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

September 9, 2024

US TECH WORKERS ET AL., Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2024B00085
ILLINOIS INSTITUTE OF TECHNOLOGY, Respondent.	)	

Appearances: John Miano, Esq., for Complainant
David A. Calles Smith Esq., Sarah J. Millsap, Esq., and Amy L. Peck, Esq., for Respondent

ORDER GRANTING MOTION TO DISMISS

I. PROCEDURAL HISTORY

This case arises under the antidiscrimination provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b. On March 19, 2024, Complainant filed a Complaint alleging Respondent, Illinois Institute of Technology, violated 8 U.S.C. § 1324b(a)(1).

On June 10, 2024, Respondent filed a Motion to Dismiss.[1]

On June 21, 2024, Complainant filed a Response.[2]

[1] Respondent's Motion to Dismiss consists of both a motion and a brief. For clarity, this Order references page numbers and argument from the brief unless otherwise specified.

[2] These are the only two filings which will be considered at this time. A full discussion of the additional filing submitted (but not considered) can be found in *US Tech Workers v. Ill. Inst. Tech*., 19 OCAHO no. 1563a (2024).

II. FILINGS OF THE PARTIES

A. Complaint

OCAHO uses a Complaint Form. The form poses a series of questions designed to facilitate the provision of statements which would give rise to an alleged violation of the law. The Complainant in this case only completed portions of the Complaint Form, but did include additional pages.[3]

Complainant identifies the "citizenship or immigration status at the time of the alleged discrimination [was] United States Citizen or National." Compl. 2. The Complaint asserts the discrimination occurred "because… of citizenship status." *Id*. at 6.

Section 7 of the Complaint form covers "Discrimination in Hiring, Recruitment, or Referral for a Fee, 8 U.S.C. § 1324b(a)(1)." Compl. 8. For ease of reference, following Section 7 as completed by Complainant:

[3] Pinpoint citations to the Complaint and other court filings are to the page numbers of the PDF, as opposed to the page numbers printed at the bottom of the page.

Section 7: Discrimination in Hiring, Recruitment, or Referral for a Fee, 8 U.S.C. § 1324b(a)(1)

1) Did the Business/Employer refuse to hire you? ___✓___YES or _____NO

If you answered NO to question (1), go to Section 8. If you answered YES to question (1), complete the rest of this section.

2) When did you apply for work at the Business/Employer? _____/_____/_____
Month Day Year

3) Please describe the job title and duties:

See attached charge for application details.

4) Were you qualified for the job? ___✓___YES or _____NO

5) Was the Business/Employer looking for workers? ___✓___YES or _____NO

6) Why did the Business/Employer refuse to hire you? **(CHECK AS MANY AS APPLY)**
✓ Citizenship status **or**
National origin

Section 7: Discrimination in Hiring, Recruitment, or Referral for a Fee, 8 U.S.C. § 1324b(a)(1) Continued

7) Please list any other reason(s), if any, why you were not hired:

8) Did the job remain open and the Business/Employer continue taking applications from other people after you were not hired? _____YES or _____NO

9) Was someone else hired for the job? _____YES or _____NO

10) If you answered YES to question (9) above, to the extent you know, who was hired and why?

11) Do you want to be hired by the Business/Employer? _____YES or _____NO

NOTE: Your answer to question (11) will *not* affect your right to continue with your complaint.

Compl. 6-7. The Complaint goes on to clarify there are no allegations of discrimination in firing, document abuse, or retaliation. *Id.* at 8-11. The Complaint includes the "90 day letter" from IER. *Id*. at 13-14. The Complaint also includes the "IER Charge Form." Based on the charge filed with IER, the Complainant alleges the date of discrimination occurred on January 21, 2023 (and is ongoing).[4] *Id*. at 16. In the context of the IER Charge Form, Complainant was asked to "[e]xplain in detail what happened when the Injured Party discriminated against;" and Complainant responded, "See attached." *Id*.

[4] Complainant offers no explanation for his decision to leave this portion of the OCAHO Complaint Form blank.

Beginning at page 21 of the Complaint, Complainant provides a text document which states "Respondent . . . began engaging in an unlawful scheme of recruitment based on immigration status … [when it] targeted its recruitment efforts towards those in H-1B visa[5] status [through] Chicago H-1B Connect." Compl. 21. The Complaint then goes onto describe the activities of "Chicago H-1B Connect," who is not a named party in this matter. *Id*. at 21-22.[6] The text document ends with "By specifically targeting non-immigrants in H-1B for employment, Respondent affirmatively discouraged protected individuals from applying for employment and has engaged in unlawful discrimination based on citizenship status." *Id*. at 22.

At pages 23 to 24 of the Complaint, Complainant provides full legal names and contact information for "injured parties" – nine individuals in total.

At page 29,[7] the Complaint contains another text document which states:

> The subject of this complaint is a conspiracy by forty-three Chicago area employers to engage in an unlawful program of recruitment based on immigration status. Operating under the collective name

[5] The Court takes official notice, *see* 28 C.F.R. § 68.41, of the following from USCIS: "This nonimmigrant classification applies to people who wish to perform services in a specialty occupation, services of exceptional merit and ability relating to a Department of Defense (DOD) cooperative research and development project, or services as a fashion model of distinguished merit or ability." U.S. Citizenship and Immigration Services, *H-1B Specialty Occupations*, https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations (last visited August 26, 2024).

Assuming it is the first category or H-1B visa holders at issue (Specialty Occupation, and not DoD research & development or fashion model), USCIS also states the following: "The occupation [must] require[] [t]heoretical and practical application of a body of highly specialized knowledge; and [a]ttainment of a bachelor's degree of higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Further H-1B Specialty Occupations require the petitioner to submit a Labor Condition Application (LCA) certified by the Department of Labor (DOL) alongside other required petitions. *Id*.

[6] The Complaint also contains a series of hyperlinks related to news or other websites. The external content of hyperlinked material are not included with the Complaint. As a practical matter, the Court does not open hyperlinks. *See Ravines de Schur v. Easter Seals-Goodwill N. Rocky Mountain, Inc.*, 15 OCAHO no. 1388b, 4 (2021) ("[T]he Court will not consider information or documents contained in hyperlinks.").

[7] Pages 25-28 appear to be a scan duplicate of the previous pages.

> "Chicago H-1B Connect" these employers continue to promote their targeted requirement of H-1B non-immigrants on a web site, through press releases, and through media interactions.
>
> US Tech Workers filed separate charges against each of the conspirators on behalf of named members who made applications to them. US Tech Workers is filing a separate complaint for each conspirator as well.
>
> The participants in the unlawful conspiracy are [Complaint contains organizations and contact addresses for organizations].

B. Motion to Dismiss

Respondent argues the Court does not have jurisdiction to hear this matter,[8] and in the alternative this Complaint "fail[s] to state a claim upon which relief can be granted." Mot. Dismiss 2-3.

[8] Respondent argues the Complainant lacks standing. Mot. Dismiss 2, 4-5. However, "[d]eterminations of who may participate in agency proceedings are not subject to the constitutional standing restrictions . . . in Article III," and so-called "'[a]dministrative standing' may thus be more expansive than 'judicial standing.'" 32 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 8228 (2d ed.) (June 2024 Update). Administrative courts, when considering standing, "must always begin with the language of the statute and regulations that provide for an administrative hearing" and where the statute and regulations do not address the standing issue raised, courts should turn to the Administrative Procedure Act. *Ecee, Inc., v. Fed. Energy Regul. Comm'n*, 645 F.2d 339, 350 (5th Cir. 1981); *see also Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601, 614 (D.C. Cir. 1978) (Bazelon, J., concurring) ("The starting point in determining administrative standing should be the language of the statutes and regulations that provide for an administrative hearing, appeal, or intervention.").

A starting (and ending) point of such a query in this administrative court leads to 8 U.S.C. § 1324b and 28 C.F.R. § 68.2. The statute allows for any "person," defined as an "individual or organization," to file a charge with IER. 8 U.S.C. §§ 1324b(b)(1), 1101(b)(3) (emphasis added). The regulation states: "In cases arising under section 274B of the INA, 'complainant' means . . . in private actions, an individual or private organization" (emphasis added). "US Tech Workers" is ostensibly a "private organization." Indeed, Complainant seems to indicate as much in its Response filing, even if not to directly address this point. ("Complainant, US Tech Workers, is an organization…" Resp. Mot. Dismiss 4). Based on the plain language of the statute and regulation, this Complainant may bring this Complaint.

The Motion at pages 5 through 6 explains:

> Complainant fails to allege a claim upon which relief can be granted and their claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) and 28 C.F.R. § 68.10… In the present complaint, Complainant fails to allege elements two through four: qualification for the position, an adverse employment decision, and disparate treatment compared to non-U.S. workers for the job sought…
>
> This is not a case in which Complainants were discouraged from seeking employment or [Respondent] otherwise implied Complainants' applications would be unsuccessful during recruitment.

C. Response to Motion to Dismiss

In its Response, Complainant argues "the complaint sets out a clear case of recruitment discrimination against the protected class of U.S. workers." Resp. Mot. Dismiss 5. The Complainant states "Chicago H-1B Connect" engaged in a "recruitment campaign targeted towards hiring H-1B non-immigrants."[9] *Id.* at 6. Complainant's Response notes multiple instances of Chicago H-1B Connect being referred to as a "a job board," a characterization it seeks to advance and not dispute. *Id*. at 5, 6, 12. Complainant asserts Chicago H-1B Connect "listed Respondent as a member." *Id*. at 6. Presumably because of the alleged connection, Complainant

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Respondent also (reasonably) keys in on Complainant's inartful use of the term conspiracy, and consequently argues that OCAHO does not have jurisdiction to handle matters related to "conspiracies." Mot. Dismiss 2. While it is accurate that OCAHO does not have subject matter jurisdiction over "civil conspiracies," it does have jurisdiction over certain "recruitment discrimination" theories, which is what this Complainant appears to be advancing.

With jurisdictional arguments addressed, the Court can address the grantable theory by which Respondent seeks dismissal.

[9] The Response then goes on to describe (via snippets from media posts and quotes from social media) the alleged purpose of Chicago H-1B connect, which was to "assist current H-1B visa holders impacted by recent layoffs in the tech industry… [but also noting the information was] open to all." Resp. Mot. Dismiss 6. The Response also contains arguments which will not be considered by the Court. Those include impermissibly filed motions seeking summary judgment; discussion or conclusions about unrelated cases which may have been settled by IER. Resp. Mot. Dismiss 4, 13.

also argues Respondent has engaged in a "civil conspiracy" which is a "method of establishing joint liability for the underlying tort." *Id*. at 17. This appears to be a clarification that Complainant does not allege conspiracy itself is actionable under the statute; rather the Complainant appears to encourage the Court to use tort-generated theories in thinking about joint liability.

Complainant also lodges a policy argument, explaining the concerns raised in the Complaint should be considered in the context of the economic stress under which "Americans" live. Resp. Mot. Dismiss 14-15. The Response includes approximately 35 pages of exhibits, which appear to be a compilation of press releases, media articles, and screenshots of social media posts related to Chicago H-1B Connect.[10] Resp. Mot. Dismiss, Ex. A-Ex. K.

III. LAW AND ANALYSIS

A. Motion to Dismiss – Failure to State a Claim

An OCAHO Administrative Law Judge (ALJ) may dismiss a complaint for failure to state a claim upon which relief may be granted. 28 C.F.R. § 68.10(b). This rule is modeled after Federal Rule of Civil Procedure 12(b)(6). *S. v. Discover Fin. Servs., LLC*, 12 OCAHO no. 1292, 7 (2016) (citing *United States v. Spectrum Tech. Staffing Servs., Inc.*, 12 OCAHO no. 1291, 8 (2016); and then citing 28 C.F.R. § 68.1). "In considering a motion to dismiss, the court must limit its analysis to the four corners of the complaint." *Udala v. New York State Dep't Educ.*, 4 OCAHO no. 633, 390, 394 (1994). The complainant's allegations of fact are accepted as true and all reasonable inferences derived therefrom are drawn in the complainant's favor. *Id.*

OCAHO's Rules of Practice and Procedure provide that complaints shall contain: (1) "A clear and concise statement of facts, upon which an assertion of jurisdiction is predicated"; (2) "The alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred"; and (3) "A short statement containing the remedies and/or sanctions sought to be imposed against the respondent." 28 C.F.R. § 68.7(b)(1)-(4).

"Statements made in the complaint only need to be 'facially sufficient to permit the case to proceed further,' . . . as '[t]he bar for pleadings in this forum is low.'" *Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450, 3 (2022) (citing *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 10 (2012), and then citing *United States v. Facebook, Inc.*, 14 OCAHO no. 1386b, 5 (2021)). "OCAHO's pleading standard does not require a complainant [to] proffer evidence at the pleadings stage . . . Rather, pleadings are sufficient if 'the allegations give adequate notice to the respondents of the charges made against them.'" *Id.* (quoting *Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO no. 1097, 10 (2003)); *see also Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, at 9.

"A § 1324b complaint must contain sufficient minimal allegations to satisfy § 68.7(b)(3) and give rise to an inference of discrimination." *Wangperawong v. Meta Platforms, Inc.*, 18 OCAHO no.

[10] None of which was included with the Complaint.

1510c, 7 (2024); *see Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272, 6 (2016). To give rise to an inference of discrimination, complaints must include information that links the complainant's protected class and the employment action in question. *Id.*; *see Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450, 5 (2022). A complainant meets this standard by "identif[ying] a theory by which [the] Respondent allegedly violated 8 U.S.C. § 1324b" in a way that "succinctly yet clearly" inform the respondent why the complainant has brough the suit. *Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450, 7 (2022).

In contrast, if a § 1324b complainant does not identify why he believes that the relevant employment action was discriminatory, this is not sufficient to meet OCAHO's pleading standard. *See, e.g.*, *A.S. v. Amazon Webservices Inc.*, 14 OCAHO no. 1381d, 16 (2021) (dismissing claim of citizenship status discrimination claim when the complainant merely asserted "in a general and conclusory fashion that Respondent discriminated against him based on his citizenship status, without citing to specific facts giving an inference to causation") (citing, inter alia, *Thompson v. Sanchez Auto Servs., LLC*, 12 OCAHO no. 1302, 7–8 (2017) (dismissing discrimination claim where the complaint was "bereft of any allegations related to [] national origin apart from cursory assertions")); *Wangperawong v. Meta Platforms, Inc.*, 18 OCAHO no. 1510c, 7–8 (2024) (allegations that the complainant applied for a position, that he was qualified, and that he was not selected, insufficient to state a claim for hiring discrimination).

B. Recruitment Violations under 8 U.S.C. § 1324b(a)(1)(B)

Under 8 U.S.C. § 1324b, "[i]t is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual[11]…" based on national origin or citizenship status, "with respect to… recruitment or referral for a fee, of the individual for employment…" 8 U.S.C. § 1324b(a)(1)(A)-(B).

While "recruitment" is not a frequently litigated personnel action, it has been the subject of precedential decisions dating back to the some of OCAHO's earliest published cases. *See United States v. Lasa Marketing Firms,* 1 OCAHO no. 141 (1990).[12]

[11] Additional caveats removed for ease of reading.

[12] The ALJ in that case provided interesting context for the then more recently passed Immigration Reform and Control Act of 1986 ("IRCA"). The ALJ referenced House Report No. 99-682 (I):

> Numerous witnesses over the past three Congresses have expressed their deep concern that the imposition of employer sanctions will cause extensive employment discrimination… These witnesses are genuinely concerned that employers, faced with the possibility of

Lasa Marketing may be one of the first instances of OCAHO setting forth elements of a prima facie case as it relates to a "recruitment" allegation. *United States v. Lasa Marketing Firms,* 1 OCAHO no. 141, 965 (1990). There, the ALJ outlined that complainant could: (1) show [she] was a protected individual; (2) [she approached Respondent, a recruiting entity] and sought to apply for a position or be referred to an advertised position; (3) despite her qualifications she was not referred or considered; and (4) the Respondent [a recruiting entity] referred U.S. citizens and permanent resident for employment subsequent to the rejection of Complainant. *Id.* at 965, n. 15.

> civil and criminal penalties, will be extremely reluctant to hire persons because of their linguistic or physical characteristics.
>
> Representative Garcia testified that 'as a shorthand for a fair identification process, employers would turn away those who appear 'foreign' whether by name, race, or accent. (Joint Hearing Before the House Subcommittee on Immigration Refugees and International Law and the Senate Subcommittee on Immigration and Refugee Policy, Anti-Discrimination Provision of H.R. 3080, Serial No. 35, p. 111;).' H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 68.

Lasa Marketing Firms, 1 OCAHO no. 141 at 951, n. 2.

The ALJ next noted the interplay (or lack thereof) between citizenship discrimination and the protections of Title VII, stating: "Despite the recognition that Title VII protects [non-citizens] from discrimination on account of national origin, the Farah Court held that 'nothing in [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage.'" *Id*. at 952; *citing Espinosa v. Farah Mfg.*, 414 U.S. 86, at 95 (1973). Separately, he noted (distinct from theories available under Title VII):

> President Reagan's statement accompanying his signing of the bill [discusses the limits of available theories]. According to the President, section 1324a requires proof that the respondent intended to discriminate against the complainant because of his national origin or citizenship. See, 'Presidents' Statement on Signing S.1200 Into Law,' 22 Weekly Comp. Pres. Doc. 1534, 1535 (November 6, 1986), reprinted in Interpreter Releases, Vol. 63, No. 44, November 10, 1986, pp. 1036-39.

Id. at 958, n. 5.

In another early precedential case, *Williams v. Lucas & Assocs.*, 2 OCAHO no. 357, 423, 433 (1991), the ALJ considered a recruiter who prescreened applicants for citizenship status. While that complainant could certainly show some elements of a prima facie case, he was ultimately unsuccessful because he failed to demonstrate he was qualified for any position related to the recruitment efforts.

In *Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272 (2016), the ALJ dismissed a recruitment-based discrimination claim. In that case, the complainant engaged with a recruitment and staffing company (applying to jobs for which she was not selected). Ultimately, she failed to plead much else, concluding that respondent hired "visa applicants" (or other non-citizens) instead. *Id.* at 7. The Court there, after characterizing her allegations as "bald conclusion[s]" noted "[s]peculation and hypotheses cannot stand in or substitute for facts, and even under the most liberal of pleading standards, claims lacking an adequate factual basis are subject to dismissal." *Id.*

Recently, in *United States v. Facebook,* 14 OCAHO no. 1386b, 8 (2021), the Court found the complainant (IER) met OCAHO's pleading standards when it alleged "a protected group, 'U.S. workers,' . . . allegedly experienced disparate treatment in the recruiting and hiring practices of Respondent based on their citizenship or immigration status." Specifically, that complainant alleged that respondent engaged in a "scheme of set-asides of certain positions for only temporary visa holders and ineffective methods of recruitment designed to solicit minimal, if any response from individuals outside the targeted group of temporary visa holders." *Id*. at 9.

C. Analysis

Turning now to a careful analysis of this Complaint, the Court is left to conclude it fails to state a claim upon which relief can be granted. It does not sufficiently plead alleged facts which place Respondent on notice of a proposed violation of the law. Complainant identifies nine individuals, who are, for the purposes of this issue, protected individuals.[13] But this is where the Complaint's specificity ends.

Complainant does not identify when or how these individuals engaged with Respondent (or even when or how they engaged with "Chicago H-1B Connect"[14]). *See Lasa Marketing Firms,* 1 OCAHO no. 141 (1990). Complainant does not allege, with any specificity, what positions were vacant (i.e. for what positions Respondent was allegedly recruiting) – indeed, Complainant does

[13] Insofar as Complainant alleges they are all citizens of the United States. "The term 'protected individual' means an individual who is a citizen or national of the United States." 8 U.S.C. § 1324b(a)(3)(A).

[14] And this is, assuming, *arguendo*, Chicago H-1B Connect and Illinois Institute of Technology are interchangeable entities (a point which Respondent does not concede).

not even allege a type or class of position for which Respondent was recruiting. *Id*. at , 965. Complainant (understandably) does not (and perhaps on this fact pattern, cannot) allege or explain how or whether the individuals identified in the Complaint were qualified for positions or types of positions at issue. *See id.; see also Lucas & Assocs.,* 2 OCAHO no. 357 at 433. Furthermore, Complainant does not allege whether Respondent ever filled vacancies, and if so, with whom. *Jablonski*, 12 OCAHO no. 1272 at 7.

What is clear, is that Complainant alleges a collaborative job board existed on the internet, and that individuals who have or had status related to an H-1B visa could find prospective employment leads there. The existence of such a job board is not a per se violation of § 1324b - a sufficiently pled complaint must plead more. *See Facebook,* 14 OCAHO no. 1386b at 8. To the extent Complainant seeks redress related to the existence of the H-1B visa program or whether a particular business has complied with that visa program,[15] it has brought such policy-related concerns or issues to the wrong place. *Id*.

IV. CONCLUSION

For the reasons outlined above, the Complaint is DISMISSED WITHOUT PREJUDICE. This is a Final Order.[16]

SO ORDERED.

Dated and entered on September 9, 2024.

Honorable Andrea R. Carroll-Tipton
Administrative Law Judge

[15] "To the extent Respondent has framed the issue at hand as a referendum on its DOL PERM process and whether the PERM process imposes certain obligations on employers, the Court will defer to the Department of Labor." *Facebook,* 14 OCAHO no. 1386b at 8.

[16] Any prehearing conferences currently scheduled are hereby cancelled, and any pending motions are DENIED as moot.

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.