an accurate and thoroughly composed record, the Court makes the following factual findings, or alternatively takes official notice of the facts contained within this section. *See generally* 28 C.F.R. § 68.41.

²⁷ The Court relied upon the Commonwealth Law Revision Commission to ensure accuracy and for context. The "Commonwealth Law Revision Commission is the official compiler and publisher of Commonwealth law; [it sits within the] judicial branch of the Commonwealth government. *See* 1 CMC §§ 3801, et seq." <https://cnmilaw.gov/index.php#gsc.tab=0>.

2. “The Northern Mariana Islands... [are] a self-governing commonwealth to be known as the ‘Commonwealth of the Northern Mariana Islands,’ in political union with and under the sovereignty of the United States of America.” The Covenant, Article I, Section 101.
3. The Immigration and Nationality Act applies in the CNMI.²⁸

BACKGROUND – CNMI & TEMPORARY VISAS

4. The CNMI-Only Transitional Worker (CW-1) visa classification allows employers in the CNMI to apply for permission to employ individuals who are otherwise ineligible to work under other nonimmigrant worker categories. The CW classification provides a method of transition from the former CNMI foreign worker permit system to the U.S. immigration system.²⁹
5. The CW-1 visa is unique to the CNMI.³⁰

BACKGROUND – CNMI DEPT OF LABOR & JOB VACANCY ANNOUNCEMENTS (JVA)

6. The CNMI has its own Department of Labor (DOL). Transcript Day 2, p. 27.
7. One department within the CMNI DOL handles local job placement, the JVA program, and the provision of certification information upon request (certification is requested by employers for use with the US DOL). Transcript Day 2, p. 27.
8. Employers who wish to post a JVA must first register with the CNMI DOL, after which they may directly post a JVA to the CNMI DOL website. Transcript Day 2, p. 28–29.
9. JVA’s will identify a particular job opening at a particular employer, using standardized position descriptions and job classifications (alongside other key details about the position, like start date, pay, application deadline, etc.) Transcript Day 2, p. 29, 40.

²⁸ The original Covenant had caveats pertaining to immigration and citizenship; however on May 8, 2008, Congress amended the applicable section by striking it from the Covenant, making the immigration laws (i.e. the INA) of the United States applicable within the CNMI. Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, § 702(g)(1)(B), 122 Stat. 754, 864 (2008); *see also* Executive Order 12572, 51 Fed. Reg. 40401, (Nov. 3, 1986) (providing that the Department of Interior Office of Insular Affairs provides “administrative supervision” of the “relations of the United States with the Government of the Northern Mariana Islands”); *Commonwealth of the Northern Mariana Islands, Political Status*, Department of the Interior, <https://www.doi.gov/oia/islands/cnmi>.

²⁹ <https://www.uscis.gov/working-in-the-united-states/temporary-workers/cw-1-cnmi-only-transitional-worker>.

³⁰ *Id.*

10. When a registered employer submits a JVA, it automatically goes “live” on the CNMI DOL website, and can be changed by the employer at any point before it closes (i.e. the end of the 21-day posting period), but a change must be minor and will need approval by the CNMI DOL. Transcript Day 2, p. 72, 73, 80.
11. If a change is major, the CNMI DOL will tell the employer they must cancel the JVA and repost. Transcript Day 2, p. 82.
12. The CNMI DOL may ask to see US (i.e. federal) DOL-generated documents when an employer seeks to change a posted and active JVA to ascertain what kind of change it is (i.e. was the requested update related to a typographical error). Transcript Day 2, p. 83.
13. Specific to JVA posting and CW-1 visa-related positions, the JVA must be posted for 21 days. Transcript Day 2, p. 52.
14. When a JVA relates to a CW-1 visa, there are additional steps antecedent to the JVA posting. Transcript Day 2, p. 55.
15. The US Department of Labor’s Office of Foreign Labor Certification may first provide a Notice of Acceptance to the employer (and only to the employer, not to the CNMI DOL). Transcript Day 2, p. 55, 60.
16. After the employer receives the US DOL Notice of Acceptance, it has 14 days to post the JVA. Transcript Day 2, p. 56.
17. At the conclusion of the 21-day posting window, the US DOL does not require a certification from the CNMI DOL; rather the employer only need show proof of posting the JVA on the CNMI DOL website. Transcript Day 2, p. 103.
18. CNMI DOL provides “certification” when requested to do so by a registered employer. Transcript Day 2, p. 32.
19. Certification is a request (from an employer) of the CNMI DOL stating there were no qualified applicants for a particular position. Transcript Day 2, p. 33.
20. CNMI DOL could withhold a certification if there were a disagreement between it and the requesting employer as to whether any of the applicants were in fact qualified. Transcript Day 2, p. 35.
21. Such certification/qualified applicant disagreements are resolved by a hearing process within the CNMI. Transcript Day 2, p. 36.

RESPONDENT POSTED A JVA TO WHICH COMPLAINANT APPLIED

22. JVA 21-05-91117 opened on May 30, 2021, and closed on June 20, 2021. Exhibit A.
23. The JVA was characterized as a “renewal” for a “CW visa.” Exhibit A, Exhibit I.
24. The JVA originally listed 15 vacancies for an “operations manager,” a position that falls within the “management operations” classification. Exhibit A, Exhibit I.
25. In contravention of normal procedures, the JVA at issue was changed by CNMI DOL after it had closed, specifically, the number of openings was changed from 15 to one. Transcript Day 2, p. 113, 116.
26. The job duties of “operations manager” listed in the JVA include “prepare business proposals... meeting with present customers... follows management instructions as per

project specifications... monitor and check project is within budget... marketing and sourcing of materials... implement safety and discipline to all workers...” Ex I, p. 2.

27. The JVA states the position requires a high school diploma and six months’ work experience. Exhibit A, Exhibit I.
28. On March 31, 2021, Complainant applied to the position by sending his application via email directly to Respondent (i.e. not by way of “self-referral” through the CNMI DOL website). Transcript Day 2, p. 85, 89, Exhibit I.

RESPONDENT BUSINESS & VACANCY INFORMATION

29. Respondent, Aljric General Services, LLC, is owned and operated by Ms. Alma Habos. Transcript Day 3, p. 30, 42.
30. Ms. Habos started the business in 2016 to provide janitorial and professional cleaning services. Transcript Day 3, p. 31.
31. Ms. Habos is a native and citizen of the Philippines. Transcript Day 3, p. 32.
32. Ms. Habos’ status in the CNMI is tied to her ability to maintain continued employment. Transcript Day 3, p. 61.
33. Ms. Habos has a bachelor’s degree in hotel and restaurant management from the Philippines. Transcript Day 3, p. 40.
34. Ms. Habos has worked in professional cleaning and hospitality since 1994, and has worked on Saipan, CNMI since that time. Transcript Day 3, p. 33.
35. Ms. Habos worked from 1994 to 2010 as a housekeeping cleaner, and then became a housekeeping supervisor in 2010 prior to starting Aljric General Services, LLC. Transcript Day 3, p. 33, 38.
36. As a supervisor, she performed quality control, conducted training, and completed other management tasks. Transcript Day 3, p. 40.
37. Aljric General Services, LLC employs several individuals. Two part-time workers are U.S. citizens, and Ms. Habos describes the other two employees as “Chamorro” and “Filipino.” Transcript Day 3, p. 51.

COMPLAINANT BACKGROUND & APPLICATION TO VACANCY

38. Complainant is a citizen of the United States. Transcript Day 1, p. 77.
39. On May 31, 2021, Complainant applied for Respondent’s advertised operations manager position, doing so by emailing the Respondent (employer) directly. Exhibit 1.
40. Complainant maintained he was qualified for the advertised position, which he believed was evident based on his resume. Transcript Day 2, p. 141, 149.
41. Complainant was unaware of the actual nature of the business, but believed the position to be for semi-skilled workers due to the CW visa renewal component of the JVA. Transcript Day 2, p. 178–79, 192
42. Complainant listed his GED on his resume, explaining he completed it as an adult. Transcript Day 2, p. 195, 197.

43. During the selection process, Respondent did not inquire about Complainant's education.
44. Specific to experience listed on his resume, Complainant has experience as a Construction Safety Officer Trainee; a Customer Sales Representative; experience with marketing, cleaning and bartending at various bars; experience in debris removal as a trainee; experience in electrical, plumbing, and welding work; experience as a Co-Owner and Operator, with management duties, at a bar; and experience as the "Co-Owner of Four-Plex: Leasing Agent." Ex. C.
45. Complainant's resume reflects various certifications, including from the Commonwealth Utilities Corporation Saipan; Codecademy; International Code Council; Commonwealth of the Northern Mariana Islands Bureau of Environmental and Coastal Quality; FEMA; the Northern Mariana Islands Chapter of the Society for Human Resource Management; the Marianas Association of Filipino Engineers & Architects; the Community Guidance Center's Department of Health and Human Service; the Building Industry Association; and Vanguard Emergency Management, in areas such as disaster/emergency response, coding, firefighting, and equal employment opportunity trends. Ex. C.

COMPLAINANT'S NON-SELECTION & RESPONDENT'S SELECTION OF INCUMBENT

46. On June 16, 2021, Respondent emailed Complainant, confirming receipt of his application, and noting the position is temporary (for just one year). Transcript Day 2, p. 141. Exhibit 1, p. 5.
47. On June 19, 2021, Complainant replied to Respondent's email confirming he remained interested in the position even though it is temporary. Exhibit 1, p. 6.
48. On June 19, 2021, Respondent emailed Complainant, requesting he provide identification and employment documents for verification purposes with a proposed start date in October 2021. Transcript Day 2, p. 141.
49. On June 28, 2021, Respondent emailed Complainant to inform him he would not be offered a position. Specifically, the email relayed: "After a thorough review of your resume and background check, we're sorry to inform you that we finally decided not to hire you for this position to run our company. This is a very sensitive position that deals with our present and prospective clients, customers, and workers. We will try to consider you for other positions in our company." Exhibit 1, p. 6. Transcript Day 2, p. 142.
50. Ms. Habos made the decision not to hire Complainant. Transcript Day 3, p. 43-45.
51. Ms. Habor stated she personally reviewed Complainant's resume and found his experience in housekeeping and cleaning services to be limited and not directly transferrable to her vacant position. Transcript Day 3, p. 67.
52. Separately, Ms. Habos' felt her experience and qualifications as the incumbent were superior to Complainant's experience and qualifications. Transcript Day 3, p. 47, 67.
53. Ms. Habos also considered information about Complainant she saw in local newspapers related to threatening behavior, which caused her further concern about hiring him. Transcript Day 3, p. 47.

COMPLAINANT’S PROTECTED ACTIVITY & ALLEGED RETALIATION

54. On June 28, 2021, Complainant lodged a complaint with IER due to his non-selection for the JVA at issue. Transcript Day 2, p. 131, Exhibit 15.
55. On June 28, 2021, Complainant informed Respondent via email: “Please know that I shall file the necessary federal complaint regarding this issue.” Exhibit 1, p. 7.
56. Respondent had vacant positions available for janitorial services in 2022. Exhibit 14.
57. Complainant was aware of, but did not apply to, Respondent’s vacant janitorial services positions in 2022. Exhibit 14.

VIII. LAW & ANALYSIS

With the Findings of Fact now established by way of reliable evidence, the Court can turn to applying those facts to the law to resolve the issue of liability on the remaining allegations.

A. Burdens of Proof and Burden Shifting Construct

“In interpreting § 1324b, OCAHO jurisprudence looks for general guidance to cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and other federal remedial statutes prohibiting employment discrimination.” *Monty v. USA2GO Quick Stores*, 16 OCAHO no. 1443c, 9 (2024) (internal citations omitted).

“In order to prove a case of employment-based discrimination under § 1324b, a complainant may use direct or circumstantial evidence.” *Id.* (citing *United States v. Diversified Tech. & Servs. of Va., Inc.*, 9 OCAHO no. 1095, 13 (2003)).

“Direct evidence is evidence that, on its face, establishes discriminatory intent.” *Id.* “Direct evidence [of intentional discrimination] . . . ordinarily means there is either a facially discriminatory statement or policy, or an unambiguous admission that the actual protected characteristic was considered and affected the decision.” *Diversified Tech. & Servs. of Va., Inc.*, 9 OCAHO no. 1095, at 21.

“Circumstantial evidence ‘suggests, but does not prove, a discriminatory motive.’” *United States v. Mar-Jac Poultry, Inc.*, 12 OCAHO no. 1298, 23 (2017) (citation omitted). “If a complainant relies on circumstantial evidence, OCAHO applies the familiar burden shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973), and its progeny.” *Monty*, 16 OCAHO no. 1443c, at 9. “First, Complainants must establish a prima facie case of discrimination; second, Respondent must articulate some legitimate, non-discriminatory reason for the challenged employment action; third, if Respondent does so, the inference of discrimination raised by the prima facie case disappears, and Complainants must then prove by a preponderance of the evidence that Respondent’s articulated reason is false and that Respondent

intentionally discriminated against Complainants.” *Id.* (citations omitted); *see also Mar-Jac Poultry, Inc.*, 12 OCAHO no. 1298, at 23–24.

B. Elements of Discrimination

Pursuant to 8 U.S.C. § 1324b(a)(1), “[i]t is an unfair immigration-related employment practice for a person or entity to discriminate against any individual . . . with respect to hiring, or recruitment or referral for a fee . . . because of such individual’s national origin or in the case of a protected individual . . . because of such individual’s citizenship status.”

An individual may make a *prima facie* case of discrimination by showing that he is “a member of a protected group, that he applied and was qualified for the job, and that he was rejected under circumstances giving rise to an inference of unlawful discrimination.” *Sharma v. Lattice Semiconductor*, 14 OCAHO no. 1362d, 9 (2023) (internal citations omitted).

In the Ninth Circuit,³¹ the hiring of a less-qualified individual outside of the complainant’s protected group may give rise to an inference of unlawful discrimination. *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1194 (9th Cir. 2003), *opinion amended on denial of reh’g*, No. 00-35999, 2003 WL 21027351 (9th Cir. May 8, 2003) (“In this Circuit, we have held ‘that a Title VII plaintiff’s qualifications were clearly superior to the qualifications of the applicant selected is a proper basis for a finding of discrimination.’”) (citing *Odima v. Westin Tucson Hotel*, 53 F.3d 1484, 1492 (9th Cir. 1995)); *see also Nelson v. Cnty. of Pima*, No. CV-21-00455-TUC-JCH, 2023 WL 112787, at *5 (D. Ariz. Jan. 5, 2023) (“Without direct evidence of a discriminatory motive, as here, the plaintiff may establish a *prima facie* case by showing that: (1) he is a member of the class protected by the ADEA;³² (2) he was satisfactorily qualified for the position for which he was applying; (3) he was not hired ; and (4) the position was filled by a substantially younger employee with equal or inferior qualifications.”).

³¹ Since the allegations at issue in this case occurred in the Northern Mariana Islands, the Court may look to the case law of the relevant United States Court of Appeals, here the Ninth Circuit. *See* 28 C.F.R. § 68.57.

“In interpreting § 1324b, OCAHO jurisprudence looks for general guidance to cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and other federal remedial statutes prohibiting employment discrimination.” *Chellouf v. Inter Am. Univ. of P.R.*, 12 OCAHO no. 1269, 5 (2016).

³² *Nickman v. Mesa Airlines*, 1 OCAHO no. 74, 461, 486 (1989) (noting that “precedent governing Title VII and the ADEA are helpful guidance in interpreting the provisions of IRCA”).

C. Elements of Retaliation

Pursuant to 8 U.S.C. § 1324b(a)(5), it is an unfair immigration-related employment practice to “intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under this section or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.”

“A prima facie case of retaliation is established by presenting evidence that: 1) an individual engaged in conduct protected by § 1324b; 2) the employer was aware of the individual’s protected conduct; 3) the individual suffered an adverse employment action; and 4) there was a causal connection between the protected activity and the adverse action.” *Monty*, 16 OCAHO no. 1443c, at 11 (citing *Chellouf*, 12 OCAHO no. 1269, at 5–6); *see also Ogunrinu v. OCAHO*, No. 21-1151, 2023 WL 2618686, at *3 (D.C. Cir. Mar. 24, 2023) (“To state a Title VII retaliation claim, a plaintiff must show that, in response to her efforts to assert her right to be free from discrimination, her employer took a ‘materially adverse’ action—that is, an action that ‘well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.’”).

D. Analysis of Citizenship Discrimination Allegation

The Court need not dwell on the first few elements as the parties stipulated to the protected class (Complainant is a US citizen), that there was a vacant position to which Complainant applied, and that Complainant was not selected for that position. Further, the record makes plain the position was filled, and it was filled by the incumbent, who hired herself.

The focus of the analysis here rests on whether the Complainant can show a prima facie case of discrimination – i.e. that Respondent did not hire him because of his citizenship.

At the outset, Complainant, the party with the burden, failed to provide direct evidence of a causal link between his citizenship status and his non-selection. Accordingly, the Court must look to whether he provided sufficient circumstantial evidence to raise an inference of discrimination. To raise this inference, a Complainant can assert any number of theories; however, on this record, this Complainant appears to advance a theory by which he was non-selected despite his alleged superior qualifications.

With this theory in mind, the Court is then tasked to look at the Complainant’s qualifications as compared to the selectee’s qualifications. If the Complainant’s are superior, he could then argue he had established a prima facie case, which would necessitate further analysis under the *McDonnell-Douglas* framework. On this record, Complainant cannot show he had superior, or even equal qualifications to the selectee. Consequently, he cannot meet his burden in establishing a prima facie case of discrimination.

The selectee has more years of experience across the hospitality industry, and has directly worked in entry level through supervisory positions within the hospitality industry. By contrast, Complainant has fewer years of experience in the hospitality industry, and has worked in fewer hospitality-specific positions as outlined in his resume and testimony.

The selectee has more advanced formal education in hospitality, earning a bachelor's degree in this area. By contrast, the Complainant has not completed collegiate coursework in this area of study; rather he has completed courses and certificate programs across an array of industries.

The selectee has more direct operations management experience specific to running a small hospitality service business, as she was the incumbent for the position after having started the company in 2016. By contrast, Complainant has management experience, but it is related to businesses in other industries (possibly of different size) or other locations (like Myanmar).

Because the record reflects the selectee's superior qualifications, and no other facts in the record give rise to circumstances allowing for an inference of discrimination, the analysis ends here. Complainant cannot establish a prima facie case of discrimination based on citizenship status related to his non-selection for the operations manager position.

E. Analysis of Retaliation Allegation

On this record, Complainant separately cannot establish a prima facie case of retaliation. While he can show some elements of a prima facie case, he cannot show them all, and thus cannot meet his burden on retaliation.

First, the communication to IER on June 28, 2021 is a protected activity. 8 U.S.C. § 1324b(a)(5) (providing that it is an unfair immigration-related employment practice to retaliate against an individual "because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section"); *Monty*, 16 OCAHO no. 1443c, at 21 (finding call to IER's hotline constitutes protected activity).

Second, Complainant can show Respondent had knowledge of his intent to engage/that he engaged in a protected activity on June 28, 2021. Specifically, the Complainant informed Respondent he did or would be engaging in a protected activity when he informed her via email he would "file the necessary federal complaint regarding this issue." Exhibit 1, p. 7. Admittedly, this is somewhat vague as he does not explain with much specificity to what kind of "federal complaint" he is referring. However, given the broad interpretation of conduct falling within the ambit of protected activity, the Court finds that this warning of an intent to file a federal complaint falls within the expressing an intent to file a charge under § 1324b. *See Monty*, 16 OCAHO no. 1443c, at 21 (noting that "federal court case law interpreting other remedial

employment discrimination statutes ‘consistently have liberally construed remedial anti-retaliation provisions to encompass a broad range of conduct.’” (quoting *Cruz v. Able Serv. Contractors, Inc.*, 6 OCAHO no. 837, 144, 155 (1996); and then citing *United States v. Robison Fruit Ranch, Inc.*, 4 OCAHO no. 594 (1994) (noting that “Congress had intended the 1986 Immigration and Reform and Control Act to have a broad, remedial purpose” and that “Courts have firmly established a policy of liberally construing remedial statutes so as to ‘suppress the evil and advance the remedy.’” (citations omitted)).

While Complainant can show the first two elements without issue, he cannot establish the third (an adverse action or refrain from action on the part of Respondent), nor can he show, then, a causal link between such a non-existent adverse action and his protected activity.

Indeed, Complainant references an alleged non-selection for 2022 janitorial services position at Exhibit 14. The Court carefully examined the contents of this Exhibit and found that it proves only the existence of a vacancy.³³ It does not prove Complainant applied to that position (and neither does his testimony).

Understandably, a record void of an actual adverse action is then necessarily void of any causation or nexus between the protected activity and an adverse action. For these reasons, the analysis of a retaliation allegation ends here. Complainant cannot establish a prima facie case of retaliation based on his protected communications with IER on June 28, 2021.

³³ The Exhibit contains communication from Complainant to Respondent about the janitorial positions, but nowhere in that communication does Complainant apply to the position or even reference an intent to apply to the position. Rather, Complainant makes assertions about Respondent’s activities relative to CNMI DOL JVA processing generally and how it impacts the CW visa process. As Complainant was made well-aware months in advance of the hearing, “Complainant cannot meet his burden of proof on his § 1324b claims by argument or evidence pertaining to alleged CW-1 visa fraud alone, or CNMI DOL labor practices alone.” *Zajradhara v. Algeric Gen. Services, LLC*, 16 OCAHO no. 1432f, 6 (2023) (citing *Zajradhara v. Ranni’s Corp.*, 16 OCAHO no. 1426d, 6 (2023)).

IX. CONCLUSION

Based on the record as developed, Complainant cannot establish a prima facie case of discrimination based on citizenship status related to his non-selection for Respondent's operations manager position. Separately, Complainant cannot establish a prima facie case of retaliation following his protected activity on June 28, 2021.

The Complainant is DISMISSED³⁴ WITH PREJUDICE.

This is a Final Order.³⁵

SO ORDERED.

Dated and entered on July 18, 2024.

Honorable Andrea R. Carroll-Tipton
Administrative Law Judge

X. CONCLUSIONS OF LAW

EVIDENTIARY STANDARDS

1. The forum is not bound by the Federal Rules of Evidence, but they are a “general guide to all proceedings” and may be cited as persuasive authority; evidence admissible under the FRE would clearly be accepted in an OCAHO case. 28 C.F.R. § 68.40(a); *Ogunrinu v. Law Resources*, 13 OCAHO no. 1332b, 2 (2019).
2. Processes administered by the Departments of Labor are outside OCAHO's jurisdiction, and the Court defers to the DOL on its processes. *Zajradhara v. Ranni's Corp.*, 16 OCAHO no. 1426d, 6 n.8 (2023).
3. When analyzing evidence, the Court evaluates the reliability of evidence and then considers what weight to assign it based on probative value.

³⁴ 8 U.S.C. § 1324b(g)(3).

³⁵ 8 U.S.C. § 1324b(g)(1); 28 C.F.R. § 68.52(e).

4. The proponent of documentary evidence must authenticate a document through evidence demonstrating the document is what it purports to be. *United States v. Carpio-Lingan*, 6 OCAHO no. 914, 5 (1997).
5. The reliability of documentary evidence can be analyzed by looking at whether it originates from the purported source, whether other evidence calls its reliability into question, or whether it is consistent with other record evidence. *United States v. Fasakin*, 14 OCAHO no. 1375l, 27–28, 32–33, 35 (2023); *United States v. Commander Produce, LLC*, 16 OCAHO no. 1428d (2023).
6. “Generally, documentary evidence that is complete, signed, sworn under penalty of perjury, dated, authenticated, laid down with foundation contains sufficient indicia of reliability.” *United States v. R&SL Inc.*, 13 OCAHO no. 1333b, 24 (2022).
7. Some factors relevant to assessing the credibility of witnesses in OCAHO proceedings are shifting and inconsistent answers; repeatedly responding to questions by stating a witness does not know, does not remember, or does not understand; testifying in a vague and evasive manner; demonstrably false statements; discrepancies between hearing testimony and other record documents; a variety of excuses for inconsistent information; and incorrect or inconsistent information provided by a witness. *United States v. Kurzon*, 3 OCAHO no. 583, 1829, 1842–43 (1993); *United States v. DeLeon Valenzuela*, 8 OCAHO no. 1004, 10 (1998).
8. Only reliable evidence merits a probative value assessment; if the source of evidence is not trustworthy, its purported weight is irrelevant. *United States v. Fasakin*, 14 OCAHO no. 1375l, 35 (2023).
9. Probative value is determined by how likely the evidence is to prove some fact. *United States v. R&SL Inc.*, 13 OCAHO no. 1333b, 26 (2022).
10. Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. Fed. R. Evid. 401; *United States v. Rose Acre Farms, Inc.*, 12 OCAHO no. 1285, 8 (2016); *United States v. Fasakin*, 14 OCAHO no. 1375l, 29 (2023).

ANALYSIS OF PARTIES’ EVIDENCE

11. The Court is mindful of Complainant’s pro se status and status as the party bearing the burden to demonstrate his claims in considering the reliability of Complainant’s evidence.
12. Complainant’s Exhibit 1 is sufficiently reliable because Complainant provided foundational explanation for how he created the exhibit, and Respondent did not disavow the correspondence.
13. Complainant’s Exhibits 2, 4, 7, 8, 10, 13, and 16 are sufficiently reliable because they are what they purport to be, are internally consistent, and are consistent with the findings

contained in Exhibit 7, reflecting Complainant's correspondence with governmental officials expressing a consistent viewpoint and outlook on policy issues.

14. Complainant's Exhibits 9 and 12 are sufficiently reliable because they appear to be what Complainant purports them to be - the letter is the entire document, is on official letterhead, and is signed and dated by its author.
15. Complainant's Exhibit 14 is sufficiently reliable. Respondent did not dispute the posting of the janitorial positions reflected in the Exhibit, and it is consistent with other Exhibits reflecting Complainant's policy ideas and concerns.
16. Complainant's admitted documentary evidence is sufficiently reliable to be considered in reaching a conclusion on the merits of his Complaint.
17. While the Court takes a generous approach to reliability, it must take a more measured one in considering the probative value of the admitted exhibits.
18. The probative value of Exhibit 1 is high, because the exhibit speaks to one of the central factual issues of the case (Complainant applied and was not selected for a position with Respondent), provides Respondent's stated reason for the decision, and provides the factual framework for what was available for Respondent's consideration in making the decision.
19. The probative value of Exhibits 2, 4, 7, 8, 10, 13, and 16 is low because they don't provide facts of consequence as to Complainant's discrimination claim, and don't show Complainant applied for future positions under Complainant's retaliation theory.
20. Exhibits 2, 4, 7, 8, 10, 13, and 16 show Complainant has some notoriety in the CNMI for his advocacy efforts; he has earned the status of a persona non grata from the CNMI legislative body. These exhibits have some probative value as they support Respondent's assertion that she was aware of Complainant/his reputation.
21. Exhibits 9 and 12 have little to no probative value. Whether the CNMI AG declined prosecution has no bearing on this employment action and Complainant's business venture in Myanmar was unknown to Respondent at the time she declined to hire him.
22. Exhibit 14 has limited probative value. It shows Respondent sought employees post-dating Complainant's protected activity, but does not show he applied to these positions.
23. Complainant testified credibly. This conclusion is based in part on the Court's observation of his demeanor. Further, Complainant answered questions to the best of his ability, and was consistent on key points.
24. Respondent's introduction of evidence of Complainant's prior inconsistent statements did not affect that Court's conclusion that Complainant testified credibly, on balance. Accordingly, his testimony should be given due weight.
25. Much of Complainant's testimonial evidence lacked probative value.
26. Complainant's testimony involving his qualifications for the vacant position (including identifying portions of his resume demonstrating his experience and explaining his management skillset) was probative.

27. A liberal approach in allowing Complainant to enter exhibits into the record was appropriate as it would allow him to access evidence he felt key to meet his burden.
28. The Court has a duty to treat parties equitably regarding the admissibility of evidence, and therefore, the Court permitted Respondent to enter evidence pertaining to Complainant's credibility, even though it was unlikely to tip the balance.
29. Respondent's exhibits were all sufficiently reliable. Complainant did not contest reliability and the exhibits contained sufficient indicia of reliability.
30. Exhibits A, B, and C are highly probative. They memorialize the vacant position at the heart of the allegation and what documents Respondent considered in making decision.
31. Exhibit F has little to no probative value as it demonstrates that Respondent engaged with the US DOL, which does not directly bear on these proceedings.
32. Exhibits C and D have limited probative value. They relate to Complainant's credibility, but ultimately do not outweigh the other data points auguring in favor of finding Complainant credible.
33. Respondent witness Ms. Habos testified credibly. The Court considered her demeanor, responsiveness to questions, and the consistency between her testimony and the record.
34. The testimony of Respondent's witness Ms. Habos was highly probative, as she testified about the nature of the business, her background and experience, the nature of the position, and the rationale for her decision not to hire Complainant, including candidly discussing her awareness of Complainant's advocacy efforts and notoriety.

STANDARDS OF LAW

35. Facts included in the Findings of Fact may not have been expressly entered into the record by the parties, the parties implicitly relief on them, and to ensure an accurate and thorough record, the Court makes factual findings or takes official notice of certain facts. 28 C.F.R. § 68.41.
36. "In interpreting § 1324b, OCAHO jurisprudence looks for general guidance to cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and other federal remedial statutes prohibiting employment discrimination." *Monty v. USA2GO Quick Stores*, 16 OCAHO no. 1443c, 9 (2024).
37. "In order to prove a case of employment-based discrimination under § 1324b, a complainant may use direct or circumstantial evidence." *Monty v. USA2GO Quick Stores*, 16 OCAHO no. 1443c, 9 (2024).
38. "Direct evidence is evidence that, on its face, establishes discriminatory intent." *Monty v. USA2GO Quick Stores*, 16 OCAHO no. 1443c, 9 (2024).
39. "Circumstantial evidence 'suggests, but does not prove, a discriminatory motive.'" *United States v. Mar-Jac Poultry, Inc.*, 12 OCAHO no. 1298, 23 (2017).

40. If a complainant relies on circumstantial evidence, OCAHO applies the burden shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973), and its progeny.
41. Under the burden shifting framework, Complainants must establish a prima facie case of discrimination; second, Respondent must articulate some legitimate, non-discriminatory reason for the challenged employment action; third, if Respondent does so, the inference of discrimination raised by the prima facie case disappears, and Complainants must then prove by a preponderance of the evidence that Respondent’s articulated reason is false and that Respondent intentionally discriminated against Complainants.
42. An individual may make a prima facie case of discrimination by showing that he is “a member of a protected group, that he applied and was qualified for the job, and that he was rejected under circumstances giving rise to an inference of unlawful discrimination.” *Sharma v. Lattice Semiconductor*, 14 OCAHO no. 1362d, 9 (2023).
43. The hiring of a less-qualified individual outside of the complainant’s protected group may give rise to an inference of unlawful discrimination.
44. “A prima facie case of retaliation is established by presenting evidence that: 1) an individual engaged in conduct protected by § 1324b; 2) the employer was aware of the individual’s protected conduct; 3) the individual suffered an adverse employment action; and 4) there was a causal connection between the protected activity and the adverse action.” *Monty v. USA2GO Quick Stores*, 16 OCAHO no. 1443c, 11 (2024).
45. Precedent governing Title VII and the ADEA are helpful guidance in interpreting the provisions of IRCA. *Nickman v. Mesa Airlines*, 1 OCAHO no. 74, 461, 486 (1989).

DISCRIMINATION LEGAL ANALYSIS

46. The Court need not dwell on the first few elements of a prima facie discrimination claim as the parties stipulated that Complainant is a member of a protected class, that there was a vacant position to which Complainant applied, and that Complainant was not selected for that position, and the record makes plain the position was filled.
47. Complainant failed to provide direct evidence of a causal link between his citizenship status and his non-selection.
48. Because Complainant did not provide direct evidence, the Court must consider whether Complainant provided sufficient circumstantial evidence to raise an inference of discrimination.
49. To raise an inference of discrimination, Complainant may assert any number of theories, but on this record, Complainant appears to advance a theory by which he was non-selected in spite of his superior qualifications.
50. To evaluate this theory, the Court compares Complainant’s qualifications to the selectee’s qualifications.

51. If Complainant's qualifications are superior to the selectee's, then Complainant may be able to establish a prima facie case of discrimination.
52. Complainant did not show that he had superior, or even equal, qualifications, and consequently, cannot meet his burden in establishing a prima facie case of discrimination.
53. The selectee had more years and a broader range of experience in hospitality while Complainant had fewer years and a narrower range of experience in hospitality; the selectee had more advanced formal education in hospitality, and the selectee had more direct operations management experience specific to running a small hospitality service business and Complainant only had management experience in businesses in other industries or locations.
54. Because Complainant did not show circumstantial evidence allowing for an inference of discrimination, and did not meet his burden to show a prima facie case of discrimination, the Court's analysis ends there.

RETALIATION LEGAL ANALYSIS

55. Complainant cannot establish a prima facie case of retaliation because he cannot show all elements of a prima facie case.
56. Complainant's communication to IER on June 28, 2021 is a protected activity.
57. Complainant showed that Respondent knew of his intent to engage or that he had engaged in protected activity on June 28, 2021 because Complainant informed Respondent that he would file a federal complaint regarding the issue.
58. Although Complainant's threat to file a federal complaint is vague, the Court finds this warning to fall within expressing an intent to file a charge under § 1324b, given the broad interpretation of protected activity.
59. Complainant cannot establish that Respondent engaged in an adverse action nor a causal link between such an action and his protected activity.
60. Exhibit 14 only proves the existence of a vacancy, not that Complainant applied to the position, nor does Complainant's testimony.
61. Complainant cannot meet his burden of proof on his § 1324b claims by argument or evidence pertaining to alleged CW-1 visa fraud alone, or CNMI DOL labor practices alone.
62. A record void of an actual adverse action is then necessarily void of any causation or nexus between the protected activity and an adverse action.

Appeal Information

This order shall become the final agency order unless modified, vacated, or remanded by the Attorney General. Provisions governing the Attorney General's review of this order are set forth at 28 C.F.R. pt. 68. Within sixty days of the entry of an Administrative Law Judge's final order, the Attorney General may direct the CAHO to refer any final order to the Attorney General for review, pursuant to 28 C.F.R. § 68.55.

Any person aggrieved by the final order has sixty days from the date of entry of the final order to petition for review 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)(1); 28 C.F.R. § 68.57. A petition for review must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.