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

December 5, 1995

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| SHONG LONG CHAO, | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | 8 U.S.C. §1324b Proceeding |
| | ) | OCAHO Case No. 94B00150 |
| McDONNELL DOUGLAS | ) | |
| CORPORATION, | ) | |
| Respondent. | ) | |
| | ) | |

**FINAL DECISION AND ORDER**

***MARVIN H. MORSE**, Administrative Law Judge*

Appearances: *W. Patrick McPhilamy, III, Esq.*, for Complainant
*Nancy-Jo Merritt, Esq.*
*Catherine L. Haight, Esq.,* for Respondent

*I. Procedural History*

By a charge dated November 20, 1993, Shong Long Chao (Chao or Complainant) alleged that McDonnell Douglas Corporation (MDC or Respondent) discriminated against him based on his Taiwanese citizenship status, a practice prohibited by §102 of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. §1324b(a). As he was required to do, Chao filed his charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). 8 U.S.C. §1324b(b)(1).

By a determination letter dated June 23, 1994, OSC advised Chao that it elected not to file a complaint before an administrative law judge (ALJ) due to "insufficient evidence of reasonable cause to be-

lieve you were discriminated against as prohibited by 8 U.S.C. §1324b." OSC informed Chao that he could pursue a private cause of action directly with an ALJ in the Office of the Chief Administrative Hearing Officer (OCAHO).

On August 12, 1994, Chao filed an OCAHO complaint which reasserts his claim that Respondent discriminated against him based on his citizenship status. As more specifically discussed, *infra,* as understood from the Complaint in light of other filings (including his OSC charge) Chao contends that as a member of MDC's C–17 Modification Team he was scheduled to be transferred on October 18, 1993 to Edwards Air Force Base (EAFB). He claims that he was removed from the Team and not transferred because "despite my qualifications, I was passed over for a new position because I was not a citizen of the U.S.," contending that MDC discriminated against him on October 13, 1993 by revoking the previously scheduled transfer to a position at EAFB. Complainant asserts that on or about November 12, 1993 he received oral notification of a layoff to take place in January 1994. Chao filed his OSC charge on November 20, 1993. On January 14, 1994, MDC revoked the layoff and assigned Chao to a new position from which he was laid off on July 22, 1994.[1] Complainant alleges that the revocation of his transfer to EAFB directly resulted in his layoff in July 1994 because the new position he was assigned to was temporary in nature while the EAFB position would have been permanent, and because the various transfers and notices of layoff resulted in lost seniority. On July 5, 1995, Chao was again rehired by MDC. On July 21, 1995, Chao was one of 56 MDC employees laid off.

On August 15, 1994, OCAHO issued its Notice of Hearing (NOH), which transmitted to Respondent a copy of the Complaint and notified the parties that the case was assigned to ALJ Robert B. Schneider.

On October 3, 1994, following a continuance granted by the ALJ, Respondent filed its timely Answer. The Answer denied the substantive allegations of the Complaint, and asserted six affirmative defenses, i.e., (1) failure to state a cause of action; (2) failure to state a claim under 8 U.S.C. §1324b(a)(1) as Complaint does not involve hir-

1 The Complaint, constituting entries on a format produced by OCAHO, specifies that Chao was "not hired" because of his citizenship status; his entries show that he responded in the negative to the query whether he was "knowingly and intentionally fired."

ing or firing; (3) failure to state a claim under 8 U.S.C. §1324b(a)(2)(C) as MDC's compliance with a federal regulation is exempt under IRCA; (4) failure to state a claim under 8 U.S.C. §1324b(a)(3)(B)(i) as Chao is not a qualified "protected individual" under IRCA to assert a citizenship discrimination claim; (5) lack of damages; and (6) good faith and absolute privilege.

On October 3, 1994, Respondent concurrently filed a Motion to Dismiss Complaint of Shong Long Chao and Request for Attorneys' Fees (Motion to Dismiss). Respondent seeks dismissal on the grounds that: (1) Chao's claim regarding work assignments is not covered by IRCA; (2) even if Chao's complaint regarding work assignments is cognizable under IRCA, MDC's conduct is exempt under the Act, because MDC was complying with federal regulations; (3) Chao cannot apply for relief under IRCA because he is not a qualifying "protected individual" as it appears that he adjusted his status from that of undocumented alien to temporary resident by providing false information to the Immigration and Naturalization Service concerning his length of residence in the United States; and (4) if Chao proves that he entered the United States in 1982, then he made a false statement to MDC on his employment application, which, pursuant to the written terms of the application, is automatic cause for discharge at any time.

On December 1, 1994, the presiding ALJ issued an Order to Show Cause Why Motion to Dismiss Should Not Be Granted, directing Complainant to explain why he had not responded to the Motion to Dismiss in a timely manner. The Order directed Complainant to file a response to the Motion to Dismiss on or before January 6, 1995.

On December 27, 1994, Complainant, who had been proceeding *pro se,* substituted W. Patrick McPhilamy, III, as his counsel.

On January 6, 1995, Complainant by counsel timely filed by facsimile transmission (FAX) his Opposition to Respondent's Motion to Dismiss Complaint and Memorandum of Points and Authorities (Complainant's Opposition). Complainant asserts that the Motion to Dismiss should be denied because: (1) Complainant's claim falls within the ambit of 8 U.S.C. §1324b, as a claim for discrimination with respect to hiring, firing (or recruitment or referral for a fee) and not a claim involving the terms and conditions of employment; (2) Respondent's claim that its discriminatory conduct is exempted under 8 U.S.C. §1324b improperly seeks to introduce information be-

yond the scope of the subject complaint, and Respondent has not offered evidence to show that its conduct was exempted or that Chao was prohibited factually or legally from working at EAFB on the C–17 project; (3) Chao is entitled to 8 U.S.C. §1324b relief as a "protected individual," and Chao made no false statement on his MDC employment application.

On January 31, 1995, Respondent FAX-filed a Motion for a Prehearing Conference on the Pending Motion to Dismiss.

On February 7, 1995, the Chief Administrative Hearing Officer (CAHO) reassigned this case to me.

On February 10, 1995, Complainant FAX-filed his Opposition to Respondent's Motion for Prehearing Conference.

On May 11, 1995, Respondent filed its Renewal of Motion for Prehearing Telephone Conference on Respondent's Pending Motion to Dismiss Complaint.

On June 12, 1995, I issued an Order of Inquiry which invited the parties to comment on the following questions:

> (1) When, specifically, was Complainant laid-off? When did he first anticipate he would be discharged, and why did he think so?
>
> (2) What connection, if any, does he claim between the revocation of the transfer and the subsequent lay-off?
>
> (3) Does Complainant contend that the alleged discriminatory conduct, as alleged in his charge form filed with OSC, covers his being laid-off and, therefore, renders his claim cognizable under 8 U.S.C. §1324b? If so, please explain how Complainant has sufficiently met the procedural requirements of filing a claim with OSC regarding the specific discriminatory conduct in a timely manner when the charge form was filed *before* Complainant was fired/laid-off? *See* 8 U.S.C. §1324b (d)(3).

On June 29, 1995, the parties requested and were granted an extension of time until August 11, 1995 in which to respond to the Order of Inquiry. Respondent filed its response on August 10, 1995 (Resp. Response), and Complainant FAX-filed his response on August 11, 1995 (Cplt. Response).

Following the responses, a Second Order of Inquiry, issued August 22, 1995, asking the parties to address the following remaining issues:

> In view of Respondent's contention that Complainant was offered and accepted rehiring by MDC, it is reasonable to infer that not only did Chao return to work for MDC, but that MDC rehired Chao *notwithstanding his lack of U.S. citizenship.* In that light, the rationale of Complainant's case is obscure. It is not readily apparent how an individual can maintain a citizenship discrimination claim in a situation where the employer rehires him and he returns to work.
>
> Complainant is instructed to address this issue and to explain his contention that the layoffs were a result of citizenship status discrimination when numerous others were also laid off, and his contention that the cancellation of the January 14, 1994 RIF was to avoid liability when Chao was one of 29 individuals whose layoffs were cancelled. Complainant is further invited to explain what, if any, connection exists between Chao's removal from the assignment at Edwards Air Force Base and the July 22, 1994 layoff.
>
> Respondent is also invited to comment on these questions. Respondent is asked to provide schedules which show the citizenship status of the individuals involved in the layoff notices dated November 12, 1993 and July 20, 1994 respectively.

Respondent filed its response on September 15, 1995 (Resp. Response #2). Complainant's response was FAX-filed on September 18, 1995, with a hard copy received on September 22, 1995 (Cplt. Response #2). On October 24, 1995, Respondent filed a Supplement to its Response to the Second Order of Inquiry (Resp. Supplement).

As both parties submitted affidavits/evidence outside the pleadings, they were informed in the August 22, 1995 Order that I will treat the Motion to Dismiss as a Motion for Summary Decision.

## *II. Legal Standards*

### A. *Motion for Summary Decision*

OCAHO rules of practice and procedure, 28 C.F.R. part 68, (Rules) authorize the ALJ to "enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that party is entitled to summary decision." 28 C.F.R. §68.38(c). A fact is material if it might affect the outcome of the case. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). In demonstrating that there is an absence of evidence to support the non-moving party's case, the movant bears the initial burden of proof.

In determining whether the movant has met its burden of proof, all evidence and inferences to be drawn therefrom are to be viewed

in a light most favorable to the non-moving party. *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The burden of production then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *United States v. Davis Nursery, Inc.,* 4 OCAHO 694 at 8 (1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986)). Failure to meet this burden invites summary decision in the moving party's favor.

B. *Citizenship Status Discrimination*

Title 8 U.S.C. §1324b provides in pertinent part that "[i]t is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a(h)(3) of this title) with respect to . . . the discharging of the individual from employment . . . in the case of a protected individual[2] . . . because of such person's citizenship status." 8 U.S.C. §1324b(a)(1)(B). Procedurally, in order to bring a citizenship status discrimination claim, a protected individual must file a charge with OSC within 180 days after the date of the alleged discrimination. 8 U.S.C. §1324b(d)(3). OSC then has 120 days to investigate the charge and either file a complaint on behalf of the individual or inform the individual that it will not do so. If OSC declines to file a Complaint on the individual's behalf, he may file a private action directly with OCAHO within 90 days after the date of receipt of notice of OSC's determination. 8 U.S.C. §1324b(d)(2).

Chao has the burden of proof to prove discrimination on the basis of citizenship status. *United States v. Mesa Airlines*, 1 OCAHO 74, 500 (1989).[3] To meet this burden in a case involving employment termina tion, a Complainant must show, by a preponderance of the evi-

2 Title 8 U.S.C. §§1324b(a)(3)(A), (B) provides that a protected individual is either a citizen or national of the United States, an alien lawfully admitted for either permanent or temporary residence, an individual admitted as a refugee, or an individual who has been granted asylum. However, an alien who fails to apply for naturalization within six months of becoming eligible to apply, or one who is not naturalized within 2 years after the date of application, is not a protected individual unless they can establish that they are actively pursuing naturalization. 8 U.S.C. §1324b(a)(3)(B).

3 Citations to OCAHO precedents reprinted in the recently distributed bound Volume 1 (Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States) reflect consecutive pagination within that bound volume; pinpoint citations to Volume 1 are to the specific pages, seriatim, of the *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 1, however, are to pages within the original issuances.

dence, that: (1) he is a member of a class entitled to the protection of IRCA, (2) that he was discharged without valid cause, and (3) that the employer continued to solicit application for the vacant position. *Nguyen v. ADT Engineering, Inc.,* 3 OCAHO 489 at 11 (1993) (citations omitted). Once the complainant makes a prima facie showing of the above-listed elements, the burden then shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's . . . [termination]." *Mesa Airlines*, 1 OCAHO 74, 500 (citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)). If the employer is successful, the burden shifts a third and final time to the Complainant who must show that the employer's reasons for termination are a "pretext or gloss designed to conceal an underlying discriminatory motivation." *Id.* at 500.

Notwithstanding the shifts in burdens of production, the ultimate burden of persuasion always remains with the complainant to prove discriminatory intent. Once the employer produces evidence "which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus," the complainant bears the ultimate burden of proving that "the proffered reason was not the true reason for the employment decision [and] that she [or he] has been the victim of intentional discrimination." *Dhuria v. Trustees of the University of the District of Columbia*, 827 F. Supp. 818, 826 (D.D.C. 1993) (quoting *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981)).

*III. Discussion*

On resolving a motion for summary decision I must consider the facts in the light most favorable to the non-moving party. *Matsushita,* 475 U.S. at 587. Accordingly, in order for Respondent to prevail and obtain summary decision in its favor, it is necessary to examine the facts in a light most favorable to Complainant, determine that no genuine issue of material fact remains for trial, and determine that Respondent is entitled to summary decision. On a motion for summary decision, the moving party bears the initial burden of persuasion that there is no genuine issue of material fact for trial.

A. *Factual Determination for Motion for Summary Decision*

As appears from his OSC Charge Form, the Complaint, Complainant's Opposition, and his responses to the two Orders of Inquiry, Complainant alleges as follows: he was a member of MDC's

C–17 Modification Team scheduled to be transferred as a unit to EAFB on October 18, 1993. OSC Charge Form at ¶9. Complainant was passed over for a position at EAFB because he was not a United States citizen. Complaint at ¶(13)(b). The job at EAFB guaranteed long-term employment for those accepted for such positions. Cplt. Response #2 at 5. Complainant's transfer to EAFB was revoked on October 13, 1993. Complainant asserts that there is no rule that U.S. citizenship is a prerequisite for entry to EAFB and that MDC "made up this rule;" that "but for MDC's use of unlawful criteria, namely U.S. citizenship, Chao's green card entitled him to work not only in the United States, but also on [EAFB]." *Id.* at 3.

On or about November 12, 1993, Chao received oral notice that he was being laid off. *Id.* at 4. He filed his OSC charge on November 20, 1993. Chao claims that in response to the OSC charge and to avoid §1324b liability MDC rehired him but that this did not exonerate the previous discriminatory conduct because MDC transferred Chao back to the C–17 modification project knowing that it was a temporary position and would result in a layoff. Complainant states: "MDC's second termination [on July 20, 1994] was in effect a constructive termination on the basis of his nationality, since MDC knew that it would be able to lay-off Chao and then defend itself on the grounds that it laid-off 118 other persons. This did not accidentally happen." *Id.* at 5. Complainant states that there is a causal connection between the alleged original discriminatory conduct, the revocation of the transfer, and the subsequent layoff. *Id.* at 6.

Complainant states that MDC cut its work force by almost 25% in 1990 and 1991, that these cuts resulted in multiple complaints against MDC and that it was common MDC practice to move minority employees to new, temporary positions which positioned them at the bottom of the "totem pole" in terms of seniority resulting in them being the first laid-off when cut backs occurred. *Id.* at 5. Complainant asserts that Chao was terminated "while whites, many of whom were far less qualified, were saved from termination by the management who run things at MDC." *Id.* at 6.

Respondent states that Chao's claim is not covered by IRCA because it involves work assignment, as distinct from hiring and/or firing; IRCA is unavailing with respect to terms and conditions of employment, such as work assignment. Motion to Dismiss at 1. Respondent asserts a lack of connection between Chao's removal from the EAFB assignment and the layoff. Respondent states that

selection of individuals for the layoffs was based on the Collective Bargaining Agreement (CBA) between an operating unit of MDC and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW).

The CBA provides for layoffs based on seniority pursuant to a seniority list on which new employees are placed at the time of hire. "Employees are laid off or recalled in accordance with their placement on this list. It is a CBA procedure with no element of discretion." Resp. Response #2 at 3. In support, Respondent points to an affidavit of James Vince (Vince), MDC Senior Manager of Human Resources, and extracts from the CBA. Vince states that "[n]either a notice of layoff nor the revocation of such notice affects seniority. (See Article VII, Section 4 of the CBA). . . . The effect on seniority of an actual layoff is dependent upon how many years of seniority an employee has at the time of the layoff. (See Article VII, Section 4(c))." Affidavit at 1, ¶¶4–5.

The CBA, at Article VII, Section 4, provides:

> Seniority shall be lost only by the occurrence of any of the following:
>
> (a) Quit.
>
> (b) Discharge or release . . .
>
> (c) Layoff out of the Bargaining Unit for two (2) years if the employee has less than two (2) years of seniority at the time of layoff, or layoff for three (3) years if the employee has over two (2) but less than three (3) years of seniority at the time of layoff, or layoff for four (4) years if the employee has over three (3) but less than four (4) years of seniority at the time of layoff, or layoff for five (5) years if the employee has more than four (4) years of seniority at the time of layoff....

Respondent objects to a "factual error" in Complainant's assertions, contending instead that Chao's seniority was not impacted by the November 12, 1993 notice of layoff, the January 14, 1994 revocation of that layoff notice, or his eventual layoff on July 22, 1994. Resp. Supplement at 1. Chao's start date into the Bargaining Unit, the event which fixed his position on the seniority list, was April 10, 1989. Under the CBA, an employee with more than four years of seniority does not lose that seniority unless and until he is laid off for five years. *Id.* at 2. As Complainant had more than five years seniority, based on the April 10, 1989 start date, at the time of his July 22, 1994 layoff, Respondent contends that Chao lost no seniority.

B. *Analysis*

MDC's Answer and Motion to Dismiss assert that Chao is not a protected individual under IRCA because "it appears that he adjusted his status from that of undocumented alien to temporary by providing false information to the INS concerning his length of residence in the United States." Answer at 4–5; Motion to Dismiss at 3. Specifically, Respondent asserts that Chao received his temporary resident card pursuant to IRCA's Legalization or Amnesty Program which granted legalization to aliens who had resided unlawfully in the United States prior to January 1, 1982 and continued to reside in the United States when the application period began in June 1987. However, because Chao's employment application indicates he worked in Iran until April 1984, Respondent asserts that he either must have provided false information to obtain his temporary resident card, or that he made a false statement on his employment application which, pursuant to the terms of the application, is grounds for dismissal.

Chao asserts that because he became a permanent resident on January 27, 1989, he was a protected individual at the time he filed his Complaint. Chao contests Respondent's allegations, asserting that his employment application with MDC states that he was employed by Iran Air from December 1975 to April 1984, not that he lived in Iran during those years. Complainant's Opposition at 8. Furthermore, the employment application does not state that false statements on the application are automatic grounds for dismissal, rather it states that "any false information . . . is cause for discharge at any time during . . . employment." *Id.* Chao states that Respondent is wrong because the information was not false and because Chao was not discharged based on statements in the application. *Id.* at 9.

Considering the facts in the light most favorable to Chao, I am unable to conclude that Respondent has established the lack of any genuine issue of material fact as to Complainant's status as a protected individual or that he made false statements on his employment application. Accordingly, I deny summary decision for Respondent on those grounds. Nevertheless, as explained below, Respondent's motion prevails.

Chao's OSC charge filed November 20, 1993, alleges an unfair immigration-related employment practice on October 13, 1993, i.e.;

MDC's revocation of Chao's transfer to EAFB. As already noted, on or about November 12, 1993, Chao was orally notified that he would be laid off in January 1994, but this layoff never took place. On January 14, 1994, Chao received notification that he was one of 29 individuals who would not be laid off, but instead was transferred to a different and temporary project. Finally, Complainant received notice on July 20, 1994 that he would be laid off effective July 22, 1994.

The question of the timeliness of filing a charge with OSC when the requisite alleged unfair immigration-related employment practice occurs after the filing appears to be one of first impression. Complainant argues that his OSC charge "properly stated a claim against MDC for termination based on discriminatory conduct, since MDC's decision to transfer Chao to the C–17 modification project at Edwards Air Force Base resulted in his layoff from MDC." Cplt. Response #2 at 4. I understand this argument to be that the OSC charge was sufficient to provide a predicate for the claim before me because there is a causal connection between the revoked transfer and Chao's ultimate discharge.

Complainant asserts that there is a causal connection because Chao lost his seniority when he was "rehired" following the revoked transfer and the November 12, 1993 oral notice of layoff. *Id.* at 7. However, Complainant provides no substantiation for the assertion that he lost seniority and that ultimately this loss of seniority led to his discharge.

Respondent provides testimonial and documentary evidence in opposition to the asserted "causal connection." Specifically, the Vince affidavit and relevant provisions of the CBA demonstrate that Chao's seniority would not have been affected by the notice of layoff, the revocation of that notice, and, in Chao's case, even the ultimate layoff, because he had over five years of seniority at MDC. Resp. Supplement at Exhibit A, ¶¶3–6; Attachment 1 at 50. There is no reason to suppose that seniority was in fact impacted. Complainant has failed to show how seniority was manipulated to his disadvantage. Chao's bald allegations conflict with the CBA which is unimpeached and accepted as controlling. Even considering the pleadings and exhibits filed by the parties in the light most favorable to the Complainant, as the non-moving party, I am unable to perceive a causal connection between the revoked transfer and the July 1994 discharge.

It is undisputed that among 60 individuals who received notification of layoffs in November, 1993, Chao was one of only 29 individuals whose layoff was revoked in January, 1994. Furthermore, when Chao was ultimately discharged he was one of 118 employees laid off. Finally, after Complainant was recalled to MDC on July 5, 1995, he was one of 56 employees laid off on July 21, 1995.

Complainant asserts that the July, 1994 layoff "was in effect a constructive termination on the basis of his *nationality*, since MDC knew that it would be able to layoff Chao and then defend itself on the grounds that it laid off 118 other persons." Cplt. Response #2 at 5 (emphasis added). Complainant's unsubstantiated argument is unconvincing. I find it improbable to the point of disbelief that Respondent laid off 118 employees to cover-up the discriminatory discharge of one.

The unrebutted Vince affidavit and the CBA which controls the setting of seniority and the selections of individuals for layoffs and rehiring, overwhelm Complainant's unsubstantiated allegations that the revoked transfer resulted in lost seniority and eventual layoff.

Complainant has provided no support for his allegation that the layoff resulted from the revoked transfer, i.e., that the position he was transferred to was a short-term one while the EAFB job was long-term.

As there is no causal connection between revocation of transfer and ultimate layoff, I find that the OSC charge filed November 20, 1993—eight months before Complainant was discharged from MDC—was untimely as the alleged requisite unfair immigration-related employment practice had not yet occurred. Additionally, as Complainant has failed to rebut Respondent's showing that he was one of 118 people laid off due to lack of work in July, 1994, and that he did not lose seniority, I find that he has failed to make out a prima facie claim of citizenship status discrimination. Specifically, in the face of a dispositive motion Complainant has provided inadequate evidence to support a prima facie showing of discriminatory discharge, i.e., that he was discharged without valid cause, and that MDC continued to solicit application for the vacant position.

I grant summary decision for Respondent because Complainant has failed to make out a prima facie case on which there is any genuine dispute of material fact within the jurisdiction of this forum:

1. The charge with OSC which is the condition precedent to the Complaint was filed prematurely, absent any basis for concluding that there was a causal connection between the November 1993 oral notification of potential layoff and the actual discharge in July 1994. The CBA protected Chao's seniority, overtaking his claim that layoffs which he contends were improperly motivated impacted on his eventual discharge.

2. Despite initial claim of citizenship status discrimination, Complain ant's argument includes explicit reference to his national origin, as to which the number of MDC employees, undisputed to be fifteen or more, exceeds ALJ jurisdiction. 8 U.S.C. §1324b(a)(2)(B).

3. In response to inquiries by the Judge and to Respondent's filings, Chao offers not a glimmer of evidence of citizenship status discrimination.

4. Whatever grievance Chao may have turns on managerial actions short of failure to hire or unlawful discharge, and is therefore outside the ambit of 8 U.S.C. §1324b.

*IV. Attorney's Fees*

Respondent requests that I grant it attorney's fees, as authorized in favor of a prevailing party upon a finding that the "losing party's argument is without reasonable foundation in law and fact." 8 U.S.C. §1324b(h). Clearly MDC is the prevailing party. However, while I have determined that it is entitled to summary decision in its favor, I do not find that Complainant's claims were so devoid of a reasonable foundation in law and fact as to justify exercising my discretion to award attorney's fees.

The conclusion not to award Respondent attorney's fees is consistent with dispositions in similar cases. *See, e.g., Bozoghlanian v. Lockheed-Advanced Development Company,* 4 OCAHO 711 at 12 (1994); *Chu v. Fujitsu Network Transmission System, Inc.*, 5 OCAHO 778 at 16 (1995); *but cf. Wije v. Barton Springs/Edwards Aquifer Conservation District,* 5 OCAHO 785 at 29–32 (1995). Although I can understand that MDC might have a different visceral viewpoint, as a legal proposition the case at hand is particularly inappropriate for fee shifting. This is so for the following reasons:

Complainant's OSC charge recited that his removal from the EAFB assignment would "result in [his] layoff from McDonnell Douglas *in the near future."* OSC Charge at ¶9 (emphasis added). Despite Chao's admission that he had not yet been laid off, OSC's

June 23, 1994 determination letter merely states that "there is insufficient evidence of reasonable cause to believe you were discriminated against as prohibited by 8 U.S.C. §1324b" and that if Chao disagrees with OSC's determination, he has 90 days in which to file a private action before an ALJ. OSC does not address the timeliness of the charge. In my view, the circumstance of Complainant's *pro se* status at the time of filing the Complaint, the lack of specificity in the OSC determination letter and the necessity of substantial fact finding to determine the appropriateness of summary decision, demonstrate that Complainant's claims were not sufficiently devoid of a reasonable foundation in law and fact to render fee shifting appropriate.

*V. Ultimate Findings, Conclusions and Order*

I have considered the Complaint, the Answer, and the pleadings filed by both parties. All motions and requests not specifically ruled upon are denied. In addition to the findings and conclusions already mentioned, I make the following determinations, findings of fact and conclusions of law:

1. Summary decision is granted in favor of Respondent;

2. Respondent's request for attorney's fees is denied;

3. The Complaint is dismissed.

Pursuant to 8 U.S.C. §1324b(g)(1), this Final Decision and Order is the final administrative adjudication in this proceeding and "shall be final unless appealed" within 60 days to a United States court of appeals in accordance with 8 U.S.C. §1324b(i).

**SO ORDERED**.

Dated and entered this 5th day of December, 1995.

MARVIN H. MORSE
Administrative Law Judge