

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

QUN WANG,	)	
Complainant,	)	
	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 2024B00110
	)	
	)	
DROPBOX, INC.,	)	
Respondent.	)	
	)	

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Appearances: Qun Wang, pro se Complainant  
Sean M. McCrory, Esq., for Respondent

ORDER ON MOTION TO AMEND COMPLAINT

I. PROCEDURAL HISTORY

This case arises under the unfair immigration-related employment practices provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b. Complainant Qun Wang filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Respondent Dropbox, Inc. on June 4, 2024, alleging that Dropbox discriminated against him on the basis of his citizenship status. Compl. 6. The Complaint was served on Respondent on September 17, 2024. *See* Answer 1 n.1; Respondent filed its Answer<sup>1</sup> on October 17, 2024.

On November 22, 2024, Complainant filed a motion to amend the Complaint. Respondent filed its opposition to the motion on November 29, 2024. Complainant did not file a reply, accordingly the motion is fully briefed and ready for adjudication.

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<sup>1</sup> Respondent titled the pleading Respondent's Response to Complainant's Supplement to Complaint. The document is the functional equivalent of an answer. Wang v. Dropbox, 20 OCAHO no. 1605a, 4-5 (2025); *see* 28 C.F.R. § 68.9(c) (outlining the requirements for an answer).

## II. MOTION TO AMEND

### A. Amendments Related to Respondent's Alleged Failure to Comply with DOL PERM<sup>2</sup> Process

Complainant seeks to amend the Complaint to include these claims:

- Respondent “failed to demonstrate good faith in recruiting U.S. worker[s] under 20 CFR 655.739(j) because the Respondent failed to offer the job of Data Scientist to the Complainant who is a qualified U.S. Worker[;]”
- Respondent violated “20 CFR 656, which governs the PERM labor certification process, and specifically 20 CFR 656.17[;]” and
- Respondent failed to demonstrate good faith in recruiting . . . under the PERM process” in violation of 20 C.F.R. § 655.17 and 8 U.S.C. § 1324b.

Mot. Modify Compl. 1-2.

Respondent counters that whatever the merit of these new claims, OCAHO is not the proper forum in which to bring them. Accordingly, Respondent argues, the motion should be denied as futile. Resp. Mot. Modify Compl. 1.

### B. Legal Analysis

Any discussion of a motion to amend should start from the premise, present both in OCAHO's Rules and its model in Rule 15 of the Federal Rules of Civil Procedure, that motions to amend allow a party to have their claims or defenses addressed on the merits, and so they should generally be permitted absent some compelling reason. OCAHO Rule 68.9 provides that a complainant may amend a complaint “[i]f a determination of a controversy on the merits will be facilitated thereby” and “upon such conditions as are necessary to avoid prejudicing the public

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<sup>2</sup> The Permanent Labor Certification, or PERM is a system operated by the Department of Labor which permits employers to hire foreign workers on a permanent basis. The PERM program works in conjunction with the US Citizenship and Immigration Services office of the Department of Homeland Security. For the purposes of this decision, the term PERM and H1-B visa process will be used interchangeably, although they relate to different programs run by different organs of the United States government. *See* DOL PERM, <https://flag.dol.gov/programs/perm>; *See also* USCIS H-1B Specialty Occupations, <https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations>

interest and the rights of the parties[.]” 28 C.F.R. § 68.9(e).<sup>3</sup> Rule 15 of the Federal Rules of Civil Procedure provides that a party may amend a pleading as a matter of right within 21 days of the date that it was served. Fed. R. Civ. P. 15(a)(1)(A). In instances where the court’s leave is required, “the court should freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). *See also* Sharma v. Lattice Semiconductor, 14 OCAHO no. 1362d, 7 (2023) (citing United States v. Valenzuela, 8 OCAHO no. 1004, 3 (1998)) (noting that OCAHO regulation 28 C.F.R. § 68.9 is modeled on Rule 15)

Complainant filed its amendments 36 days after the Answer was filed, and Respondent does not consent to their inclusion, so it falls to the Court to determine whether to grant the motion. *See* Fed. R. Civ. P. 15(a)(2) (permitting amendment to a pleading with the opposing party’s written consent, which is absent in the case *sub judice*).

The traditional factors to consider when evaluating a motion to amend are: “bad faith, undue delay, prejudice to the opposing party, and/or futility.” Griggs v. Pace Am. Grp., Inc., 170 F.3d 877, 880 (9th Cir. 1999)<sup>4</sup>; *see also* Foman v. Davis, 371 U.S. 178, 182 (1962) (identifying similar factors).

Here, there is no suggestion of bad faith, nor was there undue delay, as the motion occurred reasonably early in the litigation. Respondent does not argue that it would suffer any undue prejudice as a result of the proposed amendments, nor does the Court find any.

Addressing futility, the last factor, the justification for denying the motion largely coincides with a properly filed motion to dismiss under Rule 12(b)(6) — not just that the additional information is superfluous, which might in and of itself not provide a compelling reason, but that the new assertions fail to state a legal claim and so there is no point in adding them at all. Novak v. United States, 795 F.3d 1012, 1020 (9th Cir. 2015) (“Futility alone can justify a court’s refusal to grant a motion to amend”); Sharma v. Lattice Semiconductor, 14 OCAHO no. 1362d, 15 (2023) (quoting Ogunrinu v. L. Res., 13 OCAHO no. 1332, 3 (2019)); 28 C.F.R. § 68.10(a) (motion to dismiss for failure to state a claim); Fed. R. Civ. P. 12(b)(6) (same).

A motion might be denied as futile for asserting a cause of action which the applicable law does not provide for. Coventry First, LLC v. McCarthy, 605 F.3d 865, 869 (11th Cir. 2010) (amendment to include constitutional violation denied as futile). An amendment might also be denied as futile because the claim fails to plead a necessary element, or because it was drafted in such a confusing manner that it is impossible to know what the claim hopes to accomplish.

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<sup>3</sup> 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>.

<sup>4</sup> Since the allegations at issue in this case occurred in California, the Court may look to the case law of the relevant United States Court of Appeals, here the Ninth Circuit. *See* 28 C.F.R. § 68.57.

Kobayashi v. McMullin, 2023 WL 11822286, \*6-8 (C.D. Calif. July 7, 2023) (failure to assert a fact precedent to claim and violation of Rule 8 justify denial of motion to amend).

In the matter presently before this Court, Complainant seeks to amend his Complaint to include claims that Respondent violated Department of Labor regulations with regard to the implementation of the PERM or the H1-B visa program. However, these claims are outside the province of this Court — 8 U.S.C. § 1324b, the statute under which Complainant filed his charge, provides no cause of action for litigants arguing a violation of the PERM. Moreover, the proposed amendments all appear to this Court to not be attempts to add more facts to the previously existing claims concerning employment discrimination, but rather attempts to assert additional violations of the law, ones which this Court is not empowered to hear. “[A]djudicating compliance or lack thereof with a [Department of Labor] process is outside the scope of this forum.” United States v. Facebook, Inc., 14 OCAHO no. 1386b, 8 n. 12 (2021). Furthermore, while “compliance with DOL regulations does not, in and of itself, eliminate the possibility of an employer acting in a discriminatory manner in violation of § 1324b . . . failing to follow DOL regulation does not create a per se presumption of citizenship discrimination.” Id.

Accordingly, the undersigned finds that the proposed amendments would be futile if added, and it declines to permit their introduction to the Complaint. The Complainant’s motion to amend is therefore DENIED.

SO ORDERED.

Dated and entered on March 28, 2025.

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Honorable John A. Henderson  
Administrative Law Judge