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

March 1, 1996

ANATOLIJ MARKELINA KASATHSKO, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	OCAHO Case No. 95B00132
INTERNAL REVENUE SERVICE, Respondent.	)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

I. *Introduction*

By a charge dated August 21, 1995, Anatolij Markelina Kasathsko (Kasathsko or Complainant) alleged that the Internal Revenue Service (IRS or Respondent) discriminated against him by not hiring him based on his national origin and citizenship status, as well as alleging retaliation and document abuse, practices prohibited by §102 of the Immigration Reform and Control Act of 1986, as amended (IRCA), 8 U.S.C. §1324b. Kasathsko filed his charge with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC).

By a determination letter dated August 25, 1995, OSC advised Kasathsko that it would not file a complaint before an Administrative Law Judge (ALJ) because the Department of Justice has determined that OSC does not have jurisdiction to pursue claims against federal agencies, including the IRS. OSC informed Kasathsko that he could pursue a private cause of action directly with an ALJ in the Office of the Chief Administrative Hearing Officer (OCAHO).

On September 12, 1995, Kasathsko filed an OCAHO Complaint in which he reasserted his claim that Respondent had discriminated against him because of his citizenship status and his national origin, and that Respondent refused to accept documents that he presented to show his work authorization in he United States. Kasathsko stated in the complaint that he is a citizen of Venezuela. Complaint ¶4. Complainant did not reassert his retaliation claim, stating instead that Respondent did not retaliate against him.

On September 20, 1995, OCAHO sent out its Notice of Hearing (NOH), which transmitted to Respondent a copy of the Complaint.

On October 20, 1995, Respondent filed its Answer which admits that Complainant applied for a job with IRS on July 17, 1995 and that he was not hired. Respondent denies that it discriminated against Respondent. Respondent asserts two affirmative defenses: (1) that OCAHO lacks subject matter jurisdiction over the Complaint, and, (2) that the Complaint fails to state a claim upon which relief can be granted.

On October 20, 1995, IRS concurrently filed a Statement of Facts Supporting Respondent's Affirmative Defenses and a Motion to Dismiss for Failure to State a Claim (R. Br.). Although the title of the motion references a failure to state a claim, the motion actually seeks dismissal both for failure to state a claim and lack of jurisdiction. Attached to the Motion to Dismiss were three exhibits: (1) a copy of the vacancy announcement which Complainant responded to (R. Ex. A), (2) an instruction sheet regarding qualifications and availability of the job and Kasathsko's responses to the form's questions (R. Ex. B), and (3) the letter advising Complainant that he was ineligible for employment as an Internal Revenue Agent since he was not a United States citizen (R. Ex. C).

On November 30, 1995, I issued an Order requiring supplemental briefing regarding Respondent's Motion to Dismiss. This Order also provided that I would accept a late filed response to the Motion to Dismiss from the *pro se* Complainant and that all pleadings in response to the Order would be considered timely if filed on or before December 18, 1995.

Complainant filed a response to the Order, dated December 11, 1995 (C. Reply), in which he stated that "[t]he Motion to Dismiss should be denied because it fails to address the issue. . . . The issue

is 'my constitutional rights and privileges as a U.S. permanent resident' have not been addressed."

Respondent filed its reply to the Order, dated December 13, 1995. (R. R. Br.). The reply included copies of the cases, statutes and regulations Respondent refers to in support of its motion. Respondent addressed the issues relating to the sovereign immunity and the failure to state a claim question. However, Respondent failed to provide information regarding the number of employees in the relevant IRS offices as required in the November 30, 1995 Order.

On January 11, 1996 and February 8, 1996, Complainant filed letter pleadings in response to Respondent's reply to the November 30, 1996 Order. Complainant attached letters he had sent to various individuals in the Federal Government regarding his discrimination allegations. Complainant did not indicate that the filings had been served on Respondent so this office served the letter pleadings with the attachments on February 23, 1996. In the February 8, 1996 letter, Complainant requests an extension pending his receipt of responses to certain requests for information.

II. *The Parties' Argument*

As previously stated, Respondent has moved to dismiss this action both for failure to state a claim and due to lack of jurisdiction.

Respondent states that this tribunal lacks subject matter jurisdiction over this matter because IRCA does not contain an explicit statement waiving sovereign immunity, an express provision stating that the government may be sued, or an express provision making it applicable to the United States and its agencies. R. Br. at 3.

Respondent also asserts that Complainant has failed to state a claim upon which relief can be granted because the anti-discrimination provisions of IRCA do not apply in this matter as United States citizenship was required under applicable law and regulation for the position Complainant sought and IRCA, at 8 U.S.C. §1324b(a)(2)(C), contains an express exception to the citizenship status discrimination provisions for discrimination required to comply with law, regulation or executive order. *Id.* at 2–3. Respondent states that pursuant to 5 C.F.R. §338.101 only United States citizens can be admitted to competitive examinations for Federal jobs. *Id.* at 2. In addition, the Treasury, Postal Service and General Government

Appropriations Act, 1995 (Public Law 103–329) at §606, from which the IRS derives its funding, also states that money appropriated under that law cannot be used to employ non-citizens. *Id.* Respondent further asserts that Complainant has not established that he is qualified for the position in that he lacks the requisite professional accounting background. *Id.* at 3.

Finally, Respondent states that, in regards to the alleged national origin claim, as Respondent is a component of a Federal agency, Title VII provides the exclusive remedy for employees and applicants for employment against Federal agencies for complaints of national origin discrimination. *See* 42 U.S.C. §2000e–16.

In opposition to the motion to dismiss, Complainant states that Respondent has not addressed the issue of his Constitutional rights and the privileges he is entitled to as a United States permanent resident. C. Reply at 2. In addition, Complainant states that he has written letters to various federal agencies requesting information regarding his claim, and requests an extension until he receives such information.

While I am understanding of Complainant's *pro se* status, I do not find that the materials he is awaiting are relevant to ruling on Respondent's motion, and therefore his request for an extension is denied. As both parties have submitted filings regarding the motion to dismiss, the motion is ripe for adjudication.

III. *Applicable Law*

A. *Standards Governing Adjudication of Motions to Dismiss*

For the purpose of ruling on a motion to dismiss, the Court must assume that the facts as alleged in the complaint are true. *Donald D. Forsht Associates Inc. v. Transamerica ICS, Inc.*, 821 F.2d 1556, 1561 (11th Cir. 1987). In deciding a motion to dismiss, the complaint must be construed liberally and viewed in the light most favorable to the Complainant. The motion to dismiss should not be granted unless Complainant can prove no set of facts in support of his claim that would entitle him to relief. *Id.* citing *Conley v. Gibson*, 355 U.S. 41, 78 (1957); *Bent v. Brotman Medical Center Pulse Health Service*, 5 OCAHO 764, at 3 (1995); *Zarazinski v. Anglo Fabrics Co., Inc.*, 4 OCAHO 638, at 9 (1994). However, the motion to dismiss may be granted if, even assuming that Complainant's factual assertions are

true, the complaint fails to state a cognizable claim. *See GSW, Inc. v. Long County, Georgia*, 999 F.2d 1508, 1510 (11th Cir. 1993).

Hence the facts as alleged in the amended complaint must be accepted as true for the purpose of this motion. Thus, I accept as true for the purpose of deciding this motion that the Complainant was born in Austria, is a citizen of Venezuela, obtained permanent residence status on July 19, 1993, and is an alien authorized to work in the United States. Complaint ¶¶2, 3, 4, 7. On July 17, 1995, Complainant applied for a job as an Internal Revenue Agent with the IRS. *Id.* at ¶11. On July 21, 1995, Complainant was informed that he was not eligible for the job because it requires United States citizenship. OSC Charge Form ¶9.[1]

B. *Relevant Statutory and Regulatory Provisions*

Complainant's complaint is styled as one for citizenship status and national origin discrimination. IRCA provides, in pertinent part, that it is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual with respect to hiring because of the individual's national origin, or in the case of a protected individual because of the individual's citizenship status. *See* 8 U.S.C. §§1324b(a)(1)(A), (B).

In addition, IRCA provides certain exceptions to these anti-discrimination provisions. Specifically, 8 U.S.C. §1324b(a)(2)(C) provides that the above provisions shall not apply to:

> discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.

The implementing regulations of the anti-discrimination provisions of IRCA define "respondent" as meaning "a person or entity against whom a charge of an unfair immigration-related employment practice has been filed." *See* 28 C.F.R. §44.101(f).

[1] As required in paragraph 18 of the form complaint that Complainant filed with OCAHO, Complainant attached a copy of the Charge Form for Unfair Immigration-Related Employment Practices (Form OSC–1) that he filed with OSC on August 21, 1995.

Title 5 C.F.R. §338.101, which Respondent relies on to argue that the above quoted exception to the citizenship status discrimination provision applies here, provides that "[a] person may be admitted to competitive examination only if he is a citizen of or owes allegiance to the United States." Respondent also relies on Section 606 of the Treasury, Postal Service and General Government Appropriations Act, 1995 (Public Law 103–329) from which it derives its funding. This section provides, in pertinent part, that:

> no part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States . . . whose post is in the continental United States unless such person (1) is a citizen of the United States, . . . (3) is a person who owes allegiance to the United States.

IV. *Sovereign Immunity*

Respondent argues that this tribunal lacks jurisdiction over this matter because IRCA does not contain an express waiver of sovereign immunity or an express provision stating that the government can be sued. R. Br. at 3. Sovereign immunity refers to the doctrine that the United States, as a sovereign, may not be sued without its consent. *United States v. Sherwood*, 312 U.S. 584, 596 (1941); *Raulerson v. United States*, 786 F.2d 1090 (11th Cir. 1986). Such consent is found in the language of a statute, and any waiver of the Government's sovereign immunity must be unequivocal. *United States Department of Energy v. Ohio,* 503 U.S. 607, 615 (1992) citing *United States v. Mitchell*, 445 U.S. 535, 538–539 (1980). Furthermore, the Government's consent to be sued must be strictly construed in favor of the sovereign. *United States v. Nordic Village Inc.*, 503 U.S. 30, 33 (1992).

A threshold matter in a case in which sovereign immunity has been invoked is the determination of whether the suit is one against the United States as sovereign. *State of Florida Department of Business Regulation v. United States Department of the Interior,* 768 F.2d 1248, 1251 (11th Cir. 1985). To determine if the United States as sovereign is the real party in interest, it is necessary to find if the relief sought by the Complainant requires "payment of money from the Federal Treasury, interferes with public administration, or compels or restrains the government." *Id.* citing *Stafford v. Briggs*, 444 U.S. 527, 542 n.19 (1980), Dugan v. Rank, 372 U.S. 609, 620 (1980), and Alabama Rural *Fire Insurance Co. v. Naylor*, 530 F.2d 1221, 1225 (5th Cir. 1976). The relief Complainant requests is back pay from July 21, 1995. Complaint ¶20. Back pay from the IRS would

come from the Federal Treasury and therefore this case is a suit against the United States as sovereign.

As the United States is the real party in interest in this case, it is necessary to determine whether the United States has waived its immunity with respect to suits brought under the anti-discrimination provisions of IRCA. Waiver cannot be implied, but must be unequivocally stated in the language of the statute. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990); *United States v. King,* 395 U.S. 1, 4 (1969).

It has been previously held that the anti-discrimination provisions of IRCA do not contain an express waiver of sovereign immunity. In *Hensel v. Office of the Chief Administrative Hearing Officer*, 38 F.3d 505 (10th Cir. 1994), the Tenth Circuit found that the Petitioner had not demonstrated that IRCA contains "explicit and unambiguous language that waives the immunity of the United States." *Id.* at 509. Similarly, the Ninth Circuit, in *General Dynamics Corporation v. United States of America; Office of the Chief Administrative Hearing Officer*, 49 F.3d 1384 (9th Cir. 1995), agreed, holding that the United States was immune from General Dynamic's claim for attorney's fees because there is no expression in the statute waiving sovereign immunity. *Id.* at 1385–1387.

However, there is some OCAHO case law in support of the proposition that there is a waiver of sovereign immunity in IRCA. In *Roginsky v. Department of Defense*, 3 OCAHO 426 (1992), it was held that "[u]pon consideration of IRCA as a whole, its legislative history, its relationship to Title VII, and its implementation by the responsible federal agencies, I confirm the earlier conclusion that Congress intended to and did waive sovereign immunity under 8 U.S.C. §1324b." *Id.* at 14. In coming to this conclusion, the decision opines that Congress intended the anti-discrimination and employer sanctions provisions of IRCA to be treated as unitary, and that the Senate Judiciary Committee report addressing Section 1324a (the employer sanctions provisions of IRCA) "unequivocally embraces the universe of employers without excluding governmental employers from the intended class." *Id.* at 11. The decision further states that the combination of Section 1324b broadening Title VII's protections against employment discrimination and the fact that Title VII contains an express waiver of sovereign immunity at 42 U.S.C. §2000e–16, is consistent with finding a waiver in IRCA. *Id.*

In *Mir v. Federal Bureau of Prisons*, 3 OCAHO 510 (1993), the Administrative Law Judge also discussed the issue of whether there is a waiver of sovereign immunity under Section 1324b. In August 1992, following *Roginsky* and before *Mir*, the Office of Legal Counsel in the Department of Justice (OLC), issued a memorandum which states, in pertinent part, that it concludes that federal government is not a 'person or other entity' covered by the anti-discrimination provision of IRCA. OLC Memo at 1. In addressing the sovereign immunity issue in *Mir*, the Judge discussed whether the OLC memorandum was entitled to judicial deference. The Judge noted that in a striking departure from traditional legislation involving the Administrative Procedure Act, 5 U.S.C. §551 *et seq.*, IRCA hearing authority is conferred directly on the Administra tive Law Judge, rather than on the agency. *Id.* at 10. Moreover, in Section 1324b cases, there is no administrative review. Rather a final order of the Judge is appealable directly to a United States circuit court of appeals. The Judge rejected the argument asserted by the Federal Bureau of Prisons (FBP) that he was bound by the OLC memorandum, finding that "FBP's effort to subordinate the role and function of the judge to OLC are in derogation of and do not comport with these statutory indice of independent decision making." *Id.* After addressing the deference issue, the Judge ruled that the OLC memorandum was unpersuasive and that he would adhere to his ruling in *Roginsky* that there is a waiver of sovereign immunity in IRCA.

I entirely concur with the conclusion in *Mir* that an Administrative Law Judge is not bound by the OLC memorandum. While I agree that the OLC memorandum which states that there is no waiver of sovereign immunity in Section 1324b is not entitled to deference, I am unable to find the requisite explicit waiver of sovereign immunity in the language of 8 U.S.C. §1324b. The Supreme Court case law cited above clearly states that any waiver must be clear and unambiguous. While *Roginsky* states that the legislative history and the relationship between Section 1324b and Title VII shows that Congress intended the anti-discrimination provisions of IRCA to include a waiver of sovereign immunity, Congress did not expressly include such a waiver in IRCA. Other anti-discrimination statutes clearly include express waivers. *See, e.g.,* Title VII, 42 U.S.C. §2000e–16 (section of Title VII which states that "all personnel actions affecting employees or applicants for employment in military departments . . . , in the United States Postal Service and the Postal Rate Commission, . . . and in those units of the legislative and judicial branches of the Federal Government having positions in the

competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin."); Age Discrimination in Employment Act, 29 U.S.C. §633a (section expressly protects federal employees "who are at least 4 years of ag . . . in military departments . . . , in executive agencies . . . , in the United States Postal Service and the Postal Rate Commission, . . . and in those units of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age."). Considering the federal circuit court case law on the issue of waiver of sovereign immunity in IRCA, in the absence of a clear and explicit waiver, I conclude that 8 U.S.C. §1324b does not contain a waiver of sovereign immunity.

V. *Failure to State a Claim Due to Compliance with Federal Law*

Respondent also asserts that the complaint should be dismissed for failure to state a claim because its refusal to hire Complainant was in compliance with the provisions of the Treasury, Postal Service and General Government Appropriations Act, 1995 (Public Law 103–329) at §606, and with the regulation at 5 C.F.R. 338.101. As quoted above, the Appropriation Act, from which IRS derives its funding, states that, in addition to permanent resident aliens with citizenship in a limited group of countries[2] which does not include Complainant's (Venezuela), only United States citizens and those who owe permanent allegiance to the United States can receive compensation under the Act. Title 5 C.F.R. 338.101 provides that only United States citizens and those who owe permanent allegiance to the United States may be admitted to competitive examinations for Federal jobs. Title 8 U.S.C. §1324b(a)(2)(C) provides that the anti-discrimination provisions of Section 1324b(a)(1) do not apply where citizenship status discrimination is required to comply with law or regulation.

As the parties agree that Complainant is not a United States citizen, it is necessary to determine if he owes permanent allegiance to the United States so as to make him available to be admitted to competitive examinations for Federal jobs under 5 C.F.R. §338.101 and to receive compensation from the above-quoted Appropriations

[2] The countries designated in the Appropriations Act from which permanent resident aliens may receive compensation under the Act are: Cuba, Poland, South Vietnam, the countries of the former Soviet Union, and the Baltic countries.

Act. The term "owes permanent allegiance" has been defined to mean a noncitizen national of the United States. *See Yuen v. Internal Revenue Service*, 649 F.2d 163 (2d Cir. 1981), *cert. denied*, 454 U.S. 1053 (1981). It is clear that permanent resident aliens are not included in the category of those who owe permanent allegiance to the United States as the Appropriations Act states that permanent resident aliens from a limited number of specified countries may receive compensation under that Act. The fact that certain permanent resident aliens' countries were specified in

the Appropriations Act demonstrates that those not specified were intentionally excluded, and, accordingly, cannot be considered to owe permanent allegiance to the United States under that clause in the Act. Accordingly, I agree with the Respondent that the provision regarding those who owe permanent allegiance to the United States refers to noncitizen nationals. Complainant states that he is a permanent resident alien with Venezuelan citizenship. Complaint ¶¶4,6. Complainant has presented no evidence that he is a noncitizen national of the United States. Therefore, I find that he does not meet the criteria of one who owes permanent allegiance to the United States.

As Complainant is not eligible to be admitted to competitive examination or to receive compensation under the applicable Appropriations Act, Respondent is correct that it was complying with both law and regulation. Therefore, pursuant to Section 1324b(a)(2)(C), the anti-discrimination provisions at Section 1324b(a)(1) do not apply here, and Complainant has failed to state a claim upon which relief can be granted.

VI. *Conclusion*

Since the United States, as sovereign, may not be sued without its consent, and as such consent is lacking here, Respondent's motion to dismiss is hereby granted due to lack of subject matter jurisdiction. In addition, as Respondent was acting pursuant to federal law and regulation in rejecting Complainant due to his lack of United States citizenship, I also find that Complainant has failed to state a claim upon which relief can be granted because, pursuant to 8 U.S.C. §1324b(a)(2), citizenship discrimination required to comply with law, regulation, or executive order is not actionable under IRCA. As I have found that this tribunal lacks subject matter jurisdiction and that Complainant has failed to state a claim upon which relief can

be granted, I will not address Respondent's additional arguments.[3] For the foregoing reasons, Respondent's motion to dismiss is granted and the complaint is hereby dismissed with prejudice.

ROBERT L. BARTON, JR.
Administrative Law Judge

Notice Concerning Appeal

As provided by statute, not later than 60 days after entry of this final order, a person aggrieved by such order may seek a review of the order in the United States court of appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. *See* 8 U.S.C. §1324b(i); 28 C.F.R. §68.53(b).

[3] As the lack of a waiver of sovereign immunity and the compliance with federal law exception to Section 1324b(a)(1) resolve all issues in this action and Respondent has failed to provide information regarding the number of employees in its various offices as directed in the November 30, 1995 Order, I will not rule on Respondent's assertions regarding lack of national origin jurisdiction.