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

September 23, 2024

US TECH WORKERS ET AL., Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 2024B00076
IO DATASPHERE, INC., Respondent.	)	

Appearances: John M. Miano, Esq., for Complainant
Walter T. Markovic, corporate representative for Respondent

ORDER TO SHOW CAUSE – DEFICIENT COMPLAINT

I. INTRODUCTION

This case arises under the employment discrimination provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324b. On March 19, 2024, Complainant filed a complaint alleging Respondent violated 8 U.S.C. § 1324b(a)(1)(B).

On June 24, 2024, Respondent filed its Answer generally denying liability.

The Court now issues this Order requiring Complainant submit a filing showing cause as to why this Complaint should not be dismissed. Failure to timely submit a filing could cause the Complaint to be dismissed. 28 C.F.R. § 68.10(b) (giving the Administrative Law Judge the ability to dismiss a complaint for failure to state a claim without a motion); *see also Zajradhara v. Manbin Corp*., 19 OCAHO no. 1553a, 4-5 (2024) (dismissing a § 1324b claim without prejudice where complainant failed to provide any argument or evidence regarding the allegation in his response to an order to show cause on jurisdiction).

Parties should note that, until this matter is resolved, any scheduled prehearing conferences will be cancelled.

II. CONTENTS OF THE COMPLAINT

OCAHO uses a Complaint Form. The form poses a series of questions designed to facilitate the provision of statements which would give rise to an alleged violation of the law. The Complainant in this case only completed portions of the Complaint Form, but did include additional pages.

Complainant identifies the "citizenship or immigration status at the time of the alleged discrimination [was] United States Citizen or National." Compl. 2.[1] The Complaint asserts the discrimination occurred "because… of citizenship status." *Id.* at 6.

Section 7 of the Complaint form covers "Discrimination in Hiring, Recruitment, or Referral for a Fee, 8 U.S.C. § 1324b(a)(1)." Compl. 6. For ease of reference, following Section 7 as completed by Complainant:

Section 7: Discrimination in Hiring, Recruitment, or Referral for a Fee, 8 U.S.C. § 1324b(a)(1)

1) Did the Business/Employer refuse to hire you? ✓ YES or _____ NO

If you answered NO to question (1), go to Section 8. If you answered YES to question (1), complete the rest of this section.

2) When did you apply for work at the Business/Employer? _____/_____/_____
Month Day Year

3) Please describe the job title and duties:

See attached charge for application details.

4) Were you qualified for the job? ✓ YES or _____ NO

5) Was the Business/Employer looking for workers? ✓ YES or _____ NO

6) Why did the Business/Employer refuse to hire you? **(CHECK AS MANY AS APPLY)**
✓ Citizenship status **or**
National origin

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[1] Pinpoint citations to the Complaint and other Court filings are to the page numbers of the PDF, as opposed to the page numbers printed at the bottom of the page.

Section 7: Discrimination in Hiring, Recruitment, or Referral for a Fee, 8 U.S.C. § 1324b(a)(1) Continued

7) Please list any other reason(s), if any, why you were not hired:

8) Did the job remain open and the Business/Employer continue taking applications from other people after you were not hired? _____YES or _____NO

9) Was someone else hired for the job? _____YES or _____NO

10) If you answered YES to question (9) above, to the extent you know, who was hired and why?

11) Do you want to be hired by the Business/Employer? _____YES or _____NO

NOTE: Your answer to question (11) will *not* affect your right to continue with your complaint.

Compl. 6-7. The Complaint goes on to clarify there are no allegations of discrimination in firing, document abuse, or retaliation. *Id.* at 7-10. The Complaint includes the "IER Charge Form." *Id.* at 15. Based on the charge filed with IER, the Complainant alleges the date of discrimination occurred on January 21, 2023 (and is ongoing).[2] *Id.* at 16. In the context of the IER Charge Form, Complainant was asked to "[e]xplain in detail what happened when the Injured Party discriminated against;" and Complainant responded, "See attached." *Id.*

Beginning at page 21 of the Complaint, Complainant provides a text document which states "[Respondent] began engaging in an unlawful scheme of recruitment based on immigration

[2] Complainant offers no explanation for his decision to leave this portion of the OCAHO Complaint Form blank.

status… [when it] targeted its recruitment efforts towards those in H-1B visa[3] status [through Chicago H-1B Connect]." Compl. 21. The Complaint then goes onto describe the activities of "Chicago H-1B Connect," who is not a named party in this matter. *Id*. at 21-22.[4] The text document ends with "By specifically targeting non-immigrants in H-1B for employment, Respondent affirmatively discouraged protected individuals from applying for employment and has engaged in unlawful discrimination based on citizenship status." *Id*. at 21.

At pages 23 to 24 of the Complaint, Complainant provides full legal names and contact information for "injured parties" – nine individuals in total.

At page 29,[5] the Complaint contains another text document which states:

> The subject of this complaint is a conspiracy by forty-three Chicago area employers to engage in an unlawful program of recruitment based on immigration status. Operating under the collective name "Chicago H-1B Connect" these employers continue to promote their targeted requirement of H-1B non-immigrants on a web site, through press releases, and through media interactions.
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> US Tech Workers filed separate charges against each of the conspirators on behalf of named members who made applications to

[3] The Court takes official notice, *see* 28 C.F.R. § 68.41, of the following from USCIS: "This nonimmigrant classification applies to people who wish to perform services in a specialty occupation, services of exceptional merit and ability relating to a Department of Defense (DOD) cooperative research and development project, or services as a fashion model of distinguished merit or ability." U.S. Citizenship and Immigration Services, *H-1B Specialty Occupations*, https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations (last visited August 26, 2024).

Assuming it is the first category or H-1B visa holders at issue (Specialty Occupation, and not DoD research & development or fashion model), USCIS also states the following: "The occupation [must] require[] [t]heoretical and practical application of a body of highly specialized knowledge; and [a]ttainment of a bachelor's degree of higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Further H-1B Specialty Occupations require the petitioner to submit a Labor Condition Application (LCA) certified by the Department of Labor (DOL) alongside other required petitions. *Id*.

[4] The Complaint also contains a series of hyperlinks related to what appear to be news or other websites. The external content of hyperlinked material is not included with the Complaint. As a practical matter, the Court does not open hyperlinks. *See Ravines de Schur v. Easter Seals-Goodwill N. Rocky Mountain, Inc.*, 15 OCAHO no. 1388b, 4 (2021) ("[T]he Court will not consider information or documents contained in hyperlinks.").

[5] Pages 25-28 appear to be a scan duplicate of the previous pages.

> them. US Tech Workers is filing a separate complaint for each conspirator as well.
>
> The participants in the unlawful conspiracy are [Complaint contains organizations and contact addresses for organizations].

III. LAW AND ANALYSIS

A. Failure to State a Claim

A Complaint must state a claim upon which relief can be granted. 28 C.F.R. § 68.10(b). Respondent may file a motion highlighting this issue to the Court, and alternatively, "[t]he Administrative Law Judge may dismiss the complaint . . . without a motion from the respondent, if the Administrative Law Judge determines that the complainant has failed to state a claim upon which relief can be granted." 28 C.F.R. § 68.10(b). *See Zajradhara v. Jin Joo Corp.*, 19 OCAHO no. 1554a, 2-3 (2024) (dismissing § 1324b retaliation claim for failure to state a claim under ALJ's own authority); *Patel v. USCIS Boston*, 14 OCAHO no. 1353, 3-4 (noting that OCAHO ALJs may *sua sponte* dismiss a complaint for failure to state a claim, after providing complainant an opportunity to show cause why the complaint should not be dismissed).

Whether potential deficiencies in a Complaint are brought to the Court's attention by way a motion, or based on its own determination, the same legal standards for analyzing the pleadings apply.

OCAHO's Rules of Practice and Procedure provide that complaints shall contain: (1) "A clear and concise statement of facts, upon which an assertion of jurisdiction is predicated"; (2) "The alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred"; and (3) "A short statement containing the remedies and/or sanctions sought to be imposed against the respondent." 28 C.F.R. § 68.7(b)(1)-(4).

As was recently noted:

> 'Statements made in the complaint only need to be 'facially sufficient to permit the case to proceed further,' . . . as '[t]he bar for pleadings in this forum is low.' *Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450, 3 (2022) (citing *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 10 (2012), and then citing *United States v. Facebook, Inc.*, 14 OCAHO no. 1386b, 5 (2021)). "OCAHO's pleading standard does not require a complainant [to] proffer evidence at the pleadings stage . . . Rather, pleadings are sufficient if 'the allegations give adequate notice to the respondents of the charges made against them.'" *Id.* (quoting *Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO no. 1097, 10 (2003)); *see also Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, at 9….

> To give rise to an inference of discrimination, complaints must include information that links the complainant's protected class and the employment action in question. [*Wangperawong v. Meta Platforms, Inc*., 18 OCAHO no. 1510c, 7 (2024); *see Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450, 5 (2022). A complainant meets this standard by "identif[ying] a theory by which [the] Respondent allegedly violated 8 U.S.C. § 1324b" in a way that "succinctly yet clearly" inform the respondent why the complainant has brough the suit. *Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450, 7 (2022).
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> In contrast, if a § 1324b complainant does not identify why he believes that the relevant employment action was discriminatory, this is not sufficient to meet OCAHO's pleading standard. *See, e.g.*, *A.S. v. Amazon Webservices Inc.*, 14 OCAHO no. 1381d, 16 (2021) (dismissing claim of citizenship status discrimination claim when the complainant merely asserted "in a general and conclusory fashion that Respondent discriminated against him based on his citizenship status, without citing to specific facts giving an inference to causation") (citing, inter alia, *Thompson v. Sanchez Auto Servs., LLC*, 12 OCAHO no. 1302, 7–8 (2017) (dismissing discrimination claim where the complaint was "bereft of any allegations related to [] national origin apart from cursory assertions")); *Wangperawong v. Meta Platforms, Inc.*, 18 OCAHO no. 1510c, 7–8 (2024) (allegations that the complainant applied for a position, that he was qualified, and that he was not selected, insufficient to state a claim for hiring discrimination).

US Tech Workers v. G2, 19 OCAHO no. 1569a, 6-7 (2024).

B. Recruitment Violations under 8 U.S.C. § 1324b(a)(1)(B)

Under 8 U.S.C. § 1324b, "[i]t is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual[6]…" based on national origin or citizenship status, "with respect to… recruitment or referral for a fee, of the individual for employment…" 8 U.S.C. § 1324b(a)(1)(A)-(B).

As the Court recently noted:

> *Lasa Marketing* may be one of the first instances of OCAHO setting forth elements of a prima facie case as it relates to a "recruitment" allegation. *United States v. Lasa Marketing Firms,* 1 OCAHO no. 141, 950, 965 (1990). There, the ALJ outlined that complainant could: (1) show [she] was a protected individual; (2) [she

[6] Additional caveats removed for ease of reading.

> approached Respondent, a recruiting entity] and sought to apply for a position or be referred to an advertised position; (3) despite her qualifications she was not referred or considered; and (4) the Respondent [a recruiting entity] referred U.S. citizens and permanent resident for employment subsequent to the rejection of Complainant. *Id.* at 965, n. 15.
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> In another early precedential case, *Williams v. Lucas & Assocs.*, 2 OCAHO no. 357, 423, 433 (1991), the ALJ considered a recruiter who prescreened applicants for citizenship status. While that complainant could certainly show some elements of a prima facie case, he was ultimately unsuccessful because he failed to demonstrate he was qualified for any position related to the recruitment efforts.
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> In *Jablonski v. Robert Half Legal*, 12 OCAHO no. 1272 (2016), the ALJ dismissed a recruitment-based discrimination claim. In that case, the complainant engaged with a recruitment and staffing company (applying to jobs for which she was not selected). Ultimately, she failed to plead much else, concluding that respondent hired "visa applicants" (or other non-citizens) instead. *Id.* at 7. The Court there, after characterizing her allegations as "bald conclusion[s]," noted "[s]peculation and hypotheses cannot stand in or substitute for facts, and even under the most liberal of pleading standards, claims lacking an adequate factual basis are subject to dismissal." *Id.*
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> Recently, in *United States v. Facebook,* 14 OCAHO no. 1386b, 8 (2021), the Court found the complainant (IER) met OCAHO's pleading standards when it alleged "a protected group, 'U.S. workers,' . . . allegedly experienced disparate treatment in the recruiting and hiring practices of Respondent based on their citizenship or immigration status." Specifically, that complainant alleged that respondent engaged in a "scheme of set-asides of certain positions for only temporary visa holders and ineffective methods of recruitment designed to solicit minimal, if any response from individuals outside the targeted group of temporary visa holders." *Id*. at 9.

G2, 19 OCAHO no. 1569a, at 8-9.

C. Complaint Deficiencies

Based on the content of the Complaint, it appears it fails to state a claim upon which relief can be granted. The Complaint identifies nine "protected individuals," [7] but it is difficult to divine much else relative to what this Respondent specifically did to violate the law.

Complainant does not identify when or how these individuals engaged with Respondent (or even when or how they engaged with "Chicago H-1B Connect"[8]). *See Lasa Marketing Firms,* 1 OCAHO no. 141 at 965 n. 15. Complainant does not allege, with any specificity, what positions were vacant (i.e. for what positions Respondent was allegedly recruiting) – indeed, Complainant does not even allege a type or class of position for which Respondent was recruiting. *Id*. Complainant (understandably) does not (and perhaps on this fact pattern, cannot) allege or explain how or whether the individuals identified in the Complaint were qualified for positions or types of positions at issue. *See id.; see also Lucas & Assocs.,* 2 OCAHO no. 357, at 433. Furthermore, Complainant does not allege whether Respondent ever filled vacancies, and if so, with whom. *Jablonski*, 12 OCAHO no. 1272 at 7.

"The existence of such a job board is not a per se violation of § 1324b - a sufficiently pled complaint must plead more. *See Facebook,* 14 OCAHO no. 1386b at 8." *G2*, 19 OCAHO no. 1569a, at 9.

IV. COMPLAINANT ORDERED TO SHOW CAUSE

The Court now ORDERS Complainant to submit a filing explaining why his Complaint should not be dismissed for failure to state a claim upon which relief can be granted within 21 days of receipt of this order. Respondent shall have an opportunity to be heard and may submit matters for the Court's consideration within 14 days of receipt of Complainant's submission (if any) or October 15, 2024, whichever is sooner.

SO ORDERED.

Dated and entered on September 23, 2024.

Honorable Andrea R. Carroll-Tipton
Administrative Law Judge

[7] Insofar as Complainant alleges they are all citizens of the United States. "The term 'protected individual' means an individual who is a citizen or national of the United States." 8 U.S.C. § 1324b(a)(3)(A).

[8] And this is, assuming, *arguendo*, Chicago H-1B Connect and IO Datasphere are interchangeable entities (a point which Respondent does not concede).