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

September 19, 2024

ZAJI OBATALA ZAJRADHARA, Complainant, v. RANNI'S CORPORATION, Respondent.	)))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2022B00020

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

AMENDED FINAL DECISION[1] AND ORDER

The Court issued a Final Decision and Order on September 12, 2024. This Order amends that Order only to correct typographical errors.

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

On January 25, 2022, Complainant filed his Complaint, alleging discrimination based on national origin and/or citizenship status, and retaliation. 8 U.S.C. §§ 1324b(a)(1) and (a)(5).

On April 25, 2022, Respondent provided an Answer.

On September 11–13, 2023, the Court held an in-person hearing pursuant to 28 C.F.R. § 68.39.

The record ultimately closed on November 21, 2023.

[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 (2024).

I. BRIEF SYNOPSIS

To better orient the reader, the Court provides this brief synopsis of the facts which give rise to the Complaint.[2]

Complainant, a citizen of the United States (national origin provided as "Afro-Latino-Seminole"), resides on the island of Saipan, in the Commonwealth of the Northern Mariana Islands (CNMI), a United States Territory. The CNMI has unique visa options available for eligible individuals.

Respondent, Ranni's Corporation, is a business located on the island of Saipan with a staff of approximately four people. It provides administrative assistance (public paperwork processing and "document handling") for client businesses.

On April 29, 2021, Complainant applied for a position with Respondent, of which he was made aware through the CNMI Department of Labor's Job Vacancy Announcements (JVA).

Complainant was not selected for the position. Respondent did hire an individual for this position; the hired individual was the incumbent holder of the position (and mother of the hiring manager).

At the hearing, Complainant confirmed protected activity occurred first when he contacted IER about this Respondent business in 2020, and again when he filed an IER charge which gave rise to this Complaint.

II. TABLE OF CONTENTS

[2] 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 January 25, 2022, Complainant filed his Complaint. He alleges Respondent discriminated against him due to his citizenship and national origin and retaliated against him.[3] Complainant seeks "back pay and/or front pay" from October 1, 2021.

On April 25, 2022, Respondent filed its Answer, denying the allegations in the Complaint.

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

On March 23, 2023, the Court issued an Order Clarifying Complainant's Prehearing Submissions. The Court explained the elements of a prima facie case of citizenship/ national origin discrimination under 8 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 (CNMI DOL) to ensure the record contained accurate information related to the CNMI DOL's Job Vacancy Announcement (JVA) process.

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.

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[3] Complainant alleged that he applied to and was not selected for an "administrative manager" position, because "[Respondent] wanted to keep the foreign worker because in many cases the worker has paid… for the opportunity." Compl. 6. He alleges the position remained open and the Respondent continued taking applications, ultimately hiring someone else. Compl. 7.

As to retaliation, Complainant alleges the retaliation occurred on August 22, 2021, noting "[he] had previously filed a charge against this company [with IER, Case #20-86HH9-6FIU]." Compl. 9. He then provides his thoughts on the CNMI DOL and visa-related issues not specific to this employer. Compl. 9.

The Court held an in-person hearing on September 11–13, 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. After providing an opportunity to submit documentary evidence, the Court closed the record on November 21, 2023.

On June 10, 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.

On June 10, 2024, the parties were provided a schedule for submitting post-hearing briefings.

On June 12, 2024, Complainant submitted his written brief.

On July 12, 2024, Respondent submitted its written brief.

On July 23, 2024, Complainant submitted his written reply brief.

IV. EVIDENCE PRESENTED AT AND PRESENTED POST-HEARING[4]

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

[4] 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.

Mr. James Ulloa,[5] a labor certification supervisor for the CNMI Department of Labor (DOL), testified on September 11, 2023. Transcript Day 1, p. 131. He has worked for the CNMI DOL for 32 years. Transcript Day 1, p. 134. In his current position, he oversees the Job Vacancy Announcements (JVA's), certification, job placement, and supervising a statistics unit. Transcript Day 1, p. 134.

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 1, p. 135. There are standardized classifications (including standardized sub-categories and position descriptions, derived from "O-Net"[6]) for jobs posted by way of JVA. Transcript Day 1, p. 142. The JVAs 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 1, p. 135. After registration is successful, an employer can post a JVA, and the CNMI DOL expects employers to post true and accurate information. Transcript Day 1, p. 147. When a registered employer submits a JVA, it automatically goes "live" on the CNMI DOL website. Transcript Day 1, p. 135.

Specific to JVA posting and CW-1 visa-related (or "foreign worker") positions,[7] there are different requirements. Transcript Day 1, p. 136. When a JVA relates to a CW-1 visa-related position, there are additional steps antecedent to the JVA posting. Transcript Day 1, p. 153. 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

[5] This witness testified at a separate hearing held two days after this hearing. *Zajradhara v. Aljeric Gen. Servs., LLC*, 16 OCAHO no. 1432m, 1 (2024). Portions of his testimony at both hearings (related to general processes at the CNMI DOL) were virtually identical, and as a result, readers may find that portions of the summary of that testimony are similarly identical.

[6] This O-Net description was later provided by Respondent as Exhibit D.

[7] 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.

1, p. 151. After the employer receives the US DOL Notice of Acceptance, it must post the JVA within 14 days. Transcript Day 1, p. 152, 176. 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 1, p. 152.

Mr. Ulloa oversees the CNMI DOL certification process—certification is something a registered employer can request. Transcript Day 1, p. 137. 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 1, p. 137. 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 1, p. 137–38. If such a disagreement were to occur, it would be resolved by a hearing process within the CNMI. Transcript Day 1, p. 137–38.

Specific to this case, Mr. Ulloa was provided the JVA at issue to refresh his recollection before providing testimony. Transcript Day 1, p. 164. For this JVA, Complainant requested CNMI DOL assistance in getting referred to the position. Transcript Day 1, p. 167. The CNMI DOL does have notes within their internal-facing portion of the website memorializing this request occurred on April 29, 2021. Transcript Day 1, p. 167. (This document became Exhibit I). Mr. Ulloa believes Complainant requested his resume be provided to Respondent for consideration for the vacancy, but he could not locate the email where he provided the resume. Transcript Day 1, 169. When permitted to refresh his recollection with Exhibit C, Mr. Ulloa confirmed he did send Complainant's resume to Respondent, and he believed the version of the resume sent would have been Complainant's most recent resume at the time (as Complainant kept his resume up to date with the CNMI DOL). Transcript Day 1, p. 182.

Mr. Ulloa stated the Respondent did not seek certification for this position. Transcript Day 1, p. 172. He also noted that USDOL might not require it. Transcript Day 1, p. 173.

As to unrelated JVA referral requests, Mr. Ulloa noted that the Complainant would reach out to the CNMI DOL for assistance with referrals in general. Transcript Day 1, p. 170.

Court Exhibit I is a three-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 June 22, 2023. The document lists "Ranni's Corporation DBA Sunlight Document Handling" as the employer with contact information available. 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 occupations," with a job title of "administrative manager." It

provides the job duties,[8] and states the position requires a high school diploma and twelve months of work experience. The document memorializes Complainant "requested the CNMI DOL [assist him] to be referred to [this] JVA" on April 29, 2021.

B. Complainant Witness Testimony

The Complainant testified. The presiding ALJ reminded him the parties previously stipulated to some facts (and he need not present evidence related to those facts). Transcript Day 1, p. 203. Specifically, Respondent stipulated the Complainant is a U.S. citizen; there was a vacant position (the JVA); and Complainant applied for that vacant position. Transcript Day 1, p. 54, 203. The presiding ALJ concluded it could be inferred from the record he was not selected for the position to which he applied. Transcript Day 1, p. 205.

Complainant's national origin is "Black Seminole and Latino Black." Transcript Day 1, p. 208.

The presiding ALJ informed Complainant he could develop the record further as to the causal link between his non-selection and citizenship and/or national origin status, and he could develop the record further as to his protected activity. Transcript Day 1, p. 205–207.

Regarding his non-selection allegation, Complainant testified about his application for the vacant position. Transcript Day 1, p. 212. Following a series of questions from the presiding ALJ, the Complainant explained he was qualified for the vacant position. Transcript Day 1, p. 217. He states he was not selected the same day he applied—April 29, 2021. Transcript Day 1, p. 250. In addition, Complainant states that the Respondent emailed him on May 24, 2021, to inform him that he did not meet the qualifications for the position. Transcript Day 1, p. 250.

In describing his fitness for the vacant position, Complainant first noted the JVA description was not particularly detailed, but involved processing paperwork, and required a high school diploma. Transcript Day 1, p. 217. Complainant testified he has a "GED," a high school diploma equivalent. Transcript Day 1, p. 219. And when he was informed the vacancy required twelve months' work-related experience, he stated his resume reflected experience "running a four-plex and a 16-unit," and working for various employers assisting with projects and paperwork. Transcript Day 1, p. 221–23. In response to a statement he made, Complainant was reminded that Respondent's Answer noted the selectee was of Filipino national origin and was a

[8] For context, the job duties include "prepare and review operational reports and schedules to ensure accuracy and efficiency. Set goals and deadlines for the department. Acquire, distribute, and store supplies. Analyze internal processes and recommend and implement procedural or policy changes to improve operations, such as supply changes or the disposal of records. Conduct classes to teach procedures to staff." Ex. I, p. 2.

CW-1 visa holder, and that simply identifying the ethnic or national origin backgrounds of an employee would not, on its own, give rise to national origin discrimination. Transcript Day 1, p. 245. On this point, Complainant testified that based on his observations, the entire company was of a different national origin than him, and this would be the evidence offered on discriminatory intent. Transcript p. 244–45.

Regarding his retaliation allegation, Complainant identified his protected activity as "IER-related activity." Transcript Day 1, p. 227, 230. He testified the protected activity occurred "one to two years prior to applying for this job." Transcript Day 1, p. 233. He separately informed Respondent he intended to pursue action with IER via email, but could not provide further specificity on timing in his testimony initially—later he stated the day he informed them was May 24, 2021. Transcript Day 1, p. 237, 250. He clarified the action taken as a result of his protected activity was the non-selection in April 2021 (i.e. the personnel action referenced in his discrimination allegation as well). Transcript Day 1, p. 238.

On cross-examination, Complainant first stated he believes Respondent business is a "document handling company [that] import[s] workers to sublet them… [as] middlemen." Transcript Day 2, p. 34. Complainant has never worked for a document handling company, but he has "worked with documents." Transcript Day 2, p. 35.

Complainant reviewed the JVA to explain why he believed himself qualified for the position. Transcript Day 2, p. 39. However, when questioned about specific components of the job, he did not understand what they were. Transcript Day 2, p. 51–54. Later, he was able to articulate he believed the position would have required "administrating all the paperwork, the documents, filing the grants, the licenses, the procedures, the setting up of protocols, the liaisoning [sic] . . . attending meetings." Transcript Day 2, 61. He also describes his qualifications for a position to which he previously applied at Respondent business, the description of which is contained in Exhibit 3. Transcript Day 2, p. 63. Complainant stated he had twelve months' work-related experience, referencing specific portions of his resume. Transcript Day 2, p. 77.

Complainant characterized the Respondent's business as a "visa mill," a term he used to describe an entity engaged in fraudulent activities related to obtaining visas. Transcript Day 2, p. 100. He also stated he applied to the vacancy "to expose the visa mill." Transcript Day 2, p. 100. Specifically, he stated he intended to "submit information directly… to HSI [Homeland Security Investigations] Hawaii, or to [members of Congress]" if he were hired and learned it was a "company in disrepute [that] violated immigration laws." Transcript Day 2, p. 100–102.

Complainant was also questioned about his formal education. Transcript Day 2, p. 69. Complainant testified he earned a GED (around the year 1981); however, he did not include a copy with his resume, because "it's a given." Transcript Day 2, p. 70, 72, 74.

Regarding damages, Complainant discussed his current lack of employment and provided his rationale for the dollar amount he claimed in damages.[9]

C. Complainant's Exhibits

Complainant offered six exhibits. Each will be described below.

Exhibit 1, "Email correspondence between Complainant and CNMI DOL about Ranni's JVA," is a compilation of correspondence, sections of correspondence, and JVAs created by Complainant. Some are related to the CNMI DOL (like correspondence from Complainant to Mr. James Ulloa about unrelated matters), some are JVAs posted by other businesses, some relate to Complainant's position or views on visa and visa fraud-related issues, and some relate to issues pertaining to businesses on Guam (a US island territory that is not a part of the CNMI).

Exhibit 2, "Complainant emails to IER about this case which include other applications to Respondent business," is a compilation of correspondence, sections of correspondence, and JVAs created by Complainant. He includes the JVA at issue here (the administrative manager vacancy) and other JVAs posted by Respondent (for a housekeeping position with the same opening and closing date as the JVA at issue). The Exhibit has sections of correspondence which sets forth the timeline related to Complainant's non-selection:

> On April 29, 2021, Respondent confirms via email it received Complainant's resume from the CNMI DOL for the JVA. Ex. 2, p. 14–15.
>
> On May 24, 2021, Complainant emails Respondent, stating, "This is to inform you that since I have not received any interview, though qualified, I shall be filing a federal complaint upon your company." Ex. 2, p. 14.
>
> On May 24, 2021, Respondent emails Complainant, stating, "Upon review of your application and resume, you don't have 12 months experience as an Administrative Manager. JVA posted requires at least 12 months' work experience as Administrative Manager. We will contact you again as this position becomes available on October 1, 2021." Ex. 2, p. 13.

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

> On May 24, 2021, Complainant replies to Respondent, stating the following: "Please be advised that I shall be filing a federal complaint upon your firm, as my position shall be clearly that your company is . . . committing visa fraud." Ex. 2, p. 13.
>
> On May 24, 2021, Complainant contacts IER via email expressing a desire for IER to investigate Respondent related to a prior JVA, and subsequently files a charge with IER that same day. Ex. 2, p. 1, 17.

Exhibit 3, "Complainant correspondence with IER (email chain (7 pages and 2 letters Aug 20 Oct 20)," is a compilation of correspondence, sections of correspondence, and JVAs created by Complainant. They relate to Complainant's IER activity in 2020 regarding a charge he had previously filed against Respondent (including the charge itself and attached forms). The included JVAs from Respondent are dated from 2019 and 2020. Ex. 3, p. 1–7, 12–29. The Exhibit also contains several letters from IER to Complainant. One letter informs Complainant that IER has accepted his charge as complete and will investigate it (dated August 13, 2020). Ex. 3, p. 9. The next letter informs Complainant that IER will not pursue a complaint at OCAHO, but that Complainant may do so. Ex. 3, p. 10.

Exhibit 4, "News Article, dated 9 Sep 21, CNMI Immigration and Employment Benefits Article," is a news article written by David North, dated September 9, 2021. This article describes Complainant's efforts to engage in "whistleblowing" activities related to visas and visa-related "fraud" in the CNMI.

Exhibits 5 and 6, "Complainant's Damages Calculation on 12 Sep 23, and Complainant's Damages Calculation on 22 Sept 23," provide Complainant's damages calculations, which need not be summarized as they do not bear on the liability analysis (and thus, were ultimately not considered by the Court).

D. Respondent Witness Testimony

On the second day of the hearing, Mr. Jomel Pollisco testified. Transcript Day 2, p. 137. Mr. Pollisco is an accounting clerk at Respondent-business, a position he has held for approximately ten years. Transcript Day 2, p. 139. As an accounting clerk, he handles paperwork and tax forms. Transcript Day 2, p. 140. Mr. Pollisco is a Filipino citizen working under a CW-1 visa. Transcript Day 2, p. 140. He explained that the owner of the Respondent-business is his mother, who is a Filipino citizen and "green card holder." Transcript Day 2, p. 140.

Mr. Pollisco personally posted the JVA at issue on the CNMI DOL website. Transcript Day 2, p. 141. He posted the JVA as part of the CW-1 visa application process. Transcript Day 2, p. 141.

He ultimately hired his mother for the position, who (at the time) was a CW-1 visa holder/applicant. Transcript Day 2, p. 142.

Mr. Pollisco's mother, the selectee, had experience as an administrative manager; specifically, she has almost twenty years' experience working as an administrative manager for Respondent-business, a business for which she has worked since 1994. Transcript Day 2, p. 142.

Mr. Pollisco confirmed receipt of Complainant's resume/application for the position by way of email from Mr. James Ulloa. Transcript Day 2, p. 144. He said he reviewed the resume and recommended to the owner (his mother) that Complainant not be selected due to "insufficient qualifications." Transcript Day 2, p. 145. He confirms Complainant was told of his non-selection via email on May 24, 2021. Transcript Day 2, p. 145.

As to Complainant's qualifications, Mr. Pollisco deemed them insufficient because they related to other kinds of businesses, and Respondent-business is one which handles "regulatory forms," like "business license applications, zoning permits, DPW's, sanitation permits, and CW-1 applications." Transcript Day 2, p. 146. Based on the nature of the business, the selectee must interact with approximately thirty small business owners and "people in government offices." Transcript Day 2, p. 147. To that end, Mr. Pollisco also considered Complainant's "abilities in customer service." Transcript Day 2, p. 147. He relayed that "based on his reputation here in the CNMI, I don't think [Complainant] is qualified for the customer service." Transcript Day 2, p. 147.

Mr. Pollisco did indicate he was aware of a previous IER complaint against the business filed by Complainant. Transcript Day 2, p. 148. He learned of the IER activity in August 2020. Transcript Day 2, p. 149–52.

On cross-examination, Mr. Pollisco clarified that Mr. Shao Fu Zhang previously owned the business, and had set up the company email; consequently, emails would appear to come from him even though they were sent by Mr. Pollisco. Transcript Day 2, p. 172. He also stated the business had hired American citizens in the past, and one presently works as a registered agent (this same individual has also received training from Respondent in administrative assistant work). Transcript Day 2, p. 178, 180. Mr. Pollisco clarified all individuals working at the business (four in total) are of Filipino national origin, with two being CW-1 visa holders, one US citizen, and one lawful permanent resident. Transcript Day 2, p. 185. Mr. Pollisco did confirm that his mother would have had to leave the CNMI absent her selection for the position at issue, and he did not want his mother to leave the CNMI. Transcript Day 2, p. 198.

E. Respondent's Exhibits

Respondent provided four exhibits in total, including "Resume received from Mr. Ulloa on April 29, 2021, via email" (Exhibit A); "JVA for Administrative Manager position" (Exhibit B);

"Transmittal email from Mr. Ulloa" (Exhibit C); and "O-Net Administrative Services Manager Job Description" (Exhibit D). Respondent submitted no exhibits pertaining to damages.

Exhibit A, "Resume received from Mr. Ulloa on April 29, 2021 via email," is a thirty-two-page document. It is the resume Complainant provided when he applied for the vacant position. The resume lists his experience dating back to 1995, his awards and certificates, and his education; beginning at page twelve are copies of each listed certificate/certification.

Exhibit B, "JVA for Administrative Manager position," is a five-page document, internally date-stamped May 14, 2021. It is the JVA at issue, and it provides the position information and details of the vacancy consistent with descriptions above.

Exhibit C, "Transmittal email from Mr. Ulloa," is a two-page document. It is an email from the CNMI DOL to Respondent, dated April 29, 2021. In the email, the CNMI DOL informs Respondent that Complainant desires consideration for the vacant position identified in the JVA. Complainant's resume is attached, and Complainant's contact information is provided.

Exhibit's D, "O-Net Administrative Services Manager Job Description," is a seven-page document, internally date-stamped September 12, 2023. It is from a website entitled "O-Net Online," and provides information on "administrative services manager" positions. Specifically, it provides standardized job description information for a categorized series of jobs with proposed tasks, skills, work activities, and experience requirements. The information is not derived from the JVA at issue, but rather provides standardized, general information about the kind of vacancy (and may thus be form language upon which Respondent relied when crafting the JVA at issue.)

V. POSITION OF THE PARTIES

A. Complainant's Written Brief (June 12, 2024)

In his submission, the Complainant provides proposed findings of fact. Complainant's Br. 2.

As to his qualifications for the vacant position, the Complainant references the transcript and Exhibit A. He notes he possesses a GED, and thus has the requisite educational experience. Complainant's Br. 2. He also highlights his work experience, including his service as a safety officer, co-owner of several businesses, administrator, and compliance officer. Complainant's Br. 2. Complainant argues he has the required twelve-months' experience, citing the transcript and Exhibits A & B. He does not provide additional specificity, but does expressly contest the Respondent's conclusion that he lacks the required experience.

Complainant also takes issue with the contact information the employer provided in the JVA, specifically, he states the email address was non-operational (although the record does show he was able to successfully apply to the position as demonstrated by Respondent Exhibit C). Complainant notes he filed an IER Complaint against this Respondent in June 2020.

Complainant also notes that Respondent only informed Complainant of his non-selection for the position after Respondent was contacted by IER about the April 2021 non-selection. Complainant argues this "suggests retaliatory intent." Complainant's Br. 3.

Complainant also provides a section entitled "Conclusions of Law," in which he provides several arguments.

As to his national origin allegation, Complainant argues he met his burden because the Respondent has a "routine preference for hiring Filipino workers on CW-1 visas over U.S. Citizens . . . false statements about [Complainant] further supports this conclusion." Complainant's Br. 3.

As to his citizenship allegation, Complainant argues he met his burden because Respondent has "a deliberate practice of omitting valid contact information from their JVA's . . . .[Respondent's] intent to exclude U.S. citizens is further evidenced by their continued reliance on an email-only contact method." Complainant's Br. 3.

As to his retaliation allegation, Complainant argues he met his burden because he engaged in a protected activity of which Respondent was aware, and he argues the record demonstrates a "causal link" between the protected activity and his non-selection, because there was "a delay in hiring as a response to [Complainant's] IER [activity]." Complainant's Br. 3. Complainant further argues that Respondent failed to contact him in October as it stated it would, suggesting it never intended to hire him. Complainant's Br. 3.

B. Respondent's Written Brief

On July 12, 2024, Respondent provided its submission.

Respondent's proposed findings of fact explain the nature of Respondent's business (assisting companies with regulatory forms and public-facing paperwork, including preparing CW-1 visa applications) and its size (thirty clients). Resp't Br. 2.

The Respondent has been in business since 1994, and its current owner, Ms. Sanarez, has worked for Respondent since 1994. Resp't Br. 2. Respondent summarizes Ms. Sanarez's professional experience at Respondent business and explains her experience interacting with clients and local government entities. Resp't Br. 3. She was the incumbent in the position advertised in the JVA. Resp't Br. 2–7. Ultimately, she was selected anew for the position. Resp't Br. 2–7.

When Complainant applied for the position, they considered his resume, but determined him to lack qualifications, noting (1) his resume lacked information about a high school diploma or GED, (2) he did not understand the job requirements, and (3) his reputation on island would make it difficult for him to deliver satisfactory customer service. Resp't Br. 7. Respondent ultimately concluded Complainant's experience was not sufficiently well-tailored, (and thus he was not qualified) and, in any event, the selectee had superior qualifications. Resp't Br. 13.

As to retaliation, Respondent acknowledges it was aware of Complainant's protected activity, and it did not hire him for the vacancy subsequent to his engaging in protected activity; but it argues Complainant has not met his burden to show the two are linked. Resp't Br. 15–18.

C. Complainant's Rebuttal to Respondent's Brief

On July 23, 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 he possesses a wealth of relevant experience (English language skills, operating a four-plex, writing and instructing others). Rebuttal 3–4. Complainant again highlights a discrepancy with the email address provided with the JVA. Rebuttal 3. He attributes Respondent's actions to Complainant's efforts to "expose Respondent's violations of federal and local laws." Rebuttal 4.

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 (probative value). This multi-step analysis enables the Court to identify which facts should appear in the Findings of Fact section.

B. Evaluating Evidence – Legal Standards

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. 1375l, 27–28, 32–33, 35 (2023); *see also United States v. Commander Produce, LLC*, 16 OCAHO no. 1428d (2023).

2. Evaluating Testimonial Evidence (Credibility)

In assessing the reliability of testimonial evidence, the Court must consider whether witnesses have testified credibly. 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." *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 stance on reliability.

Exhibit 1, "Email correspondence between Complainant and CNMI DOL about Ranni's JVA," is a compilation of correspondence, sections of correspondence, and JVAs created by Complainant, none of which relate to the JVA at issue here. Separately, some portions of the exhibit relate to Complainant's position or views on visa and visa fraud-related issues on both Saipan and Guam. This exhibit appears to be what Complainant purports it to be insofar as the compilation demonstrates Complainant corresponds with individuals at various levels of government to voice his opinions and concerns related to policy issues. This exhibit is also consistent internally as it tends to show a consistent viewpoint and outlook held by Complainant on policy issues related to visas and immigration. Further, the contents are consistent with portions of Complainant's testimony, as he explained his views and concerns related to these issues at the hearing.

Exhibit 2, "Complainant emails to IER about this case which include other applications to Respondent business," is a compilation of correspondence, sections of correspondence, and JVAs created by Complainant. He includes the JVA at issue here (the administrative manager vacancy), and other JVAs posted by Respondent (for a housekeeping position with the same opening and closing date as the JVA at issue). The Exhibit has sections of correspondence which set forth the timeline related to Complainant's non-selection. 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.

Exhibit 3, "Complainant correspondence with IER (email chain (7 pages and 2 letters Aug 20 Oct 20)," is a compilation of correspondence and JVAs created by Complainant. They relate to Complainant's IER activity in 2020 regarding a charge he previously filed against Respondent. The included JVAs from Respondent are dated from 2019 and 2020. 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.

Exhibit 4, "News Article, dated 9 Sep 21, CNMI Immigration and Employment Benefits Article," is a news article written by David North, dated September 9, 2021. This article describes Complainant's "whistleblowing" efforts related to visas and visa-related "fraud" in the CNMI. This exhibit appears to be what Complainant purports it to be. It also appears to be complete in its submitted form, and Respondent does not contest its authenticity. Further, the exhibit is consistent with other evidence in the record, showing Complainant held a consistent viewpoint on policy issues related to visas and immigration.

Ultimately, 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.

Exhibit 1, "Email correspondence between Complainant and CNMI DOL about Ranni's JVA)," has low probative value. This exhibit does not provide facts "of consequence," as Complainant's views related to these issues do not assist the Court in understanding why he was not selected for the JVA to which he applied. Separately, nothing in the record demonstrates Respondent was even aware of these documents or sections of documents or correspondence at the time Complainant applied for the position.

Exhibit 2, "Complainant emails to IER about this case which include other applications to Respondent business," has high probative value. 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. It provides the factual framework (alongside other exhibits) for what was available for Respondent's consideration in making its hiring decision.

Exhibit 3, "Complainant correspondence with IER (email chain (7 pages and 2 letters Aug 20 Oct 20)," has high probative value. It shows Complainant engaged in protected activity under the statute as early as 2020, pre-dating his non-selection for the JVA position.

Exhibit 4, "News Article, dated 9 Sep 21, CNMI Immigration and Employment Benefits Article," has low probative value. Again, 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 or was retaliated against when he applied to and was not selected for a particular position. Just as referenced above, the record does not demonstrate Respondent was aware of the existence of this article prior to the hearing.

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,[10] and he was largely consistent on key points.[11] On balance, 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 CW-1 (or other) visa-related issues are outside the scope of the hearing.

[10] 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, and agitated by the process, 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.

[11] 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. 39–39, 45–47, 54, 92–96, 100.

The probative portions of Complainant's testimony included his explanation of his qualifications for the vacant position, specifically, his identification of portions of his resume that he believed demonstrated applicable experience. At times it seemed as if he either did not know what the business did, or he believed it to be engaged in fraudulent activities related to visas (referring to it as a "visa mill" on several occasions). Complainant also acknowledged his formal education did not appear on his resume, but noted he believed "it's a given." Finally, he explained his national origin allegation was viable because he believed the Respondent employee national origins alone demonstrate Respondent took his national origin into account when it did not select him for the position.

Complainant also used his testimony to explain his retaliation allegation. The action Respondent took against him was the non-selection for the position at issue. The IER protected activity identified appeared to be either his IER activity in 2020, or the IER activity which gave rise to this Complaint (i.e. a theory under which Respondent only selected someone else after Complainant informed Respondent he would pursue an IER complaint.)

2. Respondent's Evidence

a. Reliability of Documentary Evidence

Respondent provided four exhibits in total, with 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),[12] 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

The probative value of Respondent's Exhibits is 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 evidence Complainant applied for the position, and the position description was derived from standardized language from an occupation database.

[12] For example, the Complainant utilizes Respondent Exhibits during his testimony, and in his post-hearing brief.

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

Mr. Pollisco, the son of the owner/incumbent administrative manager, was placed under oath and testified. He works for Respondent business as a clerk, and he explained the process by which Complainant's resume was evaluated for the position. During his testimony, the Court had an opportunity to observe his demeanor and concluded there was nothing about his demeanor which would detract from his credibility. He was responsive to questions and was consistent with the reliable documentary evidence in the record.

Respondent's testimony was highly probative. He provided an explanation of the nature of the business and its clientele. He also provided some information about the incumbent and selectee for the position, his mother, explaining she has worked for Respondent business for decades from an entry-level position to eventually becoming the owner. Because of his mother's visa status, he explained she would have been required to leave the CNMI had she not been selected for the administrative manager position.

He explained the process by which he reviewed the Complainant's resume and why he considered the Complainant unqualified for the position. He also relayed he was aware of Complainant's reputation in the community and considered Complainant's public advocacy as a negative relative to working with clients and local government on the island.

He confirmed Respondent was aware of Complainant's IER activity (related to their business) in August 2020, roughly eight months before Complainant applied to the vacancy at issue.

VII. FINDINGS OF FACT

BACKGROUND – CNMI STATUS & RELATIONSHIP TO THE UNITED STATES[13]

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).[14]
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.[15]

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

[13] 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.

[14] 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.

[15] 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.

method of transition from the former CNMI foreign worker permit system to the U.S. immigration system.[16]

5. The CW-1 visa is unique to the CNMI.[17]

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

6. The CNMI has its own Department of Labor (DOL). Transcript Day 1, p. 131.
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 1, p. 134.
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 1, p. 135.
9. JVAs 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 1, p. 135, 142.
10. When a registered employer submits a JVA, it automatically goes "live" on the CNMI DOL website. Transcript Day 1, p. 135.
11. When a JVA relates to a CW-1 visa, there are additional steps antecedent to the JVA posting. Transcript Day 1, p. 136, 153.
12. 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 1, p. 151.
13. After the employer receives the US DOL Notice of Acceptance, it has 14 days to post the JVA. Transcript Day 1, p. 152, 176.
14. At the conclusion of the 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 1, p. 152.
15. CNMI DOL provides "certification" when requested to do so by a registered employer. Transcript Day 1, p. 137.
16. Certification is a request (from an employer) of the CNMI DOL stating there were no qualified applicants for a particular position. Transcript Day 1, p. 137.
17. 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 1, p. 137–38.

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[16] USCIS, CW-1: CNMI-Only Transitional Worker, Working in the United States https://www.uscis.gov/working-in-the-united-states/temporary-workers/cw-1-cnmi-only-transitional-worker (last updated Apr. 1, 2024).

[17] *Id.*

18. Such certification/qualified applicant disagreements are resolved by a hearing process within the CNMI. Transcript Day 1, p. 137–38.

RESPONDENT POSTED A JVA TO WHICH COMPLAINANT APPLIED

19. JVA 21-04-89228 opened on April 21, 2021, and closed on May 12, 2021. Exhibit I.
20. The JVA was characterized as a "renewal" for a "CW visa." Exhibit A, Exhibit I.
21. The JVA described one vacancy for an "administrative manager," a position that falls within the "management occupations" classification. Exhibit A, Exhibit I.
22. The job duties of "administrative manager" listed in the JVA include "prepare and review operational reports and schedules to ensure accuracy and efficiency. Set goals and deadlines for the department. Acquire, distribute, and store supplies. Analyze internal processes and recommend and implement procedural or policy changes to improve operations, such as supply changes or the disposal of records. Conduct classes to teach procedures to staff." Exhibit I, p. 2.
23. The JVA states the position requires a high school diploma and 12-months' work experience. Exhibit A, Exhibit I.
24. On April 29, 2021, Complainant applied to the position by requesting the CNMI DOL refer him. Transcript Day 1, p. 167, Exhibit C.
25. In this instance, Respondent did not request certification from the CNMI DOL. Transcript Day 1, p. 172.

RESPONDENT BUSINESS & VACANCY INFORMATION

26. Respondent, Ranni's Corporation, is owned by Ms. Shielyna Sanarez, a lawful permanent resident of the United States (and citizen of the Philippines). Transcript Day 2, p. 140.
27. Prior to becoming a lawful permanent resident of the United States, she was a CW-1 visa holder (and in fact was in that status when the JVA at issue was posted). Transcript Day 2, p. 142.
28. Ms. Sanarez acquired the business from Mr. Shao Fu Zhang. Transcript Day 2, p. 172.
29. Respondent-business provides services to local business clients in the CNMI, handling "regulatory forms" like "business license applications, zoning permits, DPW's, sanitation permits, and CW-1 applications" (i.e. interacting with local government). Transcript Day 2, p. 147.
30. Ms. Sanarez was the incumbent holder of the advertised position, a position she has held for almost twenty years. Transcript Day 2, p. 142.
31. Mr. Pollisco, the son of Ms. Sanarez, is a CW-1 visa holder and works for Respondent business as an accounting clerk, a position he has held for ten years. Transcript Day 2, p. 139–40.
32. Mr. Pollisco advertised the JVA with the CNMI DOL. Transcript Day 2, p. 141.

33. Ms. Sanarez's status in the CNMI (at the time) would have been tied to her ability to maintain continued employment. Transcript Day 2, p. 198.
34. Respondent employs several individuals. All are of Filipino national origin: one is a citizen of the United States, one is a lawful permanent resident of the United States, and two are CW-1 visa holders. Transcript Day 2, p. 185.

COMPLAINANT BACKGROUND & APPLICATION TO VACANCY

35. Complainant is a citizen of the United States. Transcript Day 1, p. 54, 203.
36. Complainant's national origin is "Black Seminole and Latino Black." Transcript Day 1, p. 208.
37. Complainant has been declared a "persona non grata" on the CNMI, at least in part because of his complaints against businesses for "CW visa fraud." Transcript Day 2, at 111–12.
38. On April 29, 2021, Complainant applied for Respondent's advertised administrative manager position, doing so by requesting the CNMI DOL refer him to the position (which it did). Exhibit 2, p. 14, Exhibit C.
39. Complainant maintained he was qualified for the advertised position, which he believed was evident based on his resume. Transcript Day 1, p. 217.
40. While Complainant was unaware of the actual nature of the business, offering descriptions like "document handling company" or even "visa mill" when asked, he did articulate his resume demonstrated he had "worked with documents." Transcript Day 2, p. 34–35, 100.
41. Complainant's GED did not appear on his resume, but he believed his education level could be inferred (as a "given"). Transcript Day 2, p. 70, 72, 74.
42. Specific to experience listed on the resume used during the application process, Complainant has experience as a Construction Safety Officer Trainee, a Customer Sales Representative, an Events Marketing Specialist, an Administrative Assistant, a CEO and Marketing Director, a Building Permits and Compliance Administrator, a Co-Owner and Operator, a Freelance Marketing Representative, a Research Assistant, and a Co-Owner of Four-Plex: Leasing Agent. Ex. A.
43. 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. A.

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

44. On April 29, 2021, Respondent received, via email, Complainant's application for the vacant position advertised in the JVA. Exhibit 2, p. 14.
45. On May 24, 2021, Complainant emailed Respondent, and relayed, "This is to inform you that since I have not received any interview, though qualified, [Complainant] shall be filing a federal complaint upon [Respondent] company." Exhibit 2, p. 14.
46. On May 24, 2021, Respondent replied to Complainant via email, stating: "Upon review of your application and resume, you don't have 12 months experience as an Administrative Manager. JVA posted requires at least 12 months' work experience as Administrative Manager. We will contact you again as this position becomes available on October 1, 2021." Ex. 2, p. 13.
47. In addition to the rationale provided in the email correspondence, Respondent also cited concerns over Complainant's "abilities in customer service . . . based on [Complainant's] reputation." Transcript Day 2, p. 147.
48. Mr. Pollisco reviewed Complainant's resume after he received it from the CNMI and concluded Complainant was not qualified, and as a result, he recommended to his mother (the owner of Respondent business) that Complainant not be selected for the position (for which his mother was both the incumbent and then selectee). Transcript Day 2, p. 141–42.
49. The selectee's qualifications related to her longevity working specifically for the Respondent-business, and (ostensibly) her ownership interest in the Respondent business. Transcript Day 2, p. 140–42.

COMPLAINANT'S PROTECTED ACTIVITY & ALLEGED RETALIATION

50. In August 2020, Complainant lodged a charge with IER against Respondent business pertaining to other vacancies. Transcript Day 1, p. 227, 230, Exhibit 3.
51. In August 2020, Respondent became aware of the IER activity of Complainant. Transcript Day 2, p. 149–52.
52. On April 29, 2021, Complainant applied for a position (the JVA and position at issue). Transcript Day 1, p. 167, Exhibit C.
53. On May 24, 2021, Complainant emailed Respondent, and relayed, "This is to inform you that since I have not received any interview, though qualified, [Complainant] shall be filing a federal complaint upon [Respondent] company." Exhibit 2, p. 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 Generally

"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." *Zajradhara v. Aljeric Gen. Servs., LLC*, 16 OCAHO no. 1432m, 27 (2024) (quoting *Monty v. USA2GO Quick Stores*, 16 OCAHO no. 1443c, 9 (2024) (internal citations omitted)).

"In order to prove a case of employment-based discrimination [or retaliation] under § 1324b, a complainant may use direct or circumstantial evidence." *Id*. (internal citations omitted) (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 [or retaliatory] intent." *Id*. "Direct evidence . . . ordinarily means there is either a facially discriminatory [or retaliatory] statement or policy, or an unambiguous admission that the actual protected characteristic [or protected activity] was considered and affected the decision." *Id*. (citing *Diversified Tech. & Servs. of Va., Inc.*, 9 OCAHO no. 1095, at 13).

"Circumstantial evidence 'suggests, but does not prove, a discriminatory [or retaliatory] 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, 802–805 (1973), and its progeny." *Monty*, 16 OCAHO no. 1443c, at 9.[18] "First, Complainants must establish a prima facie case of discrimination; second, Respondent must articulate some legitimate, non-discriminatory reason[19] for the challenged employment action; third, if Respondent does so, the inference of discrimination raised by the prima facie case disappears,

[18] The Ninth Circuit applies the traditional McDonnell Douglas Corp. burden shifting framework to claims of retaliation. *E.g.*, *Kama v. Mayorkas*, 107 F.4th 1054, 1058–59 (2024).

[19] "The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason . . . the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant." *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 254–55 (1981). "The defendant's explanation of its legitimate reasons must be clear and reasonably specific." *Id*. at 258. "The court must not substitute its own judgment about whether the employment decisions were wise, or even fair, for that of the employer." *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595, 602 (9th Cir. 1993).

and Complainants must then prove by a preponderance of the evidence that Respondent's articulated reason is false[20] and that Respondent intentionally discriminated against Complainants." *Id*. (citations omitted); *see also Mar-Jac Poultry, Inc.*, 12 OCAHO no. 1298, at 23–24.

B. Discrimination Allegation – Law & Analysis

1. Law – Discrimination Allegation

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,[21] the hiring of a less-qualified individual outside of the complainant's protected group may give rise to an

[20] "When the inference of discrimination is rebutted, 'the factual inquiry proceeds to a new level of specificity.'" *Sharma v. Lattice Semiconductor*, 14 OCAHO no. 1362h, 10 (2024) (citing *Burdine*, 450 U.S. at 255). "'The complainant retains the burden of persuasion . . . . This burden now merges with the ultimate burden of persuading the court that []he has been the victim of intentional discrimination.'" *Id*. (citing *Burdine*, 450 U.S. at 255–56). "At this point, the complainant must show that the articulated reason is pretextual 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Id*. (citing *Burdine*, 450 U.S. at 256).

[21] 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).

> 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;[22] (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.").

Aljeric Gen. Servs., LLC, 16 OCAHO no. 1432m, at 28.

2. Analysis – 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), and the Complainant testified credibly as to his national origin.

Further, the parties stipulated 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 by the incumbent, who hired herself (after receiving a recommendation from her son to do precisely that). Ultimately, 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 status or national origin.

Complainant was unable to provide direct evidence of a causal link between his national origin and/or citizenship status and his non-selection. Accordingly, the Court must look to whether he provided sufficient circumstantial evidence to raise an inference of discrimination.

[22] *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").

To raise this inference, a Complainant can assert any number of theories; however, on this record, the Complainant appears to advance a theory by which he was not 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, or even equal, 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.

As an initial matter, the record demonstrates this vacancy existed because it was a "CW-1 renewal," and not because the incumbent failed to satisfactorily perform the duties of the position. It is, then, reasonable to conclude the incumbent was presumptively qualified for the position. According to credible testimony, the record shows she had more position-specific experience than Complainant, having worked for Respondent business for almost twenty years. Further, Complainant did not show he had superior quantities of experience related to visa paperwork processing or other CNMI-specific public form or document processing. Moreover, Complainant did not show he had superior educational credentials (the record was not developed by him much on this point beyond testimony related to his own educational background), customer service-oriented skills, or relationships with local businesses as compared to the selectee.

Complainant has significant experience across a host of various industries, including experience that is, at least, tangentially related to the advertised vacancy; however, the analysis isn't whether he is qualified, the analysis here is whether he can show he was equally or more qualified.

Comparing the candidates' length and relevance of past experiences, comparable education experiences, and interpersonal skills and relationships, Complainant has not shown that he was equally or more qualified than the incumbent in these categories required by the employer.[23] On this record, he cannot, and having offered no other "circumstances giving rise to an inference of

[23] *See Aljeric Gen. Servs., LLC*, 16 OCAHO no. 1432m, at 29–30 (finding no prima facie case of discrimination where the selectee had more years of relevant experience than the complainant); *cf. Sharma*, 14 OCAHO no. 1362h, at 11 (finding prima facie case of discrimination where the employer hired two candidates outside of the complainant's protected class, one of whom had substantially less years of experience); *see also Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003*), opinion amended on denial of reh'g*, No. 00-35999, 2003 WL 21027351 (9th Cir. May 8, 2003) ("[I]t is logical to expect that an employer wants to hire the most qualified person for the position.").

unlawful discrimination," he cannot succeed on either a citizenship or national origin discrimination theory.

C. Retaliation Law & Analysis

1. Law – Retaliation Allegation

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 Kama v. Mayorkas*, 107 F.4th 1054, 1059 (9th Cir. 2024) ("A *prima facie* case requires a plaintiff to adequately allege that: "(1) she engaged in an activity protected under Title VII; (2) her employer subjected her to adverse employment action; [and] (3) there was a causal link between the protected activity and the employer's action.").

This record necessitates a careful analysis of the causal link between the protected activity and the employer's action. The Ninth Circuit has "rejected a bright-line rule for determining when temporal proximity implies causation[24] . . . but the degree of proximity nevertheless affects the relative strength of the evidence." *Kama*, 107 F.4th at 1061–62. "[A] specified time period cannot be a mechanically applied criterion. A rule that any period over a certain time is per se too long (or, conversely, a rule that any period under a certain time is per se short enough) would be unrealistically simplistic." *Coszalter v. City of Salem,* 320 F.3d 968, 978 (9th Cir. 2003). "Rather, a court must consider the period of time along with the factual setting and circumstance of the particular case." *Lisner v. City of Huntington Park*, No. EDCV1902009VAPSPX, 2020 WL 12893774, at *14 (C.D. Cal. Oct. 22, 2020).

2. Analysis – Retaliation Allegation

[24] *See Manatt v. Bank of Am., NA*, 399 F.3d 792, 802 (9th Cir. 2003) (finding a nine-month lapse alone insufficient to infer causation); *but see also Coszalter v. City of Salem,* 320 F.3d 968, 978 (9th Cir. 2003) (noting in the First Amendment context that "[d]epending on the circumstances, three to eight months is easily within the time range that supports an inference of retaliation").

a. Retaliation Allegation - Prima Facie Case

In August 2020, Complainant lodged an IER charge against Respondent pertaining to other vacancies. Transcript Day 1, p. 227, 230, Exhibit 3. This is a protected activity. 8 U.S.C. § 1324b(a)(5) (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"). Respondent became aware of this IER activity in August 2020. Transcript Day 2, p. 149–52. Moreover, it is undisputed that Complainant suffered an adverse employment action, i.e. his non-selection for the position in April/May 2021.

As to the fourth element of a prima facie case, the Court finds that Complainant met his burden of proof via sufficient circumstantial evidence of a causal connection between his August 2020 protected activity and his subsequent non-selection in April/May 2021.

Here, the length of time between Complainant's IER charge in August 2020 and his non-selection in April 2021 is eight months. Alone, this may not be enough to meet Complainant's burden. *See Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (for "mere" temporal proximity to constitute sufficient evidence of pretext, the temporal proximity between the protected activity and termination must be "very close"). However, the hearing testimony and evidence reflect additional circumstances supporting an inference of retaliation. First, Respondent testified as to concerns regarding Complainant's "reputation" on the island of Saipan as one reason for his non-selection. Transcript Day 2, p. 147, 167. Complainant has been declared a "persona non grata" on the CNMI, at least in part because of his complaints against businesses for "CW visa fraud." Transcript Day 2, at 111–12. It seems like this may be the "reputation" datapoint to which Respondent referenced, but in context, it is difficult to disentangle this from his validly lodged IER charge Moreover, while Respondent originally told Complainant that it had decided not to hire him because he did not have enough experience, Ex. 2, p. 13, but in testimony, Respondent's answer shifted to include this nebulous "reputation" factor and "insufficient qualifications." Transcript Day 2, at 144–45, 147. On the point of Complainant's qualifications, it isn't entirely clear they were "insufficient" based on the vacancy posting and his resume, and thus this fact also augurs towards the inference. Indeed, an employer can request CNMI DOL certification stating there were no other qualified applicants for a particular position, and Respondent chose not to request such a certification for this position (perhaps tacit recognition Complainant was qualified). Transcript Day 1, pp. 137, 172.

Considering "the period of time along with the factual setting and circumstance" of this case, *Lisner*, 2020 WL 12893774, at *14, the Court finds that the temporal proximity of eight months coupled with the surrounding circumstances meet Complainant's burden to establish a causal link between his protected activity and his non-selection.

b. Retaliation Allegation – Legitimate Non-Discriminatory Reason

With a prima facie case shown on this record, the burden shifts to Respondent to articulate a legitimate non-discriminatory reason for taking the action at issue. A failure to successfully do so can lead to a finding of liability. While the record supports an inference of retaliation, it also supports Respondent's assertion of a legitimate non-discriminatory reason for selecting the incumbent. As was outlined above, the incumbent was selected because she possessed superior qualifications. Additionally, the testimony developed at the hearing revealed the selectee was both the owner and a CW-1 visa holder. But for her renewed selection, she would be forced to leave the CNMI and her family (her son lived in the CNMI). Perhaps even more compelling than her superior qualifications was her drive to keep her family geographically intact. Transcript Day 2, p. 198.

The Court finds that incumbent's superior qualifications and her strong (and understandable) desire to keep her family geographically intact are both legitimate, non-retaliatory reasons for her selection (and thus Complainant's non-selection). *See Davis v. Wag Labs, Inc.*, No. 22-16802, 2023 WL 11802189, at *1–3 (9th Cir. June 5, 2024) (assertion that the applicant "lacked the desired qualifications and experience" for the position, and that the person hired had "superior qualifications" were sufficient legitimate, non-retaliatory reasons for the applicant's non-selection); *see also Lawson v. KFH Indus., Inc.*, 767 F. Supp. 2d 1233, 1244–45 (M.D. Ala. 2011) (finding evidence of preference for family member was "irrelevant, because it shows nepotism, not racism, and nepotism is not actionable under Title VII or § 1981"); *Holder v. City of Raleigh*, 867 F.2d 823, 825–26 (4th Cir. 1989) ("[We] do not believe that Title VII authorizes courts to declare unlawful every arbitrary and unfair employment decision. To hold that favoritism toward friends and relatives is per se violative of Title VII would be, in effect, to rewrite federal law. The list of impermissible considerations within the context of employment practice is both limited and specific . . .. We are not free to add our own considerations to the list."); *Powell v. Am. Remediation & Env't, Inc.*, 618 F. App'x 974, 979 (11th Cir. 2015) ("The District Court correctly concluded that "[n]epotism is not actionable under Title VII or Section 1981.").

c. Retaliation Allegation – Pretext

"Again, a Complainant may show pretext 'indirectly, by showing that the employer's proffered explanation is 'unworthy of credence' because it is internally inconsistent or otherwise not believable, or . . . directly, by showing that unlawful discrimination more likely motivated the

employer.'" *Sharma*, 14 OCAHO no. 1362h, at 16 (quoting *Chuang v. Univ. of Cal. Davis, Bd. of Trustees*, 225 F.3d 1115, 1127 (9th Cir. 2000)); *see also Davis*, 2023 WL 11802189, at *1–3 ("To prove pretext, a plaintiff must point to evidence 'either directly evidencing a discriminatory motive or showing that the employer's explanation is not credible.'") (citing *Lindahl v. Air France*, 930 F.2d 1434, 1437–38 (9th Cir. 1991)). "The plaintiff may also rely on 'a combination of these two kinds of evidence.'" *Id*. (citing *Opara*, 57 F.4th at 723 (simplified)).

"Direct evidence of discriminatory intent consists of 'evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption,' and includes such evidence as discriminatory remarks." *Mayes v. WinCo Holdings, Inc.*, 846 F.3d 1274, 1280–81 (9th Cir. 2017); *see also Chuang*, 225 F.3d at 1128–29 (considering racist remarks to constitute "direct evidence" of pretext). Complainant presented no such direct evidence of discriminatory or retaliatory intent.

"To show pretext using circumstantial evidence, a plaintiff must put forward specific and substantial evidence challenging the credibility of the employer's motives"—essentially, that the reasons for the non-selection are "not believable." *Sharma*, 14 OCAHO no. 1362h, at 14–15 (quoting *Vasquez v. Cnty. of L.A.*, 349 F.3d 634, 642 (9th Cir. 2003), *as amended* (Jan. 2, 2004)).

Complainant has not shown that Respondent's explanation was not credible. Both common sense and the record here bear out an employer would reasonably prefer a candidate with superior qualifications. Further, and perhaps even more compelling, logic cannot support the proposition that a mother's desire to remain on the same island as her child is a pre-textual reason to not select a prospective employee.

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, although Complainant established a prima facie case of retaliation following his protected activity in August 2020, he could not establish that Respondent's legitimate, non-discriminatory reason for not selecting him was pretextual.

X. CONCLUSIONS OF LAW

EVIDENTIARY STANDARDS

1. 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).
2. 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).
3. 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;
4. 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).
5. Only reliable evidence merits a probative value assessment; if the source of evidence is not trustworthy, its purported weight is irrelevant. *Fasakin*, 14 OCAHO no. 1375l, 35 (2023).
6. Probative value is determined by how likely the evidence is to prove some fact. *R&SL Inc.*, 13 OCAHO no. 1333b, 26 (2022).
7. 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); *Fasakin*, 14 OCAHO no. 1375l, 29 (2023).

ANALYSIS OF PARTIES' EVIDENCE

8. 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.
9. Complainant's Exhibit 1 is sufficiently reliable because it appears to be what Complainant purported it to be, is internally consistent, and is consistent with Complainant's testimony.
10. Complainant's Exhibits 2 and 3 are sufficiently reliable as Complainant provided foundational explanation for how he created the exhibits and Respondent at no point disavowed them.

11. Complainant's Exhibit 4 is sufficiently reliable because it appears to be what Complainant purported it to me, appears complete, Respondent does not contest its reliability, and it is consistent with other record evidence.
12. Complainant's admitted documentary evidence is sufficiently reliable to be considered in reaching a conclusion on the merits of his Complaint.
13. 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.
14. The probative value of Exhibit 1 is low, because it does not provide facts of consequence, and nothing in the record demonstrate that Respondent was aware of these documents when Complainant applied for the position.
15. The probative value of Exhibits 2 is high, because it speaks to one of the central facts of the case, an provides the factual framework for Respondent's hiring decision.
16. The probative value of Exhibit 3 is high, because it demonstrates that Complainant's engaged in protected activity under the statute pre-dating his non-selection.
17. The probative value of Exhibit 4 is low, because Complainant's advocacy efforts do not pertain to the claims at issue in this case, and the record does not reflect that Respondent was aware of the article prior to the hearing.
18. 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.
19. Complainant's testimony involving his qualifications for the vacant position (including identifying portions of his resume demonstrating his experience) and explanation of his national origin allegation and retaliation allegations was probative.
20. Respondent's exhibits were all sufficiently reliable. Complainant did not contest reliability and the exhibits contained sufficient indicia of reliability.
21. The probative value of Respondent's exhibits is high, as they memorialize the vacant position at the heart of Complainant's claims and the documents Respondent considered in making its hiring decision, as well as the fact Complainant applied, and the position description.
22. Respondent witness Mr. Pollisco testified credibly based on his demeanor, responsiveness, and consistency.
23. The probative value of the testimony of Respondent's witness Mr. Pollisco was high, as he provided an explanation of the nature of the business and the selectee, the process by which Respondent made its hiring decision, and his awareness of Complainant's advocacy efforts and IER activity.

STANDARDS OF LAW

24. Facts included in the Findings of Fact may not have been expressly entered into the record by the parties, the parties implicitly relied 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.
25. "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).
26. "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).
27. "Direct evidence is evidence that, on its face, establishes discriminatory intent." *Monty v. USA2GO Quick Stores*, 16 OCAHO no. 1443c, 9 (2024).
28. "Circumstantial evidence 'suggests, but does not prove, a discriminatory motive.'" *United States v. Mar-Jac Poultry, Inc.*, 12 OCAHO no. 1298, 23 (2017).
29. If a complainant relies on circumstantial evidence, OCAHO applies the burden shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–805 (1973), and its progeny.
30. Under the burden shifting framework, Complainant 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.
31. 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).
32. The hiring of a less-qualified individual outside of the complainant's protected group may give rise to an inference of unlawful discrimination.
33. "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).
34. The Ninth Circuit has rejected a bright-line rule for determining when temporal proximity implies causation. *Kama v. Mayorkas*, 107 F.4th 1054, 1061–62 (9th Cir. 2024); *Coszalter v. City of Salem,* 320 F.3d 968, 978 (9th Cir. 2003).

35. "Rather, a court must consider the period of time along with the factual setting and circumstance of the particular case." *Lisner v. City of Huntington Park*, No. EDCV1902009VAPSPX, 2020 WL 12893774, at *14 (C.D. Cal. Oct. 22, 2020).
36. 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

37. 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.
38. Complainant failed to provide direct evidence of a causal link between his citizenship status and his non-selection.
39. Because Complainant did not provide direct evidence, the Court must consider whether Complainant provided sufficient circumstantial evidence to raise an inference of discrimination.
40. 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 despite his superior qualifications.
41. To evaluate this theory, the Court compares Complainant's qualifications to the selectee's qualifications.
42. If Complainant's qualifications are superior or even equal to the selectee's, then Complainant may be able to establish a prima face case of discrimination.
43. 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.
44. The record reflects that the incumbent was presumptively qualified for the position, had more position-specific experience than Complainant, and Complainant did not show he had superior quantities of relevant experience or educational credentials, customer service-oriented skills, or relationships with local businesses.
45. Because Complainant did not show circumstantial evidence allowing for an inference of discrimination and did not meet his burden to show a prima face case of discrimination, the Court's analysis ends there.

RETALIATION LEGAL ANALYSIS

46. Complainant established a prima facie case of retaliation.
47. Complainant's IER charge in August 2020 is a protected activity.
48. Complainant showed that Respondent knew of this charge in August 2020.
49. It is undisputed that Complainant suffered an adverse employment action, i.e. his non-selection for the position.
50. Given that the time between the protected activity and the adverse action is 8 months, coupled with Respondent's testimony of concerns with Complainant's "reputation" in Saipan, shifting reasons for Complainant's non-selection, and Respondent's decision not to request certification from the CNMI DOL for the position, the factual setting and circumstance of the case allow for an inference of a causal link.
51. Respondent met its burden to establish a legitimate, non-discriminatory reason for its non-selection—the incumbent was selected, she possessed superior qualifications, and the incumbent wanted to keep her family geographically intact.
52. Complainant did not show that Respondent's explanation for his non-selection was pretextual.
53. Complainant presented no direct evidence of discriminatory or retaliatory intent.
54. Complainant also did not show that Respondent's explanation was not credible, and common sense and the record before the Court bear out that an employer would reasonably prefer a candidate with superior qualifications, and that the incumbent wanted to remain on the island of Saipan with her son.

The Complainant is DISMISSED[25] WITH PREJUDICE.

This is a Final Order.[26]

SO ORDERED.

Amended Final Order dated and entered on September 19, 2024 (Final Order dated and entered on September 12, 2024).

Honorable Andrea R. Carroll-Tipton
Administrative Law Judge

[25] 8 U.S.C. § 1324b(g)(3).

[26] 8 U.S.C. § 1324b(g)(1); 28 C.F.R. § 68.52(e).

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.