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

February 12, 2025

MIKHAIL NAZARENKO, Complainant, v. SUPPORTYOURAPP, INC., Respondent.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2024B00056

Appearances: Mikhail Nazarenko, pro se Complainant
Petro Bondarevskyi, for Respondent

ORDER GRANTING MOTION TO DISMISS AND TO SHOW CAUSE

This case arises under the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324b. Complainant, Mikhail Nazarenko, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on March 5, 2024. Complainant alleges that Respondent, SupportYourApp, Inc., discriminated against him based on his citizenship status and national origin in violation of 8 U.S.C. § 1324b(a)(1) when he was not hired for a customer support consultant position, and asserts retaliation and unfair documentation practices in violation of 8 U.S.C. §§ 1324b(a)(5) & (6). Respondent filed an Answer and Motion to Dismiss on April 30, 2024.

On June 12, 2024, Complainant submitted a filing titled Response and Motions, requesting, among other things, additional time to respond to the Respondent's Answer and to oppose the Motion to Dismiss. Resp. and Motions 1. In its August 1, 2024 Order on Motions, the Court granted Complainant extensions to respond to the Answer and to the Motion to Dismiss, until August 28, 2024. On August 10, 2024, Complainant submitted a filing that the Court has construed as a Response to the Motion to Dismiss.

I. MOTION TO DISMISS AND COMPLAINANT'S RESPONSE

In the motion to dismiss, Respondent argues that the Complaint should be dismissed because OCAHO does not have subject matter jurisdiction over the Complaint as to citizenship discrimination as the Complainant is not a protected individual under 8 U.S.C. § 1324b; specifically, Complainant states in the Complaint that he is a citizen of the Russian Federation currently residing in Greece. Mot. Dismiss 3. Further, the statute excludes persons who are unauthorized aliens, and thus Complainant cannot bring a claim for discrimination based on nationality. *Id.* Further, Respondent argues that it employs fewer than four employees, and provides a declaration from the company's president indicating that the total number of employees employed during the period in question was fewer than three. *Id.* at 3-4.

Complainant states in the Complaint that he does not need to have employment authorization to be offered a position, that employment authorization can be obtained after the company has made a preliminary positive hiring decision. Compl. 2.[1] Complainant also indicates that he did not know how many employees the Respondent employs. Compl. 4.

In his August 10, 2024, Response to Motion to Dismiss, Complainant argues that "[t]he statement . . . that the number of employees of [Respondent] does not exceed 3 people . . . does not fully correspond to reality," citing internet searches he conducted. Resp. Mot. Dismiss 1. Complainant did not address the issue of whether he should be considered a protected individual.

II. LEGAL STANDARDS AND DISCUSSION

A. Motion to Dismiss

OCAHO's Rules of Practice and Procedure for Administrative Hearing provide that an OCAHO ALJ may dismiss a complaint for failure to state a claim upon which relief may be granted either upon motion by the respondent, or by the ALJ. 28 C.F.R. § 68.10;[2] *see also US Tech Workers v. Relativity*, 20 OCAHO no. 1579a, 3 (2024) (citing *United States v. Spectrum Tech. Staffing Servs., Inc.*, 12 OCAHO no. 1291, 8 (2016) (citations omitted)).[3] An ALJ considering a motion to dismiss

---

[1] Citations to the Complaint refer to the PDF pagination, rather than the internal pagination.

[2] OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2024). The rules are also available through OCAHO's webpage on the United States Department of Justice's website. *See* https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-regulations.

[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 been 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 "FIMOCAHO," or in the LexisNexis database "OCAHO," or on the website at https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions.

for failure to state a claim must "liberally construe the complaint and view 'it in the light most favorable to the [complainant].'" *Relativity*, 20 OCAHO no. 1291, at 3 (citations omitted).

B. Discrimination based on citizenship status

Section 1324b(a)(1)(B) prohibits a person or other entity from discriminating against a "protected individual" with respect to hiring for employment or discharge from employment based on the individual's citizenship status. *See MacKinnon v. The Financial Times*, 13 OCAHO no. 1316, 2 (2019). According to § 1324b(a)(3), a "protected individual,"

> (A) is a citizen or national of the United States, or
> (B) is an alien who is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under section 1160(a) or 1255a(a)(1) of this title, or is granted asylum under section 1158 of this title . . . ..

"To maintain a citizenship status discrimination claim, Complainant has the burden of establishing she is a protected individual." *Zu v. Avalon Valley Rehab. Ctr.,* 14 OCAHO no. 1376, 6 (2020) (citing *MacKinnon*, 13 OCAHO no. 1316, at 3; *Omoyosi v. Lebanon Corr. Inst.*, 9 OCAHO no. 1119, 4 (2005)). OCAHO caselaw reflects that whether a person meets the definition of a protected individual should not be treated as jurisdictional, but is more akin to a claims processing rule. *Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 7 (2012). In other words, this is a necessary element that Complainant must prove to succeed in his case.

In addition, OCAHO does not have jurisdiction to hear citizenship status discrimination claims if the employer employs three or less individuals, nor can a Complainant state a claim where the employer employs three or fewer individuals. 8 U.S.C. § 1324b(a)(2)(A).

In the Complaint, Complainant states that he was a citizen of the Russian Federation at the time of the alleged discrimination, was born in the Soviet Union, and is a refugee living in Greece. Compl. 2. He checked the box stating that he is an alien authorized to work in the United States, *id*., but then states "I have never obtain[sic] a work visa in the US or a work permit in the US" *id*. at 3. He did not complete the portions of the complaint form indicating what type of work authorization he had, or when he had work authorization. Compl. 2.

Taking the allegations in the Complaint as true, as this court must in a motion to dismiss, the Complaint states that Complainant is not a citizen of the United States, and the section in the Complaint that asks if Complainant is an alien lawfully admitted for permanent residence is blank. Compl. 5. Nor does Complainant indicate that he was admitted as a temporary resident or a refugee or granted asylum under 8 U.S.C. § 1158. Thus, it appears from the allegations in the Complaint that Complainant is not a protected individual, and thus Complainant cannot state a claim for citizenship discrimination. *See* 8 U.S.C. § 1324b(a)(3).

Because under 8 U.S.C. § 1324b citizenship status discrimination claims may only be brought by protected individuals and because nothing in the Complaint indicates that Complainant falls under the definition, the Court DISMISSES Complainant's citizenship status claim. As this basis is

dispositive, the Court need not address Respondent's argument that it employed fewer than three individuals.

C. Discrimination based on national origin

Section 1324b(a)(1) prohibits discrimination in hiring or firing based on an individual's national origin. While a claim based on national origin is not limited to a "protected individual," the statute nevertheless specifies that the prohibition is "against any individual (other than an unauthorized alien as defined in section 274A(h)(3)) [of the INA]". 8 U.S.C. § 1324b(a)(1). Section 1324a(h)(3)), in turn, defines unauthorized alien to mean "with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General." Similar to the citizenship discrimination claims, whether a person is protected by the statute is akin to a claims processing rule and it is thus a necessary element to be proven. *Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, at 7.

Moreover, OCAHO only has jurisdiction to hear national origin discrimination claims against employers with between four and fourteen employees. *Sivasankar v. Strategic Staffing Solutions*, 13 OCAHO no. 1343, 3 (2020); § 1324b(a)(2)(B).

As noted above, Complainant checked a box at the beginning of the Complaint stating that he had work authorization. Later in the application, however, he explains that he has never obtained a work permit or visa in the United States, but that he did not need to have a work visa to apply, as he would have obtained the visa after being selected for the position. Compl. at 2-3. In the IER charge form, Complainant left the sections blank that sought his citizenship, immigration, or work authorization status. Compl. at 15. Complainant did not further address this argument in his response to the motion to dismiss.

While Complainant may be correct that a company could first hire an individual and then seek to sponsor the individual for work authorization, in order to state a claim in this forum, the Complainant must be an alien admitted as an alien lawfully admitted for permanent residence, or authorized to be so employed by this Act or by the Attorney General. 8 U.S.C. §§ 1324b(a)(1); 1324a(h)(3). In other words, in order to seek protection under the statute, the Complainant must already have work authorization. Respondent provides an explanation for the checked box in his form; that is, he would have sought work authorization had he been hired for the position. He provided no further pleading that he had work authorization. Consequently, Respondent has not sufficiently pled that he falls within either of these categories. Complainant's claim based on national origin is dismissed. As this basis is dispositive, the Court need not address Respondent's argument that it employed fewer than three individuals.

D. Retaliation

The statute provides,

> It is an unfair immigration-related employment practice for an employer

> to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under [§ 1324b] 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.

8 U.S.C. § 1324b(a)(5). Unlike a claim for discrimination based on citizenship status or national origin, 8 U.S.C. § 1324b(a)(5) protects "any individual." *R.O. v. Crossmark, Inc.*, 11 OCAHO no. 1236, 12 (2014), *aff'd mem. sub nom. Odongo v. OCAHO*, 610 F. App'x 440 (5th Cir. 2015); *see also Roseman v. Walmart, Inc*., 21 OCAHO no. 1618, 5 (2024) ("Although Complainant is not a 'protected individual' as defined by § 1324b(a)(3), he still may maintain a claim for retaliation 'because . . . § 1324b(a)(5) protects 'any individual.'") (quoting *Crossmark*, 11 OCAHO no. 1326, at 12).

Complainant explains that he was intimidated, threatened, coerced or retaliated against by IER because IER, by dismissing his claim, "grossly violated my rights because it did not indicate where else I could turn to protect my violated rights. This scares me and completely disappoints me in the U.S. legal system." Compl. at 11. It appears that Complainant is not asserting that Respondent retaliated against him, he is asserting a claim against IER.

This claim suffers from a number of defects, the first of which is that he is not asserting any claim against Respondent, the employer. Secondly, this forum does not have the authority to adjudicate a claim against IER.[4] The remedy for this is what Complainant has done, that is, file a private right of action seeking a new adjudication.[5] Lastly, the statute specifies the type of activity that constitutes retaliation: a person or entity must "intimidate, threaten, coerce, or retaliate." 8 U.S.C. § 1324b(a)(5). The action Complainant refers to, IER's dismissal of his claim, is none of those things. While Complainant has expressed profound disappointment at the results of IER's investigation, this does not equate to retaliation.

However, Respondent did not seek to dismiss this allegation; therefore, while this ALJ can dismiss the claim for failure to state a claim, such a dismissal may only follow after an Order to Show Cause. 28 C.F.R. § 68.10(b) ("The Administrative Law Judge may dismiss the complaint . . . without a motion from the respondent, if the Administrative law Judge determines that the complainant has failed to state a claim" but must "afford[] the complainant an opportunity show cause why the complaint should not be dismissed."). Accordingly, Complainant is ordered to show cause as to why this allegation states a claim for retaliation.

---

[4] "OCAHO case law has consistently held that sovereign immunity precludes jurisdiction over claims against the federal government under 8 U.S.C. § 1324b." *Windsor v. Landeen*, 12 OCAHO no. 1294, 6-7 (2016), citing *Kim v. Getz*, 12 OCAHO no. 1279, 5 (2016); *Shen v. Def. Language Inst.*, 9 OCAHO no. 1117, 3 (2004). Moreover, OCAHO case law has held that "the provisions of 8 U.S.C. § 1324b contain no language which could plausibly be read as a waiver of federal sovereign immunity." *Shen*, 9 OCAHO no. 1117 at 3.

[5] IER's letter, dated December 1, 2023, informed Complainant of his right to file with this Court. Compl. 13.

E. Documentation Practices

"Document abuse within the meaning of 8 U.S.C. § 1324b(a)(6) occurs only when an employer, for the purposes of satisfying the requirements of § 1324a(b), requests more or different documents than necessary or rejects valid documents, and does so for the purposes of discriminating on the basis of citizenship or national origin." *Angulo v. Securitas Sec. Servs. USA, Inc.*, 11 OCAHO no. 1259, 5-6 (2015). Thus, to establish a case of document abuse in violation of 8 U.S.C. § 1324b(a)(6), a complainant must show that the requests for documents occurred in connection with the employment verification process required by 8 U.S.C. § 1324a(b). *Johnson v. Progressive Roofing*, 12 OCAHO no. 1295, 4 (2017).

Complainant asserts that the Respondent rejected or refused to accept his Greek identification, his resume and other documents because Respondent "is using (manipulating) wrong interpretation of the sense of the US sanctions." Compl. 10. This refers to the basis as articulated by Complainant of his claim, that Complainant was not hired because Respondent believed he was a resident of the Russian Federation and it was prohibited from hiring any persons who were residents of a country or territory that is the subject of any United States sanctions. Compl. 7. It does not appear that Complainant's claim of unfair documentary practices relates to the employment verification process under 8 U.S.C. § 1324a(b). However, again, because Respondent did not challenge this claim, the Court issues an Order to Show Cause as to why this allegation states a claim for unfair documentary practices.

F. Motion to Amend Complaint to Add LinkedIn

Lastly, in his Response and Motions, Complainant seeks to add LinkedIn as a "co-defendant "for my inconvenience due to my failure to promptly inform that the position was being offered only to those who were (or are) authorized to work in the United States." Resp. and Motions 2. Complainant states that his "right as an employee" was violated by the fact that he was misled. *Id*. Complainant did not mention LinkedIn in either his application before IER or OCAHO.

The Court need not reach the merits of this issue because, as noted above, Complainant is not a person protected by the statute as it relates to a citizenship and naturalization claim. Further the retaliation claim appears to be levied against IER, not LinkedIn, and Complainant has not implicated LinkedIn in the document abuse claim.[6] Complainant's motion to add LinkedIn is denied.

[6] In any event, a "complainant cannot amend a private action to assert claims against individuals who were not named in a charge filed previously with [IER]." *Bozoghlanian v. Magnovox Advanced Prods. & Sys. Co*., 4 OCAHO no. 695, 950, 953 (1994). This is because filing a charge with IER is a prerequisite to filing a private action with OCAHO. 8 U.S.C. §§ 1324b(b)(1) and (d)(2); *Ogunrinu v. Law Resources*, 13 OCAHO no. 1332, 4 (2019). This prohibition is subject to waiver, estoppel, and equitable tolling. *Ogunrinu,* 13 OCAHO no. 1332, at 4; *Caspi v. Trigild Corp*., 7 OCAHO no. 991, 1064, 1071 (1998). The charging party bears the burden of demonstrating that equitable modification is appropriate, *Bozoghlanian*, 4 OCAHO no. 695, at 956, and the court's power to equitably excuse noncompliance with administrative filing deadlines, "will be exercised only in extraordinary and carefully circumscribed instances."

G. Stay of Discovery

Because the retaliation and documentary practices claims are not dependent upon Complainant's status, resolution of the motion to dismiss is not dispositive of the entire claim. Given the pendency of the Orders to Show Cause on Complainant's retaliation and documentary practices claims, *supra* II.D and II.E, the Court will STAY the initiation of discovery until after the adjudication of Complainant's responsive filing as to his retaliation and documentary practices claims. *See* 28 C.F.R. § 68.5(a); Gen. Lit Order 1 (deferring initial prehearing conference until motion to dismiss is resolved and not authorizing commencement of discovery at the time of issuance).

IT IS SO ORDERED that Complainant must explain how his claim for retaliation and unfair documentary practices state a claim under 8 U.S.C. § 1324b. Complainant's response must be filed by March 5. Respondent may file a response, and such response must be filed by March 19, 2025.

III. ELECTRONIC FILING

In its September 11, 2024, Order Disclosing Ex Parte Communications, the Court gave the parties notice that it would be converting the case to electronic filing, absent objection from the parties. *Nazarenko v. SupportYourApp, Inc*., 19 OCAHO no. 1532b, 3-4 (2024). As the 30-day deadline for submitting an objection has passed and neither party filed an objection, the case is now CONVERTED to e-filing. The Court will issue all orders electronically and the parties should submit all filings electronically, to the ######## inbox. The Court will utilize the email addresses listed for the parties in the accompanying certificate of service.

SO ORDERED.

Dated and entered on February 12, 2025.

_____
Honorable Jean C. King
Chief Administrative Law Judge

Ogunrinu, 13 OCAHO no. 1332, at 5 (citations omitted). This requires, among other things, demonstrating that some extraordinary circumstance stood in his way and prevented timely filing. *Id.* (citing *Holland v. Fla.,* 560 U.S. 631, 649 (2010)); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Complainant has not explained why he did not include LinkedIn when he filed his claim with IER or, for that matter, with this Court. Thus, he has not demonstrated that equitable tolling is merited.