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

November 21, 2024

RAVI SHARMA, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 2022B00023
NVIDIA CORP., Respondent.	)	

Appearances: Ravi Sharma, pro se Complainant
Patrick Shen, Esq., K. Edward Raleigh, Esq., and Samantha Caesar, Esq., for Respondent

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

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

I. PROCEDURAL HISTORY

On February 2, 2022, Complainant, Ravi Sharma, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). Complainant alleges Respondent, NVIDIA Corp. (NVIDIA), did not select him for a "Senior Logic Design Engineer, FGPA" position because of his citizenship status, in violation of § 1324b(a)(1).[1] Compl. 6.[2]

On March 15, 2022, Respondent filed an Answer denying liability.

[1] Complainant applied to a Senior Logic Design Engineer, FGPA position at Respondent business. He was telephonically interviewed by two different individuals on two different days. Ultimately, he was non-selected for the Senior Logic Design Engineer, FGPA position. There were several individuals selected for the position.

[2] Pagination reflects internal pagination of the PDF in the Court's records, not the pagination at the bottom of the complaint form.

On March 13, 2023, Respondent filed a Motion for Summary Decision.

On April 10, 2023, Complainant filed a Response.

On May 2, 2023, Respondent filed a Motion for Leave to Reply to Complainant's Response, with its proposed Reply attached.

On May 4, 2023, the Court granted Respondent's Motion for Leave to Reply and accepted the attached Reply. *Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450i, 3 (2023).[3] In the same order, the Court also granted Complainant leave to submit an additional filing. *Id.*

On May 22, 2023 (and various other dates),[4] Complainant filed what will be collectively considered his sur-reply.

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[3] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website athttps://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions .

[4] In an Order dated July 26, 2023, the Court provided an accounting of the multitude of ad hoc filings provided by Complainant and explained which filings would and would not be considered. The Court clarified for parties:

> Complainant's May 22 Motion for Leave is GRANTED. Complainant's May 11 Motion for Leave is DENIED AS MOOT.
>
> Complainant's May 18 Motion for Leave is GRANTED IN PART with respect to arguments about the evidence relied upon by Respondent in its Motion for Summary Decision.
>
> As a result, the Court will consider Complainant's May 22 Sur-response and will consider his March 21 and April 10 Motions to Strike in a limited capacity. The Court will also consider Respondent's March 22 and April 19 oppositions in a limited capacity as it adjudicates the Respondent's pending Motion for Summary Decision.

Sharma v. NVIDIA Corp., 17 OCAHO no. 1450j, 5–6 (2023).

II. POSITIONS OF THE PARTIES

A. Respondent's Motion for Summary Decision[5]

Respondent argues there are no genuine issues of material fact, and it is entitled to summary decision as a matter of law. Mot. Summary Decision 5. According to Respondent, Complainant cannot establish a prima facie case, and in the alternative, Respondent had a legitimate and nondiscriminatory reason for its non-selection of Complainant. *Id*. at 18.

In support of its motion, Respondent provided: a transcript of its deposition of the Complainant, (including Complainant's corrections), declarations from interviewers (a Senior Logic Design Engineer and a Senior ASIC Engineer), and documents from its personnel database (which is called "Workday") memorializing the interview process (application question responses, interview ratings spreadsheets, and candidate profiles for Complainant and for the selectees). Exhibits A-I. This evidence will be further evaluated and discussed in later sections of this Order.

Respondent "extended offers only to the top four candidates with the highest average interview scores." *Id.* at 18. Respondent noted the interview used "objective questions" and assessed "candidates' technical capabilities and cultural fit for the position." *Id*. at 19.

Respondent argues its decision to non-select Complainant was based on his average interview score (which was lower than the selected candidates). Respondent argues that "[a]ny inference of discrimination, to the extent Complainant can establish one . . . disappears" and it "has satisfied its burden of articulating a legitimate, nondiscriminatory reason for hiring the two nonimmigrant candidates;" and that Complainant has failed to show that the proffered reason for his non-selection is pretextual. Mot. Summary Decision 23, 23–25.

B. Complainant's Response to the Motion for Summary Decision[6]

Complainant argues something akin to an existence of genuine issues of material fact, where he provides a list of facts or conclusions with which he takes issue. Resp. Mot. Summary Decision 2–6. Complainant disputes the computation of the interview scores and the identity of second

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[5] In the Court's official file, this Motion and its attachments were scanned as one submission totaling 410 pages. When this filing (motion or exhibits) is referenced in this Order, the page number utilized by the Court reflects the internal pagination of the PDF.

[6] While Complainant's Response addresses the evidence and argument presented by Respondent, Complainant also added extraneous argument related to his assessment of discovery-related issues. For example, Complainant seems to take issue with Respondent's use of excerpts from the attached exhibits, an otherwise customary practice in motions.

To the extent Complainant sought to move the Court to take an action, such a motion would be DENIED as improperly lodged within a Response. *US Tech Workers v. CohesionIB, Inc.*, 20 OCAHO no. 1594b, 1 n.1 (citing *A.S. v. Amazon Web Servs*., 14 OCAHO no. 1381j, 5 (2021)).

round interviewers. *Id*. at 2–4. Next, he disputes the Respondent counsel's characterization of the interview questions as ones about "software engineering;" Complainant also disputes the Respondent's assertion that Complainant performed poorly in the interview, noting interviewers informed him he answered questions satisfactorily. *Id*. at 4–5. Finally, Complainant takes issue with Respondent's assertion that interviewers were unaware of a candidates' citizenship status, noting the application process asks applicants to indicate if they require visa sponsorship. *Id*. at 6.

Complainant argues the record demonstrates he has "better" qualifications, noting he met all the requirements for the position and received positive feedback from his interview performance. Resp. Mot. Summary Decision 7–8. He then discusses the qualifications of the non-citizen selectees. *Id*. at 8–11. The two selectees, identified by the last three digits in their candidate number, are 827 and 295.

Selectee 295 has inferior qualifications, according to Complainant. Resp. Mot. Summary Decision 9. Specifically, Complainant states Selectee 295's background is in "physical design . . . which is very different from FPGA logic design." *Id*. at 9. Complainant states this candidate has no work experience or coursework in FPGA logic design, rather she "mainly worked on clocks, global circuits, PD areas[.]" *Id*. Complainant concluded interviewers had lukewarm assessments of her skills, and some did not ask her about "hands-on FPGA logic design experience." *Id*.

Selectee 827 also has inferior qualifications, according to Complainant. Mot. Summary Decision 10. Complainant states Selectee 827's background is in "testing devices which is very different from doing FPGA design… and [he does] not possess the expertise in FPGA RTL design, synthesis and timing closure, design documentation and system level validation and debug required [by the position]." *Id*. Further, Complainant argues this Selectee's resume reveals he completed no FPGA-related course work. *Id*. Complainant noted interviewers had lukewarm assessments of his skills, as interviewers annotated this Selectee would "need architectural support," and that he did not have "experience fixing setup or hold issues in ASICs or FPGAs." *Id*. at 11.

Finally, Complainant characterizes Respondent as "an H-1B dependent employer," and argues that "[i]f an employer is H-1B dependent, a U.S. worker who applies for a job for which an H-1B worker is sought must be offered the job if he/she is equally or better qualified than the H-1B applicant." Resp. Mot. Summary Decision 17, 19. Complainant then argues he should have been hired for the Position rather than the non-immigrant workers who were hired. *Id*. at 19.

In support of his Response, Complainant attaches several exhibits.[7] They include what appears to be the vacancy posting and application package (resume and coordination emails), internal Respondent correspondence evaluating his interview performance and the comparator candidates' (possibly selectees)[8] application packages, the same transcript of his deposition, a Department of

[7] Of note, some Complainant exhibits are duplicates of Respondent exhibits. Others are presented in different form, but the substance is identical. The Court can infer that, to the extent both parties are offering the same evidence, any facts derived therefrom are intrinsically not in dispute.

[8] Many of these exhibits are redacted, making it difficult to divine information. It is possible they were redacted by Respondent in discovery, and not by Complainant prior to inclusion with his motion.

Labor Freedom of Information Act (FOIA) response pertaining to Respondent's H-1B process (a Labor Condition Application form), Complainant's responses to Respondent's interrogatories, Respondent's responses to Complainant's interrogatories, a Department of Labor Wage and Hour Division Fact Sheet, and "rebuttals" of affidavits submitted by Respondent.

C. Respondent's Reply[9]

In its Reply, Respondent argues Department of Labor processes and regulations are "immaterial" to OCAHO proceedings; merely employing H-1B visa workers is "not evidence of discrimination;" and Complainant's "subjective assessment of his qualifications" does not "create a genuine factual dispute." Reply 5, 4.

As to Complainant's arguments pertaining to Respondent's alleged deviation from DOL requirements, Respondent argues Complainant's understanding of regulatory requirements and exemptions is incorrect, and a correct application of the regulations and exemptions transpired here, which is to say Respondent is arguing there was no need or requirement to offer the position to "equally or better qualified U.S. workers before hiring an H-1B worker." Reply 5.

As to Complainant's assertion that Complainant was better qualified than the non-citizen selectees, Respondent argues "[it] was not required to hire the candidates with the most FPGA experience, or even the most technically qualified candidate . . . the hiring decision was based on the candidates' average interview scores, which in turn was based on a variety of factors[.]" Reply 8.

D. Complainant's Sur-Reply

In the compilation of filings, Complainant argues the Court should give limited or no weight to the affidavit of one of the Respondent interviewers because the contents of the affidavit may not be accurate (i.e., whether the interviewer ever conducted additional telephonic interviews vice perhaps simply reviewing the notes of other interviews).

Complainant also asserts his assessment of the Department of Labor rules and regulations is accurate, and statistical information about Respondent business relative to non-immigrant workers should be considered. Finally, he takes issue with Respondent's assessment that he made new arguments in his reply filing.

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[9] Respondent's Reply in Support of Respondent's Motion for Summary Decision was filed as Exhibit A to Respondent's Motion for Leave to Reply to Complainant's Response to Respondent's Motion for Summary Decision. In the Court's official file, the motion and the attached reply in support are a single PDF. When the Reply is referenced in this Order, the page number utilized by the Court reflects the internal pagination of the Reply.

III. DOCUMENTARY EVIDENCE – LAW & ANALYSIS

A. Summary Decision Analytical Framework

The Court "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue of material fact and that the party is entitled to summary decision." 28 C.F.R. § 68.38(c).

"An issue of material fact is genuine only if it has a real basis in the record" and "[a] genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (first citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986), and then citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 284 (1986)).

"Subjective and conclusory allegations unsupported by specific, concrete evidence, provide no basis for relief. Neither do such allegations create a genuine factual issue where one does not otherwise exist." *Hajiani v. ESHA USA, Inc.*, 10 OCAHO no. 1212, 6 (2014).

"[T]he party opposing the motion for summary decision 'may not rest upon the mere allegations or denials' of its pleadings, but must 'set forth specific facts showing that there is a genuine issue of fact for the hearing.'" *United States v. 3689 Commerce Place, Inc.*, 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). The Court views all facts and inferences "in the light most favorable to the non-moving party." *United States v. Primera Enters.*, 4 OCAHO no. 615, 259, 261 (1994) (citations omitted).

B. Evaluating Documentary Evidence Submitted By Both Parties

1. Reliability – Law

Evidence should be reliable, probative, and substantial. 5 U.S.C. § 556(d); *see also* 28 C.F.R. § 68.52(b). To ensure evidence meets this standard, the Court must "evaluate the reliability of the evidence, and then . . . consider what weight, if any, to assign the evidence based on its probative value." *Zajradhara v. Aljeric Gen. Servs., LLC*, 16 OCAHO no. 1432m, 16 (2024).

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. 1375*l*, 27–28, 32–33, 35 (2023); *see also United States v. Commander Produce, LLC*, 16 OCAHO no. 1428d, 9 n.14 (2023).

2. Reliability – Analysis (Respondent's Evidence)

Respondent presented ten exhibits in total.

Exhibit A is the transcript of the deposition of Complainant. This document is sufficiently reliable. There are indicia that the deposition was taken before a court reporting service, including a signed certificate of the notary public who took and transcribed the testimony. Mot. Summary Decision, Ex. A at 96. The transcript's pages are also sequential, without missing pages. Complainant does not disavow that the deposition took place and Exhibit B consists of Complainant's corrections to the transcript. In Exhibit B, Complainant certified that subject to the corrections, the transcript was "true and correct" and signed his signature. Mot. Summary Decision, Ex. B at 8. Additionally, Complainant submitted the identical transcript in his response, allowing the Court to infer both parties believe the deposition transcript is sufficiently reliable.

Exhibits C, E, F, and I are all affidavits of employees of Respondent who were in some way involved in the hiring for the position, or the process in general. In these affidavits, the employees state their positions with Respondent company, share relevant information about Respondent's hiring processes, and describe the employees' involvement with the hiring process for the position and in the decision to non-select Complainant. Each of these exhibits is sufficiently reliable. The affidavits are all dated, signed, and sworn. The content is also consistent with other parts of the record.

Exhibits D, G, and H are print-outs of the Workday profiles for the Complainant and the two non-citizen candidates hired by Respondent. These documents are sufficiently reliable. They are each complete, including all pages of the profiles. They appear to be business records that were kept in the regular course of Respondent's human resources functions, rather than created for the purposes of litigation.

While these documents are sufficiently reliable insofar as they are what Respondent holds them out to be, Complainant appears to take issue with the content of some of the documentary evidence. To the extent his concerns bear on reliability, it is worth assigning weight to particular sets of documentary evidence relative to other sets of documentary evidence.

The Complainant takes issue with the affidavits provided by Respondent HR professionals and interviewers; however, to the extent he relies on statements in those affidavits to make his own assertions, or alternatively, to the extent the statements in those affidavits are consistent with other record evidence, those statements are or would be sufficiently reliable.

The personnel records (the Workday profiles) contain content that would be, on balance, inherently more reliable. These documents contain interviewer notes made close in time to the interviews, and in the normal course of business (not in anticipation of litigation). Therefore, these records would be more reliable than the affidavits created later in time, and post-Complaint.

Complainant's deposition is reliable insofar as it is a verbatim record of his statements made with the understanding that those statements would be considered here. Further, Respondent prudently provided Complainant's correction sheet, eliminating any concern of inaccuracies.

3. Reliability – Analysis (Complainant's Evidence)

Complainant presented ten exhibits, though several exhibits include multiple documents or correspondence related to documents or events. In general, Respondent does not raise concerns of reliability, rather Respondent asserts that some exhibits are not relevant, (in particular, exhibits pertaining to the Department of Labor). *See* Reply 4–6, 7. All documents submitted by Complainant are sufficiently reliable for consideration by the Court.

Exhibits A and B are documents and correspondence pertaining to the vacant position, Complainant's application package, and two of the selectee's application packages. These documents appear to be complete and much of the content also appears in or aligns with Respondent's exhibits.

Exhibit C is the transcript of the deposition of Complainant and his subsequent corrections to the transcript. It is identical to Respondent's Exhibits A and B, which have already been deemed sufficiently reliable.

Exhibit D and Exhibit E are FOIA Response Letters from the Department of Labor, regarding requests for information pertaining to Respondent's H-1B Labor Conditions Applications for the position in question and a Senior Logic Design Engineer position. They are both on Department of Labor letterhead and are signed by a Department of Labor official, and appear to be the complete response from the Department of Labor. Exhibit H is a print-out of a Department of Labor, Wage and Hour Division Fact Sheet.

Exhibit F and G are documents that appear to have been produced in discovery. They appear to be complete and signed by the responding party.

Exhibit I includes documents, in which Complainant "rebuts" the declarations attached to Respondent's Motion for Summary Decision. The documents identify the case at hand and are signed by Complainant. Insofar as they reflect Complainant's objections to the declarations, they are reliable. This Exhibit also includes the Workday profile for Selectee 827, which was also submitted by Respondent and found to be reliable.

Exhibit J is a print-out of a job posting on Respondent's website for a Senior FPGA Prototyping Engineer – Hardware position. Respondent's logo is included and the URL at the bottom of the page indicates that it originated on Respondent's website.

IV. FINDINGS OF FACT[10]

A. POSITION ADVERTISED BY RESPONDENT

1. Respondent uses Workday, a human resources database, which creates unique candidate profiles and allows for client businesses to capture information about the application, interview, and selection process generally. Mot. Summary Decision, Exs. D, G, H.
2. Respondent, NVIDIA, advertised a "Senior Logic Design Engineer, FPGA Position" (JR 1937367). Mot. Summary Decision 239, Ex. C at 1.
3. According to the job posting, a qualified candidate for this position would have a "Bachelors Degree in Electrical Engineering, Computer Engineering or Computer Science or equivalent work experience," eight or more years of "experience in FPGA and/or ASIC semiconductor designs, Verilog/System Verilog expertise" and "a deep understanding of ASIC/FPGA design flow including RTL design, verification, logic synthesis, prototyping, DFT, timing analysis, and lab debug," in addition to "[s]trong communication and interpersonal skills." The job posting also lists "[a] strong background in FPGA design and FPGA EDA tools" as well as "[f]amiliarity with industry standard protocols such as I2C, SPI, JTAG, PCIE, USB, Ethernet, Encryption as well as languages such as embedded C, python, perl" as plus factors. Resp. Mot. Summary Decision 27, Ex. A.
4. The position was posted on Respondent's website. *See* Resp. Mot. Summary Decision 26–27, Ex. A.
5. This application contains two (optional) screening questions pertaining to work authorization and status (asking if an applicant is legally authorized to work in the United States and whether the applicant will now or in the future require sponsorship for employment visa status (e.g. H-1B visa status)). Mot. Summary Decision 242, Ex. C at 4.
6. Internal candidates are not asked the work authorization and sponsorship screening questions. Mot. Summary Decision 243, Ex. C at 5.

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[10] Inherent in the Court's decision to include a fact in this section is a probative value analysis. Stated a different way, if the fact appears here, the probative value of the evidence from which it was derived is high.

Probative value is "determined by how likely the evidence is to prove some fact." *United States v. R&SL Inc.*, 13 OCAHO no. 1333b, 18 (2022) (quoting *United states v. Bensimon*, 172 F.3d 1121, 1126 (9th Cir. 1999).

It is worth noting for the parties that, while some documentary evidence was sufficiently reliable, it was not particularly probative (or at least, at this juncture, the probative value of the evidence is not clear).

For example, the Court has no reason to doubt the reliability of Complainant's DOL FOIA request exhibit; however, the existence of H-1B visa workers, generally, does not assist the Court in determining whether Respondent considered this Complainant's citizenship status when Respondent selected different candidates. "Complainant cannot meet his burden of proof on his § 1324b claims by argument or evidence pertaining to alleged . . . visa fraud alone." *Zajradhara v. Aljeric Gen. Servs., LLC*, 16 OCAHO no. 1432f, 6 (2023) (citing *Zajradhara v. Ranni's Corp.*, 16 OCAHO no. 1426d, 6 (2023)).

B. APPLICANT POOL & SELECTEE DATA (GENERALLY)[11]

7. Respondent received ninety-one applications for the Senior Logic Design Engineer position. Mot. Summary Decision 241, Ex. C at 3.
8. Respondent interviewed thirty-two of the ninety-one candidates. Mot. Summary Decision 241, Ex. C at 3.
9. Respondent extended offers to five candidates in total, and one candidate declined the offer. Mot. Summary Decision 242, Ex. C at 4.
10. Candidates were rated on a 5-point scale, with 5 being the best score possible; at each interview a candidate would be rated on this scale, and such a rating would contribute to a cumulative average carried by the candidate throughout the selection process. Mot. Summary Decision 240, 241–42, Ex. C at 2, 3–4.
11. After the highest-rated candidate withdrew from the process, the remaining four candidates accepted the offer and were hired. Mot. Summary Decision 242, Ex. C at 4.
12. Candidates who accepted the job had assigned identification numbers, and will be referred to as C-612, C-479, C-827 and C-295. Mot. Summary Decision 241–42, Ex. C at 3–4.
13. Selectee C-612 is a U.S. citizen. He chose to respond to the visa screening questions. Mot. Summary Decision 244, Ex. C at 6.
14. Selectee C-479 is a U.S. citizen. He chose to respond to the visa screening questions. Mot. Summary Decision 244, Ex. C at 6.
15. Selectee C-827 is not a U.S. citizen. He responded to the screening questions for work authorization and sponsorship, stating he did require sponsorship—as of February 2, 2023, he was in H-1B status (on a petition sponsored by Respondent).[12] Mot. Summary Decision 244, Ex. C at 6.
16. Selectee C-295 was described as an internal candidate, and was not asked the sponsorship screening question; however, she was in H-1B status on a petition already sponsored by Respondent. Mot. Summary Decision 244, Ex. C at 6.

[11] These facts come from the affidavit of the "Head of Global Recruiting Operations for NVIDIA," who has knowledge of "general recruiting and hiring processes and procedures," and has "access to records regarding internal requisition numbers." Mot. Summary Decision 239, Ex. C. She has no personal knowledge pertaining to the position at issue here; rather, she was able to use her knowledge of operations generally to attest to the facts in her affidavit.

[12] It unclear whether C-827 is an "internal" candidate as well. The Workday Profile lists "internal" at the header next to C-827's name (similar to the header for known internal candidate C-295, and in contrast with known external candidate Complainant, who does not have such a marker next to his name in the header of his Workday Profile). The human resources employee affidavit (Exhibit C) does not expressly state if this candidate is internal or external; however, she states this candidate answered the external candidate screening questions.

Ultimately, these discrepancies are not explained or addressed by Respondent, the moving party.

C. COMPLAINANT'S APPLICATION PROCESS

17. Complainant, Mr. Sharma, applied for the advertised "Senior Logic Design Engineer, FPGA Position" (JR 1937367). Mot. Summary Decision 240, Ex. C at 2.
18. His application generated a Workday candidate profile with Respondent (or alternatively the application may have updated an already existing Workday profile); Respondent provided Complainant's full Workday profile as Exhibit D. Mot. Summary Decision 265, Ex. D at 1.
19. According to the Workday profile, Complainant's resume was available as a PDF, and his work experience was separately entered, showing he had a total of six jobs, seven years' total experience, and had been in his current position for eight months. Mot. Summary Decision 265–67, Ex. D at 1–2.
20. The Workday profile lists his education as "Institute of Technology, BTech, Electrical and Electronics Engineering," along with a master's degree in computer engineering from University of Michigan, Ann Arbor. Mot. Summary Decision 267, Ex. D at 2.
21. The Workday profile contains Complainant's responses to the screening questions pertaining to work authorization and status (where Complainant indicated he did not require "sponsorship for employment visa status (e.g. H-1B visa status)." Mot. Summary Decision 311–12, Ex. D at 47–48.
22. The Workday profile provides the timeline of the Complainant's application process and ultimate rejection. Mot. Summary Decision 267-68, Ex. D at 3–4.
23. On January 9, 2021, Complainant applied to the position, and his application was screened several days later, on January 11, 2021. Mot. Summary Decision 268, Ex. D at 4.
24. On February 5, 2021, Complainant was interviewed telephonically, with the interviewer placing notes in the Workday profile. Mot. Summary Decision 304–06, Ex. D at 40–42.
25. On March 1, 2021, Complainant was interviewed by a different individual, telephonically, with the interviewer placing notes in the Workday profile. Mot. Summary Decision 306–08, Ex. D at 42–44.
26. On March 2, 2021, Respondent (unclear who, specifically) "reject[ed]" Complainant, with a note in the Workday profile stating Complainant "does not meet job qualifications."[13] Mot. Summary Decision 267, Ex. D at 3.
27. It is unknown whether Respondent employees who evaluated Complainant could see some, all, or none of Complainant's Workday profile (to include resume and screening questions). Mot. Summary Decision 265–78, 304–15, Ex. D at 1–2, 40–51.

[13] There is some dissonance between this assessment and the interview ratings noted in the section below. Respondent, the moving party, does not explain how Complainant did not "meet job qualifications," but was also rated by both interviewers as "meet[ing] expectations."

D. COMPLAINANT'S EVALUATION AS A CANDIDATE

28. On February 5, 2021, Complainant was interviewed telephonically by a Respondent employee with a technical background (a Senior Logic Design Engineer) who rated Complainant as a "3 – meets expectations" overall (with additional breakout assessments in the following categories: "technical capability" and "culture/fit.") Mot. Summary Decision 304, Ex. D at 40; *id*. at 317, Ex. E at 1.
29. This first interviewer made assessments and recommendations, but appears not to have been a part of the ultimate selection or decision-making process. Mot. Summary Decision 318, Ex. E at 2.
30. While the first interviewer stated he never inquires about citizenship or visa status, he does (or did) have access to applicant Workday profiles; thus, it is unknown whether he was exposed to candidate citizenship or visa status during the hiring process. Mot. Summary Decision 318, Ex. E at 2.
31. The first interviewer confirmed his notes in the Workday profile for Complainant were the best memorialization of what transpired and of his impressions of Complainant as a candidate. Mot. Summary Decision 318, Ex. E at 2.
32. The first interviewer recommended Complainant continue with the hiring process, and stated: "This is quite a unique candidate. He doesn't have any relevant experience in either logic design or Intel FPGA. However, somehow he is able to give on-point answers with subtle hints. Feels like he is smart enough to do good work but was never given the opportunity." Mot. Summary Decision 304, Ex. D at 40.
33. The first interviewer memorialized the technical questions and answers from the interview, and in some instances the interviewer memorialized that the interviewer provided "hints" after Complainant requested "hints." ("He asked for hint . . . He doesn't get the idea here; I gave him more hints.") Mot. Summary Decision 305, Ex. D at 41.
34. The first interviewer later recalled (and placed in his affidavit) that Complainant answered 80% of his questions correctly, and there were other candidates who were superior (but he does not provide further specifics as to which candidates or even how many candidates). Mot. Summary Decision 319-20, Ex. E at 3–4.
35. On March 1, 2021, Complainant was interviewed telephonically by a different Respondent employee with a technical background (a Senior ASIC Engineer) who rated Complainant as "3 – meets expectations" overall (with no breakout assessments). Mot. Summary Decision 306–08, Ex. D at 42–44; *id*. at 322, Ex. F at 1.
36. The second interviewer made assessments and recommendations, but appears not to have been a part of the ultimate selection decision-making process. Mot. Summary Decision 322–23, Ex. F at 1–2.
37. While the second interviewer stated he never inquires about citizenship or visa status, he does (or did) have access to the applicant Workday profiles; thus, it is unknown whether he was exposed to citizenship or visa status during the hiring process. Mot. Summary Decision 323, Ex. F at 2.
38. The second interviewer confirmed his notes in the Workday profile for Complainant were the best memorialization of what transpired and of his impressions of Complainant as a candidate. Mot. Summary Decision 323, Ex. F at 2.
39. The second interviewer did not unequivocally recommend Complainant continue or not continue with the interview/hiring process, instead stating: "I recommend another phone

screen interview before considering him for the next round . . . The candidate had lots of experience on paper, but it was very difficult to evaluate him as his responses were quite vague. I am not sure if his answers were vague because he thought they were obvious or if he wasn't sure of them and didn't want to be put on the spot. My repeated attempts to get some specifics/detailed explanations were not successful. I would recommend another phone screen by another interviewer before the candidate can proceed to the next round." Mot. Summary Decision 306, Ex. D at 42.

40. The second interviewer memorialized the technical questions and answers from the interview, but unlike the first interviewer, the second interviewer did not memorialize whether he provided hints or how thorough an individual answer was. Mot. Summary Decision 306–08, Ex. D at 42–44.

E. SELECTEE C-295 APPLICATION PROCESS & EVALUATION (INTERNAL H-1B)

41. Selectee C-295 applied for the advertised "Senior Logic Design Engineer, FPGA Position" (JR 1937367). Mot. Summary Decision 326, Ex. G.
42. Her application generated a Workday candidate profile with Respondent (or alternatively the application may have updated an already existing Workday profile); Respondent provided Selectee C-295's full Workday profile as Exhibit G. Mot. Summary Decision 326, Ex. G at 1.
43. According to the Workday profile, Selectee C-295's resume was available as a PDF, and her work experience was separately entered, showing she had a total of one job, nine years' experience, and had been in her current position for nine years. Mot. Summary Decision 326, 356–57, Ex. G at 1, 31–32.
44. The Workday profile lists her education as a bachelor's in electrical engineering and a master's in electrical engineering (with the identity of the institutions redacted by Respondent). Mot. Summary Decision 326, 356–57, Ex. G at 1, 31–32.
45. As an internal candidate, she was not asked screening questions pertaining to work authorization and status. Mot. Summary Decision 327, Ex G at 2.
46. The Workday profile provides the timeline of Selectee C-295's application process and eventual selection. Mot. Summary Decision 327, Ex. G at 2.
47. On January 26, 2021, Selectee C-295 applied for the position, and her application was screened and referred to an on-site interview on the same day. Mot. Summary Decision 327, Ex. G at 2.
48. On February 4, 2021, Selectee C-295 was interviewed onsite by several individuals, including the individual who conducted Complainant's first telephonic interview. Mot. Summary Decision 327, Ex. G.
49. On February 18, 2021, she was offered the Senior Logic Design Engineer, FGPA Position. Mot. Summary Decision 326, Ex G at 2.
50. The on-site interview for Selectee C-295 was conducted by a panel of five individuals, at least one of whom had a technical background (a Senior Logic Design Engineer);[14] these five interviewers rated Selectee C-295 as a 3.6 (averaging their scores of 4, 4, 3, 4, and 3 respectively). Mot. Summary Decision 349, Ex. G at 24.

[14] The shared interviewer (i.e. he interviewed both Complainant and C-295) rated Selectee C-295 as a "3 – meets expectations." Mot. Summary Decision 349, Ex. G.

51. Selectee C-295's interviewer comments included: "did well on my interview . . . seems motivated, proactive, and able to describe things she's worked well and in detail . . . she'll be able to ramp up quickly on new task and be an asset to the team . . . Her general direction at high level is correct. However, training and experience would be required to improve her logic design abilities . . . She lacks experience in design but seems like she can figure it out . . . I liked her . . . I think she will be a good addition to the group . . . From working with her in the past, I think she has the drive and talent to succeed . . . ." Mot. Summary Decision 350–55, Ex. G at 25–30.
52. In some instances, an interviewer (the shared interviewer with Complainant's first telephonic interview) memorialized that he provided "hints," and Selectee C-295 requested "hints." ("[H]inted her about High Z . . . She didn't know the answer and asked for hint.") Mot. Summary Decision 352, Ex. G at 27.

F. SELECTEE C-827 APPLICATION PROCESS & EVALUATION

53. According to his Workday profile, Selectee C-827 applied for 45 different positions with Respondent business (beginning in August 2020), and it is unclear whether he worked for Respondent at the time he applied to these positions (Respondent's Workday profile lists him as "internal," and Respondent redacted portions of the Workday profile attached to the motion such that it is difficult to divine this information.) Mot. Summary Decision 359, Ex. H.
54. According to the Workday profile, Selectee C-827's resume was available as a PDF, and his work experience was separately entered, showing he had a total of one job, seven years' experience, and he had been in his current position for seven years. Mot. Summary Decision 359, 403–04, Ex. H at 1, 45–46.
55. The Workday profile lists his education as a "BTECH" in Electrical Engineering and a master's in computer engineering (with the identity of the institutions redacted by Respondent). Mot. Summary Decision 359–60, Ex. H at 1–2.
56. While it is unclear whether C-827 was an internal candidate,[15] he was asked the screening questions pertaining to work authorization and status. Mot. Summary Decision 402, Ex. H at 44.
57. The Workday profile does not provide a clear timeline of Selectee C-827's application process and eventual selection for the position at issue here, which is understandable given that the profile seems to contemplate application for a different position (a Senior Verification Engineer – Hardware). Mot. Summary Decision 359–60, Ex. H at 1–2.
58. Selectee C-827 would have applied to the position on or before February 15, 2021, based on the existence of a "comment" about an application to the position existing on that date. Mot. Summary Decision 365, Ex. H at 7.
59. It is unknown when an offer was made to C-827, but it appears he accepted the offer on May 12, 2021. Mot. Summary Decision 365, Ex. H at 7.

[15] For example, within the Workday profile, it states he withdrew from consideration for a different position for "other NVIDIA role;" however, this was in February 2021, and he does not accept the position at issue here until May 2021.

60. Unlike Selectee C-295 and Complainant (for whom Respondent provided the "Interview Details" portion of the Workday Profile), Selectee C-827's "Interview Details" sub-profile within Workday was not provided. Mot. Summary Decision 360, Ex. H at 2.
61. Respondent does provide the "Candidate Applications" portion of the Workday Profile, which shows an average interview score (3.67), the "last completed step," and has a narrow sub-column of text called "Interview Feedback," which is approximately an inch wide and spans over 20 pages of Exhibit H. This narrow sub-column appears to be a mash-up of technical queries and acronyms along with assessments of an interview or prospective job performance. It is difficult to digest in its presented form. Mot. Summary Decision 360–92, Ex. H at 2–34.

V. LAW & ANALYSIS

Respondent argues there are no genuine issues of material fact, and it is entitled to judgment as a matter of law. Respondent's argument presumes there will be no direct evidence of discrimination, and the analysis will be guided by the *McDonnell Douglas* burden shifting framework. This framework will be set forth below, and then it will be the rubric against which Respondent's submission is measured, bearing in mind Respondent's burden as the moving party and that Complainant receives favorable treatment as the non-moving party (distinct from cases evaluated at hearing).

A. Burdens of Proof

"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." *Aljeric Gen. Servs., LLC*, 16 OCAHO no. 1432m, at 27 (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." *Aljeric Gen. Servs., LLC,* 16 OCAHO no. 1432m, at 27 (citing *Monty*, 16 OCAHO no. 1443c, at 9).

"Direct evidence is evidence that, on its face, establishes discriminatory [or retaliatory] intent." *Monty*, 16 OCAHO no. 1443c, at 9. "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." *Aljeric Gen. Servs.*, 16 OCAHO no. 1432m, at 27 (citing *United States v. Diversified Tech. & Servs. of Va., Inc.*, 9 OCAHO no. 1095, 21 (2003)).

"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. "First, Complainants must establish a prima

facie case of discrimination; second, Respondent must articulate some legitimate, non-discriminatory reason[16] 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[17] and that Respondent intentionally discriminated against a Complainant." *Id.* (citations omitted); *see also Mar-Jac Poultry, Inc.*, 12 OCAHO no. 1298, at 23–24.

B. Prima Face Case – Non-Selection

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 hiring 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) (citing *Mid-Atlantic Reg'l Coal., Laborers' Int'l Union of N. Am. V. Heritage Landscape Servs., LLC*, 10 OCAHO no. 1134, 7 (2010)).

While there is not a finite list of available theories establishing an inference of discrimination, two which are often advanced involve the employer at issue either leaving a vacant position unfilled, even though a qualified candidate (from a protected category) applied, or filling the position with

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> 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).

17 "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). "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).

a less qualified candidate than a complainant (from the protected category).[18] *Ipina v. Mich. Dep't Lab.*, 2 OCAHO no. 386, 709, 721 (noting that for failure to hire cases, complainant may fulfill one element of their prima facie case by showing that "the position remained open and respondent continued to seek applicants from individuals having complainant's qualifications."); *Aljeric Gen. Servs., LLC*, 16 OCAHO no. 1432m, at 28 ("In the Ninth Circuit, the hiring of a less-qualified individual outside of the complainant's protected group may give rise to an inference of unlawful discrimination.") (collecting cases).

C. Genuine Issues of Material Fact Remain

While parties may present more or different evidence and/or theories at hearing, at this juncture (i.e. on the record evidence provided alongside the motion), the Court finds there are several genuine issues of material fact.

To succeed in summary judgment, a respondent would need to present sufficient evidence that a complainant would not be able to demonstrate a prima facie case at hearing, or alternatively that the respondent had a legitimate, non-discriminatory reason for a complainant's non-selection. On this record, Respondent has not met its burden. The record, as it has been developed through this motion practice leaves unresolved, at a minimum, the following:

1. The number of total vacancies for the Senior Logic Design Engineer, FPGA Position (JR 1937367) at the time of advertisement, and whether (and when) all vacancies were filled (which could bear on whether vacancies remained or not after Complainant's non-selection, or alternatively could bear on the true comparators against which a complainant could be measured);

2. Who within the hiring process (interviewers, administrators, actual hiring official) had access to the Workday profile section with citizenship information/had knowledge of applicant citizenship status;

3. Whether Complainant was or was not qualified for the Senior Logic Design Engineer, FPGA Position from a technical standpoint,[19] and when/for what reason was his progress in the interview process halted;

[18] The parties present evidence about/ seem to discuss at length comparator non-citizen candidates; which could indicate the proposed theory relates to one involving inferior candidates selected over a more qualified candidate from a protected class; however, this is how the matter has been framed in summary decision by Respondent, a framing to which Complainant is not bound going forward.

[19] As was noted above in Section III:

> On February 5, 2021, Complainant was interviewed telephonically by a Respondent employee with a technical background (a Senior Logic Design Engineer) who rated Complainant as a "3 – meets expectations." Mot. Summary Decision 304, Ex. D at 40, *id.* at 317, Ex. E at 1.

4. The timeline of the application-to-onboarding process for Selectee C-827, as the parties both identify him as a comparator candidate, but it is difficult to divine the decision timing for his selection relative to Complainant's non-selection.

VI. CONCLUSION

The Motion for Summary Decision is DENIED. The case shall proceed to hearing. Parties can anticipate a separate order, which will include further guidance on the next phase of litigation.

SO ORDERED.

Dated and entered on November 21, 2024.

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Honorable Andrea R. Carroll-Tipton
Administrative Law Judge

On March 1, 2021, Complainant was interviewed telephonically by a different Respondent employee with a technical background (a Senior ASIC Engineer) who rated Complainant as "3 – meets expectations" overall (with no breakout assessments). Mot. Summary Decision 306-08, Ex. D at 42-44, *id*. at 322, Ex. F at 1.

On March 2, 2021, Respondent (unclear who, specifically) "reject[ed]" Complainant, with a note in the Workday profile stating Complainant "does not meet job qualifications." Mot. Summary Decision 267, Ex. D.