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

March 5, 1997

WAYNE P. COSTIGAN,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	Case No. 97B00026
NYNEX,	)	
Respondent.	)	
	)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

I. *Background and Procedural History*

The Complaint in this case was filed on November 18, 1996, and alleges that Respondent NYNEX (hereinafter Respondent or NYNEX) discriminated against Complainant Wayne P. Costigan (hereinafter Complainant or Costigan) on the basis of his United States citizenship status (Comp. ¶9), and committed document abuse by refusing to accept the documents that he presented; namely a Statement of Citizenship and Affidavit of Constructive Notice (Comp. ¶16). The Complaint further asserts that Complainant filed a charge with the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) on August 3, 1996 (Comp. ¶18), and that OSC sent him a right to sue letter informing him that he could file a complaint directly with the Office of the Chief Administrative Hearing Officer (OCAHO) (Comp. ¶19). Complainant attached to his Complaint a copy of the August 20, 1996, letter from OSC.

Respondent was served with a copy of the Complaint on December 9, 1996, and on January 13, 1997, I granted Respondent's request for an extension of time to file an answer to the Complaint. On February 3, 1997, Respondent filed its Answer to the Complaint,

which included three affirmative defenses, and also filed a Motion to Dismiss for failure to state a claim upon which relief may be granted. Subsequently, on February 12, 1997, Respondent filed both an amended answer and an amended motion to dismiss. On March 4, 1997, I issued an order accepting the filing of both the amended answer and motion.[1] Respondent also moved to disqualify John B. Kotmair, Jr., Complainant's representative, on the ground that he is not an attorney qualified to represent a person before this agency and has not filed a declaration that he is a member in good standing of the highest court of the state. Per my Order of February 4, 1997, I directed Complainant to include certain factual information in its response to the Motion to Dismiss.

Complainant has filed a motion to strike the appearance of the attorney representing Respondent and a Motion for Findings of Fact and Conclusions or Reconsideration of Judgment. On February 14, 1997, Complainant filed a reply to Respondent's affirmative defenses, a reply to Respondent's Motion to Dismiss, and a reply to my Order of February 4, 1997.

In his reply to the February 4, 1997 Order of this Court, Complainant acknowledges that Complainant was hired on June 1, 1987, by NYNEX, was working for Respondent at the time the Complaint was filed on November 18, 1996, and is currently employed by Respondent NYNEX. (C. Reply to Order at 6). Complainant attached a copy of the Statement of Citizenship signed by Mr. Costigan and dated May 5, 1995, and the Affidavit of Constructive Notice signed by Mr. Costigan and dated July 6, 1995, which allegedly were submitted to Respondent on May 8, 1995, and July 7, 1995, respectively, *id.* at 6–7. Although Complainant challenges as inaccurate Respondent's assertion that Complainant's claim concerns withholding of taxes, and instead asserts that this case involves discrimination and document abuse, I note that the Statement of Citizenship states that it is being provided to conform to internal revenue regulations that will relieve a withholding agent of any duty to withhold money from payments to a United States citizen. Further, the Affidavit of Constructive Notice states, in pertinent part, that Mr. Costigan does not have a social security number

[1] The OCAHO Rules of Practice and Procedure provide that the Judge may allow appropriate amendments to complaints and other pleadings at any time prior to the issuance of the final order. *See* 28 C.F.R. §68.9(e).

and never lawfully registered with the Social Security Administration.

II. *Standards Governing a Motion 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. *Painewebber Inc. v. Bybyk*, 81 F.3d 1193, 1197 (2d Cir. 1996) (citing *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.,* 476 U.S. 409, 411 (1986), and *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1098 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989)); *Murray v. Miner*, 74 F.3d 402, 403–04 (2d Cir. 1996). In deciding a motion to dismiss, the complaint must be construed liberally, allowing the nonmoving party the benefit of all inferences that can be derived from the alleged facts. *Painewebber*, 81 F.3d at 1197–98 (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds, Davis v. Scherer*, 468 U.S. 183 (1984)); *Geller v. County Line Auto Sales, Inc.*, 86 F.3d 18, 20 (2d Cir. 1996); *Bent v. Brotman Medical Ctr. Pulse Health Servs.*, 5 OCAHO 764, at 3 (1995), 1995 WL 509457, at *2[2] (citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)); *Zarazinski v. Anglo Fabrics Co., Inc.,* 4 OCAHO 638, at 9 (1994), 1994 WL 443629, at *5. A motion to dismiss should be granted only when it appears that under any reasonable reading of the complaint, the nonmoving party will be unable to prove any set of facts that would justify relief. *Geller*, 86 F.3d at 20 (citing *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)); *Murray*, 74 F.3d at 404 (citing same); *Painewebber*, 81 F.3d at 1198; *Bent*, 5 OCAHO 764, at 3, 1995 WL 509457, at *2; *Zarazinski,* 4 OCAHO 638, at 9, 1994 WL 443692, at *5. "[That] principle is to be applied with particular strictness when the [complainant] complains of a civil rights violation or where the [complainant] is appearing *pro se*." *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991) (internal citations omitted). However, the motion to dismiss may be granted if, even assuming that the complainant's factual assertions are true, the complaint fails to state a cognizable claim. *See Geller*, 86 F.3d at 20.

III. *Applicable Statutory Authority*

The complaint alleges violations of 8 U.S.C. §1324b, specifically citizenship status discrimination and document abuse. The statutory

[2] If available, parallel Westlaw citations will be given to OCAHO decisions. OCAHO decisions published in Westlaw are located in the "FIM–OCAHO" database.

provisions for those types of unfair immigration-related employment practices provide as follows:

> (a) Prohibition of discrimination based on . . . citizenship status
>
> (1) General rule
>
> It 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 hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment —
>
> . . .
>
> (B) in the case of a protected individual (as defined in paragraph (3)), because of such individual's citizenship status.
>
> . . . .
>
> (6) Treatment of certain documentary practices as employment practices
>
> For purposes of paragraph (1), a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

8 U.S.C. §1324b(a)(1), (6) (1994).

IV. *Decision and Order*

A. *Lack of Subject Matter Jurisdiction*

The Complaint in this case raises the issue of whether, pursuant to 8 U.S.C. §1324b, a party can maintain an action against an employer with whom there is a continuing employment relationship based on a claim of citizenship status discrimination, pursuant to 8 U.S.C §1324b–(a)(1), and a claim of document abuse, pursuant to 8 U.S.C. §1324b(a)(6). This issue has been addressed recently in a Decision and Order by Judge Marvin H. Morse. *See Horne v. Town of Hampstead*, 6 OCAHO 906 (1997).[3]

[3] Because the issues are similar and because I agree with the findings and conclusions in *Horne,* I have borrowed liberally from the language of that decision on the issue of jurisdiction. Although I could have adopted the language of that decision by reference rather than repeating the language in this decision, for the convenience of the reader I have included significant portions of the exact language from pages 4–9 of that opinion.

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As held in *Horne* at 4, OCAHO lacks subject matter jurisdiction of a "complaint of citizenship status discrimination which fails to allege either discriminatory refusal to hire or discriminatory discharge . . . because the power of the administrative law judge is limited to [granting relief for] discriminatory failure to hire and to discharge and does not include conditions of employment."

Although Respondent in this case did not move to dismiss for lack of subject matter jurisdiction, the issue of subject matter jurisdiction may be raised at any time, even by the court *sua sponte*. *Westmoreland Capital Corp. V. Findlay*, 100 F.3d 263, 266 (2d Cir. 1996); *United Food & Commercial Workers Union, Local 919 v. Centermark Properties Meriden Square, Inc.,* 30 F.3d 298, 301 (2d Cir. 1994). A court's first duty is to determine subject matter jurisdiction because "lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed." *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376, *reh'g denied*, 309 U.S. 695 (1940). It is always incumbent upon a federal court to evaluate its jurisdiction *sua sponte*, to ensure that it does not decide controversies beyond its authority. *See Petereit v. S.B. Thomas, Inc.,* 63 F.3d 1169, 1175 (2d Cir. 1995) ("An inquiry respecting this issue is one we always have the power to undertake, and where jurisdiction is questionable we are obliged to examine it *sua sponte*"), *cert. denied*, 116 S. Ct. 1351 (1996); *McCorkle v. First Pa. Banking & Trust Co.,* 459 F.2d 243, 244 n.1 (4th Cir. 1972) ("It has often been held that federal courts must be alert to avoid overstepping their limited grants of jurisdiction"). "[L]ack of subject matter jurisdiction is an issue that requires sua sponte consideration when it is seriously in doubt." *Cook v. Georgetown Steel Corp.,* 770 F.2d 1272, 1274 (4th Cir. 1985). Parties cannot confer jurisdiction by consent. *Insurance Corp. Of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *United States v. 27.09 Acres of Land*, 1 F.3d 107, 111 (2d Cir. 1993); *McCorkle*, 459 F.2d at 244 n.1. "If the court perceives the defect, it is obligated to raise the issue sua sponte." *Id.* at 244–45 n.1

As noted in *Horne* at 5, a judicial tribunal cannot expand or constrict the jurisdiction conferred on it by statute. *Willy v. Coastal Corp.,* 503 U.S. 131, 135, *reh'g denied*, 504 U.S. 935 (1992). Courts, therefore, have the authority "to determine whether or not they have jurisdiction to entertain [a] cause and for this purpose to construe and apply the statute under which they are asked to act." *Chicot*, 308 U.S. at 376.

The Supreme Court has opined that federal administrative law judges are "functionally comparable" to Article III judges. *Butz v. Economou*, 438 U.S. 478, 513 (1978). To the extent that reviewing courts characterize the Article III trial bench as a court of limited jurisdiction, the administrative law judge is *a fortiori* a judge of limited jurisdiction subject to the same type of jurisdictional strictures applicable to federal district judges.

The present Complaint does not allege that Respondent either refused to hire or fired him, and, in fact, Complainant concedes in his reply to the Court's order that he was hired by Respondent in 1987, was working for Respondent when the complaint was filed, and is currently employed by Respondent. *Supra* at 2.

"It is established OCAHO jurisprudence that administrative law judges have §1324b citizenship status jurisdiction only in those situations where the employee has been discriminatorily [fired] or not hired. Title 8 U.S.C. §1324b does not reach conditions of employment." *Horne*, 6 OCAHO 906, at 5 (citing *Naginski v. Department of Defense*, 6 OCAHO 891, at 29 (1996) (citing *Westendorf v. Brown & Root, Inc.,* 3 OCAHO 477, at 11 (1992), 1992 WL 535635, at *7), *appeal filed*, No. 96–2138 (1st Cir. 1996)); *Ipina v. Michigan Dep't of Labor*, 2 OCAHO 386 (1991), 1991 WL 531898, at *8–9; *Huang v. Queens Motel*, 2 OCAHO 364, at 13 (1991), 1991 WL 531875, at *9)). Controversies over conditions of employment do not confer §1324b jurisdiction. *Horne,* 6 OCAHO 906, at 6; *Naginski*, 6 OCAHO 891, at 29.

Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99–603, 100 Stat. 3359 (Nov. 6, 1986), enacted a new antidiscrimination cause of action, amending the Immigration and Nationality Act (INA) by adding a section 274B, codified as 8 U.S.C.

§1324b. Section 102 was enacted as part of comprehensive immigration reform legislation, to accompany Section 101, which, codified as 8 U.S.C. §1324a, forbids an employer from hiring, recruiting, or referring for a fee, any alien unauthorized to work in the United States. Section 1324b was intended to overcome the concern that, as a result of employer sanctions compliance obligations introduced by section 1324a, people who looked different or spoke differently might be subjected to workplace discrimination.[4]

[4] *See* "Joint Explanatory Statement of the Committee of Conference," Conference Report, IRCA, H.R. Rep. No. 99–1000, 99th Cong., 2d Sess. 87 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5840, 5842.

"President Ronald Reagan in his formal signing statement observed that '[t]he major purpose of Section 274B is to reduce the possibility that employer sanctions will result in increased national origin and alienage discrimination and to provide a remedy if employer sanctions enforcement does have this result.'" *Horne,* 6 OCAHO 906, at 6 (quoting Statement by President Reagan Upon Signing S. 1200, 22 WEEKLY COMP. PRES. DOCS. 1534, 1536 (Nov. 10, 1986)).[5] Consistent with the purpose of prohibiting discrimination resulting from sanctions, section 1324b only covers the practices of hiring, discharging or recruitment or referral for a fee. It does not cover discrimination in wages, promotions, employee benefits or other terms and conditions of employment, as does Title VII. *Id.* at 6–7 (citing EEOC Notice No. –915.011, Responsibilities of the Department of Justice and the EEOC for Immigration Related Discrimination (September 4, 1987)); *Tal v. M.L. Energia, Inc.,* 4 OCAHO 705, at 14 (1994), 1994 WL 752347, at *11 (as amended in 1990 to add §1324b(a)(6), §1324b relief is limited to "hiring, firing, recruitment or referral for a fee, retaliation and document abuse"), *petition for reh'g denied*, No. 94–3690 (3d Cir. 1994), *and review denied*, 66 F.3d 312 (3d Cir. 1995) (table)). Therefore, I do not have subject matter jurisdiction of Complainant's citizenship status discrimination claim.

I also lack jurisdiction of Complainant's document abuse claim. Section 101 of IRCA, 8 U.S.C. §1324a, makes it unlawful to hire an individual without complying with certain employment eligibility verification requirements, which are set out at 8 U.S.C. §1324a(b). As implemented by the Immigration and Naturalization Service (INS), the employer must check the documentation of all employees hired after November 6, 1986, and complete an INS employment eligibility verification form (form I–9) within a specified period of the date of hire. 8 C.F.R. §§274a.2(a), (b)(1)(ii) (1996). The employee must pro-

[5] *See Williamson v. Autorama*, 1 OCAHO 174, at 1173 (1990), 1990 WL 515872, at *4 ("Although a Presidential signing statement falls outside the ambit of traditional legislative history, it is instructive as to the Administration's understanding of a new enactment"). *Accord*, *Kamal-Griffin v. Cahill Gordon & Reindel*, 3 OCAHO 568, at 14 n.11 (1993), 1993 WL 557798, at *28 n.11. [Citations to OCAHO precedents in bound Volume I, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws*, reflect consecutive decision and order reprints within that bound volume; pinpoint citations to pages within those issuances are to specific pages, *seriatim*, of Volume I. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume I, however, are to pages within the original issuances.]

duce documentation establishing both identity and employment authorization. 8 U.S.C. §1324a(b)(1) (1994).

The employment verification system established under section 1324a provides a comprehensive scheme that stipulates categories of documents acceptable to establish identity and work authorization. *Id.*

§1324a(b)(1)(B)–(D); 8 C.F.R. §274a.2(b)(1)(v) (1996). When an employer hires an individual, the latter must sign an INS form I–9 certifying his or her eligibility to work and that the documents presented to the employer to demonstrate the individual's identity and work eligibility are genuine. The employer signs the same form, indicating which documents were examined, and attests that they appear to be genuine and appear to relate to the individual who was hired. The employment verification process mandated in 8 U.S.C. §1324a requires that an employer, in completing section two of the I–9 form for each employee, examine documents that prove an employee's identity and employment eligibility. An employer is required to examine and document either a List A document, *or* a List B *and* a List C document. List A documents, for example a U.S. Passport, show both identity and employment eligibility.[6] List B documents, for example a driver's license or state issued I.D. card, establish identity.[7] List C documents, for example a social security card, establish employment eligibility.[8]

The employee completing the I–9 process is free to choose which among the prescribed documents to submit to establish identity and work authorization. Upon verifying the documents, the employer must accept any documents presented by the employee that reasonably appear on their faces to be genuine and to relate to the person presenting them. "The Immigration Act of 1990 amended the INA to clarify that the employer's refusal to accept certain documents or demand that the employee submit particular documents in order to complete the Form I–9 violates IRCA's antidiscrimination provi-

[6] Acceptable List A documents are noted at 8 U.S.C. §1324a(b)(1)(B) (1994) and8 C.F.R. §274a.2(b)(1)(v)(A) (1996).

[7] Acceptable List B documents are noted at 8 U.S.C. §1324a(b)(1)(D) (1994) and 8 C.F.R. §274a.2(b)(1)(v)(B) (1996).

[8] Acceptable List C documents are noted at 8 U.S.C. §1324a(b)(1)(C) (1994) and 8 C.F.R. §274a.2(b)(1)(v)(C) (1996).

sions." *Horne*, 6 OCAHO 906, at 8 (citing Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (Nov. 29, 1990), as amended by The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009 (Sept. 30, 1996); 8 U.S.C. §1324b(a)(6)).

However, section 1324b, as interpreted by regulation and administrative decisions, does not convey jurisdiction of a claim that an employer failed to accept documents that were not proffered in relation to the employment verification requirement. Complainant's assertion that Respondent violated the Act by refusing to accept his Statement of Citizenship and Affidavit of Constructive Notice is not viable, particularly since the Complaint does not allege that the Respondent refused to accept documents tendered for the purpose of completing the I–9 form[9] or that Respondent either was denied employment or discharged.

Consequently, in this case there is no basis on which to posit jurisdiction of a section 1324b document abuse claim. Document abuse can only be established by proving that the employer refused to accept documents that were proffered "for purposes of satisfying the requirements of section 1324a(b)." 8 U.S.C. §1324b(a)(6) (1994). Nothing in the case before me suggests that the tender of documents identified by Complainant at ¶16a of his Complaint implicates §1324a(b) requirements. Patently, the Complaint negates any inference that Complainant was either denied employment or was discharged for failure to satisfy requirements of the employment eligibility verification system established pursuant to 8 U.S.C. §1324a. Indeed, the documents referenced in the Complaint are not acknowledged as acceptable by or embraced by that system. Neither the Statement of Citizenship nor the Affidavit of Constructive Notice is a document specified as an appropriate List A, B or C document.[10] Complainant does not assert that the employer asked for wrong or different documents than those required to show work authoriza-

[9] In the part of the OCAHO form complaint that inquires whether "[t]he Business/Employer refused to accept the documents that [Complainant] presented to show [he] can work in the United States," Complainant responds in the affirmative, but definitively crosses out the portion that states "to show [he] can work in the United States." (Comp. ¶16).

[10] Although a Certificate of U.S. Citizenship, INS Form N–560 or N–561, is a document that an employer may accept as evidence of both the employee's identity and employment eligibility as part of the employment verification system pursuant to 8 U.S.C. §1324a, Complainant's Statement of Citizenship is not such a document.

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tion. (Comp. ¶17.) Accordingly, this tribunal has no subject matter jurisdiction over Complainant's purported document abuse claim.

B. *Failure to State a Claim*

In addition to the jurisdictional defect, Complainant has failed to state a claim of citizenship status discrimination or of document abuse. First, with respect to citizenship status discrimination, Complainant simply has made a bald assertion of citizenship discrimination without alleging any facts that show such discrimination. Although Complainant alleges that he is a United States citizen, (Comp. ¶2), and that he was discriminated against because of his citizenship (Comp. ¶9), he does not allege that he was refused employment or was fired from his job (Comp. ¶¶13–14). His only allegation of discrimination is that his employer refused to accept his proffered Statement of Citizenship and Affidavit of Constructive Notice and, thus, in some unspecified manner impeded his protected status under federal law to be entitled to all of his pay and not treated as an alien under federal law. Accepting, as I must, the truth of the facts in the Complaint for the purpose of adjudicating this Motion, the Complaint does not state how the Respondent's refusal to accept Complainant's proffered documents constituted any discrimination in the employment verification process.

Complainant has the burden of proving discrimination on the basis of citizenship status. *Toussaint v. Tekwood Assocs., Inc.,* 6 OCAHO 892, at 16 (1996), 1996 WL 670179, at *10, *appeal filed*, No. 96–3688 (3d Cir. 1996); *United States v. Mesa Airlines*, 1 OCAHO 74, at 500 (1989), 1989 WL 433896, at *32, *appeal dismissed*, 951 F.2d 1186 (10th Cir. 1991). In a section 1324b case based on citizenship status, a complainant must establish discriminatory treatment by proof that he was treated less favorably than others because of his protected status, i.e., his citizenship status. *See, e.g., Westendorf v. Brown & Root, Inc.*, 3 OCAHO 477, at 12 (1992), 1992 WL 535635, at *8. As a United States citizen, Complainant is a "protected individual" under 8 U.S.C. §1324b(a)(3) and, thus, has standing to bring a claim. However, Complainant must allege facts that show discriminatory treatment based on his citizenship status. Specifically, in the case at bar, to defeat a motion to dismiss Complainant must allege facts that, if true, would show that he was treated less favorably than other workers in his situation, but of different citizenship, because of his U.S. citizenship. He has not alleged such facts. Specifically, Complainant has not alleged that Respondent treated

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U.S. citizens differently from noncitizens by requiring social security numbers from the first group but not the second. *See id.* Also, he has not alleged that he either was rejected for employment or was fired from his job because of his citizenship status. Thus, he has not shown the type of disparate treatment that has been found to constitute employment discrimination. Certainly he has failed to allege how the employer's conduct relates in any way to the employment verification procedure governed by IRCA. In sum, the Complaint completely fails to state a claim upon which relief may be granted with respect to citizenship status discrimination.

The Complaint also fails to state a claim with respect to document abuse. 8 U.S.C. §1324b(a)(6) provides, in pertinent part, that refusing to honor documents that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals. The purpose of this section of the Act is to prohibit employers from demanding any particular document to satisfy the employment eligibility verification requirements of 8 U.S.C. §1324a. *Lewis v. McDonald's Corp.,* 2 OCAHO 383, at 5 (1991), 1991 WL 531895, at *4; *Jones v. DeWitt Nursing Home*, 1 OCAHO 189, at 1250 (1990), 1990 WL 511979, at *11–12. The choice of documents that a job applicant may present to an employer to establish identity, work eligibility, or both, is exclusively that of the job applicant and not that of the employer. At the risk of engaging in an unfair immigration-related employment practice, the employer may not insist on a particular document to establish employment eligibility under IRCA. *United States v. A.J. Bart, Inc.*, 3 OCAHO 538, at 13–14 (1993), 1993 WL 406027, at *10; *United States v. Louis Padnos Iron & Metal Co.*, 3 OCAHO 414, at 9 (1992), 1992 WL 535554, at *6.

IRCA does not create a blanket rule with respect to an employee's proffer of documents. Rather, section 1324b(a)(6) renders unlawful an employer's refusal to accept documents with respect to satisfying the requirements of section 1324a(b), which references the employment verification system. IRCA does not render unlawful an employer's refusal to accept documents that are not related to the employment eligibility verification procedures provided in IRCA. In this case, the Complaint does not allege that Respondent refused to accept documents tendered by the employee for the purpose of satisfying the employment eligibility requirements of IRCA. Indeed, the documents identified in the Complaint, namely a Statement of Citizenship and an Affidavit of Constructive Notice, are not documents acceptable to establish an employee's identity or employment eligibility pursuant to 8 U.S.C. §1324a, *supra* n.10 and

accompanying text, and, in fact, the Complaint does not allege that they were offered for that purpose, *supra* n.9.

Since the document abuse provisions in 8 U.S.C. §1324b(a)(6) require that the questionable documentary practices must involve the employment eligibility verification system, it is necessary to address whether, examining the facts in the light most favorable to the Complainant, Complainant has sufficiently stated a claim of document abuse in his Complaint.

Complainant alleges that Respondent refused to accept his Statement of Citizenship and Affidavit of Constructive Notice. However, Complainant has not alleged in any of his many pleadings that nonacceptance of this document was made in the process of completing his employment eligibility verification. In fact, the alleged documents are not acceptable documents in Lists A, B or C for purposes of showing employment eligibility and/or identity. Moreover, the employer's refusal to accept those documents did not result in a refusal to hire or a decision to fire. Consequently, the employer's actions did not involve the employment verification system covered by IRCA. In this respect, the recent holding in *Lee v. Airtouch Communications*, 6 OCAHO 901 (1996), is particularly apt:

> [T]he prohibition against an employer's refusal to honor documents tendered . . . refers to the documents described in §1324a(b)(1)(C) tendered for the purpose of showing identity and employment authorization. Because neither of the documents [Complainant] asserts that [Respondent] refused to accept is a document acceptable for these purposes, and, moreover, because the documents were not offered for these purposes, the complaint fails to state a claim upon which relief may be granted as to the allegations of refusal to accept documents appearing to be genuine. *Cf. Toussaint v. Tekwood Associates, Inc.,* 6 OCAHO 892 at 18–21 (1996) and cases cited therein.

Airtouch, 6 OCAHO 901, at 13, 1996 WL 780148, at *10, *appeal filed*, No. 97–70124 (9th Cir. 1997).

Finally, I would note that Complainant asserts that his Complaint against Respondent does not involve the question of withholding taxes, but, rather, "discrimination against him as a U.S. Citizen by the denial of his rights by document abuse under 8 U.S.C. §1324b, not any tax abuses." (C.'s Reply to R.'s Motion to Dismiss at 4; *see* Cl.'s Reply to R.'s Affirmative Defenses at 4). I find Complainant's assertion to be disingenuous. It is patently obvious, from the statements made in Complainant's Statement of Citizenship, Affidavit of Constructive Notice, and the June 29, 1995, letter from T. Paul Bell to Mr. McAndrews,[11] that the U.S. tax

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requirements are central to Complainant's grievance. At any rate, regardless of whether tax law truly is the nucleus of Complainant's Complaint, it is certainly clear that Complainant does not state a claim under IRCA because Complainant's charge does not implicate the employment review and verification process.

Complainant has failed to state a claim upon which relief can be granted as to the allegation of document abuse pursuant to 8 U.S.C. §1324b(a)(6), even construing the standard for dismissal in the most stringent sense, considering that Complainant is appearing without legal counsel, *see supra* pt. II. Therefore, Respondent's Motion to Dismiss is granted as to the allegations in the Complaint related to both the claims as to citizenship status discrimination and document abuse.[12]not entitled to leave to amend the Complaint in this situation because Complainant has given *no indication* that he *can* state a valid claim under IRCA. Moreover, my Order of February 4 already has given Complainant an extra opportunity to clarify his contentions before my ruling on the Motion to Dismiss. Allowing Complainant the chance now to amend his Complaint so that it would state a cause of action under IRCA, i.e., having Complainant amend his allegations regarding his current employment status and the purpose for which he proffered the two documents in question, would be to encourage perjury, given Complainant's clear and unwavering positions on those decisive factual issues.

C. *Disqualification*

Respondent has moved to disqualify Complainant's representative solely on the ground that he is not an attorney. Mr. Kotmair does not

[11] These documents are attached as exhibits to Complainant's reply to my Order of February 4, 1997.

[12] The Second Circuit provides that "the court should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives *any indication* that a valid claim *might* be stated." *Branum*, 927 F.2d at 705 (emphasis added). Even in light of that pronouncement and Complainant's status as a *pro se* litigant, Complainant is not entitled to leave to amend the Complaint in this situation because Complainant has given no indication that he can state a valid claim under IRCA. Moreover, my Order of February 4 already has given Complainant an extra opportunity to clarify his contentions before my ruling on the Motion to Dismiss. Allowing Complainant the chance now to amend his Complaint so that it would state a cause of action under IRCA, i.e., having Complainant amend his allegations regarding his current employment status and the purpose for which he proffered the two documents in question, would be to encourage perjury, given Complainant's clear and unwavering positions on those decisive factual issues.

claim to be an attorney. However, he has produced a power of attorney that indicates Complainant has chosen Mr. Kotmair to represent him in this matter. The Rules of Practice neither specifically authorize or prohibit lay representation. *See* 28 C.F.R. §68.33 (1996). However, the language suggests that lay representation is possible. *See id.* §§68.33–(b)(6), 68.35(b) (both referring to a party's "representative," rather than a party's "attorney"). Moreover, lay representation has been permitted in some past cases. *See United States v. Chaudry*, 3 OCAHO 588, at 1 (1993) (allowing the respondent's brother, a non-attorney, to represent the respondent upon receiving no objection from the complainant and upon finding no prejudice to the Court); *Alvarez v. Interstate Highway Constr.*, 2 OCAHO 385, at 2 (1991) (allowing an association of employers to represent the respondent upon finding reliable proof that the party had authorized representation by a lay representative and that the non-attorney possessed some degree of competence, "including a familiarity with the statute and regulations that govern these proceedings").

While the Rules are not entirely clear as to the question of lay representation, given my ruling on the Motion to Dismiss, I do not need to decide this issue and, therefore, I decline to do so.[13]

V. *Respondent's Request for Costs and Attorney's Fees*

As part of its Motion to Dismiss, Respondent states that the Complaint is patently frivolous and should be dismissed with costs and fees to the Respondent. Pursuant to 8 U.S.C. §1324b(h) and 28 C.F.R. §68.52–(c)(2)(v), once the case has been adjudicated, the prevailing party may recover a reasonable attorney's fee if the losing party's argument was without reasonable foundation in law and fact.

At this time I am reserving judgment on the issue of whether Respondent is entitled to receive attorney's fees and, if so, in what amount. The parties will be given an opportunity to brief the question of costs and attorney fees. Since the statute only refers to the

[13] Even assuming that lay representation is permissible, a particular lay representative may not be permitted to appear if there are reasonable concerns about his competence or ethical standards. If a lay representative seeks to represent a party in a particular case, the lay representative must act in accordance with the same ethical standards required of attorneys. Moreover, a representative may be barred from the proceeding if he fails to comply with directions or fails to adhere to reasonable standards of orderly and ethical conduct. 28 C.F.R. §68.35(b) (1996).

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award of an "attorney's fee" and not costs, Respondent will have to show that an awarding of costs, as well as an attorney's fee, is authorized. Respondent bears the burden of demonstrating that the Complainant's position was without reasonable foundation in law and fact, and that burden is especially heavy when, as here, the Complainant was acting *without legal counsel.*

Therefore, Respondent is ordered to file, not later than April 7, 1997, a certification of services detailing the fees and costs incurred in connection with this action, including a detailed itemized statement of the hours expended and the hourly rate, as well as an itemized list of costs. It is Respondent's burden to show that the requested attorney's fee is "reasonable" within the meaning of the statute. Further, Respondent will support its request with a legal brief or memorandum showing why Respondent's arguments are "without reasonable foundation in law and fact" and discussing (not just citing) the pertinent OCAHO case law, such as *Banuelos v. Transportation Leasing Co.,* 1 OCAHO 255 (1990), 1990 WL 512091, *request for CAHO review denied,* 1 OCAHO 259, 1990 WL 512083 (on the grounds that the Chief Administrative Hearing Officer does not have review authority over cases arising under 8 U.S.C. §1324b), *aff'd, Banuelos v. United States Dep't of Justice*, 5 F.3d 534 (9th Cir. 1993) (unpublished; available at 1993 WL 312769), *and cert. denied*, 114 S. Ct. 1055 (1994); *Becker v. Alarm Device Manufacturing Co. and District 65 Union*, 1 OCAHO 107 (1989), 1989 WL 433827, *errata issued*, 1 OCAHO 118, as well as more recent cases such as *Wije v. Barton Springs/Edwards Aquifer Conservation District*, 5 OCAHO 785 (1995), 1995 WL 626204, *aff'd*, 81 F.3d 155 (5th Cir. 1995) (table); *Chu v. Fujitsu Network Transmission System*, 5 OCAHO 778 (1995), 1995 WL 584254; *Bozoghlanian v. Lockheed-Advanced Development Co.*, 4 OCAHO 711 (1994), 1994 WL 761185; and *Huesca v. Rojas Bakery*, 4 OCAHO 654 (1994), 1994 WL 482552. Respondent also shall discuss the leading Title VII case law with respect to awards of attorney's fees, such as *Christiansburg Garment Co. v. EECO*, 434 U.S. 412 (1978), and *Miller v. Los Angeles County Board of Education*, 827 F.2d 617 (9th Cir. 1987).[14] Following Respondent's filing, Complainant shall have twenty days from the

[14] Because Complainant's representative is not an attorney, the same rules applicable to *pro se* parties may be pertinent here. Thus, Respondent should address the factors raised in such cases as *Christiansburg, Miller* and *Banuelos*, including the four factors discussed in *Banuelos,* 1 OCAHO 255, at 1653, 1990 WL 512091, at *12, which apply to the award of attorney's fees against *pro se* parties in discrimination cases. If Respondent contends that *pro se* rules should not apply here, it should state its position on that issue as well.

date of service of Respondent's submission to file its response to Respondent's submission.[15]

VI. *Conclusion*

For the above stated reasons, the Complaint is dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. I retain jurisdiction to determine whether costs and attorney's fees are appropriate in this case and in what amount. Any outstanding motions not expressly addressed in this Decision and Order, except for Respondent's motion for costs and attorney fees, are hereby denied.

IT IS SO ORDERED:

ROBERT L. BARTON, JR.
Administrative Law Judge

[15] The parties are reminded that "file" means that the document must be received by my office by that date. *See* 28 C.F.R. §68.8(b) (1996).